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**IS THERE SCHOLARSHIP AFTER DEATH
OR
ARE EVIDENCE TEACHERS NEEDED AFTER THE FEDERAL
RULES?**

JACK B. WEINSTEIN*

It is a great honor to be asked to address this distinguished company — the scholars responsible for cultivating a field I have, from time to time over the past thirty years, worked in as a plowboy following the directions of such brilliant evidentiary horticulturists as Thayer, Wigmore, Morgan, Maguire, McCormick and Michael, to speak only of some of the departed.¹ The question before us is whether there is any further need for scholars and teachers of evidence since adoption of the Federal Rules.

We all begin our careers in awe of our predecessors. I remember when Dean Smith telephoned and asked me if I would join the Columbia faculty. Surprised, I stuttered out a quick “yes,” before he could withdraw the offer. But I worried, “What can I possibly do? It’s all been done.” That was not true then. And it is even less true now. Every problem solved opens up new vistas for further study. Even areas constantly tilled sprout new hybrids requiring further attention.

During my first few years of teaching I had the entire set of Wigmore behind my desk and at one time or another read through it fairly completely, putting a yellow slip at each page where there was something that I did not understand and needed to reread. When I left Columbia, I think there was a yellow slip in almost every page, including much of the index. It looked as if my Wigmore had grown a yellow mold. Nor could this fungus of doubt be confined to its native habitat in the library — it continues to blight my daily decisionmaking. Often I wish one of you were on the bench so we could turn to each other and

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1. Perhaps even these greats — doctrinal analysts all — might be seen as useful serfs slowly and laboriously converting the wild thickets of the common law into more organized gardens, while high above in their grand castles the social scientists and philosophers create the new theories that may change the entire landscape of the law, the way we view it, and what it does. See Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981). But cf. Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1131 (1981) (comment on Posner, suggesting that all of us are really serfs in the morning and squires in the afternoon).

discuss the pros and cons — but, alas the trial judge is denied this luxury of time and dialogue.

This troubling uncertainty is not mine alone. It is the ultimate fate even of many of those who devote themselves to this field long enough to become identified with its scholarly tradition. When I or others would turn to McCormick for guidance, he would plead for time to think about the question. Edward Cleary, in our sessions on the drafting of federal rules of evidence, often had to admit that the law was ambiguous — and that he had little sense of how to resolve the ambiguity. We left not a few “misshapen” stones and “grotesque” structures in the Federal Rules.²

No evidence scholar was a more courageous explorer than Morgan. He searched deep in the recesses of the Harvard Law Library for the antidote to the bite of that werewolf, *Res Gestae*. But even after discovering that it was only garden-variety good sense, he would readily have agreed that there were many strange growths still hidden in the thickets of evidence. And some of you may recall that Maguire's classes at Harvard were dubbed the Mystery Hours because of the convoluted nature of some of his accurate explanations. Only Wigmore and perhaps Learned Hand were apparently absolutely sure of themselves, and not a few of their positions have been discredited by subsequent analysis and case law.³

This is not to suggest that we have not been doing our job. God put authorities on earth to take positions that become out of joint with changing times, and then he created young scholars to make the necessary adjustments of theory to life. One of the greatest tools mankind has developed for the performance of both duties is codification. Codification routinely requires at least two generations of scholarship — the first to encode, the second to decode.

When, in the eleventh century, Moses Maimonides had the temerity to codify Jewish oral law, his intention was to resolve the confusions of his people once and for all. Yet, as we know, Maimonides initiated a new cycle of codification and commentary in which perplexity and dispute were probably even more common than they formerly had been.

2. See *Michelson v. United States*, 335 U.S. 469, 486 (1948) (Writing prior to adoption of the federal rules, Justice Jackson upheld the common law practice allowing inquiry into specific instances of conduct on cross-examination of criminal defendant's character witnesses, noting that the common law of evidence could not be rationalized piecemeal.) (“To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.”); see also *FED. R. EVID.* 405 & 608.

3. See, e.g., *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972); *United States v. Melillo*, 275 F. Supp. 314 (E.D.N.Y. 1967).

Similarly, it is an oft-noted paradox that in continental countries, where codes predominate, there is a large role for scholarly interpretation.

In our own legal culture, the rise of legal scholarship as a profession coincided with the formalization of the law. Late in the nineteenth century, Holmes still could say accurately that the life of the law had been experience rather than logic.⁴ (Judge John Dooling of my court regularly reminded us that Holmes might have been as widely quoted had he said that a page of logic is worth a volume of experience.) During this era, Charles Langdell came to Harvard to initiate what Grant Gilmore has called the Age of Faith.⁵ The traditional legal style of reasoning — selecting, analyzing and reconciling cases, always with one eye over one's shoulder on the practicalities of the matter — was almost petrified into a method. The products of this new discipline were published in the equally new student law journals as well as in a proliferation of treatises and casebooks.

The sudden manufacture of an academic discipline out of whole cloth was an amazing feat. It multiplied the need for law professors, something for which we must all, in our most venal heart of hearts, be grateful. The resultant royalties are sufficient to make all the authors of our casebooks happy. But the creation of a new profession was only half of Langdell's project. He wanted law to become not merely a discipline, but a science, and so consensus as to method was only a prelude to consensus as to substance.

Individual efforts of the various treatise writers were brought together by the American Law Institute — and formalization then became codification by partial consensus of the profession's elite. Fortunately, these developments did not eliminate the need for fresh legal scholarship. On the contrary, they increased it. Consensus was very difficult to achieve, but very easy to imagine — and so codes were drafted that papered over the contradictions and conflicts within the discipline.

This general pattern of development in our legal scholarship has been exemplified by the field of evidence. Much of the law of evidence developed on a case-by-case basis by fairly sophisticated and sometimes streetwise trial judges exercising their discretion and best judgment of the moment. Then the appellate courts and the treatise writers began to consolidate these cases into doctrine. On analysis much of

4. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

5. G. GILMORE, *THE AGES OF AMERICAN LAW* 56 (1977). See also Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632, 666, 674-75, 677-79 (1981).

this doctrine turned out to be somewhat silly. Thus began a critical development beginning with Bentham and Stephen in England and running through Thayer, Wigmore, Morgan, Cleary and others in this country who sought to explain, simplify, criticise and reform.

At the same time an enormous mass of newer decisions required analysis. Beginning most notably with Greenleaf in this country — Wigmore's first edition constituted a revision of his volumes — there was an attempt to winnow from the cases a meaningful analysis. Wigmore and others succeeded in squeezing and twisting the cases into what appeared to be a magnificent rational structure for determining truth at trials. We are all grateful to James Harmon Chadbourn for keeping Wigmore's treatise up to date and Professor Cleary and his colleagues for keeping alive McCormick's great single volume.

The erection of this rational structure did not signal the end of evidence teaching, else none of us would be here today. If anything, it simplified our task as teachers because we could point out contradictions and counterintuitive results against a background of coherence and sense. By these means, we could present our inquiries as evidence of critical intelligence rather than mere confusion. Eventually, the attacks and emendations of the treatise and law review analysts became so prevalent that they acquired more legitimacy than the structure they had affixed themselves to.

The Field Evidence Code and other evidence codes of the last century did not get very far, but in the twentieth century evidence codes have fared better in this country. With the Commonwealth Fund reforms of the twenties, and then Morgan's ALI Code of Evidence, and the 1954 Uniform Rules, codes began to exert increasing influence. Two states — New Jersey and Kansas — adopted the Uniform Rules with few changes. Others developed partial codes of their own, based on existing doctrinal analyses and immediate needs such as those of department stores for business entry exceptions and banks for the use of photostats. California drafted the most comprehensive code, based in large part on Chadbourn's theoretical memoranda. More recently, the Federal Rules have held sway. They have been adopted with variations in more than twenty jurisdictions.⁶ The acceptance of these reforms has provided a relatively simple and authoritative formulation of the subject around which we can organize a course.

Some traditional analysis of developing case law continues to be

6. Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Puerto Rico, South Dakota, Washington, Wisconsin, Wyoming, and the United States Military.

required. Even in areas such as presumptions where scholars have worked hard to cultivate a neat garden, courts sow such new weeds as *County Court v. Allen*⁷ (a case cross-breeding the concept of "inference" with that of "presumption," to create the unpalatable hybrid, "permissive presumption"), creating new clearing work for scholars.⁸ And occasionally a tornado of cases destroys an entire planting. As one judge put it, "In the Chinese tradition, the legal aftermath of the Supreme Court's ruling in *Mullaney v. Wilbur* [dealing with situations when the burden of proof could not be placed on the defendant in a criminal case] would have entitled this year . . . to the epithet, 'The Year of Mullaney'. . . ."⁹

On the whole, however, codification has taken much of the spark out of criticizing the old cases. Nevertheless, it has not succeeded in ridding the world of the need for evidence scholarship.

This is in part because codification has created new puzzles of its own. In drafting the Federal Rules of Evidence, Ed Cleary was clever enough to deliberately include inconsistencies and exclude important material — such as most of the subject of witness credibility. The result was to create a need for evidence teachers that will last through many generations. At the time I did not fully appreciate his genius, but it is now apparent to me that he was insuring the welfare of all of us and of our children. I am convinced that he had the ability to draft a perfect set of rules, manacled to Congress and the Advisory Committee though he was, but that he chose not to do so. Such conflicts of interest are inevitable when codes are drafted by scholars with a teaching territory to protect. If we really wanted consistency in our codes, we would have our first year students draft them. A group of real experts, if they proceed with care, can be counted upon to construct a code that cannot be traversed safely without the aid of skilled guides.

One consequence of a shift away from reliance on appellate decisions, is a need for evidence scholars to develop new tools of analysis. When a body of case law does not make sense, we can mumble a few benedictions and make something up. If distinct lines of cases absolutely cannot be tortured into submission, they can be overruled, or better still, ignored. When a body of law is codified, however, we no

7. 442 U.S. 140 (1979).

8. See, e.g., Allen, *More on Constitutional Process of Proof Problems in Criminal Cases*, 94 HARV. L. REV. 1795 (1981); Allen, *Structuring Jury Decision-Making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980); Lushington, *Faces Without Features: The Surface Validity of Criminal Inferences*, 72 J. CRIM. L. & CRIMINOLOGY 82 (1981).

9. *Warren v. State*, 29 Md. App. 560, 562, 350 A.2d 173, 176 (1976) (citation omitted).

longer have these options — even though theoretically there is a continuing supervising body to recommend change.¹⁰ We must confront the problem of legislative design.

While the Federal Rules of Evidence are not statutory, they look like statutes, and often they act like statutes. Unlike the rules of civil procedure, the Federal Rules of Evidence bear the stamp of extensive Congressional revision; rule 412, relevancy of victim's behavior in rape cases, is a purely legislative enactment. The picture is further complicated by the participation of the Advisory Committee and the Standing Committee on the rules.

Constitutional scholars like Paul Brest and John Hart Ely often have noted that legislative intent is a fiction.¹¹ In the case of the Federal Rules even the idea of a legislator is fictional. The history that may be relevant to interpreting the Federal Rules includes: communications to, and internal discussions of, the Advisory and Standing Committees of the Judicial Conference; hearings and marking sessions of Congressional committees as well as debates on the floor among the handful of legislators who had an interest in the draft; an occasional dissenting memorandum from a member of the promulgating authority — the Supreme Court; and the huge mass of material the rules were designed to replace.¹²

This amorphous data base gives modern evidence scholars the kind of wide discretion they need to do interesting work. But it requires the development of sophisticated and novel methods of interpretation.

An example of the sort of interpretive effort that increasingly may be attempted is Peter Tague's fine critique of rule 804(b)(3).¹³ Through a painstaking examination of the sort of materials I have mentioned, he comes to the conclusion that in drafting the penal interest exception, the Judicial Committees and Congress yielded to pressure from a Senator and a Justice Department eager to maximize convictions. Tague

10. Perhaps it would be useful for the teachers of evidence as a body to press for necessary updating of the rules as their individual and collective scholarship suggested areas needing revision.

11. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

12. See, e.g., Weinstein, *Preface* to J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* at vii & *passim* (1980); J. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* 71-75 (1977).

13. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981).

sees this interpretation as the basis for a number of constitutional and other infirmities in the rule.

An approach of this sort raises all of the epistemological problems implicit in the diffusion of drafting responsibilities occasioned by the rulemaking process. Should we infer from the Tague analysis that it was the intent of the Supreme Court of the United States in promulgating rule 804(b)(3) to make convictions easier? In determining the intent of Congress in modifying the rule, should we look merely at the statements of the few representatives who took an active interest in the revisions of the rules? The purposes of any one legislator or committee member may be highly idiosyncratic but the language employed to implement these purposes is often part of the common currency of legal discourse. Should we look to the draftsman's purpose in these instances or the common meaning of the language in the context of developed practice?

Skepticism about "casual statements from floor debates,"¹⁴ are always in order, but when rules of evidence are involved sometimes even remarks made in premeditated malice should receive little weight in a subsequent complex courtroom setting. What flexibility, if any, is afforded by rules such as 102, directing that the rules be construed to obtain justice and determine "truth," or 403, granting judges discretion to limit prejudicial evidence, or 803(24) and 804(b)(5), the catchall hearsay loopholes? Questions like these, raised by the very process of codification through rulemaking,¹⁵ promise to keep us busy for quite some time.

The methodological challenges posed by codification are exacerbated by a concomitant development — the increasing reliance of federal courts of appeals on unpublished memoranda and summary dispositions.¹⁶ In the area of evidence, of course, most decisions are made at the trial level and never appear in any written form. Usually, they are recorded but not transcribed.

There has been a recent proliferation of opinions construing the new rules. But, based on the appellate court memoranda I see, only a small portion of appellate evidence rulings will be available to scholars. I note that the *Federal Rules of Evidence Reporter* has taken to printing

14. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

15. The entire rulemaking process needs reconsideration for this and other reasons. See, e.g., J. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* (1977).

16. See, Reynolds and Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

a few unpublished opinions.¹⁷ But the Reporter misses most of them. As a result it is very difficult to get a clear picture of how the rules are being applied and interpreted in the courts. My own feeling is that this may be just as well. Often evidentiary rulings on appeal are actually substantive judgments dressed up in procedural clothing. Consequently, even when they are published they have uncertain precedential value for the law of evidence and unsalted reliance on them by scholars would be downright misleading.

I was struck by this problem in my correspondence with Paul Giannelli, occasioned by his excellent article on novel scientific evidence. In this article he espoused a restrictive burdens of proof approach¹⁸ to replace the *Frye* doctrine, which limits new scientific proof to that recognized in the science community. I have expressed a preference for a judicial discretionary approach derived from rule 403.¹⁹ In the course of comparing our views, it became apparent to us both that neither of us have much useful data on how discretion is actually being utilized. Our arguments gasp for breath because they are made in the vacuum of ignorance about the critical factor. How shall we get that data? Questionnaires do not work well. Observing trials or reading transcripts is burdensome. Published opinions are not a fair sampling.

While nonpublication by judges may increase the value of academic scholarship, it probably lowers the integrity of judicial decision-making. Partly this is because publication is an inherent check on judicial caprice; but, in addition, present procedures probably make it difficult even for the conscientious federal appellate judge to appreciate fully the practice of his own court. The federal courts of appeals panels change constantly, and without the gravitational pull of precedent, consensus is hard to develop. When I make evidentiary rulings at trial, I often know that particular panels would have conflicting responses on

17. See, e.g., *Newhouse v. Robert's Ilima Tours, Inc.*, 8 FED. R. EVID. SERV. (CALLAGHAN) 1114 (9th Cir. 1981).

18. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States A Half Century Later*, 80 COLUM. L. REV. 1197, 1248 (1980) ("The prosecution in a criminal case should be required to establish the validity of a novel scientific technique beyond a reasonable doubt. Civil litigants and criminal defendants, on the other hand, should establish the validity of a novel technique by a preponderance of the evidence.").

19. I have advocated a balancing approach, weighing the probative value of the novel scientific evidence against

such factors as the significance of the issue to which the evidence is directed, the availability of other proof, and the utility of limiting instructions. . . . [This] approach gives courts a latitude which they do not possess under the general scientific acceptance rule [because it] favors admissibility whenever the general conditions for the admissibility of evidence have been met.

3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[03] (1980).

appeal. Doubtlessly, the judges on the courts of appeals know something of one another's leanings as well — but in the absence of recorded precedent, minority views live to fight again and even triumph, on a differently constituted panel. The views of the various judges drift through the docket like Anthony Amsterdam's pool hall scoring racks — in parallel lines, notching a case here and there, never converging or communicating.²⁰

Thus, the rare occasion when an appellate evidentiary ruling is considered and reported at length is often no cause for celebration. Such opinions are potential criminals — of dubious parentage, unrestrained by communal norms, and unpredictable. Armed and dangerous, they must be confined at all costs. For example, in *United States v. Oates*,²¹ the Second Circuit made some elaborate interpretations of the hearsay rules, suggesting that police reports not admissible under 803(8), the official records exception, could not be admitted under any other hearsay exception.²² The court thus held that the trial judge had improperly admitted the report of a government chemist who was not present to testify. His report concluded that the substance allegedly taken from the defendant was heroin. There is some merit in the idea — particularly in the context of the case at hand — that what is excluded under 803(8)(B) and (C), the qualification of the official records exception relating to police reports, should not come back in under 803(6). Nevertheless, the dicta in *Oates* sweep much more broadly than this, catching up much of the evidence traditionally accepted in criminal prosecutions, including fingerprints.

In a subsequent case I attempted to obtain clarification.²³ The case involved a fingerprint lifted from the wheel of a hijacked Brinks truck. The defendant contended that the words "from wheel of truck" were written, not at the time the prints were lifted, but much later, and to perjurious purpose. Suspecting that the FBI would have received a copy of the prints before defense counsel contended that they had been relabeled, I suggested that the prosecution call Washington. The next morning, an FBI agent arrived with a stamped and dated photographic

20. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

21. 560 F.2d 45 (2d Cir. 1977).

22. [I]n criminal cases reports of public agencies setting forth matters observed by police officers and other law enforcement personnel and reports of public agencies setting forth factual findings resulting from investigations made pursuant to authority granted by law cannot satisfy the standards of any hearsay exception if those reports are sought to be introduced against the accused.

Id. at 84.

23. *United States v. Marino*, No. 79-CR-367 (E.D.N.Y. 1979).

duplicate of the prints. Prior to *Oates*, the date stamped on this photograph, though hearsay, probably would have been admissible at least under rule 803(1), the contemporaneous statements exception, 803(5), the recorded recollection exception, and 803(24),²⁴ as well as under rule 803(6). But, since it was “[the] report of [a] public agency setting forth matters observed by . . . law enforcement personnel,” and it was introduced against the accused in a criminal case, under *Oates* it “[could] not satisfy the standards of any hearsay exception,” despite its obvious relevance and reliability.²⁵ I invited the defense counsel to object, finally putting the word “hearsay” in his mouth. At this point, I laid out the issue and overruled the objection, in the hope that the Court of Appeals, in reviewing the matter, would be induced to limit the *Oates* case. I must admit to a certain amount of naivete on this point. I am told that on argument, one of our most eminent judges said that he could not see any hearsay issue; the memorandum decision rejected defendant’s argument out of hand; and in any case, the opinion was never published.

I have no claim upon your sympathy in this matter — the law journals are open to us, and I can make my views known. But most judges do not write except in the form of opinions, and most contributors to the law reviews or treatises do not sit on the bench. We must recognize that now, partially as a result of codification, there may be less communication between the two groups.

If codification has not eliminated the need for evidence scholarship, it has dramatically altered much of its function and direction. By blocking traditional avenues of doctrinal analysis, codification has forced the charting of previously unexplored routes. Had the Iberian sailors of the Renaissance had free access to the eastern Mediterranean, they might never have circumnavigated Africa or discovered America when they did. For better or worse, the direct route to the spice-rich East was preempted by Venice. Similarly, if we all could continue in-

24. Rule 803(24) is a general provision for exempting from the hearsay rule testimony that is 1) accompanied by circumstantial guarantees of trustworthiness, 2) offered as evidence of a material fact, 3) more probative on the point for which it is offered than any other evidence which the proponent can provide through reasonable efforts, 4) admissible consistent with the interests of justice. There is a fifth requirement of advance notice which has been applied flexibly in cases like *Marino*, in which the need for the hearsay testimony is not fully realized until after the trial begins, *United States v. Iaconetti*, 540 F.2d 574, 578 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (“[S]ome latitude [in giving notice] must be permitted in situations like this in which the need does not become apparent until after the trial has commenced. The fact that defendant did not request a continuance or in any way claim that he was unable adequately to prepare to meet the rebuttal testimony further militates against a finding that he was prejudiced by it.”).

25. *See supra* note 22.

definitely in the almost perfectly engrossing pursuit of such matters as purifying theories of hearsay, we would have no need to innovate. But the law of hearsay, unfortunately, is already so refined that much hearsay scholarship today is primarily heuristic in its aims — for example, Roger Park's *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed By Suggestions to Law Teachers*,²⁶ and Laurence Tribe's *Triangulating Hearsay*.²⁷

When the state of the law is ostensibly settled by codification, legal scholars can no longer define their tasks in terms of the clarification of the law. Widespread codification and restatement has turned the attention of teachers more towards the societal impact and the value of legal institutions. Generally, in our discipline, these new interests have been reflected in methodological borrowings from the social sciences and humanities. The disciplines of economics and philosophy have become particularly influential.²⁸ Of course, social scientists and humanists are probably no more sanguine about being discovered than were the natives of the American and African continents. Nevertheless, the latter discoveries greatly enriched Europe, and the former discoveries deepen the study and practice of the law. Scholarship informed with normative and practical perspective can bring life to what has sometimes been an arid theoretical exercise.

As evidence scholars, we have availed ourselves much more of the secrets of the social sciences than of the humanities. Lawyers are seen and see themselves as practical people, men and women of affairs. Much of that reputation for practicality derives from our experience in evaluating factual evidence about the social world.²⁹ We are actuaries and oddsmakers. Though we now treat probability as a creature of mathematics, more and more evidence scholars are seeking to domesticate it and bring it to heel.

Perhaps the single most controversial issue discussed by recent evidence scholarship in the leading journals concerns the utility of mathematical methods in assessing evidence. This controversy effectively

26. 65 MINN. L. REV. 423 (1981).

27. 87 HARV. L. REV. 957 (1974).

28. Economic theory informs much recent legal scholarship. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972); *Symposium-Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *Symposium-Legal Scholarship: Its Nature and Purpose*, 90 YALE L.J. 955 (1981). Similarly, one can trace the influence of contemporary philosophers — for example, John Rawls — in modern legal commentary. Compare J. RAWLS, *A THEORY OF JUSTICE* (1971) with L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-1 (1978) and R. DWORIN, *TAKING RIGHTS SERIOUSLY* ch. 6 (1977).

29. As Michael Finkelstein recalls in the introduction to his study, *QUANTITATIVE METHODS IN LAW* 2 (1978), Leibniz viewed lawyers as masters of the logic of probability in the same way that mathematicians were experts on the logic of necessity.

began in 1970, with the publication of Michael Finkelstein's and William Fairley's, *A Bayesian Approach to Identification Evidence*.³⁰ It inspired Tribe's famous, rueful response — *Trial by Mathematics*.³¹ Tribe argued that the use of such devices exalted the prosecution's case much more than it added to it substantively. Beyond this, he suggested, the entire project might be a misapplication of probability theory. Others, notably Daniel J. Kornstein,³² came to Fairley and Finkelstein's defense, while a third group consisting most prominently of the British philosopher, L. Jonathan Cohen,³³ and Lea Brilmayer and Lewis Kornhauser³⁴ took the view that probability theory could be fairly employed in legal decisionmaking only if it were substantially revised to reflect law's varying standards and burdens of proof. More cautious proponents of Bayesian analysis, such as David Kaye,³⁵ have defended the use of traditional probability theory in limited contexts. Richard Lempert, among this group, has argued that probability theory is useful, if not essential, in developing reasoned criteria of relevance.³⁶ Still others, such as Elizabeth Loftus,³⁷ have used the tools of mathematical experimental psychology to test the veracity of eyewitness identifications.

Statistical analysis of evidence is a burgeoning area of research, and one which will inevitably find its way into a central position in our evidence curriculum. When Lexis tells us how much more frequently terms such as "standard deviation" and "multiple regression" appear in the cases, their place in the reviews³⁸ and in the classroom is clear.

At one time the role of statistical inference in litigation was confined to such quaint problems as whether or not to hold a bus company

30. 83 HARV. L. REV. 489 (1970).

31. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

32. Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121 (1976).

33. L. COHEN, *THE PROBABLE AND THE PROVABLE* (1977).

34. Brilmayer & Kornhauser, *Review: Quantitative Methods and Legal Decisions*, 46 U. CHI. L. REV. 116 (1978).

35. Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 MICH. L. REV. 1456 (1979); Kaye, *The Laws of Probability and the Laws of the Land*, 47 U. CHI. L. REV. 34 (1979).

36. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1977).

37. E. LOFTUS, *EYEWITNESS TESTIMONY* (1980). A survey of the literature in this area may be found in Weinstein, *Book Review*, 81 COLUM. L. REV. 441 (1981).

38. See, e.g., Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980). See also COMM. ON NAT'L STATISTICS AND COMM. ON RESEARCH ON LAW ENFORCEMENT & THE ADMINISTRATION OF JUSTICE, ASSEMBLY OF BEHAVIORAL & SOCIAL SCIENCE, NAT'L RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCES, *PROPOSAL FOR A STUDY OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* (1980) (multilithed).

operating a line on a given street responsible for accidents there involving unidentified buses.³⁹ Today, however, the crucial evidence in much of our most important litigation is explicitly probabilistic. In areas of public concern ranging from race discrimination to the carcinogenic effects of pollutants and other toxins, litigation is synonymous with statistical evaluation. In cases of this sort, complex procedural issues such as the joinder of parties through class actions and multi-district litigation intersect with fundamental problems of evidence theory.

This increasing role for statistical assessment of evidence results not from any attempt on the part of scholars to formalize a jury's evaluation of circumstantial evidence, but from an increasing commitment throughout our legal system to holding individuals and institutions responsible for the long-range and indirect effects of their actions. It is this more sophisticated understanding of our society now animating the administration of justice⁴⁰ that requires a more sophisticated process of judicial and jury decisionmaking. But even in the simpler and more traditional forms of litigation basic studies on how people reason and how they may be trained to evaluate evidence more accurately require us to consider mathematical and other models of the real world more seriously than we have in the past.⁴¹

While we have developed a good deal of theoretical and practical knowledge about how people individually and in small groups think, there is much to be done in gaining a better understanding of decision-making in and outside the courtroom. Even the effect on fact finding of the individual knowledge and background of the trier — whether judge or jury — is still a mystery which has not been dispelled by lawyers' increasing use of social psychologists in picking juries.

Evidence pedagogy in general is becoming more sensitive to the practical nuances of applying the law. This is, of course, part of a larger picture in which clinical education is on the rise. But concurrent with this has been a new phenomenon in classroom teaching — the advent of the problem method, in which students test rules of law they are asked to apply in situations simulating those they might face as lawyers — an extension of our traditional use of hypotheticals. It is to be regretted that the time devoted to clinical and problem methods may

39. See, e.g., *Smith v. Rapid Transit, Inc.*, 317 Mass. 469, 58 N.E.2d 754 (1945); see also Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101.

40. See Fiss, *The Supreme Court 1978 Term-Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

41. See, e.g., R. NISBETT & L. ROSS, *HUMAN INFERENCE* (1980); Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123 (1980-81); Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 207 (1973).

diminish the amount of time that can be devoted to theoretical instruction; but these teaching methods are particularly useful in teaching fields of law which are codified. One study comparing the problem method with the case method and computer techniques in teaching evidence found that the problem method produced (in slight degree) the highest scores in comprehension in the least amount of overall study time.⁴²

Problem instruction can be effective not only where the law is fixed and fairly specific, but where it barely exists at all. Today house counsel are often confronted with such questions as whether a new product creates an environmental or other hazard. In this and in other contexts, lawyers increasingly are acting as factfinders outside the courtroom. Students can consult neither the casebook nor the rulebook for guidance about such situations.⁴³ They can only consult their own experience and fundamental theory on factfinding and decisionmaking. As a result, it may be useful to expose students to a setting in which they will develop and evaluate evidence in interaction with a client or witness or in response to raw data.

Whether teaching by computers, clinical or written problems, cases, or a combination, most teachers will, I think, continue to stress theory. That is what the best evidence teachers have done and what their students have probably found has the most carryover value into later years at the bar. Nevertheless, perhaps in post-graduate teaching of practitioners, problems and practical content rather than theory should be emphasized.

TV cassettes and films as well as computer teaching may permit teachers to achieve what a few feel is the optimal academic life — teaching without the need to talk to students. I rather doubt that this is true of many law school teachers of evidence.

Emphasis on clinics and non-courtroom settings increasingly requires us to import ethical issues into the subject of evidence. In interviewing a client, is an attorney really finding out what a client wants? What a witness really saw? Is he imposing his own perceptions? These questions are particularly important in light of findings by William Simon⁴⁵ and Jack Himmelstein⁴⁶ that lawyers sometimes impose their

42. Kimball & Farmer, *Comparative Results of Teaching Evidence Three Ways*, 30 J. LEGAL EDUC. 196 (1979).

43. See, e.g., CENTER FOR PUB. RESOURCES, DISPUTE MANAGEMENT (1981).

44. Weinstein, *Introduction* to E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE at ix (5th ed. J. Weinstein 1976).

45. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

own preconceptions on litigants. In instances where lawyers cut their clients to fit the suit, they are perhaps as much victims of socializing pressures as the clients are. But in instances where lawyers act outside of the court system as informal dispute settlers, they may have a greater obligation to step outside their own preconceptions.

In general we are witnessing a convergence between the fields of evidence and legal ethics. The intersection is clearest in the area of attorney-client privilege.⁴⁷ Can privileges even be taught in the evidence course which has contracted from six to four to three points? Or are they too important for us, and should they be parceled out among the new courses in Professional Responsibility, or the ones in Constitutional Law, Corporations, Criminal Procedure and Family Law? Since they present some of the most stimulating areas of law, I would hate to see Privileges escape from our preserve.

Questions of privilege are cropping up in so many areas that they now seem fundamental to any meaningful concept of the field of evidence. The ABA's Kutak Committee proposals⁴⁸ and widespread criticism and counterproposals,⁴⁹ raise issues central to our concept of the adversarial system. Their resolution will have an important, perhaps a profound, impact on our approach to trials and rules of evidence.⁵⁰ Here, the economists, sociologists and philosophers may be critical. Our adversarial techniques for resolving disputes are not sacrosanct.

46. Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514 (1978).

47. See, e.g., *Upjohn Company v. United States*, 449 U.S. 383 (1981) on the scope of the attorney's work product and of the attorney-client privilege in the context of inquiries by the Internal Revenue Service.

48. See Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 116 (1981). The draft rules emphasize attorneys' ethical obligations to their clients, *id.* at 1117, but stress that "[a] lawyer may do for a client only what the client could lawfully do if possessed of similar skills." *Id.* at 1119 (emphasis added). They mandate disclosure of client misconduct whenever disclosure is necessary to avoid assisting a criminal or fraudulent act, and also authorize disclosure if the act threatens substantial harm. *Id.* at 1119-20.

49. See, e.g., THE AMERICAN LAWYER'S CODE OF CONDUCT (Commission on Professional Responsibility of the Roscoe Pound-American Trial Lawyers Foundation) (Discussion Draft 1980), reprinted in TRIAL, Aug. 1980, at 44. The basic thrust of this code is that the lawyer has an overriding responsibility to represent his client as best he can. The code permits disclosure of client misconduct only in very limited circumstances.

50. A recent New York State Supreme Court decision, *People v. Salquerro*, 107 Misc. 2d 155, 433 N.Y.S.2d 711 (Sup. Ct. 1980) held that attorneys were obligated to reveal to the court knowledge of their client's intent to perjure themselves and were precluded from recusing themselves thereafter. The *Yale Law Journal* recently proposed that the Code of Ethics be amended to condemn the participation or acquiescence of an attorney in the destruction of evidence detrimental to his client's interest — something I never thought any lawyer could think either ethical or tactically sound. Note, *Legal Ethics and the Destruction of Evidence*, 80 YALE L.J. 1665 (1980).

The benefits may not be worth the social costs, given possible alternatives.

Examples of conflict between the attorney-client privilege and the interests of justice are part of the larger conflict between, on the one hand, professional or personal ethics and, on the other, the integrity of a fact-finding process and the substantive needs of the public. We are all familiar with the California case in which a psychiatrist was held civilly liable for violating his duty to warn the acquaintance of a patient that her life was in danger.⁵¹ There are a myriad of relationships in society — genetic, domestic, professional, journalistic, religious — generating analogous privacy interests. There are also a myriad of fact-finding processes — judicial, administrative, legislative, even scientific — on the success and integrity of which great interests depend.

It is increasingly clear that this fundamental conflict between privacy and inquiry⁵² binds evidence inexorably not merely to legal ethics, but to ethics itself. And that means that the current generation of scholars have before them a group of problems that will take more than one generation to solve.

In short, we may paraphrase Malthus by concluding that the hunger for evidence scholarship grows faster than scholarly production. We must not only till and retill the old fields more intensively. We must develop whole new genetic strains of dispute resolution and ethics, fertilized by new needs and policies and research techniques. We must clear new fields in the eternal search for the truth, and develop new methods of cultivating future harvests of better lawyers, judges and teachers.

In the course of tending the garden we have been bequeathed, however, we should recall that our purpose is not merely to grow fruit, but to enjoy it. As a much beloved teacher of evidence, the late Arthur Leff, reminded us shortly before his untimely death, not the least reason for pursuing a life of scholarship is, and should be, that it's fun.⁵³

51. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

52. See, e.g., the debate between Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173 (1980) and Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial"*, 14 U. MICH. J.L. REF. 371 (1981). See also *Lora v. Bd. of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977).

53. Leff, *Afterword to Symposium, Legal Scholarship: Its Nature and Purpose*, 90 YALE L.J. 1296 (1981). Professor Leff's last words on the subject were: "But to have crafted, on occasion, something true and truly put — whatever the devil else legal scholarship is, is from, or is for, it's the joy of that too." *Id.* at 1296.