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THE VALUE OF AN INITIAL LOOK AT COUNTERINTUITIVE EVIDENCE RULES

JACK H. FRIEDENTHAL* & W. DANIEL SHIEH**

Just prior to taking a course in Evidence, a typical law student will have some idea of the rules involved, but will not have seriously considered the policies, or lack thereof, to support those rules or the decisions applying them. Because individuals, in or out of law school, are throughout life constantly called upon to make decisions, they develop some sense about the nature and type of information that they wish to have before making a determination. The instinctive notions about what type of evidence is or is not important and reliable does not always comport with the formal evidence rulings employed for courtroom purposes. Indeed some rulings seem counterintuitive in a modern world while others are highly questionable. It sets a proper tone for the course if, at the outset, students are prepared to question the validity of various rules and their interpretation.

In Evidence courses, the tendency is to plow through the formal Federal Rules of Evidence, beginning with relevancy, moving to issues of reliability, and ending with matters governed by special policies, such as privilege. Although the underlining policies and rationales are explored along the way, emphasis tends to be on the way the rules read and how they are interpreted, which is, of course, of major significance. It may be worthwhile, however, to spend a session or two at the very start of the course exploring policy and rationale regarding some of those areas where the rules seem to diverge from what the students beginning a course in evidence would believe the rules should be. Simply noting what those areas are, and what information they involve, can heighten student interest in the course and provide some lively debates that can continue throughout the course.

One possibility is to ask the students, at the very outset of the course, to answer a questionnaire containing a number of fairly simple inquiries that raise the issues and make students aware that all they might surmise is not necessarily what the result will be in a court of law. There are numerous possible examples. Some rules will seem to make little sense even after

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consideration of the policies that are said to justify them. Others may appear counterintuitive at first but ultimately will make sense to the student after some reflection. It would appear useful to include examples of both in the questionnaire to make students aware that what may seem intuitive can often cut both ways. We have prepared a short set of questions, attached hereto¹ as one approach, but there are many inquiries in other areas that could be substituted.

Consider, for example, a situation in which a person involved in an automobile accident divulges facts showing her negligence in separate confidential statements to her husband and her twin sister. Should either of these individuals be forced to testify as to what they were told? Suppose the statements were made to one's child or to an unmarried life-partner? If privileges are to exist to preserve important relationships, what rationale could justify different results regarding the different people involved? Or consider the varying rules among the states regarding the situation when one spouse is called upon to testify against the other in a criminal case.² Should the spouse who is called be permitted to refuse to testify? If the spouse is willing to testify should the defendant spouse be permitted to prevent the testimony? Is there any reason to believe that prohibiting a person from willingly giving adverse testimony against one's spouse would help preserve the relationship? The instructor need not answer all of the questions that might arise at such an early stage of the course; it would be sufficient to note the differences and challenge the student to think about why, or why not, it should exist so as to be prepared to respond when matters of privilege are reached in due course.

Of course the hearsay rules, and in particular some of the exceptions, are prime targets for similar analysis. In a modern society does the dying declaration make any sense?³ Do past assumptions of a person's belief in the afterlife still hold true today? If they do not, should dying declarations that are clearly self-interested be admissible? Even if the assumption holds true and guarantees that the dying person is not likely to deliberately lie, does it equally guarantee his or her perception of who is responsible?

Another prime area for raising awareness is that which involves admission against an employer of statements of an employee regarding the subject of the employment. Assume, for example, that a company vehicle is involved in an accident in which the driver of another vehicle is injured and brings suit against the company. The driver of the company vehicle informed his or her

1. See the "Questionnaire" immediately following this Article.

2. While the Supreme Court has held that the privilege can only be invoked by the witness spouse in *Trammel v. United States*, 445 U.S. 40, 53 (1980), a number of states continue to allow either spouse to invoke the privilege. See, e.g., ALASKA R. EVID. (505)(a)(1) (1989), available at <http://www.state.ak.us/courts/ev.htm#505>; MINN. STAT. ANN. § 595.02(1)(a) (West 2000); MONT. CODE ANN. § 26-1-802 (2003).

3. FED. R. EVID. 804(b)(2).

supervisor, the head of the company motor pool: “The accident was all my fault.” The driver has left the company’s employ and can no longer be located. Why should the supervisor, who has no personal knowledge of the facts, be required to repeat the absent driver’s admission?⁴ If the driver had said, “It was all the other driver’s fault,” why should that statement be excluded?

A similar situation can occur with regard to the admission of statements of a party to a lawsuit that were favorable to the party when made but turn out to be unfavorable in the legal action.⁵ Consider a situation in which a person lies about the ferocity of his watchdog in order to obtain lower premiums on his homeowner’s insurance. If the dog later attacks a pedestrian, why do the rules permit the statement to be admitted? If the purpose of the rules of evidence were to serve a policy goal of punishing persons for lying, perhaps admitting the statement should be permissible. But if the goal is to ensure an accurate trial, then perhaps the admissibility of the statement should be reconsidered.

Other interesting examples in which a common sense approach seems to prevail in the face of “technical policy” difficulties are in areas in which the basic underlying policy seems primarily to be the fact that we intuitively believe that the information is credible. Thus a statement of one’s intent to act in the future is admissible to show that the person did indeed carry out the stated intent.⁶ In fact, there is no more reason to credit such a statement than one in which a person outside of the trial describes an act that he has just completed, although the latter would be considered inadmissible hearsay unless it falls within another exception. If anything, the former type of evidence is more vulnerable than the latter since not only may a person falsely state what his or her intent is, but also the person may decide not to carry out an honestly stated intention.

One area in which the rules have seemingly gone astray, due primarily to political furor that energized Congress, involves the use against a criminal defendant of certain prior crimes. Although a defendant’s past convictions are generally inadmissible to establish his or her guilt,⁷ specific rules have been added in cases of sexual assault or child molestation permitting admission of prior convictions of those same types of crimes.⁸ One cannot help but note a very real concern that an innocent defendant will be convicted solely on the basis of past crimes. Yet the rules remain in force despite the fact that empirical studies have not turned up conclusive evidence of a higher recidivism rate to distinguish sexual crimes from those of murder or theft.

4. FED. R. EVID. 804(b)(3).

5. FED. R. EVID. 801(d)(2)(A).

6. FED. R. EVID. 803(3).

7. *See, e.g.*, FED. R. EVID. 404(b); FED. R. EVID. 406.

8. FED. R. EVID. 413–15.

It is true that a course in Evidence will normally address many of these issues as the course progresses. But some of the benefits of early exposure to these issues may be lost as students scurry to learn the black letter of the law rather than seeking to understand its intended purpose. By presenting these and other similar issues at the outset of the course, it can help lay a proper foundation for students to examine the assumptions underlying the rules and thereby enable them to provide a more meaningful analysis of complex evidentiary matters, first as students and ultimately as practitioners, who can take leading roles in the necessary reformation of evidentiary rules.

QUESTIONNAIRE

You are the presiding judge over the following proceedings and must decide what evidence should be admitted in each case.

Mary and Bill are married with two small children. Both Mary and Bill were avowed atheists, a fact known to their local community that includes many very religious families.

John and Joe are twin brothers in the community. Joe is an upstanding person who was friendly with Mary and Bill. John, however, is a troubled young man who has had a number of violent encounters for which he has served some time in prison. At the same time he has expressed deep religious beliefs and animosity toward atheists.

Recently Bill and Mary were attacked by some local thugs. Bill was badly beaten and Mary was sexually assaulted. Neither can conclusively identify their assailants, who wore crimson ski masks, but the assailants did express their displeasure due to their victim's non-religious beliefs.

1. Several local young men have been arrested and charged with the crimes, including John. John denies any involvement. At John's trial for criminal assault and rape, would you admit the following:
 - a. The actual showing of a gruesome scar on Bill's abdomen, in addition to testimony describing it, resulting from a knife wound received during the assault, and reading "God Lives."
 Yes
 No
 - b. John's prior felony conviction for assault on a local tailor because "he wouldn't go to church on Sundays."
 Yes
 No
 - c. John's prior felony conviction for assault on a security guard where he used a knife to write "God" on the guard's lower back.
 Yes
 No
 - d. John's prior conviction for attempted rape of a former girlfriend who had broken off their relationship.
 Yes
 No

- e. A religious tract, written by John, entitled “Non-Believers Must Die” that did not directly advocate violence.
- Yes
 No
- f. Testimony by a trash collector that he saw a mask in the dumpster behind John’s apartment in the early morning on the day after the assault, although he could not recall its color.
- Yes
 No
- g. John’s confidential statement to his lawyer, Lucy, regarding the crimes against Mary and Bill, “Sure I took part. It served those guys right.”
- Yes
 No
- h. John’s statement to his lawyer, Lucy, made when Lucy’s paralegal, Peter, was present in Lucy’s office.
- Yes
 No
- i. John’s statement to his lawyer, Lucy, made when Lucy’s golfing buddy was present in Lucy’s office.
- Yes
 No
- j. John’s confidential statement to his twin brother Joe regarding the crimes against Mary and Bill, “I got those creeps and I’m glad.”
- Yes
 No
2. Suppose Wilma, John’s estranged wife, was in John’s apartment just prior to the assaults on Mary and Bill, and it is believed that she has information about John’s planning of the assaults at that time.
- a. Can Wilma refuse to testify?
- Yes
 No
- b. If Wilma is willing to testify, should John be able to successfully prevent her from doing so?
- Yes
 No

3. Suppose Bill dies from his injuries just prior to John's trial. On his deathbed, and fully aware that he is about to die, Bill whispers to the attending nurse, "That troublemaker Joe is responsible for my death." The nurse immediately responds, "Don't you mean John?" Bill passes away before he can reply.
- a. Should John be permitted to introduce Bill's statement?
- Yes
- No
- b. If the nurse testifies as to Bill's deathbed statement, should the prosecution be able to admit evidence to show that Bill was an avowed atheist?
- Yes
- No
- c. If the nurse testifies for John, should the prosecutor be able to show that nine years previously, the nurse had been convicted of felony burglary, for which she received one month in jail and three years probation, for driving a getaway car for her then boyfriend?
- Yes
- No

