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Economic Analysis of Evidentiary Law: An Underused Tool, an Underplowed Field (Symposium: The Economics of Evidentiary Law)

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SYMPOSIUM

ECONOMIC ANALYSIS OF EVIDENTIARY LAW: AN UNDERUSED TOOL, AN UNDERPLOWED FIELD

*Richard D. Friedman**

INTRODUCTION

The law and economics movement has had a major impact on many areas of law, but rather little on the law of evidence. This is not to say that there have been no attempts to analyze evidentiary issues through an economic lens,¹ but such efforts are far more scattered in evidence than in other legal fields, including the closely related one of civil procedure.²

Believing that economics has value for evidentiary analysis, I suggested to the Executive Committee and Advisory Board of the Evidence Section of the Association of American Law Schools ("AALS"), when I was chairman of the section, that an interesting topic for the annual program of the section might be "The Economics of Evidentiary Law." Somewhat to my surprise, the committee and the board agreed. Eric Rasmusen and Bruce Hay, two leading young law and economics scholars, agreed to participate.

* Professor of Law, University of Michigan Law School. Many thanks to Dan Farber, Sam Gross, David Kaye, Roger Park, and Peter Tillers for helpful suggestions, and to the members of the Executive Committee and Advisory Board for the Evidence Section of the AALS during my year as Chair, for their support for the program described in this Article.

¹ See, e.g., Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990); Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309; Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1991); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1789-90, 1802-03 (1980); Thomas Gibbons & Allan C. Hutchison, *The Practice and Theory of Evidence Law—A Note*, 2 INT'L REV. L. & ECON. 119 (1982); see also *infra* note 20 (citing works that examine issues related to burdens of proof from an economic orientation).

² See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 549-94 (4th ed. 1992) (extended chapter on procedural topics); *id.* at 590-92 (bibliography included in chapter on procedural topics). Only a small portion of the discussion bears closely on evidentiary topics. See, e.g., *id.* at 593, Problem 10.

Myrna Raeder made the useful suggestion that somebody not oriented to economic analysis ought to serve as a caveator—and then graciously accepted my invitation to play that role. This symposium is the result of that session, unfortunately without the paper presented by Hay and co-written by his colleague David Rosenberg, but with the addition of another contribution by the Israeli scholar Ron Shapira. I am grateful to the participants, and to the editors of the *Cardozo Law Review*, for their decision to publish these papers. I hope that these efforts will raise consciousness on two fronts. First, I hope scholars and others interested in evidentiary issues will consider the potential value, and limitations, that economic analysis might have. Second, I hope that legal economists will realize that there are many interesting evidentiary problems that might be illuminated by their attention.

Why has economic analysis not played a larger role in evidentiary discourse? One factor may be the tendency of evidentiary analysts to look on evidentiary problems as a static matter: "Here is the evidence; should it be admitted or not?" In discussing some of the principal criteria governing admissibility—such as probative value and prejudicial impact, as well as fundamental fairness concerns—there seems, at least at first glance, to be little room for play for economic concepts. Nevertheless, I believe that for several reasons economic analysis can be a valuable, even indispensable, tool for analysis of various evidentiary issues.

I. COSTS

First, evidence does not simply show up in the courtroom. It must be produced, sometimes at a significant cost. Witnesses must be identified, located, and transported, sometimes from afar. Experts must be found, selected, prepared, and paid.³ Demonstrative evidence must be produced. Depositions must be taken and recorded, whether as a traditional transcript or by video. In short, evidence can be expensive and, to be realistic, analysis of evidentiary issues cannot fail to take this expense into account in determining what should be expected of a party. For example, determining whether a potential witness is unavailable for the purpose of the rule against hearsay is sometimes a matter of degree,⁴ and

³ For an excellent analysis of the complexities raised by our system of expert evidence, with appropriate sensitivity to matters of cost, see Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1125-87.

⁴ See, e.g., FED. R. EVID. 804(b)(5) (speaking of the proponent's inability to procure the declarant's attendance "by process or other reasonable means").

the cost of producing her as a witness—which may include the cost of identifying and locating her—is a factor to be considered.

II. ALLOCATION

Second, costs and burdens must be allocated between the parties. Here, I think we can see a strong connection between a basic concept of evidentiary analysis, the best evidence principle,⁵ and one of the keystones of economic analysis of law, the concept of the cheapest cost avoider.⁶ Under the best evidence principle, evidence that is beneficial to the truth-determining process can be excluded in hopes of inducing the proponent to produce evidence that is better yet; the better evidence may include the originally proffered evidence but with a supplement, such as a foundation. Suppose, however, that the opponent is at least as able to produce the better evidence, or the supplement necessary to make it better. Then perhaps it is better to allow the proponent to introduce her evidence, leaving it to the opponent to introduce the better or supplemental evidence.⁷ Similarly, differential ability to produce evidence is a factor in allocating the burden of production.⁸

III. TRANSACTIONS

Third, the production of information for trial, or restraint on production, is sometimes a result of transactions between the parties. A stipulation—which may obviate the need for evidence on a given point—may result from an agreement between the parties: “If you agree not to offer evidence of my prior conviction, I’ll agree to have the jury informed that I have been convicted of a felony.” The party conceding the point by stipulation may be pressured into doing so by the threat of adverse evidence; conversely, in some circumstances a party may avoid the threat by essentially forcing the transaction.⁹

⁵ See, e.g., Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

⁶ See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS* 135 (1970); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055, 1060 (1972).

⁷ See Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439, 453, 476-77 (1994) (applying this principle to authentication); Friedman, *supra* note 1, at 753-64 (applying this principle to hearsay).

⁸ See Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651 (1997).

⁹ See *Old Chief v. United States*, 117 S. Ct. 644 (1997); James Joseph Duane, *Litigating Felon-with-a-Firearm Cases After Old Chief*, CRIM. JUST., Fall 1997, at 18, 20. See generally James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor’s Supposed “Right” to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in Old Chief v. United States*, 168 F.R.D. 405 (1996).

Along the same lines is the set of problems posed by *United States v. Mezzanatto*,¹⁰ analyzed with characteristic flair in this symposium by Professor Rasmusen. Federal Rule of Evidence 410 prescribes that statements made by a defendant during plea negotiations may not be admitted against him if the negotiations fail and he goes to trial.¹¹ But now suppose the prosecutor demands a waiver of this limitation, and the defendant agrees. Here we have a classic example of contract regulation. Does it make sense to make the default rule that the statements may not be used? Does it make sense to allow the parties to contract around the rule, and if so, how far?

As Professor Raeder points out, various criteria enter into making such a decision, and not all of them are easily captured in economic terms. But in deciding whether, and to what extent, a prosecutor may demand as a precondition to plea negotiation that the defendant waive the protection created by Rule 410, surely one consideration is what effect this will have on plea bargaining. Will it mean that substantially fewer negotiations are commenced and fewer bargains struck?¹² Will it result in bargains less favorable to defendants? Or, as Rasmusen contends, will it facilitate bargaining by allowing the defendant to make a binding commitment? The Ninth Circuit and the Supreme Court analyzed the problem in explicitly economic terms,¹³ and it seems perfectly appropriate that they did so. Scholars of evidence who fail to do so, it seems to me, are turning their backs on the body of thought and learning that most squarely addresses these questions.¹⁴ Much the same can be

¹⁰ 513 U.S. 196 (1995).

¹¹ See FED. R. EVID. 410(4).

¹² As Rasmusen points out, this was the fear of Judge Sneed, writing for the panel majority in the United States Court of Appeals for the Ninth Circuit. See *U.S. v. Mezzanatto*, 54 F.3d 613 (9th Cir. 1995).

¹³ "To use the Ninth Circuit's metaphor, if the prosecutor is interested in 'buying' the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains." *Mezzanatto*, 513 U.S. at 208.

¹⁴ Professor Raeder treats *Mezzanatto* as a question of legislative intent, a matter of understanding Congress's meaning in passing Rule 410. See Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 CARDOZO L. REV. 1585 (1998). But neither the language nor the history of the Rule gives a square answer to the questions posed by *Mezzanatto*, and the courts were justified in asking the consequentialist question of how different possible constructions of the Rule would affect future plea bargaining. Note also that Rasmusen does tie his analysis to congressional intent, but at the broad level of desire to facilitate plea bargaining. Given that intent, he says, "the issue comes down to whether allowing waivers of Rule 410 rights really does facilitate plea bargaining." Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541, 1548 (1998). One might argue that this is

said with respect to an error of execution that Professor Rasmusen makes, according to Professor Raeder—underemphasis of the importance of the Federal Sentencing Guidelines. Such an error, if it is one, does not go to the basic soundness of Rasmusen’s economic approach (nor in my view does it undermine Rasmusen’s sensible conclusions). Moreover, the policy questions posed by *Mezzanatto* are present in any jurisdiction that engages in plea bargaining that involves taking statements from the suspect; there is no reason why Rasmusen need limit himself to the context of the federal guidelines.

IV. EXTRINSIC EFFECTS AND PROCEDURE

Fourth, evidentiary rules are often meant to shape activity outside the courtroom. Economic analysis might help make sophisticated predictions of responses (both intended and unintended) to rules taken by the parties and others, including, as in *Mezzanatto*, attempts to contract around the rule. For example, to what extent does creating a privilege for conversations in a given relationship encourage better communications, and to what extent does it merely forsake evidence of potential significance? To what extent does excluding evidence of subsequent remedial measures encourage parties to take such measures free of fear that doing so will have adverse evidentiary consequences for them, and to what extent does it simply create a windfall for wrongdoers?

As Professor Raeder mentions, probabilistic reasoning has gained far more attention in evidentiary discourse than has economic analysis,¹⁵ even though, as Dr. Shapira points out, there is an affinity between economic and probabilistic approaches.¹⁶ The correlation between Bayesians and the economically oriented is not perfect, of course. Ron Allen, who has used economic analysis in his work, is a leading Bayesioskeptic. I can surmise as to why this is so. Probabilistic analysis is an inevitable part of the fact-

an overstatement, but even if it is, Rasmusen has clearly focused on *one* of the important issues posed by the case. In any event, a scholar should always be free to ask such consequentialist questions, unbound by the language of any particular statute or rule. And that is particularly so in a case like *Mezzanatto*, because the Federal Rules of Evidence apply of their own force only in the federal jurisdiction.

¹⁵ See Raeder, *supra* note 14, at 1589.

¹⁶ See Ron A. Shapira, *Economic Analysis of the Law of Evidence: A Caveat*, 19 CARDOZO L. REV. 1607, 1608 (1998) (“Law and economics scholars have traditionally shown a strong bent toward Bayesianism . . .”). I have often used Bayesian probability in my analysis of evidentiary problems, while Shapira is what I have called a Bayesioskeptic. Accordingly, I do not mean to endorse what Shapira says about the “flaws of Bayesianism as an overall decisionmaking technique.” *Id.*

finder's role in adjudication, for its critical task is often to determine whether the probability of some aggregate of uncertain propositions is greater than a prescribed threshold, the standard of persuasion. Thus, even if we take a relatively static view of evidence—assessing the evidence that is presented to the factfinder, without concern for the extrinsic impact of evidentiary rulings—probabilistic analysis has a crucial role to play. The value of economic analysis becomes most apparent as we take a more complex, dynamic view of evidence, recognizing not only that evidence presented in court is the result of a process that might have begun long before, but also that an evidentiary ruling is part of a process that may have consequences long after.¹⁷

Similar considerations help explain another interesting disparity, one that I mentioned at the outset—the far greater impact that economic analysis has had in the field of civil procedure than in evidence. Even at the AALS session, the papers had a strongly procedural component. As Professor Raeder says, the Hay and Rosenberg paper “grappl[ed] with sophisticated tort policy in a civil procedural context.”¹⁸ And Professor Rasmusen's paper lies at the murky borderline between the fields of evidence and criminal procedure;¹⁹ indeed, Federal Rule of Evidence 410 is essentially identical to Federal Rule of Criminal Procedure 11(e)(6). I think it is fair to say that the value of economics is more likely to be apparent when procedural considerations are also apparent, for the very reason that economics helps analyze how various actors

¹⁷ Cf. Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 *Nw. U. L. Rev.* 604, 627 (1994) (“Evidence is not a set of things, as the conventional theory would have it; it is instead the process by which fact finders come to conclusions about the past.”).

¹⁸ Raeder, *supra* note 14, at 1587.

¹⁹ Professor Raeder comments on the fuzziness, and arbitrariness, of this boundary. *See id.* at 1599. Indeed, much of her article addresses an issue brought home to her by these papers—the question of whether it would be better to think of civil and criminal evidence as separate disciplines. The issue is peripheral to the question of evidence and economics, but I offer a brief comment. Certainly evidentiary considerations and outcomes are substantially different in the civil and criminal contexts, as well they should be: the trials are held pursuant to substantially different procedures, invoke different sets of rights, and have far different consequences. But this is just to say that context is crucial. The importance of context is not, however, limited to a separation between two spheres, civil and criminal. This is obvious simply from consideration of the fundamental doctrine expressed by Federal Rule of Evidence 403, which makes crucial a series of extremely context-laden assessments—probative value, prejudicial impact, danger of confusion, and so forth. But though measurement varies with context, the basic concepts themselves are essentially consistent across contexts. I believe that there is value in thinking of a broad body of evidence law, so long as we are prepared to apply it in different ways in different contexts.

respond to rules.²⁰ But to say this does not diminish the importance of economics to evidence analysts. I agree with the celebrated English scholar William Twining that we should foster some reintegration of the fields of evidence and procedure.²¹ Put another way, it is important for evidence analysts to pay greater attention to procedural considerations. If economic analysis encourages us to do this, that is all to the good.

V. OPTIMIZATION

Fifth, and most generally, economic analysis provides a framework for design of rules that optimizes the yield of costs and benefits. The paper on individualized and aggregate evidence by Professors Hay and Rosenberg, not published here but addressed by Professor Raeder, sought to use economic theory in this way.

Consider also two basic concepts that I mentioned earlier, probative value and prejudicial impact. Even assuming that economic analysis offers no insight into measuring them, these are cardinal concepts, matters of degree; evidence can have more or less probative value and more or less prejudicial impact. Quantifying them in any objective sense may be impossible, and even agreeing on a theoretic metric to measure them is no simple matter, but that does not diminish the fact that weighing them against each other is crucial to evidentiary analysis. Federal Rule of Evidence 403, expressing one of the most fundamental principles of evidentiary doctrine, provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” and other negative considerations.²²

Suppose, for example, that a prosecutor wishes to introduce a series of past bad acts similar to the one charged, for the purpose of dispelling the possibility that the act charged was an accident. It seems clear to me that a useful way of thinking about where to draw the line between admissible and inadmissible evidence is to apply the economic concept of equalizing marginal benefit and

²⁰ Perhaps for similar reasons, questions of burden of proof—another topic that straddles the line between evidence and procedure—have been explored to a significant extent by legal economists. See, e.g., Hay, *supra* note 8; Jason S. Johnston, *Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 S. CAL. L. REV. 137 (1987); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 410 (1973). Setting a burden of proof may be considered a question of decision theory, which is closely related to economic analysis.

²¹ See William Twining, *The New Evidence Scholarship*, 13 CARDOZO L. REV. 295 (1991).

²² FED. R. EVID. 403.

cost. The marginal benefit, in terms of probative value, of introducing additional prior acts declines quite rapidly after the first one, but the marginal cost, in terms of prejudice, does not necessarily do so. I do not mean, of course, that a court should attempt to express its analysis in mathematical formulas; I am here only talking about the use of economic techniques as a heuristic device for aiding clear thought.

As Professor Raeder suggests, not all rules and considerations are readily capable of being analyzed in this fashion. I believe, for example, that a criminal defendant's right of confrontation should be regarded as an absolute, within its properly defined realm, just as the right to trial by jury for a serious crime is an absolute. But even here, an economic style of analysis might be useful in thinking about the bounds of the right. How far afield, for example, may the defendant claim a constitutional right to go in cross-examination? Courts tote up costs and benefits in answering questions like this, and as long as they do so, the calculation might as well be performed in as helpful a framework as possible.

CONCLUSION

In short, I regard economic analysis as a tool that can offer insight on a wide variety of evidentiary problems and that therefore should not be ignored. I hope evidence scholars will infuse more economic thinking in their work, and I hope that more legal economists, like Rasmusen, will find evidentiary issues worthy of exploration.

Raeder and Shapira, even while challenging economic models on broad grounds, both seem to acknowledge that it can be useful in some evidentiary contexts.²³ Both seem, however, to fear that economic analysis would exclude other approaches and values.²⁴ I

²³ See Raeder, *supra* note 14, at 1585 (“[I]t is always useful to know the results of any cost-benefit analysis when trying to choose among alternatives.”); *id.* at 1599 (“[T]o the extent [law and economics methodology] compels us to reexamine our own beliefs, and thereby sometimes reveal vital information hidden in plain view, it serves a valuable function.”); Shapira, *supra* note 16, at 1607 (“Prior to the [AALS] Evidence Section session, little had been done to explore the possibility of analyzing the law of evidence through the perspective of law and economics.”).

²⁴ See Raeder, *supra* note 14, at 1590 (expressing “anxiety about whether process values, including fairness, let alone storytelling can be encompassed in a law and economics framework”); Shapira, *supra* note 16, at 1629 (“An economic approach to evidence would endeavor to frame the law of evidence within a comprehensive, goal-directed system, essentially following the philosophical presumptions of consequentialism.”). Shapira is concerned that economic analysis will undermine the “separation between admissibility and evidentiary inference,” in which admissibility is governed by legal principles but inference

certainly agree that such imperialism would be a bad thing, but I do not think it is an inevitable consequence of examining evidentiary issues through an economic lens. Nothing I have said is meant to suggest that economic analysis ought to be the exclusive, dominant, or even the principal method of analysis of evidentiary problems. I only mean to contend that economic methods are often very useful in examining evidentiary problems and that analysts of evidence ought to embrace them, rather than shun them as something foreign to our discipline. Recognizing the value of economics in assessing the consequences of evidentiary rules is not at all inconsistent with recognizing that part of what evidentiary rules do is protect fundamental human values that should not be traded off, no matter what the cost.²⁵

is essentially unregulated. "A system based on the subjection of all the considerations leading to factual findings to a single set of predefined goals would find it harder to justify this separation." *Id.* at 1633. The caution is a valuable one, and it may be particularly applicable to some economic analyses. But I do not believe that economic analysis inevitably raises this concern. *Cf. id.* at 1608 (noting variety of possible economic analyses of evidence). It seems to me that, where the nature of the particular problem being examined makes the technique appropriate, economic analysis can take the activities of the factfinder as a given, essentially a black box, and work from there.

²⁵ *Cf. Raeder, supra* note 14, at 1598 (arguing that modeling like Rasmusen's "completely depersonalizes the criminal justice system").