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Focus on Faculty

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IF MY WIFE ORDERS A MEAT DISH at a restaurant, I'll usually get seafood — but if she orders fish I won't. We'll share, and I like variety. This may help explain not only why I am dilettantish in the courses I teach but also why my two biggest academic projects have absolutely nothing to do with one another.

A dozen years ago, I agreed to become general editor of The New Wigmore, the successor treatise to Wigmore on Evidence. And I also decided to write the portion of the treatise on the law of hearsay. As anyone who has taken a course in evidence knows, hearsay is a baffling doctrine, much disliked and manipulated. But I believe that if we dig deep enough under the muck, we find a principle of enormous importance, which lies at the heart of the Sixth Amendment's Confrontation Clause: the adjudicative system must not allow a person, whether in court or outside, to create testimony for use against a criminal defendant unless the witness is testifying under oath, in the presence of the defendant, and subject to cross-examination. This is a narrow principle — it only applies to a limited set of out-of-court statements, those that are in some sense "testimonial" — and I wouldn't ring it with an array of exceptions. (The defendant's right is subject to forfeiture if his own misconduct makes confrontation infeasible.) I believe that if this principle were well understood and protected, we could happily do with a much simpler body of law dealing with secondary evidence, or even with no such law at all. This reconceptualization would work a large change in the way litigation is conducted — but it would be more efficient, better informed, and also more protective of defendants' rights.

I've churned out a fair number of articles on evidentiary law, and two editions of a coursebook, and much of this writing has been on hearsay and confrontation. But working out my ideas in the treatise itself is painfully slow work. I am trying to offer help to lawyers and judges on a vast array of doctrinal issues — but at the same time to nudge the law rather unsubtly from its current framework into the one I favor. I have about 1,000 pages of manuscript done, and I am hoping to publish the first part within a couple of years. Recognizing the finiteness of life, I have taken on a co-author — an excellent scholar from Indiana University named Aviva Orenstein — for the second part.

By the time we get done, I hope to have made substantial progress on my other project. It has an
interesting history. When Justice Holmes died in 1935, he left much of his estate to the government. The principal project that has been sponsored with the money is a multi-volume history of the Supreme Court. Paul Freund of Harvard was supposed to write the volume on the Hughes Court (1930-41), but he was unable to finish the job. I was lucky enough to get the assignment, in part because I had written a doctoral dissertation on Charles Evans Hughes as Chief Justice. This period was one of huge constitutional transformation — I call it "the crucible of the modern Constitution" — with FDR's attempt to pack the court as its dramatic centerpiece. In my view court-packing has less to do with the transformation than is sometimes supposed, a view I have elaborated at some length in "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 University of Pennsylvania Law Review 1891 (1994). I love this work; I love dealing with the manuscripts, the personalities, and the disputes of an era that is bygone but still familiar. I can't wait to turn fuller attention to it.

I am very fortunate — above all in my family, and in having the blessings of health and liberty, but also in having work, in the classroom and out, that I wake up to each day with zest, and the opportunity to do it in the stimulating, humane, and supportive environment that the Law School provides.

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"Rich Friedman is simply an energy machine. He is an extraordinarily productive scholar. His main field is evidence law, where he staked out an early claim as a central figure in the application of statistical reasoning (Bayesian analysis) to evidentiary issues, and developed an original framework for understanding the hearsay rule.

"But he doesn't stick to any specified turf. In evidence law he has also written about the confrontation clause, conditional relevance, the use of photographs in evidence, and impeachment with character evidence, among other issues, not to mention taking on the arduous role of General Editor of the new re-written version of Wigmore's classic treatise.

"And that's not nearly it; he writes in other areas entirely: antitrust, the vice presidency of the United States, Chief Justice Hughes, the use of peremptory challenges in criminal trials, and so on.

"You might think that someone who writes that much must simply recirculate bland, well-worn notions. Not in the least. Rich is nothing if not original, and quite frequently controversial. He doesn't hesitate to push new ideas, and — judging from the volume of published responses to his articles — is quite successful at provoking other scholars. But he is the most lovable provocateur one can imagine.

"Not only is Rich one of the most friendly, outgoing and generous people I have met, he manages to maintain that personality even as he engages people with his unconventional ideas. In a recent article responding to one of Rich's proposals, a severe critic complained: 'How does one maintain the requisite fire for a proper academic quarrel with a man who first quotes his wife's disparaging judgment [about his own work] and follows with a reassuring footnote citation to the birth certificate of his daughter [attesting to the continued success of his marriage all the same]? I am altogether disarmed.' (H. Richard Uviller, "Unconvinced, Unconstructed and Unrepentant: A Reply to Professor Friedman's Response," 43 Duke Law Journal 834 (1994).

"We are all disarmed, and lucky to have Rich among us."