The Future of Evidence Law: Or, Some Prophecies about Proof

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I am honored to participate in this seminar that is part of the celebration surrounding the dedication of Colorado's new State Judicial Building.

But that feeling of honor is tempered by an awareness of the responsibility and perils of the role I have been asked to play. With the assignment, "The Future of Evidence Law," I have been asked to play the prophet, to be a seer of sorts, and to suggest what rules and principles will govern proof at trials at some date in the future. Exactly what date was not specified in the invitation—a decade, perhaps? A generation? A century? Until recently, 1984 served as the common futuristic date, nearly always with sinister implications. But 1984 is almost here, and we need a more remote date for our next appointment with destiny. Lacking an Orwell to provide a memorable year, and needing a specific date in the middle distance, I suggest the year 2000 as our target for today. It is far enough away to permit flights of fancy and to challenge our imaginations, yet near enough to make us grapple with contemporary problems. Moreover, the year 2000 is of real interest to everyone in this predominantly young assemblage. Many of us—perhaps a majority—will still be practicing law then. Indeed, the year 2000 will be only the mid-point of the careers at the bar of the young men and women who are now students in this very building.

And so, I direct your attention to the year 2000. If the crystal ball seems a bit clouded—if we seem to see through a glass darkly—it may not be our fault. You may recall the ophthalmologist who said to his patient: "Your eyes are fine; the world is out of focus."

There is risk in this role of forecasting, it being familiar fact that the lot of the prophet is hard. He is without honor in his own country, and I still think of Colorado as my country.

One approach to the task would be to predict the shape of particular and familiar rules of evidence some twenty-three years hence. In this wise, for example, we might expect dying declarations to be admissible in non-homicide case (or, quite as likely, to be inadmissible in all cases); we might suggest that video-taped statements by an unavailable declarant will be admissible as an exception to the hearsay rule; or we might predict that confidential communications with a computer (whatever that means) will be privileged. But such exercise, no matter how fascinating, has minimal utility. More in keeping with the theme of this occasion is an overview of the
field, to gain a sense of where we are and where we’re going, first directing
our attention to some things that are happening now and then suggesting their
probable implications.

First, then, let me refresh your recollections of a series of changes that are
taking place among the various elements of the litigation process—its person-
nel, its subject matter, its procedures—for it is these changes that will
determine the character of evidence law of the year 2000. I need touch on
them only lightly, because you are aware of them all; but I want to bring them
to bear on our foretelling task here today, because, as Kierkegaard et put it,
‘‘while life has to be lived forwards, we can only understand it backwards.’’

I. CONSTITUENTS OF CHANGE.

A. The Trial Bar.

First I remind you that the practice of law is going through what, a
quarter-century hence, will almost surely be regarded as a revolution. From
entry into the profession to exit from it, changes impend. The bar’s accredit-
ing authority over legal education is under attack. The profession’s authority
to admit persons to practice is slipping, and probably will have to be shared
with non-lawyers. Also shared with non-lawyers are tasks once considered
strictly legal but no longer deemed to be ‘‘unauthorized practice of law.’’
Lawyer advertising (only last week the subject of a comedy skit on a major
network television show), law clinics, legal services fringe benefits in labor
contracts, ‘‘judicare,’’ the pressures of numbers as the profession bulges (in
Chief Justice Berger’s alarmist phrase, the nation is in danger of being
‘‘overrun by hordes of lawyers hungry as locusts’’)— these developments,
most of them almost inconceivable to any of us twenty-five years ago, are
changing the profession. Woven among these forces are the pressures for
specialization, certification, and mandatory education, both before and after
admission; and the trial bar is the particular focus of these pressures, espe-
cially because of attacks by the Chief Justice and by the Clare Committee.

The extent to which the charges of incompetency leveled at the trial bar are
justified is a matter of dispute. The fact remains, however, that the bar’s
quality inevitably will improve, whether the criticisms serve as a stick, with
mandatory training and experience or competency standards, or as a carrot,
with the desire to demonstrate the lack of need for a ‘‘barrister class’’ leading
the profession to redouble its effort to assure competency of trial counsel. The
law schools of the nation are offering more effective instruction in litigation
skills than ever before in their history. The National Institute of Trial Advo-
cacy provides excellent training of lawyers early in their trial careers, and its
example has made trial practice courses a growth industry in the law schools.
And continuing legal education around the nation, growing more mature year
by year, continues to pay heavy attention to the trial bar.
A general consequence of these changes in the bar—particularly specialization and better training—is that trial lawyers will be better informed and more sophisticated about rules of evidence and their application. An interested and able trial bar will affect the shape of evidence law, because any law is in significant part affected by the capacity of those who use it.

B. The Bench.

The change in the trial bench is less dramatic than the change taking place in the trial bar, but change there is. Throughout much of our modern history, American judges have been elected and placed on the bench, where at once they were assumed to be omnicient. Although there may be reasonable difference of opinion about the political desirability of electing judges as against appointing them, it is undeniable that the traditional elective system has not directly taken into account either judicial abilities or judicious nature. Judicial appointment, to which Colorado went a decade ago and towards which there seems to be movement nationally, makes possible an assessment of judicial skills, potential or demonstrated.

Moreover, it is increasingly perceived that, however selection occurs, title and robe do not a judge make. Beginning with the National College of the State Judiciary, with its first site in Boulder, a wave of judicial education programs has swept the country. The American Academy of Judicial Education, the Institute of Judicial Administration, mandatory seminars for newly selected judges, with funding for these programs occasionally provided by LEAA—all of these represent a remarkable shift in our procedures and expectations, again taking place only over the last ten or twelve years. Other nations, for example Germany and Japan, have long understood that judging is a craft for which one should be trained as for any other. Indeed, in those countries, one’s career path is diverted fairly early into a course that leads to a judging position. I hear no one proposing that kind of judicial selection and training for this country, but it is clear that, once the judicial selection has been made, we are going to expect training in the art and science of judging. As a consequence, we may expect judges to be more skillful, if not wiser, with greater familiarity with the principles and rules of evidence, and with a greater sense of security in their judgment in handling questions of evidence.

C. The Jury.

The rules of evidence are heavily determined by the fact that our system uses lay factfinders—the jury. The course of development of the law of evidence will be affected by the answers to two questions: First, will the jury continue to be widely employed as a fact-finder, in civil as well as criminal cases? Second, if the answer to the first question is affirmative, will there be changes in the jury’s complexion that will bear on the rules of evidence?
As I shall have occasion to say a little later, my own view of the first question is that the jury will continue to be widely used. To whatever extent the jury is retained, the common observation is probably correct; namely, the level of sophistication and ability of the average American jury is increasing. That improvement is undoubtedly slow and slight, but it exists nevertheless. In part, it exists because our people have had the entire world brought into their living rooms via television and other media. The level of literacy may not have improved. (A young woman applied the other day for a job as typist for a government agency. She was asked if she could spell Mississippi. Very brightly she responded, "The river or the state?") But the average American juror is surely more familiar with what is going on in society than was true a generation ago. I do not expect that trend to diminish.

Moreover, jury selection processes may move us toward better educated juries. Consider, for example, Detroit's "one day/one trial" jury service. Prospective jurors are called to serve for only one day or one trial, whichever is longer. Because the imposition on the particular juror is ordinarily slight, the courts excuse almost no one from service, and whole groups that might ordinarily be excused routinely because of the nature of their employment or other responsibilities are now brought in to serve. The consequence is that a more representative pool is available with, on the whole, a higher level of sophistication and education.

If my assessment of that trend is correct, it follows that rules of evidence in the years ahead need not be fashioned on the assumptions that complexity of proof must be limited to the kindergarten level and that jurors cannot discriminate between legitimate and illegitimate uses of particular items of evidence.

D. The Evidence.

In the next generation or two, the nature and form of evidence presented to jurors may change slightly as a consequence of our increased knowledge of psychology, science, and technology. Already this afternoon we have had a preview of the effect of technology on the law of evidence. But I am thinking more of the possibility that scientific developments will provide the triers of fact with data not heretofore available—data that may well be dispositive of particular cases.

On my desk is a 1908 book by Hugo Munsterberg, entitled *On the Witness Stand*. A series of essays on psychology and crime, Professor Munsterberg's book was a pioneering effort to suggest the contributions that psychology could make to fact-finding, pointing out fallacies in then current assumptions about perceptions and memory. He spoke of suggestibility of witnesses, of the unreliability of eye-witnesses, and of hypnotism as a truth-seeking device; and he urged that the principles of psychology—which he characterized as scientific—be brought to bear on the problems of proof.
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Seventy years after Munsterberg it is still not possible through science to know the "truth," though we are helped by such items of scientific evidence as radar evidence of speed, breathalyzer evidence of intoxication, and neutron activation analysis of substances; and we continue to toy with polygraphs, psychological stress evaluation, narcoanalysis, and the like.

Whatever the ingenuity of science, whatever the validity of the new kinds of proof offered, the courts undoubtedly will respond according to the same principles of probative value and prejudicial effect as they have in years past, with little change in rules of evidence as a consequence. And proof will continue to come primarily from the mouths of human beings and from documents and other objects in litigation, and not from mysterious "black boxes."

E. The Forum.

The rules that govern the proof of disputed facts inevitably will be determined by the nature of the forum in which they are employed, as well as by the quality of the fact-finder. Although judicial statistics indicate that there are more cases in the courts than ever before, it is also a fact that more disputes are being resolved in other settings. Even in the normal judicial litigation process, a substantial portion of evidentiary problems are resolved before trial, as where facts are stipulated, documents are authenticated, and information is exchanged. The loosening of rules of evidence in depositions probably leads to some relaxation of rules in the courtroom setting, if only out of habit.

But in addition to "pre-trial trials," many controversies are being diverted to other forums. The National Center for State Courts recently published Outside the Courts, a survey of diversion alternatives in civil cases. The survey's table of contents suggests the range of possibilities:

- Semi-automatic relief: affording assistance without deciding disputes.
- Probate administration reform: selective elimination of the need for deciding a dispute.
- Simplified laws: no-fault divorce as an example of fewer operative facts.
- Arbitration: an alternative forum.
- Persuasive remedies: ombudsmen and mediation.

All of these change the nature of dispute resolution and potentially, therefore, the means of proof employed.

Major changes in our notions of rights and liabilities also affect the kinds of evidence offered, with some probable effect on the rules of evidence over a period of time. The National Center's survey mentions probate reform and no-fault divorce as examples, to which may be added the entire range of movements toward eliminating fault as a material element in determining
liability, as in automobile cases and product liability disputes. In the discussion of what it calls "persuasive remedies," the survey deals not only with ombudsmen and mediation but notes the extent to which disputes are resolved by the use of consumer complaint mechanisms and media intervention—newspaper, radio, and television services offered to resolve complaints, under such names as Action Line!

The processes of proof in these alternative settings are governed by more relaxed and generous principles than is true in traditional trials. The widespread use of these alternatives will have some liberalizing influence on the rules of evidence by virtue of a probably unconscious but nevertheless real sense of competition. However favorably one views the development of a range of diversion alternatives, there is an inherent tendency on the part of courts to proceed in a way that does not diminish the attractiveness of the particular forum. As a consequence, the fact that certain kinds of evidence are widely admissible in the proliferating alternative settings for dispute resolution will have a liberalizing effect on the rules of evidence in courts.

F. The Codification Movement.

Until recently one looking for the authoritative source of a rule of evidence looked in most instances to case law. With the exception of California, which had a nineteenth century code, American states did not codify the law of evidence. The American Law Institute's Model Code, of 1942, was adopted nowhere, and the Uniform Rules of Evidence, of 1953, had only a little more success. The Federal Rules of Evidence, of 1975, however, not only changed evidence law—both source and substance—in the federal courts instantly, but they have served as the stimulus for state codification, with ten adoptions to date, and upwards of twenty-five more in process. It appears that the law of evidence will be largely codified in American jurisdictions by the end of the decade or shortly thereafter. Thus, approximately a century and a quarter after David Dudley Field provided New York with a code of civil procedure and began the codification of American law, we finally have come to codification of the law of evidence.

It must be conceded that the Federal Rules, which are serving as a pattern for state rules, do not constitute an exhaustive code. General principles are stated, and some particular applications are dealt with in areas either frequently recurring or particularly troublesome; but other areas are ignored. Nevertheless, we have moved far toward codification of evidence law, and that fact will serve as a brake on the rate of change and development in the field. It is an often overlooked fact that common law changes more readily and more smoothly than does statutory law. We are accustomed to thinking of dramatic changes by statute, as, for example, in an area like no-fault, where an entire new regime is established; but once a statute is enacted, it is harder to get the statute changed than it is to get a court to evolve new case law from old.
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I shall come back to this point a little later in connection with a discussion of the hearsay rule, where the rigidifying effect of codification is likely to be particularly noticeable. At this point, I simply want to observe that codification of evidence law, even though it makes significant changes at the moment of codification, will have the effect of reducing the rate of change, with the consequence that evidence law in the year 2000 will look more like present evidence law than it would have without the codification movement.

These then have been six elements, some already in existence and others predictable, that will influence the shape of evidence law in the year 2000: improvement in the trial bar, bench, and jury; minor contributions to the processes of proof by science; significant relaxation of rules of evidence in alternative forums; and the lodging of the main body of evidence law in rules and codes. Let us now speculate about developments that may be expected in four general areas of evidence.

II. THE SHAPE OF THINGS TO COME.

A. The Judge's Role.

A legal historian looking back on our time from the year 2000 will view the middle third of the twentieth century as a time of substantial erosion of the adversary process, with an assimilation of some of the features of the continental system of litigation, technically known as inquisitorial. Much of the diminution in adversariness has occurred in the non-trial aspects of litigation, in such matters as discovery and pre-trial procedures and in judicial management of complex litigation. But some of the changes have related to the trial itself, as for example the spreading practice of court voir dire of prospective jurors, and the apparently increasing tendency of judges to employ their historic but little-used power to question, and even to call, witnesses; and I refer not simply to the idiosyncratic practices of a few judges, but to a perceptible movement system-wide.

The question is whether modification of the adversary system is likely to continue, and, if so, what consequences that will have on the law of evidence.

It is my prediction that the adversary characteristics of the trial process, and the concomitant evidentiary rules, in the year 2000 will be substantially as they are now. Another way of stating the point is that the erosion of the adversary system has been arrested, and the procedures in 2000 will be more like those of 1977 than the procedures of 1977 are like those of 1937, the year before the Federal Rules of Civil Procedure brought the American litigation process into the Twentieth Century. The reasons for this prediction are three in number:

First, with court voir dire of jurors likely to persist, and with one day/one trial jury panels used increasingly, so that counsel inevitably will know less about individual jurors, the dangers of undetected prejudices and biases will
be increased, giving reason therefore to control the admissibility of evidence about as tightly as now.

Second, although courts will continue to have their traditional authority to call and question witnesses, improved quality of trial counsel will make the exercise of that power less necessary and therefore less frequent.

Third, the various endorsements of the adversary system in the Federal Rules will serve, both symbolically and technically, to restrain the drift toward the inquisitorial system. Time does not permit making the lengthy case for the proposition that the Rules, on balance, codify the existing commitment to the adversary system. The single most important evidence of this, however, is their relatively complete preservation of the traditional hearsay rule, which has its base in the right of an adversary to cross-examine and, in criminal cases, to confront the witnesses against him, and so manifests a fundamental commitment to an important assumption of the adversary system; namely, an individual’s belief that a fact occurred may not be used as a basis for inferring that it did occur unless the adversary has the opportunity to cross-examine that individual. In short, I predict that the heavy commitment of the Federal Rules to fundamental characteristics of the adversary system will counteract forces, from whatever quarter, seeking to make trials more magisterial.

B. The Jury as Assayer of Credibility.

It seems safe to conclude that if the jury were abolished, the rules of evidence, in civil cases at least, would be reduced in number and complexity, with all changes in favor of admissibility “for what it’s worth.” One’s predictions about the rules of evidence in the year 2000, therefore, are inevitably connected with predictions about the future of the jury.

Despite the vigor of the debate over retention of the jury in civil cases, I think it clear that twenty-three years hence there will still be the right to jury trial substantially as at present.

As I said earlier, the quality of the American jury is holding firm at least, and probably improving. Despite the concern, arguably well-founded in some cases, that jurors are caused by excesses of counsel to reach irrational conclusions, the weight of opinion supports the jury as an effective assayer of credibility and finder of fact.

Even if, however, it be argued that the jury is not superior in such matters, the real and symbolic value of citizen participation in the judicial process serves the public interest. The benefits of the lay jury include a more acceptable result, an important opportunity for citizen involvement in the operations of government (voting and jury service tend to be the only two governmental functions left to the typical layman), a fresh, unbureaucratic approach to the solution of problems to which a judge may become inured, and the reduction of the danger that a single fact-finder’s prejudices may inappropriately determine the decision. The Chief Justice’s apparent opposi-
tion to the widespread use of juries in civil cases is on a collision course with the public’s perception of the importance of the jury. As government and society at large become more bureaucratic, resort to a non-bureaucratic jury becomes more and more attractive.

Those who are concerned about the quality of results in jury trials paradoxically support the use of the jury in criminal cases, where error probably works greater damage to individuals and to society. Moreover, there seems to be a widespread misapprehension that the purpose of a trial is to find out exactly what happened, to arrive at the ‘‘truth.’’ Of course an approximation of these is a goal and an important one. But in the nature of things we shall never know exactly what happened at the moment of the explosion, or the rape, or the making of the incision. Neither will it be possible to know exactly what was in the mind of the defendant promisor who now alleges mistake. Because we shall never know with certainty, it is preferable to have the decision as to probabilities reached by fellow citizens using their common sense to assess the credibility of witnesses and the strength of evidence and to produce a result that in some sense is the will of the community.

There undoubtedly will be some changes around the edges in the extent to which the jury is used: perhaps a denial of the jury in cases stating statutory causes of action unknown to the common law; perhaps some abatement of the Supreme Court’s insistence on jury trial where legal questions arise in equitable cases; perhaps increased waiver of the right of jury trial where the courts have, with malice aforesaid, assigned enough judges to the non-jury docket to keep it current while allowing the jury docket to fall further behind and become practically unavailable; perhaps denial of jury trial in complex cases, which I believe is unconstitutional. As a consequence, I suggest that the rules of evidence, focused as they are largely on the use of the lay jury, will not be significantly streamlined or eased.

It should be noted, however, that the widespread practice of reducing the size of the jury makes a difference as to what information should be given to the jury. One of the functions of larger size is that prejudices tend to cancel out; with a reduction in size, the possibility of prejudice is of greater concern, and proof must be more carefully monitored by means of exclusionary rules—a change generally unwelcome to the ‘‘reformers.’’

In summary, then, if jurors in the year 2000 will be more capable than at present, and if we should admit more rather than less evidence, there will be the countervailing factor of the smaller jury, with the concomitant need to be somewhat more cautious. It washes out, and I forecast therefore no substantial changes in the rules of evidence attributable to changes in the characteristics of the trier of fact.

C. The Witness’s Status.

In the years ahead the process of proof will still entail the presentation of oral evidence and the offering of exhibits. Even if we should move to
pre-recorded video-tape trials, still the testimony and credibility of human beings—witnesses—will be laid before the fact-finders.

Because assessment of the credibility of witnesses is so critical to the jury’s result, there are numerous rules dealing with evidence bearing on that credibility. At a time not too long past, adversary counsel could mount rather free-ranging attacks on witnesses, even though they might simply be responsible citizens who, by the happenstance of presence at the scene of an accident, found themselves on the stand in almost a duel with cross-examining counsel. Attacks on general character, reference to miscellaneous bad acts, reference to innocent but prejudicial conduct (“Do you play bridge?”), and proof of criminal convictions, for whatever crime and however long ago—these were standard fare and part of “good lawyering.” The trend, now, is to limit that kind of inquiry, and that trend will continue, so that, in the year 2000, there will be even less freedom to attack the credibility of witnesses.

This is not to say that the adversary system will not be allowed to work. It is not to say that circumstances with rational bearing on credibility will be foreclosed from inquiry. It is to say that sensible judgments will be made—as they have not always been made in the past—concerning the relevance of such inquiries to the fact of credibility.

Federal Rule 609, perhaps the single most controversial rule, is the product of compromise, permitting impeachment by evidence of conviction of any crime involving dishonesty or false statement, and by proof of any other kind of crime, if of felony grade, but only if the court determines that the probative value of admitting it outweighs its prejudicial effect to the defendant. Obviously this latter provision, requiring the court to make a special determination, is to protect the criminal accused, and reflects the doctrine of *Luck v. United States*.1

Already, of course, this represents a substantial restriction on the old practice of allowing conviction of any crime to bear on impeachment. But some would restrict the process further, limiting impeachment to crimes involving dishonesty or false statement, or requiring the judge to determine in every instance that probative value on credibility outweighs prejudicial effect. The most extreme restriction to date is the Hawaii rule, announced in *State v. Santiago*,2 to the effect that no conviction of any kind may be used to impeach a criminal defendant. The federal rule also places a presumptive ten-year statute of limitations on the use of convictions, thus protecting the person whose rehabilitation is indicated by his decade-long blameless record. Another narrowing appears in Rule 608(b), which limits cross-examination about specific instances of the witness’s conduct to those that are probative of truthfulness or untruthfulness, and even then gives the court discretion to limit such cross-examination.

1. 348 F.2d. 763 (D.C. Cir. 1965).
The trend illustrated by these limitations will not abate. Indeed, the need for these protections becomes greater as the individual increasingly loses privacy through such technological developments as the computer revolution. The Orwellian horror stories, no longer fictional, of the extent to which an individual’s life may be chronicled on a computer print-out, indicate the need for tighter and tighter limits on character attacks. Here, as at other points, the acquiring of every last bit of information may be too high a cost to attain the “truth” in the particular litigation. That trade-off should surprise none of us.

We have lived with the evidentiary privileges for decades and even centuries—attorney-client, doctor-patient, husband-wife, illegally obtained evidence, and the like. We prefer, as a matter of policy, to accept the possibility of a slightly less supportable result than to impair confidential professional relationships, marital communications, rights of privacy and due process.

To repeat, in the year 2000 attacks on witnesses’ credibility will be more tightly limited to those circumstances having a direct and important bearing on that credibility and, in some cases, will be totally precluded by considerations of privacy.

A second area of change in the status of witnesses, the extent of which is treacherous to predict, concerns the use of experts in the trial process.

Although general in nature and almost innocuous in appearance, Article VII of the Federal Rules, dealing with opinions and expert testimony, presents the possibility of significant change in the processes of proof in some kinds of trials. Its significance lies not only in its substantial liberalization of the rules regarding the manner in which experts may testify, but also in the possibility that it may lead to the use of experts as scientific advisers to the court.

Under Article VII the threshold for qualifying as an expert appears to be low; the facts or data relied on by the expert need not have been admitted—indeed, need not even be admissible—if they are “of a type reasonably relied upon by experts in the particular field in forming opinions” on the subject; the expert may give his opinion without prior disclosure of the underlying facts or data; and it is unobjectionable that the opinion “embraces an ultimate issue to be decided by the trier of fact.” Obviously these permit a broad use of experts to advise the court and jury. Relieved of the traditional impediments of carefully crafted hypothetical questions and of the need to offer evidence of all the underlying data (which omission, by the way, may be poor advocacy), counsel may now employ an expert in what amounts to an advisory role to the trier of fact. A fairly detailed Rule 706 authorizes court appointment of expert witnesses, with disclosure of that sponsorship to the jury, a practice hitherto prohibited in some jurisdictions. Where the court is clear that scientific proof is controlling on an issue, Article VII sets the stage for more directing of verdicts in civil cases and, conceivably, the use of science advisers to the courts.
I am untroubled by these possibilities at all stages up to court appointment. The use of experts chosen by parties to testify even on so-called ultimate issues is entirely orthodox—for example, the doctor's opinion on the disputed causal connection between plaintiff's trauma and his paralysis, or on the damages issue of chances of recovery. On occasion, we have allowed an expert to express an opinion of a witness's credibility, in which a psychiatrist, having studied Whitaker Chambers' life and having listened to his testimony against Alger Hiss, was permitted to testify that he believed that Chambers was a pathological liar; and we have even permitted a psychiatrist to testify that in his opinion a defendant charged under a criminal sexual psychopath statute was not a sexual deviate. Although these two cases are atypical, they seem supportable under the new Federal Rules; and it may well be that the influence of the rules will produce more such employment of experts.

But the use of court-appointed experts, particularly if the process evolves into the use of science advisers, intrudes upon the adversary system unwisely. It is the Federal Rules' one threat to "adversariness." As has often been observed, there is no such thing as "an impartial expert." Each is partial to his own view. If scientific theory be at issue, the accident of choice of the court's adviser from one school of thought or the other is likely to determine resolution of that scientific question. Even if choice of scientific theory be not in doubt, there still is the question of the accuracy and adequacy with which the expert has formulated his views in the case at hand. And finally, if, though in form an adviser, the expert becomes the decider of the technical questions, we have substituted the illusive appearance of scientific certainty in fact-finding for the community-endorsed process of lay fact-finders, whose decisions are more acceptable psychologically and politically than decisions made by scientists, or juries of scientists.

Nevertheless, the influence of Article VII and the proliferation of litigation raising technical issues probably will produce increased use of scientists and technicians as witnesses, and may lead to their greater involvement in the decision process. It is perfectly safe to forecast that in the year 2000, experts will be allowed to testify in an increasingly liberal format and on more issues than heretofore.

D. The Premature Reports of the Impending Death of the Hearsay Rule.

The hearsay rule is at once the glory and the disgrace of the law of evidence—the glory because it is the guarantor of the right to cross-examine and the disgrace because of the complexity and disorderliness of its exceptions. As Professors Morgan and Maguire once wrote, "A picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt


made of patches cut from a group of paintings by cubists, futurists and surrealists." But proposals to modify the hearsay rule substantially have been uniformly rejected by the profession. No single feature contributed more heavily to the failed influence of the A.L.I.'s Model Code than its emasculation of the hearsay rule. The question now is whether, by the year 2000, the rule will fall or be significantly altered in response to the familiar criticisms.

The first and most significant influence is the fact that the Federal Rules have retained the familiar pattern of rejecting hearsay, rather traditionally defined, but admitting it if it falls under one or more of numerous specific exceptions. It is my judgment that this action, proposed by the Supreme Court and enacted by Congress, has assured that the hearsay rule will be largely unchanged in the year 2000.

Not only do I view retention of the hearsay rule as highly probable, I view it as highly desirable as well.

First, the dangers of hearsay evidence are real. The concern is not so much that the out-of-court statement will be misreported (cross-examination of the witness can warn the jury of possible defects in his reporting of the hearsay statement) but that proof of a hearsay statement gives the adversary little or no opportunity to probe the quality of the declarant's perception of the event, his memory, his meaning, or his honesty. That lack alone is ground for at least a presumptive rule of exclusion, without going to other occasionally cited lacks of hearsay declarations, that is, no oath, lack of the fact-finders' opportunity to see the demeanor of the declarant, and in criminal cases the lack of confrontation.

Second, despite the disorderly, unaesthetic appearance of the hearsay rule with its long list of exceptions, it seems to work fairly well. Despite academic criticisms of the scheme of the rule and its exceptions, there is remarkably little criticism from the trial bench and bar; and there is a salutary reluctance to change a system that apparently produces satisfactory results, however orderly and appealing the suggested alternative.

Third, abolition, or even a significant liberalization, of the hearsay rule may change attitudes toward hearsay undesirably. Under present law, hearsay is suspect, reflecting our concern that it has not been exposed to the searching inquiry of the adversary process. If hearsay does not fit an established exception, a judge must struggle to find a basis for admitting it. Under a greatly liberalized or abolished hearsay rule, it is probable that judges would revert to admitting such evidence "for what it's worth," a term barely acceptable when relevance is the question, but inappropriate and dangerous when the issue is competence.

Finally, if courts were to admit more hearsay, lawyers would undoubtedly offer more hearsay, so that over time an increasing proportion of trial evidence would be hearsay rather than first-hand testimonial accounts. 5

5. LEMPERT & SALTBURG, A MODERN APPROACH TO EVIDENCE 491-96 (1977).
Proposals for liberalizing the admission of hearsay typically entrust the trial court with considerable discretion, the assumption being that the court will admit hearsay only if it meets some standard of reliability and necessity. Some oppose this on the ground that the quality of the trial bench is too uneven, and that a rule applicable in all the courts is preferable to the judge-by-judge results under an essentially subjective discretionary rule. One is reminded of the ancient complaint that equity results were as unpredictable as linear measurements would be if the unit of measure were the chancellor's foot. Others object to the discretionary rule for the admission of hearsay on the ground that the trial bench, for a variety of reasons, has a tilt toward the prosecution, and that the exercise of discretion in the hearsay area will make it easier for prosecutors to obtain convictions. Another influential objection to a rule of discretion is its adverse effect on predictability. Even if one were to concede the point that particular rulings might be better than rulings under the present system, counsel would be unable to predict admissibility and therefore would be adversely affected in the process of seeking settlements.

Despite these objections, the Supreme Court in its draft of the Rules proposed a generalized exception for hearsay not fitting the specific pigeonholes "but having equivalent circumstantial guarantees of trustworthiness." The provision would allow for flexibility and judicial creativity in responding to particular situations in which highly trustworthy evidence is offered which, however, failed to fit the traditional exceptions. The prototype case, of course, is Dallas County v. Commercial Union Assurance Co., in which the court admitted as evidence of a fire in a county courthouse some fifty years earlier a newspaper account of that blaze. The court received the evidence, even though it did not fall under what the court termed "any readily identifiable and happily tagged species of hearsay exception," simply because "it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds."

The House Committee on the Judiciary, however, would have no part of the proposed catch-all exception, saying, in effect:

Do you want a code or don't you? The point of spelling out more than two dozen exceptions is to inform bench and bar of the grounds for admitting otherwise objectionable hearsay. The purpose, the end, of codification is not achieved by specifying the exceptions in a statute and then, in the statute, suggesting that the court may admit other evidence in the exercise of its common law powers. If additional hearsay exceptions are to be created, they should be by amendments to the rules, not on a case by case basis.

The Senate and Conference Committees restored the language of the

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6. 286 F.2d 388 (5th Cir. 1961).
7. Id. at 398.
Supreme Court proposal, but then hedged it about with a series of emasculating conditions and, in the Committee reports, made it clear that the residual exceptions are to be used "very rarely, and only in exceptional circumstances, there being no intent "to authorize major judicial revisions of the hearsay rule, including its present exceptions'."

Early judicial application of the exception has been mixed, with, it seems safe to say, more rulings in favor of admissibility than Congress intended. Nevertheless, each of the opinions admitting hearsay under the residual exception has carefully avoided suggesting a categorical new exception, and has simply found, with the procedural requirements met, that the particular hearsay was trustworthy and needed. It is worth noting, moreover, that in virtually every instance, the evidence bore on a fact of limited importance to the case.

Despite the uncertain treatment of the residual exception thus far, I predict that we shall arrive at the year 2000 with the exceptions to the hearsay rule consisting essentially of those appearing in the current Federal Rules. In any given jurisdiction, three may be added and two restricted; in another, two added and none eliminated. But the general pattern will be the same. The profession’s desire for predictable results, the deeply felt faith in the concept of the hearsay rule, and the consequent lack of a significant push from any point in the profession to alter the shape of the rule and its exceptions significantly—all point to minimal change by 2000.

You will observe that I have not spoken of the Federal Rules’ abolition of the rule in Wright v. Tatham, which established the proposition that evidence of conduct is hearsay if offered to prove the truth of a belief of the actor, even though the actor was not attempting to assert anything. Despite the fact that law teachers have found this the most fascinating concept in the evidence course, it has been largely undetected and unused as an exclusionary rule in trials. Therefore, its loss, though I deeply mourn it, represents almost no change in the exclusionary effect of the hearsay rule.

It is undeniable that the broad acceptance afforded hearsay in all kinds of non-judicial settings—arbitration, workers’ compensation cases, administrative hearings, and the like—obviously conduces toward the reception of more hearsay in trials, not alone because of familiarity and influence of the process, but also because of the natural inclination of courts to woo cases back from alternative forums. Nevertheless, I fully expect the general appreciation of the hearsay rule and its effectiveness, particularly in matters of a consequence going to litigation, to resist all but minimal inroads.

III. HOW MUCH "IMPROVEMENT CAN WE STAND?"

You will have observed that my predictions for so short a term as twenty-

three years are essentially conservative, if we take the Federal Rules as the base line. I foresee relatively little change in the law of evidence over that span of time.

Probably the most important single brake on the rate of change for the short run is nationwide codification in the image of the Federal Rules. Even if statutes were not harder to change than case law, the newness of the rules and the probable disposition to give them a fair trial, will minimize changes to the year 2000. Consequently, a fair summary of the general tenor of my prediction is that the rules of evidence in the year 2000 will bear a remarkable resemblance to the Federal Rules of 1975, and that even those aspects of evidence law is not codified will change more slowly because of the presence of the rules. The rules have effected immediate changes, of course—not only those already mentioned but others for which we have no time, such as abolition of the rule in *Queen Anne's Case*, the controversial enlargement of the business records exception, the making of some prior inconsistent statements substantive evidence, making learned treatises an exception to the hearsay rule, and the like. But those changes have diminished, if not exhausted, the capacity of the system to change significantly over the next twenty-three years.

Even if the dynamics of the situation were otherwise, however, I should not expect the rules in the year 2000 to be significantly different from those today, for the simple but important reason that in broad outline, if not in detail, they serve their purpose well, which is the reasonable control of information placed before lay fact-finders to determine disputes between citizens or between citizens and their governments. However much one might dream of a science, literal or occult, that would enable us to make decisions in such matters without human fallibility, the undeniable fact is that disputes are not, never have been, and never will be susceptible to determination by a black box with lights that flash, needles that point, or bells that ring. Advances in knowledge have given us the ability to improve the fact-finding and decision process, and further advances will make possible still more improvement. At such time, appropriate but narrow adjustments should and will be made in the rules. But having fallible human beings try to determine what happened between other fallible human beings on a given occasion is a process that improves slowly, with finite limits. Whatever your view about the accuracy of my predictions if extrapolated to the date of the Tricentennial, I have uncharacteristic self-assurance about the essential accuracy of my prophecy for the year 2000.