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Studying Evidence Law in the Context of Trial Practices

Robert P. Burns
Northwestern University School of Law

STUDYING EVIDENCE LAW IN THE CONTEXT OF TRIAL PRACTICES

ROBERT P. BURNS*

I. INTRODUCTION: THE FIRST LECTURE IN EVIDENCE[1]

A number of principles underlay our approach to learning the law of evidence. Just as Ian Macneil always insisted that contracts were more important than the law of contract,[2] evidence is more important than the law of evidence. Evidence is the means by which we go about determining accurately what occurred in the past, while also determining how it ought fairly to be understood or interpreted, how it ought fairly to be evaluated, and also what we ought to do in response to that event. For practical purposes the past is irrelevant: it is the one thing we can do nothing to change. It is only because we presently embrace notions of corrective justice that we are concerned with what happened in the past. We will find that these notions of corrective justice, and notions of the rule of law with which they are intertwined, are only *one* aspect of the moral sources that trial practices honor.

We will see as well that the law of evidence operates in the main to exclude evidence at trial. Notice what a paradox this is. Generally, we think that the more we know about a subject, the more likely we are to make accurate and fair judgments about it. Furthermore, at trial, the officer of the court whose role it is to present the most persuasive case in favor of his client has already decided that every piece of evidence excluded is sufficiently important ("material and relevant") and arguably reliable in that it may serve to convince an impartial jury of the strength of his cause. One of the questions that we will be asking throughout the semester is whether or not the law of evidence really does function to achieve "truth and the right result," as the stated purpose of the Federal Rules,[3] for example, is often paraphrased.

* Professor of Law, Northwestern University School of Law.

1. The first section of this essay reproduces the explanation I usually give to students in the integrated program in Evidence, Trial Advocacy, and Professional Responsibility at Northwestern University School of Law. Between forty and fifty percent of each class chooses to take the program in any given year.

2. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 5 (1980).

3. FED. R. EVID. 102.

Some have suggested that the law of evidence, in its traditional or contemporary forms, serves to disfigure the picture of events that the jury sees and to cripple the ability of the jury to do substantive justice in particular cases. This is the central intellectual question surrounding the law of evidence, and doubt has been expressed on this question. A prominent American evidence scholar has admitted that he sometimes thinks that the law of evidence may be a kind of "blind man's bluff," based on the consoling fiction that we can actually identify those rules and procedures that, if rigorously followed, allow us to converge on the factual and practical truth of a particular situation. We should recall that Sir Rupert Cross, perhaps the greatest British Evidence scholar of the twentieth century, wrote that he was "working for the day when my subject is abolished."[4] And Edmund Burke, the great conservative political philosopher, claimed to know a parrot who could learn the law of evidence in a half hour and repeat it back in five minutes.[5] By contrast, others have suggested that one way of understanding what a trial would look like without the benign effect of the law of evidence is to watch the Jerry Springer show . . . or some congressional hearings on judicial appointments.

In the course of the integrated program, you will be doing weekly trial practice exercises and will try two full cases: the first a criminal case, tried to the court; the second a civil case trial to a jury. Each of you will once represent the party who bears the burden of proof, or the "risk of nonpersuasion," as we say more precisely, and once the party who does not. You will experience the transformation that occurs when your file, which contains all of the potential evidence that could be presented to the jury, is transformed *both* by the law of evidence and the practices of the adversary trial to produce quite a different picture of events than may emerge on the first, or second, or even third reading of the file. You will be involved as participant-observers in the legal and political construction of truth, a truth that has important consequences.

You will see that the law of evidence must be understood in the context of the *trial* court. According to the last report I saw, fewer than a dozen cases were reversed on evidentiary grounds in a year by our Court of Appeals here in Chicago. Hundreds of cases are tried in the federal trial courts within the Seventh Circuit, and thousands, probably tens of thousands, of evidentiary determinations are made by the district court judges within that Circuit. The deferential standards of review that apply to most evidentiary determinations, the open-textured nature of many evidentiary rules, the difficulties surrounding preserving error on appeal, and doctrines of harmless error account for a good deal of this. Most evidentiary arguments are made—and won or lost in the trial court—period.

4. WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 1 (1990).

5. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM & WIGMORE 1 (1985).

I have here in my left hand the text of the Federal Rules of Evidence.[6] I have in my right hand the Internal Revenue Code, just the Code—not the volumes of regulations that have been issued pursuant to the Code.[7] The Code applies to a very limited range of human interactions, those in which income is realized. Now, those particular interactions may be particularly dear to some lawyers, but the vast majority of human conduct does not realize income. On the other hand, the rules of evidence apply to every event in the great "booming, buzzing confusion" of human life that could possibly find its way into an American trial court. And in our society, that is a great range of human interaction, indeed. What does that mean about these few rules of evidence which we have? It means that they must be extremely broad, and if they are to cut at the joints of the enormous range of human situations that find their way into court, they must leave a great range of interpretive flexibility in application.

That means that learning the law of evidence can be very frustrating, especially if you are of a certain cast of mind. It will turn out that evidence law is composed of a relatively small number of overlapping rules that, in practice, generally serve as guidelines for the exercise of the trial judge's sound discretion. And, over the past three decades in particular, the development in the law of evidence toward simplicity and admissibility has accelerated. In your Jurisprudence class, you may have been exposed to Ronald Dworkin's hypothetical great judge, Hercules, who could discern the legally right answer to every legal question that arose. Any thought that something like that could be true in evidence law has long since disappeared, unless you include within "the law of evidence" a large range of considerations about which the rules are only suggestive.[8] In particular, judges and scholars have long abandoned the notion that the right answer to every evidentiary question can be derived from evidence doctrine alone. There is a second and related reason why evidence can be a frustrating subject. During your first-year discussions of case law, you became no doubt accustomed to describe "the facts of the case." The source of those "facts" was, of course, the appellate judges' recital at the beginning of the opinion, before the court begins

6. I hold the National Institute of Trial Advocacy pamphlet, which is about four inches by three inches, and less than a quarter inch thick.

7. The Code is in two paperback volumes, each about ten inches by eight inches, and together about a foot thick.

8. Late in his career, Wigmore proposed an evidence code that sought to address and resolve, if not all, at least a very broad range of recurring evidentiary issues. TWINING, *supra* note 5, at 162–63. It appears, though, that he viewed even this very complete code as providing guidelines rather than strict rules. Dworkin's Hercules does, in fact, have access to a range of principles that transcend the legal rules. I have suggested that a study of the practices that prevail in the trial court suggests a different sort of expansion of what the law is. Robert P. Burns, *The Lawfulness of the American Trial*, 38 AM. CRIM. L. REV. 205, 205–06 (2001).

its explicitly legal analysis. Only occasionally, I suspect, did you pause to recall that this recital was a narrative of factual *conclusions* narrated by the court that had already decided the case one way or another. The factual narrative of the appellate case inevitably serves a rhetorical purpose and is written to manifest the cogency of the decision itself. The appellate narrative of facts is created to be consistent, in a number of ways, with the legal analysis and the decision the court reaches. You will find, I think, that "the facts" with which a trial lawyer deals have a more adamantine quality—an ornery independence of the law's interest in factual domestication—relatively indifferent to the law's, even evidence law's, categories. This will make that key enterprise of fair categorization more difficult and tend to make many evidentiary questions more arguable.

So what do you learn when you learn evidence law? With a nod to the "trivium" of the curriculum in the great medieval universities (where law was a respected faculty), I would say you will learn three things: a grammar, a logic, and a rhetoric. You will learn a grammar—the grammar of the trial courtroom. The law of evidence is the grammar book of the trial courtroom. In ordinary conversation, ungrammatical speech may affect one's clarity and sometimes occasion an unflattering judgment about one's cultural level. But in the trial courtroom there is an official whose role it is to prevent ungrammatical speech altogether. The inability to speak grammatically can reduce you to silence. Now these grammar rules are not haphazard, nor are they exclusively the priestly language of a privileged guild intent on maintaining its own power. We will see shortly that embedded in these grammar rules are fundamental epistemological, legal, and political commitments, and they reflect a certain vision of what the rule of law is, and derivatively, what a trial should be.

You will also learn a logic.[9] Evidence doctrine will dictate important consequences that flow from trial events, which, as characterized by evidence law, serve as premises for compelling inferences. These premises, however, are often within the control of the advocate. The lawyer's choice of theory of the case—the crafted God's eye narrative of past events, chosen to reflect, in the most balanced and comprehensive way, the most important factual, moral, legal, and political values—will have evidentiary consequences by virtue of the internal logic of evidence doctrine. Most globally, the narrative theory of the case—itself legally sufficient to establish the elements of a crime or claim (or, for the defense, to negative at least one of them)—will channel all of the relevancy determinations the court will make. Under one theory, a defense of truth in a defamation action, for example, a whole range of evidence will be relevant ("material" in the older language) that would otherwise be

9. The logic I am discussing here is the internal doctrinal logic of evidence law, not the (more important) "logic" of discovery and confirmation that may apply to the accurate determination, fair interpretation, and evaluation of past events.

inadmissible. The defense's decision to point the finger at another perpetrator in a murder case, for example, will mean that evidence that the claimed perpetrator had motive, opportunity, means, and so forth will become newly relevant. A decision by a criminal defendant to "put his character for peacefulness into issue" will expand the range of his prior violent acts that the prosecutor may introduce.[10] The decision of an advocate to impeach an opposing witness's character for truthfulness by calling a negative character witness or by attacking that opposing witness's character for truthfulness on cross examination will allow the opposing counsel to call an accrediting character witness, and so forth.

Finally, you will learn a rhetoric, a set of arguments that may be made for or against admissibility in individual cases. In general, rhetoric is the art of finding the *premises* from which arguments begin—in contrast to logic, the canons of cogent relationships among the propositions that connect premises and conclusions. Many of these arguments derive directly from the doctrine surrounding the scope of individual exclusionary rules and the exceptions to those rules. Many others are much more broadly calibrated and require the judge to determine the place of an individual piece of evidence within the factual and normative fabric of the entire trial: for example, whether the probative value of the individual bit of evidence offered is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[11] For example, in *every* case where, in the face of a hearsay objection, a trial judge admits an out of court statement "not for the truth of the matter,"[12] but to prove some other matter, she must balance the importance of this other matter with the "prejudicial effect" created by the hearsay rule itself, that the jury will take the statement for the truth of the matter.[13] Relatively few of these arguments look like the kind of "common law" reasoning from statutes and cases construing them,[14] in which we have a sequence of decisions refining a rule and confining its operations to specified factual contexts so that, in an always qualified way, precedent may be said to "control" the decisions. That kind of rhetoric can occur at trial, usually in the more leisurely arguments on a relatively few evidentiary matters that take place *in limine*, that is, on a motion brought by a litigant before the trial begins. The overwhelming majority of the evidentiary arguments that occur at trial involve the evidentiary rule and the facts of the case, and very little in

10. *See, e.g.*, U.S. v. Big Crow, 74 F.3d 163, 165–66 (8th Cir. 1996).

11. FED. R. EVID. 403.

12. FED. R. EVID. 801.

13. Indeed, the social science suggests that these determinations are all but impossible for juries. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 124–26 (1986).

14. *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 10–16 (1961); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 50–58 (1988).

between.[15] They move between the rule (and often more than one rule) and a detailed account of the specific facts of the case: they are fact-intensive. I think you will find that you will be persuasive in making evidentiary arguments in the trial court to the extent that you gain a detailed and comprehensive understanding of the case files that we will be working out of this semester. This understanding is not simply an inventory of the discreet (or "atomic") facts with the file, but also a grasp of the countless inferential relationships that exist among those facts, which we will be exploring under the rubric of relevance over the next few weeks.

Some law students find areas of the law where there are "no answers" discouraging. At the end of a course, some wonder what they have learned. I think you will find participating in the argumentative practices surrounding the law of evidence satisfying. I think you will come to see that the lack of a quasi-deductive necessity in most evidentiary determinations does not lead to a nihilistic conclusion. I think you will come to see that there is a kind of integrity about the arguments that surround evidentiary determinations, perhaps the only kind of integrity that could apply to judgments where competing and often incommensurable values are at stake. The forms of rhetoric that surround evidentiary arguments reflect those values in an extremely case-intensive manner. To use an image favored by a great American philosopher, the factually specific forms of evidentiary arguments are like short and fine wires, which, when wound together tightly, can produce a thick cable of enormous strength.

I have nothing against useful knowledge. Alfred North Whitehead, the great philosopher and logician, wrote that only pedants sneer at useful knowledge.[16] I would go further. In the context of learning evidence law, "knowing how" and "knowing that" are often closely intertwined. When you can conduct a direct examination within the confining conventions of the law, you will understand the meaning of the central concept of foundations in general, and foundation as to personal knowledge in particular.[17] It is when you can conduct an effective cross-examination that you understand the intricate rules that surround impeachment. It is when you can make timely and specific objections and offers of proof in particular situations that you show your understanding of the rules surrounding the preservation of error for appeal. It is when you can present an unobjectionable and persuasive opening statement that you understand the concept of relevance and the relationship

15. I think this is true for jurisdictions, like the federal system, in which there is a single set of evidentiary rules, but also for jurisdictions, like my home jurisdiction in Illinois, that seem to be "common law" jurisdictions with only a few specific statutes.

16. THE BLACKWELL GUIDE TO THE PHILOSOPHY OF EDUCATION 275 (Nigel Blake et al. eds., 2003).

17. *See* FED. R. EVID. 602.

between fact and law in the trial court. It is when you can lay the necessary foundations to admit exhibits that you demonstrate an active knowledge of the rules surrounding authentication, Best Evidence, and hearsay.

Evidence law can be fun and is important. It can be fun because it requires both imagination and rigorous thinking. It requires imagination to locate the premises for evidentiary arguments in what the old rhetoricians called the "commonplaces" or "sources for argument." And you will often find that evidence that is inadmissible under one theory is admissible under another. It requires rigorous thinking to demonstrate the logical relationships—the "catenate" (from *catena*, chain) connections, as Wigmore called them,[18] among the propositions running from those premises to conclusions about admissibility. Evidence law is important in that it provides a lens through which to understand what occurs in the trial court, and consequently, insight into "what law is." In studying evidence law, you will see the techta of competing principles grind up against each other. You will see epistemological concerns push up against moral concerns and against political concerns embedded in the law of evidence itself. The privilege against self-incrimination and a criminal defendant's confrontation rights, for example, are rooted in political judgments deep in our tradition that are suspicious of state power. You will come to understand, I think, that the form of truth that is allowed to appear at trial tells us a lot about what the law is and about the kind of society that we have. The linguistic practices through which we balance these political, legal, moral, and epistemological concerns in an *extremely* contextual, case-by-case manner is one of the most important ways in which we actually constitute and continually reconstitute our society. DeTocqueville wrote that we Americans tend to transform our central political issues into legal issues.[19] We often transform our legal issues into procedural issues. I think you will find deeply intertwined with evidentiary issues—like presumptions, burdens of proof, appealability, materiality, and scope of expert testimony—central political determinations of a very high order. If you pay attention, you will often find a universe in a grain of sand.

The methods and materials of the course are, then, meant to further a surer grasp of the rules of evidence and a capacity to operate within them, to understand their quite complex interrelations, and to help students attain the beginnings of a critical perspective on them, as they operate in context. What are the methods and materials of the course? Our study of evidence law in this class is coordinated with your study of Trial Advocacy and Professional Responsibility. We will be studying relevance in here while you are studying theory of the case in Trial Advocacy and the ethical limitations on persuasive

18. JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF § 7 (3d ed. 1937).

19. WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW & IDEOLOGY IN AMERICA, 1886–1937, at 22 (1998).

case construction in Ethics. We will study Authentication and Best Evidence in here, while you are offering exhibits in Trial Advocacy. We will be studying the evidentiary rules surrounding privileges here, while you are studying confidentiality in Ethics. We will be studying the basic evidentiary rules surrounding expert witness testimony, while you are preparing and presenting expert witness testimony in Trial Advocacy. We will conduct our first extended normative consideration of competing evidentiary "regimes" here in Evidence, after you have tried your first simulated bench trial as your Trial Advocacy midterm. And so on.

Rules are important. Practices are more important. Rules are typically "abridgements" of envisioned forms of good practices. You will understand the rules when you grasp the ideal form of practice they are designed to enforce. You will grasp the rules more completely when you understand the deeper moral and political commitments that justify those practices. You will find, for example, that the structure of the direct examination of lay witnesses is envisioned as a series of vignettes whose order is determined by rhetorical considerations, each of which is constructed in a sequence of physical description followed by chronological narrative. If you do not conduct direct examination that way, you cannot but violate the rules of evidence that are enforced by objections such as, "Calls for a conclusion!" "Improper lay witness opinion!" and "Foundation!" The integration of Trial Advocacy and Evidence will allow you to understand evidence law in the context for which it was created. You will not emerge from the courses like a student who knows all the grammar rules of a language that he cannot speak or write. And, from a purely learning standpoint, you will have all the enormous advantages of truly active learning.

We will begin each topic in here with an overview lecture where I will try to provide the big picture of the fundamental notions underlying each area. Then, most of our time will be spent working through the three hundred or so problems in the evidence section of *Problems and Materials in Evidence and Trial Advocacy*.[20] We will argue the problems in a somewhat relaxed version of a trial courtroom. By our next class, you will be divided into two groups: one half of you representing the prosecution and the other half, the defense. The arguments will be in role, with each side trying to identify and make the most persuasive arguments in favor of and against the admissibility of each piece of evidence. We will then step back, put on our judicial hats, and try to identify who had the better of the argument and why. Sometimes we will then put on our scholarly hats and evaluate whether the law of evidence, as it is best understood in this context, really does promote "truth and the right result."

20. 1–2 ROBERT P. BURNS, STEVEN LUBET & JAMES H. SECKINGER, PROBLEMS AND MATERIALS IN EVIDENCE AND TRIAL ADVOCACY (4th ed. 2004).

All of the evidence problems we will argue in here will come from the two files out of which you will also be working in Trial Advocacy and Professional Responsibility. If you understand the issues raised by those problems, you will have sure and active mastery of the basics of the law of evidence. The "problem method" encourages an active and contextual understanding of the law of evidence. There are limits, however, on the power of a series of free-standing hypotheticals. These limits can be overcome by using relatively long files that approximate the level of detail that exists in important cases that actually go to trial. These richer factual contexts vastly increase the range of relevant arguments for and against the admissibility of any particular bit of evidence. For example, in our civil case, a prior crime of one of the parties, who will also be a witness, may be admissible to impeach that witness's testimony, subject to relatively precise legal constraints, and for other reasons as well, subject to different and weaker constraints, as an aspect of the story each side is telling whose significance is transformed by its place within each story. By placing evidentiary issues in this vaster, and more typical, factual universe, you will be operating within the context in which evidence law *actually* functions. You will learn both how to "speak the language" and to appreciate its strengths and weaknesses.

The two case files have similarities and important differences. One is a criminal murder case, and the other is a civil defamation action. Both cases require the advocates on each side of the case to engage in the process of theory choice.[21] You will come to experience the circular movement between the theory of the case and the individual pieces of evidence that the advocate and the jury engage in at trial. You will come to see how the admissibility of important individual pieces of evidence depends on the theory chosen by the advocate. You will see as well that one, and only one, of the criteria that the advocate will employ in choosing a theory is the admissible evidence that supports the theory. Each case will require the defendant, the party who does not have the burden of proof, to weigh the wisdom of a "purely negative" case, that is, one that does not seek to prove an alternative version of events to that proposed by the prosecution or plaintiff, but simply insists that the party with the risk of non-persuasion has not met his burden of proof.

The two cases are different in a number of ways as well. Perhaps most significantly, the identity of the killer is the central issue in the criminal case. It asks whether the defendant was indeed firing a gun into the heart of the victim at a certain time and place. It addresses brutally elementary data[22]

21. For the importance of theory choice on the part of the advocate, see ROBERT P. BURNS, A THEORY OF THE TRIAL 42–49 (1999). For the criteria by which juries determine the relative superiority of one theory over another, see *id.* at 167–76.

22. *See generally* HANNAH ARENDT, BETWEEN PAST AND FUTURE: SIX EXERCISES IN POLITICAL THOUGHT (1961).

about perceptible physical movements in time and space and only derivatively more subtle questions of human motive. Either the defendant did it or he did not.[23] In the defamation case, there are relatively few disagreements about these brutally elementary data. The case turns on more subtle "interpretive" questions such as the intentions and beliefs of the protagonists and the meanings of words in the contexts in which they were spoken. Both cases have "political" dimensions. One involves alleged violence directed against a woman by her estranged husband, and the other involves allegedly mean-spirited words spoken by a very rich man against a very poor person who is a servant in his household. Again, I think you will see that evidence law functions differently in these different contexts.

These courses will be the only chance you will have for a number of years to see the transformation that legal practices and rules visit upon data that approximate the "investigative and trial file" of a trial lawyer. (You will later come to understand how these files are themselves products of other legal practices that themselves shape the underlying facts.) You will be participant-observers in the legal and political construction of practical truth—the only truth relevant to the important decisions about life, liberty, and property that our trial courts make every day. You will also be closer to the place you need to be if you are to judge critically whether the law of evidence, as it operates in context, serves to clarify or to disfigure the meaning of human events.

We will read only a few cases. Our sources for the substantive evidence doctrine will be the Federal Rules of Evidence, the Advisory Committee's Notes, legislative history to the Federal Rules, and a good, short treatise on evidence law. These will provide more than enough doctrine to sustain us in the practices of argument around the law of evidence. In arguing motions *in limine* during your two trials in Trial Advocacy, you are encouraged to do your own original research in support of, and in opposition to, those motions and to go deeper on some issues than is possible in a survey course. (It is good to know that those depths exist, even though we will only sometimes fathom them!)

II. THE ASSUMPTIONS AND COMMITMENTS OF THIS APPROACH

The approach to evidence law that I describe to the class each year in roughly the foregoing manner is supported both by purely pedagogical principles and by a philosophy of the trial and the place of evidence law within

23. *See* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004) (arguing persuasively the importance of the distinction between these either/or cases and cases where the jury is called on to decide more subtle questions and the relative weakness of the current law of evidence and other adversary devices in adjudicating cases of "actual innocence").

it. I will try very briefly to summarize those in the remaining sections of this essay.

A. Three Educational Principles

1. Students Will Effectively Master the Skills and Bodies of Doctrine Necessary for Effective Performance

Law students come to law school after a long period of relatively passive learning. Not completely, of course: participation in seminars and, more importantly, writing papers are active enterprises. The old-style Socratic dialogues of *The Paper Chase*[24] style "encouraged" a desire for competent performance, though of a sort, in my view, relatively discontinuous with the performances in which lawyers generally engage, even in the (relatively rare) enterprise of appellate oral argument, which is probably the closest analogue from the real world of practice. Students in their mid-twenties or older are eager to become competent practitioners of skills that have traction in our important legal institutions. There is no shame in relying on this promethian joy to motivate learning. (I believe that the real satisfaction that comes from participating in the ways of the trial court derives more from an understanding of the importance of the advocate's limited role in a set of practices that actually can converge on the practical truth of a human situation, something that emerges in all three of the classes in the integrated program.)

Though active learning is always powerful, it is especially appropriate where, as I explain to the students in the first class, doctrinal rules are an attempt to enforce a vision of "good practice," where the rules themselves are merely an abridgment of the activity and do not actually exist prior to the activity.[25] Pedagogically, it makes more sense to move from an experience of the practice to an understanding of the rules than to attempt to reconstruct the practice from the rules. Indeed, much of our motivation for creating this program came from our experience in continuing legal education programs for young lawyers. We found that very intelligent and articulate lawyers, who had apparently done very well in their law school evidence classes (and the evidence section of the bar exam) did not have any contextual grasp of what the evidence rules meant in the world in which the rules had their most important function—the trial courtroom. These lawyers could not construct witness examinations to conform to the rules, nor recognize objectionable evidence that was presented by the opponent and frame appropriate objections.

24. THE PAPER CHASE (20th Century Fox 1973).

25. MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 258–59, 390–91 (1991).

2. Meaning is Use: "Knowing That" and "Knowing How" Are Deeply Intertwined[26]

A related point is that the meaning of many key evidentiary doctrines emerges only from the practices that they structure and limit. An understanding of the meaning of the central[27] principle that a witness achieves "competency" once there is evidence sufficient to support a finding that he has "personal knowledge"[28] is demonstrated by constructing a direct examination in which the witness testifies effectively in the "language of perception." The meaning of the rule limiting lay witness opinion testimony is concretely understood when the lawyer gains the contextual, and indeed often tacit, understanding of the situations where a particular trial judge is likely to allow the witness to move from strict perceptions across the shifting border into interpretations and conclusions. The meaning of the rule prescribing the methods of authentication can only be fully understood through a grasp of the ideal form of evidence envisioned by rules which requires no authentication at all, a grasp of a "background" against which the explicit rules make sense. More particularly, the meaning of the form of authentication that proceeds through "[a]ppearance, contents, substance, internal patterns, or other distinctive characterisitics, taken in conjunction with circumstances"[29] is likely to become apparent when the lawyer actually attempts such an authentication of an exhibit of doubtful integrity. And on and on.

3. A Critical Perspective on the Law of Evidence Is Possible Only After a Contextual Grasp of Its Effects in Complex Situations

As I mentioned, the exclusionary rules of the law of evidence often fail to bite. Because there are so many available arguments for admissibility under circumstances that the advocate can control, coupled with the fact that there is so much deference given to the determinations of the trial judge, the jury will often see evidence that, on first blush, seems inadmissible. Sometimes, however, the rules, as applied by a fair-minded judge, do exclude evidence. Understanding this pattern of hard rules and judicial discretion and seeing its effects in a complex factual pattern begins to place the student in a position to evaluate the law of evidence as it functions in the trial court.

We explicitly consider these "big picture" issues after the students have actually tried their first simulated case—a bench trial in a murder case. The students are then, it seems to me, able to appreciate what I call the "dialectic"

26. HANNA FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT 47–49 (1972).

27. *See* Robert P. Burns, *Notes on the Future of Evidence Law*, 74 TEMPLE L. REV. 69, 70–71 (2001).

28. FED. R. EVID. 602.

29. FED. R. EVID. 901(b)(4).

of evidence law,[30] and the deep tensions that it manifests. This dialectic has six steps and leaves us about where we are now in American evidence law.

First, it seems that epistemological concerns suggest a regime of truly free proof. Any evidence that a reasonably competent advocate would seek to offer is likely to have *some* probative value, a value that could be important as the jury engages in an inevitably holistic determination of what occurred, how it should be understood, and what should be done in response to it. The binary quality of exclusionary rules deprives a jury of all the probative value tendered evidence has, and is thus inferior to the methods of the adversary trial itself (such as cross-examination, closing argument, and rebuttal evidence), which have a more subtle capacity precisely to determine weight. But of course, an interested advocate may offer evidence where the power comes not from its relationship to the authoritative norms embedded in the jury instructions, but rather from its power to evoke a range of political and moral norms that lack that pedigree. At this stage, the political considerations surrounding the rule of law require some policing for materiality. Further, the evidence offered may simply be unreliable, and for various practical reasons, the ordinary devices of the adversary trial may not be able to eliminate this systematic unreliability. But then (we are at the third stage of our dialectic), we should allow the "wise and strong trial court"[31] to admit or exclude evidence based solely on whether the danger of its unfair prejudice substantially outweighs its probative value.

But now other political considerations, particularly salient in the American tradition of skepticism about the power of state officials,[32] come to the fore. Can we really trust our judges to make these unconstrained determinations wisely? And what about the key element in "formal justice,"[33] that similar cases be similarly decided? Better to rely on the usual methods of common law adjudication continually to refine general rules as they apply to the recurring categories of cases that come before our trial courts.

But (and we are now at stage five) think again of the vast, booming, buzzing confusion to which the law of evidence must apply and the resultant complexity of the rules necessary to cut at the joints of that vast range of situations. The only way our appellate courts could ensure that trial lawyers and judges could master such a complex body of law and bring it to bear accurately would be to treat the resultant codes as "hard law" to be enforced by frequent reversals.[34] Otherwise, trial practitioners would drift only toward

30. BURNS, *supra* note 21, at 99–101.

31. Michelson v. United States, 335 U.S. 469, 486 (1948).

32. GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 208 (1999).

33. JOHN RAWLS, A THEORY OF JUSTICE 235–43 (1971).

34. Such an institutional strategy might have a disproportionate effect on the prosecution in criminal cases. Because the double jeopardy clause prohibits the state from appealing from

trying to follow those aspects of the code likely to result in reversal. And, of course, this strategy assumes that trial lawyers and judges actually *could* make these determinations in the time available. This brings us, as our students begin to see better after trying their first case, to our current evidentiary regime: a small set of evidentiary guidelines for the trial courts, which provide appellate courts with something of a template for identifying fundamental unfairness at the trial level. The experience of seeing the law of evidence in operation allows for a sharper perception of these epistemological, political, moral, and practical values, the balance of which determines an evidentiary regime.

Furthermore, students arrive at a position to evaluate the proposition that *wherever possible* the more nuanced devices of the adversary trial should be employed to identify the proper weight to be given to almost all sorts of tendered evidence. It is only where those devices are, for cognitive or practical reasons, demonstrably likely to fail that we should resort to the either/or of the law of evidence to completely exclude evidence. As my colleague Shari Diamond has recently demonstrated in the context of the evidence of liability insurance,[35] juries will inevitably "finish the story" in a manner dictated by the sometimes false maxims of their common sense when evidence is kept from them without explanation. It seems to me that the student's participant–observer understanding of all the devices of the adversary trial will place them in a better position to make the judgment about the appropriateness of exclusionary rules across a range of situations.

B. The Law of Evidence Within a Broader Understanding of the Trial

1. The Internal Rhetoric of Evidentiary Argument: The Received View of the Trial

I believe that the approach we take to the study of evidence law can be justified solely on the basis of the pedagogical principles described above. However, it gains additional force from the much more central understanding of the American trial within which we try to place it. In this understanding, the law of evidence plays a distinctive role—that of enforcing *to a limited degree* what I have called the "received view of the trial."[36] Within this received view, the trial is the institutional device for operationalizing the rule of law.

evidentiary determinations made after jeopardy has attached, the criminal defendant would be the likely beneficiary of a complex hard-law regime.

35. Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

36. BURNS, *supra* note 21, at 10.

This is understood, in Justice Scalia's happy phrase, as the "law of rules."[37] This vision of the trial forms the "background" for evidence law as a whole and a participant-observer grasp of this background allows the student to grasp the broad-gaged coherence of evidence law as a whole.

The two generative principles of the law of evidence can be understood as the principles of materiality and the requirement that a witness's testimony be in the language of perception.[38] The former requires that every piece of evidence received be warranted[39] by its logical relationship to one of the authoritative norms embedded in the jury instructions. Otherwise, it is not "of consequence to the determination of the action."[40] The latter, on which I will focus, requires that a witness may testify only to what he saw, touched, tasted, smelled, or felt, unless some further requirements are met. Now, the distinction between perceptions and interpretations is understood as provisional. In other words, seeing is "seeing as." Perceptions are "theory laden." In Pierce's example,[41] I do not see a set of patches of color whose nature I then infer, I see an azalea. The twenty or so problems we do on the subject of lay witness opinions make that point.[42] They also show that this provisional distinction does have some practical uses and can, to some degree, guide both the trial lawyer and judge. As testimony approaches the ideal of testimony in the language of perception, it becomes unproblematic. To the extent that it is not, it becomes problematic and potentially objectionable as improper opinion, characterization, speculation or hearsay. One then needs to invoke some special rule to admit this problematic testimony.

This requirement that testimony be in the language of perception and, concretely, the character of direct examinations that this requires are deeply rooted in basic features of the American trial. It is not the task of the witness, nor of the jury, to evaluate the facts except and until the judge provides the authoritative norms by which they should be evaluated. Broadly, natural law and positivist understandings of law will root that supremacy in difference sources. The former will argue that the norms that have found their way into constitutions, statutes, and case law are deeper and more considered than are the likely reactions of a jury to a factual pattern. The former will ground the

37. MARK TUSHNET, A COURT DIVIDED: THE RHENQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 152 (2005).

38. I argue this at greater length in Burns, *supra* note 27, at 69–71.

39. For a discussion on the notion of a "warrant," see STEPHEN E. TOULMIN, THE USES OF ARGUMENT (updated ed. 2003).

40. FED. R. EVID. 401.

41. As the founder of American pragmatism, Charles Sanders Pierce researched the four-color map conjecture and developed extensive connections between logic and topology. Stanford Encyclopedia of Philosophy, Charles Sanders Pierce, at 20, http://plato.Stanford.edu/entries/pierce.

42. BURNS, *supra* note 21, at 27–28.

norms in the instructions in the will of the American people, expressed in different ways in the Constitution, statutes, and case law.

Regardless of the justification, the supremacy of the law of rules is the condition of there being a legal world at all. This world of relative stability is built on preexistent rules that, in combination with a focused effort, accurately determine what occurred. This is the condition of possibility of our enjoying rights of any kind. It is the concern with accuracy that connects the fundamental principle of testimony in the language of perception to the other deeply practical concern of the trial: the centrality of cross-examination, "the greatest legal engine for the discovery of truth ever discovered." In combination with the hearsay rule, the requirement that a witness testify in the language of perception provides the cross-examiner access to the claimed perceptual basis of testimony and allows for its challenge through the dozen or so methods of impeachment and, probably more importantly, the possible reinterpretation of those perceptions.[43]

So evidence law then moves the presentation of evidence toward testimony in the language of perception. This "purpose" of evidence law, which a participant-observer can grasp in the practices of the trial, serves *both* goals of the rule of law. It is committed to the importance of accuracy in that it recognizes that perceptions are *less* likely to be part of the "anxious, usually self-preoccupied, often falsifying veil,"[44] in Iris Murdoch's words, that our egos weave to keep us from seeing what offends our self-interest. (As Madison put it, our opinions are the objects to which our self-love attaches itself.[45]) True, we often see what we want to see, but we can also see (and report) what offends or disappoints us. The practices of the trial courtroom increase the likelihood that false reports of perceptions will be identified.

At least as importantly, perceptions are relatively more plastic to the norms that are embedded in the jury instructions than are the opinions and conclusions of the witnesses. The received view of the trial understands the perceptions of witnesses to be this kind of "prime matter" that can be stamped with the norms in the instructions to produce a verdict. It is this understanding of trial processes which is embedded in much of the law of evidence and which forms the deep rhetoric through which evidentiary arguments are made. It embodies a deep cultural commitment to the rule of law as the law or rules. A participant-observer experience with the practices of the adversary trial and the law of evidence allows the student a contextual understanding of this deep structure and the political commitments that surround it.

43. BURNS, *supra* note 21, at 102.

44. IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 82 (2001).

45. THE FEDERALIST No. 10 (James Madison).

2. Evidence Law Within a Broader Understanding of the American Trial

The received view of the trial—as the institution that assures the hegemony of the rule of law as the law of rules where there are disputes of fact—is an important aspect of the American trial, but it is only an aspect of the trial. The law of trial procedure itself recognizes that the American trial is something much more than that. I have argued at length that these other aspects of the trial that are inconsistent with the received view are part of our considered judgments of justice.[46] Although I tend not to describe my more philosophical notions of the place of the trial within our legal order, the students' work in Trial Advocacy and Professional Responsibility allows them to see the received view of the trial as implicit in much of the law of evidence and is a partial view of the trial as a whole. This broader view of the trial, which they themselves have achieved, informs the more critical discussions of the law of evidence which we have in the Evidence class.

Trial practices allow lawyers to construct their cases from a *double* helix of norms. One of those strands is constituted by the law of rules. The other strand is constituted by norms that find their natural home within the life-world of the judge and jury. These common sense norms are embedded primarily in the different sorts of narratives that the trial lawyer may employ at trial, from the fully characterized storytelling of the opening statement to the more Spartan narratives of direct examination. They are also embedded, in a manner more difficult to explicate, within the tensions between the in-role performances of the lawyers, witnesses, and judges, and within the trial as drama.

As they learn, the trial students experience that evidence law is something quite different from a set of procedures for deciding cases by stamping the imprint of the law of rules on a value-free narrative of past events. In the integrated program, the students experience the tension between the vision of the trial that is embedded in the deep structure of the law of evidence and a vision of the trial to which the law of evidence nods,[47] but is fully embedded in all the linguistic practices of the trial working together. Students who are studying trial practice while they study evidence law see that the trial proceeds by the construction and deconstruction of narratives. The most important thing a trial lawyer does is to identify a theory of the case: the inspired simplification of a dense human situation that understands it fairly and also provides the jury with a reason to *act* in a decisive way. This theory of the case must be respectful of the law of rules but is not, and cannot be, completely bound by the values underlying that law. This broader notion of what the trial is, which

46. BURNS, *supra* note 21, at 26–27; *see* RAWLS, *supra* note 33, at 47–53 (describing the notion of "considered judgments" of justice).

47. BURNS, *supra* note 21, at 26–33.

is apparent from a careful description of what we actually do at trial, has normative roots deep in our constitutional order.[48]

Though qualified by the notion of materiality, the students experience the trial as the institutional device by which the jury chooses to accept one case over another. The heart of each case is the lawyer's "theory of the case," which offers, in narrative form, reasons for the jury to act. The students see, in both Trial Advocacy and Evidence, that the only way the human mind may discern historical truth is to build plausible narratives consistent with common sense and (sometimes) scientific truth supported by reliable evidence. They see that the key terms in this latter statement, "consistent," "supported," and "reliable," raise deep questions and are subject to conflicting interpretations. Because contradictory narratives can be constructed from the same material by different characterization, omissions, and sequencing of facts, we need an institutional device to discern the superiority of one narrative over another. And so, the trial proceeds by the construction *and deconstruction* of narratives, leaving a kind of practical truth beyond simple storytelling. One theory of the case gains relative plausibility in important part not only because of the quality of the evidence supporting it, but also for practical reasons, such as invoking more important norms, not in general, but in the painfully precise and detailed context revealed by the linguistic practices of the trial.

Indeed, the students will learn that the trial judge tends to make her key relevancy rulings not by linking a proposed piece of evidence to the elements of the crime or claim, but rather by linking them to the narrative theory of the case. There are often several theories of the case available to the lawyer and her choice among them will largely determine the admissibility of much of the evidence offered—evidence that will invoke norms on both strands of the double helix.

So, the theory of the case will determine the admissibility of much crucial evidence. Equally important, though, is the insight that the meaning of individual pieces of evidence is largely indeterminate. Trial lawyers like to say that "every fact has two faces." The meaning of any one particular piece of evidence, its "relevance" in a broader sense, depends on its place within a plausible theory of the case. (For example, does the fact that the defendant was drinking just before the shooting mean that his inhibitions against doing the deed were reduced, or that his coordination was affected to the point where he couldn't accurately fire the shot? Or does it mean both, something the prosecution theory may accommodate by proposing that he was trying to kill

48. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 83, 96 (1998) (explaining the centrality of the jury trial with the Bill of Rights); Robert P. Burns, *Reinvigorating the Jury: A Conservative Perspective on the Future of the American Jury Trial*, 78 CHI.-KENT L. REV. 1319 (2003); Burns, *supra* note 8; Robert P. Burns, *The History and Theory of the American Jury*, 83 CAL. L. REV. 1477 (1995).

the person standing next to the actual victim.) The meaning of individual pieces of evidence is conferred by their places within the overall theory, and the overall theory gains plausibility from individual pieces of evidence. This is, of course, the famous hermeneutical circle, which suggests the interpretive nature of all human knowledge of human affairs.

Thankfully, individual pieces of evidence are not *infinitely* plastic to reinterpretation on the one hand, and interpretive theories can be powerful for moral or political, as well as for purely explanatory, reasons. Students begin to learn the judgment necessary to assess the strength of one theory rather than another and to understand the place of the law of evidence in that process. They also come to understand the crucial tensions between the roles of advocate and judge,[49] the judge's obligation to police materiality, and the lawyer's insistence on his right to "try my own case." Really understanding those tensions and the reasons for them provides an opportunity for a student to understand one important element of the ideal of "ordered liberty" in American institutions.

Learning the law of evidence in the context of trial practices allows the student to reach his own conclusions about the integrity of the law of evidence. Students debate whether or not that law is simply a set of technical hurdles to substantive justice, or whether it serves to promote "truth and the right result." Indeed, I have always included an essay question on the final exam that requires the students to assess concretely the function of the law of evidence in one of their simulated trials and to explain whether evidence law as it was applied in that trial really did further its high stated ideals, or whether it frustrated that result. A substantial majority of students give (sometimes qualified) approval to our evidentiary regime as they see it applied.[50] Even if a student comes away from his study of evidence law with largely critical conclusions, I believe the methods and materials of the course allow him to feel the strength of the tensions with which that law must contend, and the difficulty of the enterprise in which it plays a crucial role.

49. *See* ROBERT P. BURNS, THOMAS F. GERAGHTY & STEVEN LUBET, EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY 93, 113 (2d ed. 1994).

50. It may be that evidence law looks better in the hands of the very good trial lawyers and judges who act as judges in our simulated trial than it might in other hands.