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EVIDENTIARY RULES AND RULINGS: THE ROLE OF TREATISES

*Richard D. Friedman**

I have devoted large gobs of time to work on a multi-author treatise on the law of evidence.¹ And before even one volume is published, I will devote further multiple gobs of time to the project—which, perhaps audaciously and perhaps merely foolishly, but with heredity and precedent on our side,² we are calling *The New Wigmore*. Accordingly, I found the question posed by this symposium—Does Evidence Law Matter?—rather disquieting. If it is doubtful even whether the law of evidence matters, then how much can a treatise on the law of evidence matter, and how worthwhile can such a work be? Luckily (but not surprisingly, I suppose, for I have considerable sunk cost), I have resolved my fears. Yes, I believe that evidentiary law does matter, at least some of the time. What is more, an evidentiary treatise might make a difference even when in some sense the law does not.

In some cases, evidence law matters because it affects conduct or attitudes, or protects values, outside the courtroom. It seems reasonable to believe, for example, that sometimes a potential defendant's willingness to make a settlement offer depends on her having confidence that the fact of the offer will not come back to haunt her in some proceeding—whether or not against the potential plaintiff—as evidence of her own belief that she was liable.³ In some circumstances, a client is more likely to communicate with his lawyer if he is confident that privilege will bar the lawyer from revealing the substance of the communication. The rape

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1. I am General Editor of the treatise and will be author of the volumes on the law of hearsay.

2. Heredity because the treatise is to be published by Little, Brown and Company, publisher of all four editions of the Wigmore treatise, as the successor to that treatise. Precedent because a similar locution has been used for other large successor works. See *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* (John Eatwell et al. eds., 1987), the modern successor to a famous 19th century economics encyclopedia, and *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* (Stanley Sadie ed., 1980), a 20-volume standard work.

3. See *FED. R. EVID.* 408 (limiting admissibility of settlement offers and statements made in settlement negotiations).

shield laws⁴ not only keep out evidence of great potential prejudice and dubious probative value,⁵ but also protect the privacy of complaining witnesses, limit the possibility of a renewed trauma, remove a potentially large obstruction to the reporting and prosecution of rape and may also help alter deep-seated social attitudes.⁶

Most commonly, though, evidence law matters because it may determine what evidence is presented to the fact finder. And sometimes that is crucial to the case. For example, a jury that has enough doubt in a criminal case to acquit might come out the other way if it hears evidence that the accused committed a similar crime on another occasion.⁷ Thus, an evidentiary ruling—a decision whether or not to allow a given piece of evidence to be considered by the fact finder—may be outcome-determinative.

But a *ruling* is not the same thing as a *rule*. By an evidentiary rule, I mean an articulation applicable to a general class of situations that prescribes what the evidentiary ruling should be, or at least what considerations should determine the ruling. Though evidentiary rulings may determine the outcomes of cases and some consequences outside the courtroom, it is another question whether evidentiary rules determine rulings. My answer is hardly surprising: they do, more or less, depending on the circumstances.

4. *E.g.*, FED. R. EVID. 412 (limiting admissibility, in sex offense cases, of evidence of past sexual behavior of alleged victim).

5. I do not mean to suggest that all evidence of prior sexual conduct of the complaining witness ought to be excluded. Note that Federal Rule of Evidence 412 articulates certain circumstances in which the evidence is admissible, and recognizes that in some other circumstances admissibility of the evidence may be constitutionally required. FED. R. EVID. 412. For a thoughtful consideration of the circumstances in which such evidence ought to be admitted, see Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

6. For an excellent exposition of the policies underlying the rape shield statutes, see Galvin, *supra* note 5 at 791-801.

7. Here is one piece of anecdotal evidence. Several years ago, I sat in on part of a rape trial. The defendant, Dennis (the names are made up), admitted having had sex with the complainant, Carol, who was the roommate of his then girlfriend, Gail. Dennis contended, however, that the sex was consensual. There was some evidence tending to make Dennis's account plausible and so to introduce doubt into the prosecution's case. For example, Gail's testimony concerning her reaction on hearing from Carol of the encounter was that she felt betrayed by Dennis's infidelity and did not suggest that she felt outraged by a criminal act; the defense also presented a plausible account of why Carol, who did not report the incident to the police for some time, might then have fabricated a charge. I was not surprised that the jury voted to acquit Dennis on the evidence I heard; I too thought that the prosecution had not proved its case beyond a reasonable doubt. My perception, though, was altered considerably when I learned one piece of information that had been excluded from evidence: Tina, the girlfriend of Dennis's roommate, also alleged that he had raped her. I strongly suspect that the jury also would have come out differently had it learned of this evidence.

Sometimes a rule is stated with a hard enough edge, and the case falls sufficiently close to the core of the rule's concern, so that a conscientious judge will have little choice but to apply the rule. Often, for example, it is clear beyond serious debate that a similar crime previously committed by the accused has no substantial probative value in the current case other than to prove his propensity to commit crimes of this sort. And, as offered for this purpose, the evidence should clearly be excluded, in a jurisdiction adhering to the Federal Rules of Evidence, under Rule 404(b).⁸ Moreover, even if the judge does not adhere to the rule, an appellate court is likely to monitor it carefully; the issue is easy to spot, and, given the bright-line nature of the rule, the violation may be as well. The appellate court will also have reason for concern because a violation may well have significant consequences, given that the evidence has great persuasive power, and that the power is exercised in a prejudicial manner⁹ against a criminal defendant.¹⁰

On the other hand, sometimes articulation of an evidentiary rule, either by codifiers or by courts, is very fuzzy. This is true most obviously of Rule 403, which allows a trial court to exclude relevant evidence if the probative value of the evidence is "substantially outweighed" by any or a combination of considerations, including "unfair prejudice" and "undue delay."¹¹ But the trial court's discretion is not limited to this general rule; discretion is imbedded in most of the more particular rules of evi-

8. FED. R. EVID. 404(b) provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The Rule does not interfere with the admissibility of such evidence when it is offered "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* It is not always clear whether the evidence truly has enough probative value with respect to one of these factors to warrant admissibility notwithstanding the likelihood that the jury will improperly consider the evidence on a propensity theory. See EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 190 (3d ed. 1984).

9. That is, a jury would often be correct in regarding propensity evidence as tending to make the accused's guilt more likely, but given the policy judgment that a verdict of guilt depending on a propensity theory is unacceptable, the more persuasive the propensity evidence is the more prejudicial it should be deemed.

10. This concern is not peculiar to Rule 404(b) and its kin; rather, special solicitude for the criminal defendant is a recurrent theme of the law. Largely because a wrongful conviction is so dreaded, due process has been deemed to require a presumption of innocence and the imposition on the prosecution of a burden of persuasion beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970). Other principles, either protecting only current or potential criminal defendants, see U.S. CONST. amend. V (granting defendant right not to be a witness against self), or, like the exclusionary aspect of Rule 404(b), having their most important effect in favor of criminal defendants, see FED. R. EVID. 404(a) (general exclusion of character evidence to show action in conformity with character trait); FED. R. EVID. 609 (limiting admissibility of prior crimes in impeaching credibility of witness), exclude evidence that is, or might be thought to be, highly probative.

11. FED. R. EVID. 403.

dence as well. Consider, for example, the language of Rule 702 governing expert testimony—whether “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”¹² The residual exceptions to the hearsay rule, Rules 803(24) and 804(b)(5), quite obviously leave the trial court a great deal of room to maneuver.¹³ But so too do most of the particular exceptions; for example, for a statement to be considered an excited utterance within the meaning of rules such as Federal Rule of Evidence 803(2), how much must the stress of a startling event have limited the ability of the declarant to engage in reflective thought before making the statement?¹⁴

Often a case lies sufficiently close to a fuzzy evidentiary line that even a conscientious judge trying hard to adhere to the rule is pretty much free to do whatever she would have done if the rule did not exist at all. Moreover, even if an appellate court concludes that the judge either admitted or excluded evidence incorrectly, it will often be reluctant, especially in civil cases, to reverse the judgment on that basis.¹⁵

Lawyers and judges often need guidance in applying the law of evidence. One of the functions that a treatise may serve is to set out the rules, whether codified or not, and to show how they apply in various significant situations. This is certainly a function that lawyers and judges find valuable, for many keep close at hand a treatise on the law of evidence in their jurisdiction. And this function is a valid and important

12. FED. R. EVID. 702.

13. One of the critical factors in applying the residual exceptions is whether the evidence in question has “equivalent circumstantial guarantees of trustworthiness,” in comparison to the other exceptions listed in Rules 803 and 804, FED. R. EVID. 804(b)(5), respectively—a mystifying standard, given the long lists of very dissimilar exceptions in those rules. Another consideration is whether “the general purposes of [the] rules and the interests of justice will best be served by admission of the statement into evidence.” FED. R. EVID. 804(b)(5).

14. FED. R. EVID. 803(2) excepts from the rule against hearsay “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Courts have varied in their application of the excited utterance exception:

Although one court has held a statement made fourteen hours after a physical beating to be the product of the excitement caused by the beating, other courts have held statements made within minutes of the event not admissible. Perhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process.

CLEARY, *supra* note 8, § 297 (citations omitted); *see also* *People v. Nevitt*, 553 N.E.2d 368, 375-77 (Ill. 1990) (upholding under excited utterance exception admission of statement made five hours after alleged incident of sexual abuse).

15. In the federal system, evidentiary error should not be the basis for reversal unless it “affect[s] substantial rights of the parties within the meaning of 28 U.S.C. § 2111.” *United States v. Borden Co.*, 347 U.S. 514, 516 (1954).

one as well, for clarity is all to the good. I do not believe that uniformity in evidentiary decision-making is usually crucial—trial judges differ widely in how they treat evidentiary issues, and the differences are usually tolerable—but it is important that judges and lawyers at least *understand* the rules. Moreover, if the rule is optimal, then it is best that the ruling it prescribes (to the extent that it prescribes one) be followed.

There are two important qualifiers in the last sentence, and these suggest two other functions that a treatise may serve, functions that to my mind are more interesting than clarification and exposition. First, not all rules of evidence are optimal. A treatise can make a difference by suggesting how evidence law might be improved. Second, a treatise can offer guidance for those many cases in which the rules do not prescribe a ruling. I will focus on each of these functions in turn.

Most courts in day to day practice are not inclined to attempt broad-based revisions of evidentiary rules. Codifiers might, but even codification can be a largely conservative exercise—articulating, clarifying and neatening the law without seriously examining its underlying principles.¹⁶ Courts and codifiers might *institute* broad changes, but they are unlikely to *initiate* them. That is a job primarily, or at least largely, for scholars, the more so the broader the change is. A law review article, the most common means of legal academic discourse, might present a broad-based proposal, but a treatise offers a better forum for doing so.

By undertaking the task of contributing to a treatise on evidentiary law, a writer commits to exploration with both the microscope and the telescope. The writer must examine a broad segment of the law, and do so in depth, thinking about it not only on the grand scale but also in its application to a myriad of situations that might arise. The detail work will tend to confront the writer with all the significant consequences of the rule, both within the courtroom and beyond—its impact on truth determination at trial, on the litigation process, and on conduct, values and attitudes intrinsic and extrinsic to the litigation. And so he will naturally be led to examine the precepts, both intrinsic and extrinsic to the litigation system, underlying the evidentiary rule, and to consider how the rule might be transformed. He must then test the replacement rule

16. The Federal Rules' approach to hearsay provides an example:

The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions . . . This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

FED. R. EVID. art. VIII advisory committee's note.

against a similar set of situations, precepts and potential consequences. Thus, the need to do microscopic work encourages, and improves the quality of, the writer's telescopic work.

That the treatise writer reconceptualizes a portion of the law of evidence does not, of course, mean that anyone will listen. But there is a chance that they will. At least the treatise, if it is well done, becomes one of the primary sources that judges and lawyers facing difficult evidentiary problems tend to consult, even if they are searching more for narrow analysis than for broad conceptualization. And that means that the treatise offers a bully pulpit, far better than most law review articles. Thus, Wigmore's treatise had enormous impact on the development of the law of evidence.¹⁷ Latter day treatise writers cannot—and should not—hope to dominate the field as Wigmore did.¹⁸ But if there is to be a broad-based rethinking of the law of evidence, the treatise form maximizes the writer's chance to make a significant contribution.¹⁹

Day to day, though, a treatise may make a contribution more mundane than transformation of the law, or even of a particular rule, and yet more creative than mere clarification and exposition of the rules. As I have argued above, often the rules leave a judge with ample room to

17. See RONALD L. CARLSON ET AL., *EVIDENCE IN THE NINETIES* 21 (3d ed. 1991) ("Wigmore's influence cannot be overstated; his work has remained the dominant authority in the field to this day. Perhaps this treatise was in part responsible for the fact that codification did not begin to take hold until the 1970's.").

18. As late as 1940, Edmund Morgan echoed John Maguire's words, "Wigmore is still first, and there is no second." Edmund M. Morgan, Book Review, 20 B.U. L. REV. 776, 777 (1940) (reviewing JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (3d ed. 1940)) (quoting JOHN M. MAGUIRE, Book Review, 22 ILL. L. REV. 688, 692 (1928)). Such a statement does not set an appropriate level of aspiration; rather it makes a (perhaps unjustifiably) sad comment of the evidence scholarship of that time.

19. Consider, for example, Wigmore's pathbreaking work in rationalizing the exceptions to the rule against hearsay. Wigmore perceived the exceptions as being justified by "circumstantial guarantees of trustworthiness," and concerns of "necessity." 2 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 1420-22 (1904). To a large extent, these considerations still, according to the received wisdom, provide the rationale for the hearsay exceptions. See FED. R. EVID. 803(24), 804(b)(5) (residual exceptions requiring, inter alia, "circumstantial guarantees of trustworthiness" equivalent to those for enumerated exceptions, and proof that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"); FED. R. EVID. 803 advisory committee's note ("[u]nder appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant . . ."); FED. R. EVID. 804(b) advisory committee's note (hearsay that is of lesser quality but still "meets a specified standard" may be admitted if declarant is unavailable). Incidentally, I believe that Wigmore's rationalization is no longer adequate. See Richard D. Friedman, *Toward a Partial Economic, Game Theoretic, Analysis of Hearsay*, 76 MINN. L. REV. (forthcoming 1992).

maneuver to make the ruling that she thinks is optimal in the particular situation; it is here that, at least in a sense, evidence law may not matter very much. I think that this is good, or at least that it is better than any feasible alternative. Rule-makers, whether codifiers or courts, cannot hope to anticipate in advance all the situations that might arise and the precise ruling, or even considerations, that should govern. And if they did try to be too prescriptive, the rules too often would lead to rulings that poorly fit the situation at hand. But to the extent that the rules are open, the trial judge is left free to roam. My concern, again, is not so much that judges' rulings will lack uniformity, though that is sometimes of importance, but that the rulings will not be soundly based and reasoned. A busy trial judge cannot ordinarily expect to reach consistently sound results by working out each difficult evidentiary problem from basic principles.

Or at least she cannot expect to do so without help. A treatise cannot totally bridge, but it can *narrow*, the gap between rule and ruling, between the functions of codifier or appellate court and trial court. No, a treatise cannot anticipate all the situations in which a rule may come into play. But it can anticipate far more broadly than can an evidentiary code or an appellate opinion. And it can analyze in depth those important situations that it does anticipate.²⁰ In most situations, that analysis, however persuasive, will not relieve the trial judge of all responsibility, for she will still have to address the facts of the particular case. But the treatise writer, by offering a reasoned discussion, and one grounded in underlying principles, can vastly ease the trial judge's burden and improve the quality of her rulings. In this case, the treatise writer's telescopic work facilitates his microscopic work.

By now perhaps it is clear what kind of treatise I hope *The New Wigmore* will be. Although the treatise may help readers find out what the law is, that will only be an incidental function. There are already many very helpful research tools for finding the law: codifications such as the Federal Rules of Evidence, where they govern, are usually clearly structured and provide a helpful means of access to case law; computer-

20. Suppose, for example, a judge or lawyer is considering the question of whether a particular factual statement made in the proof of loss accompanying an insurance claim should be deemed a party admission when offered against the claimant. The governing evidentiary code, if there is one, probably sheds little light on the matter. There may not be any reasonably recent law review article on the topic (I know of none). Opinions dealing with similar questions may be found, but they may appear to be in conflict and, particularly if they focus tightly on the facts of the cases there presented, may not offer much guidance for the case at hand. A treatise may cover the issue in broad enough terms to place it in context, and in precise enough terms to be of real assistance.

ized services can instantly gather the cases bearing on certain problems; useful handbooks explain the law of evidence in many jurisdictions; excellent syntheses, like *McCormick on Evidence*, and even longer treatises, such as Weinstein and Berger's or Louisell and Mueller's, explain evidentiary law in general or under the Federal Rules.

What I do hope is that *The New Wigmore* becomes, as its predecessor certainly was, one of the first sources that anyone—judge, practitioner, academic or non-lawyer—naturally consults when seeking a reflective discussion of a difficult evidentiary question. To reach this status, a treatise must achieve a comprehensiveness that is beyond the scope of even most multi-author treatises—comprehensive not only in the scope of evidentiary questions covered but also in the depth of attention paid to each area and in the extent to which underlying conceptual issues are addressed. Such a treatise must examine and challenge the basic precepts and organizing principles of evidentiary law, paying careful attention to the procedural context and consequences of evidentiary questions and to the light that may be shed on those questions by knowledge gained from outside the law. From this intellectual base, a treatise can ask how a wise set of precepts and principles should apply, through the operation of particular rules, in a broad range of situations. The Wright, Graham & Gold treatise now in progress achieves this type of comprehensiveness. But the market for contributions of this sort is not anywhere near saturation, and realistically probably never could be.

How useful, and how enduring, a contribution we make will in the end determine whether we had any justification, apart from history and precedent, for using the name Wigmore on the spine.