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A RESIDENT OF EVIDENCELAND DEFENDS HIS TURF

By Richard D. Friedman

A few years ago, I wrote an essay welcoming Judge Richard Posner down from a star to Evidenceland, the sometimes obscure province occupied by evidence scholars.[1] Although I criticized one of the points of his article on the economics of evidence law, I expressed the hope that he would remain in Evidenceland for an extended stay.[2] I should have known that if he did so he would tell us long-term inhabitants what we have been doing wrong.

Judge Posner has been teaching a course that he calls Evidence, though frankly it sounds more like Trial Advocacy for Students Who Have Not Taken Evidence. Although he assigns some materials of the type that are used in a conventional Evidence course (including, I understand to my gratification, my own coursebook) and lectures on the rules of evidence for the first few class sessions, the heart of the course is simulated trials based on case files of the National Institute for Trial Advocacy ("NITA"). He organizes the course this way because he is convinced that "you can learn [the rules of evidence] only by applying them and not by studying them (just as you can learn to ride a bicycle only by doing it and not by studying the pertinent rules of physics), because their meaning and significance emerge only in the context of a trial."

I am sure the course is a wonderful experience for students, and that they learn a great deal. Indeed, if a student decided to take this course—taught by one of our leading legal scholars and appellate judges, who is also an experienced trial judge—rather than a conventional Evidence course taught by, say, someone like me, I could hardly fault the choice. Moreover, I am sure that a Trial Advocacy course is an excellent one for any law student or lawyer to take,

1. Richard D. Friedman, *A Presumption of Innocence, Not of Even Odds*, 52 STAN. L. REV. 873 (2000).
2. *Id.* at 887.

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especially—but not exclusively—if the student intends to be a litigator, and that one can learn a great deal from such a course that the student is unlikely to learn in a conventional Evidence course. But I also believe that students can learn a great deal in a conventional Evidence course that they cannot in a course of the type that Judge Posner teaches. The ideal, given enough time in a student's schedule and enough resources in the school, is for the student to take both. The optimal order is clearly to take the Evidence course first.[3] Furthermore, if one applies the economic doctrine of comparative advantage and asked in which law school course a law student could learn more of what he or she could not learn later, either in a short course taken while in practice or in practice itself, I believe the resulting advice usually would be: "Take Evidence now, and fill in the Trial Advocacy later."

I certainly do not disagree with Judge Posner that a Trial Advocacy course has advantages over the conventional Evidence course in that it more easily gives a student a feel for application of evidentiary principles, and that it puts evidentiary questions in the context of a full case. An Evidence instructor concerned about these disadvantages can compensate to a significant degree in designing the course. Role-playing—for example, with a student acting as counsel attempting to secure the admissibility of evidence, and the rest of the class acting as opposing counsel—can be used quite effectively even in a large class. And, to the extent the instructor feels that analysis of evidentiary problems will be improved by placing them in the context of a fully developed case, it is possible to do this by having much of the course revolve around a limited number of case files.[4] Even so, the Evidence course will be in deficit in these respects compared to a Trial Advocacy course.

Thus, there is a great deal of appeal in Judge Posner's bicycle analogy. But its force only goes so far. Once one has learned how to ride a bicycle, one can do so practically anywhere. But when one has

3. That may not appear self-evident. Trial experience gives students insights that they can bring to the Evidence course. But, for reasons discussed below, I believe the Evidence course gives students a grounding that can be of substantial assistance in real or simulated trial experience. In any event, I generally find that some students in my Evidence course have already had some trial experience, from clinics or summer jobs or prior careers, that they are able to bring to bear in class. Interestingly, Judge Posner had planned to have a theoretical component of his course after holding the NITA trials, but he found (not surprisingly) that those trials "engulfed" the course.

4. This is an aspect of RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES (5th ed. 2002).

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learned how a particular evidentiary problem has been addressed and resolved in a given setting, it is not always clear whether one has learned anything but a war story. If the Trial Advocacy course has the advantage of the context of a case, the Evidence course has the advantage of the context of a broad-ranging body of law and of thought. It can offer a systematic study and critique of the underlying principles and goals of evidence law, and of the psychological and sociological premises that are thought to support particular rules, a perspective on the interconnections between the various parts, and a reasonably rigorous study of the epistemological foundations of fact-finding. And, without wishing to claim too much for the professoriate, it can offer students the guidance of a scholar who has thought for some time about this maze, which may help them work their own way through it. I am sure in Evidence, as in most law school courses, students soon forget most of the doctrinal points we teach them. But we can hope that, as with other courses, the exercise itself will hone their analytical abilities, that a fair amount of what we teach at the broader level will become part of their intellectual landscape, and that even some of the narrower points, though dormant, may be reawakened by the proper stimulus.

The two recurrent student suggestions about Judge Posner's course that he reports—that he act as the trial judge and that he lecture more on the rules of evidence—therefore strike me as significant. They suggest that his students recognize that they are lacking a systematic view of evidence law and theory, and that they suspect the same is true of their classmates. And indeed, if the student judge knows very little about the law of evidence, that will undercut the value of the exercise to the other participants. I do not pretend that the ordinary trial judge has a complete command of the rules of evidence as they are taught in the conventional course, or indeed as they are enunciated at relative leisure by treatise writers or by appellate courts. But I do believe that most trial judges have a broader, deeper, more detailed understanding than is likely to be had by a law student—even a very bright one at the University of Chicago—who has not had a course in Evidence.

Much of what I have said assumes that, or at least takes on greater force if, there *is* a body of Evidence law worth learning. (Whether it is worth *having* is another matter.) Can this proposition be reconciled with Judge Posner's Realist view that what judges try to do in deciding a case, and usually are able to do, is to come up with a result that is sensible in light of the situation that confronts them in the particular case, and to try to make that result square with precedent, statutory

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language, and the other formal materials of legal decision making? To a large extent, I believe it can—but to some extent, I believe Judge Posner overstates his point. Sometimes judges will decide an evidentiary issue without even referring to—perhaps without even being aware of—the relevant legal materials. Indeed, often, evidentiary doctrine is so open-textured, leaving so much discretion in the hands of the trial judge, that there is not much harm in this. And certainly judges, both trial and appellate, often manipulate the doctrine to reach results they deem desirable; the stretching of some hearsay exceptions is a good example of this. But evidence law does not seem different from other areas of the law in this respect. And the fact is that in some ways doctrine *does* limit the range of possible rulings; most often the trial judge will not even consider some outcomes because they are clearly forbidden by law, and sometimes appellate courts will bring trial courts within bounds.

Judge Posner is certainly correct to give preeminence to the balancing of benefits in accurate fact-finding against a wide range of costs, as suggested by Federal Rule of Evidence 403. Nevertheless, there are large areas of evidence law that cannot be usefully described by that balancing test, without stretching it so far as to make it lose usefulness. Consider the following hypotheticals:

- A witness in an assault case has decided she does not want to come to court. But a week after the assault, she gave a police officer her rendition of what happened, and the officer is prepared to testify as to what she said.
- In a fraud case, plaintiff's counsel offers to present to the jury, before any witness has testified, a letter containing the allegedly fraudulent representation, and bearing at the bottom what purports to be the defendant's signature.
- In a robbery case, the prosecution offers to prove that in the last five years the defendant has committed three other robberies. This evidence, the prosecutor says, shows that the defendant has a strong propensity to commit robbery.
- Suspecting that the defendant made a frank confession to his lawyer, the prosecutor asks him, "What did you tell your lawyer about what happened?"
- Recalling that in the course of failed compromise negotiations, defendant in a products liability case made some statements strongly suggesting liability, plaintiff's counsel asks her, "Well, when we were trying to settle this

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case, didn't you admit to me you were liable?"

- In a date-rape case, to support his contention that the complainant had consensual sex with him, the defendant offers to prove that on at least three other occasions the complainant had consensual sex with a man on their first date.

If these hypotheticals seem somewhat farfetched, it is because, in most American jurisdictions in this era, a lawyer would not likely offer the evidence in question, knowing that the trial judge would almost certainly reject the offer out of hand. And if the judge did admit the evidence, and it appeared that the evidence plausibly had an effect on the outcome, an appellate court would likely reverse. In these, and many other cases that tend not to arise, and in some that do arise often, the effects of doctrine cannot be ignored.

And yet in each of these cases there is a reasonable argument that the probative value of the evidence outweighs the danger of prejudice and the other factors identified by Rule 403. I do not mean that the argument is necessarily compelling, just that a judge, constrained only by the open balancing test of Rule 403, might well decide that the evidence should be admissible. The fact that exclusion is nevertheless clearly the proper result in each of these cases suggests that the law makes critical one or more factors that a judge might not consider, or give much weight to, in a Rule 403 determination. These might include, for example, the confrontation rights of a criminal defendant, the best evidence principle, the desire to avoid punishing people for crimes not charged in the indictment, the need to protect a confidential channel of communication between client and lawyer, and a policy that the intrusion into one's personal life entailed by bringing a rape complaint should be minimized.

I am not suggesting that Rule 403 cannot be understood to comprehend such factors. I am inclined to agree with Judge Posner that Rule 403 should be understood as a broad authority to the courts to weigh costs and benefits—but only to the extent some narrower rule does not govern. Read this way, however, Rule 403 is not particularly informative. One certainly could make arguments that a sound analysis under Rule 403 would lead to the results prescribed by conventional doctrine in cases like the hypotheticals set out above. In doing so, though, one would essentially be reconstructing that doctrine, simply cramming it into a Rule 403 rubric.

And, of course, an analyst not shackled by prevailing doctrine

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might conclude that many of the results prescribed by that doctrine, even in clear-cut cases like the above hypotheticals, are not optimal. If evidence law is wrongheaded, that makes it no less worthy of study, even in schools with high intellectual aspirations that avoid treating study of the law as simply the absorption of currently prevailing doctrine. Bad law can persist for quite a long time, and must be understood; understanding law requires more study when the law is bad than when it is good, for the very reason that it is less likely to flow naturally from sound first principles; and the goal of improving law requires particularly that bad law be studied and understood. There is plenty of bad evidence law. For starters, the entire doctrine of hearsay desperately needs a revamping, and it provides much of the meat of a conventional Evidence course.

So I continue to believe that there is an important role played by that type of course, and the scholarship that centers around it. I do not mean to be smug. I take seriously Judge Posner's point that we should try hard to get as much of the feel of the courtroom as possible in the course. And he is surely right that most of us would benefit by taking a more empirical and cross-disciplinary approach to the subject than we do, though I believe there are limits to what empirical studies can tell us about how the law of evidence should be shaped.[5] Finally, and regrettably, I believe that Judge Posner is probably correct in saying "that much of the analytically most sophisticated work in evidence, based on statistical theory, psychology, and epistemology, just is not getting through to the decision-making class." If that is correct, the problem is not that such disciplines—and in particular Bayesian probability theory—have little to offer in providing the groundwork for addressing real problems in evidentiary law. Rather, the problem may be that those of us who tend to use such methods have, in typical academic fashion, been more active in arguing to each other than in engaging in the decision-making process.[6]

I have taken the view that economics is one of the disciplines that, at least potentially, has a good deal to offer the study of evidence.[7] But, just as evidence law cannot be reduced to a sophisticated application of

5. I have made this point in Richard D. Friedman, *"E" is for Eclectic: Multiple Perspectives on Evidence*, 87 VA. L. REV. 2029 (2001).

6. I am not sure the fault is entirely ours. There is a limit to how much judges and lawmakers want to hear from academics.

7. *See generally* Friedman, *supra* note 5, at 2036-40; Richard D. Friedman, *Economic Analysis of Evidentiary Law: An Underused Tool, an Underplowed Field*, 19 CARDOZO L. REV. 1531 (1998).

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Rule 403, neither cost-benefit analysis nor any other economic technique is likely to provide an overall organizing tool for evidence law. So long as Judge Posner sojourns in Evidenceland, he will find most of the residents unwilling to kneel before an economic throne.

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