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Introduction to the Evidence Symposium: The New Generation of Realists in Evidence Law

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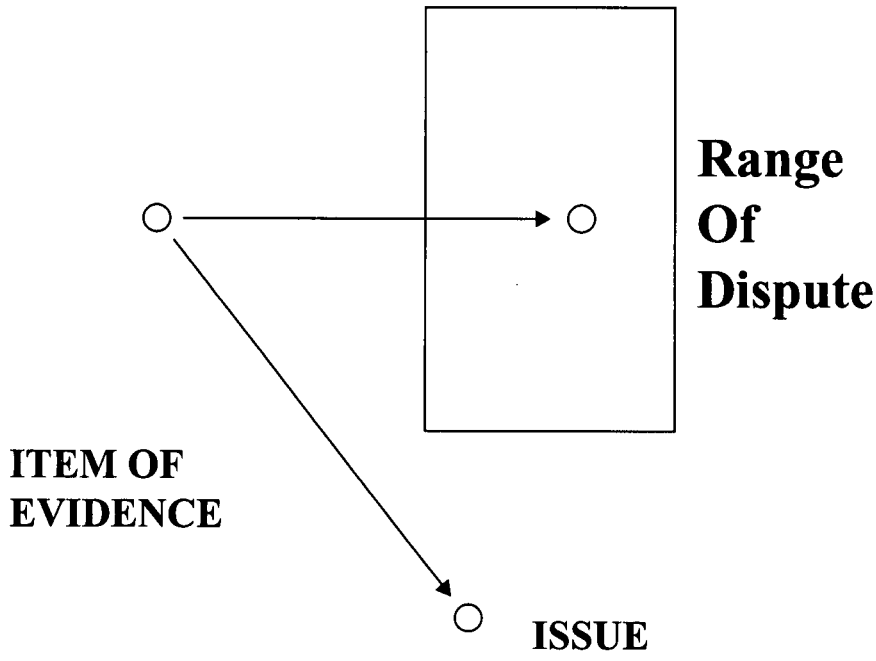
During this Symposium, we shall hear a large number of student presentations on a set of seemingly disparate subjects. If we look closely enough, however, we shall see that the student presentations share four common denominators. The first common denominator is what the students have chosen *not* to discuss. The students have decided against discussing areas of evidence law, such as privilege doctrine, in which the courts are supposed to balance the needs of the factfinding process against extrinsic social policy.[1] During the discussion, we shall not be debating the advisability of recognizing an environmental audit privilege or the scope of the crime-fraud exception to the attorney-client privilege.

The second common denominator is what the students have chosen to discuss. All the students have opted to analyze a facet of judicial regulation of the jurors' factfinding process. Figure 1 depicts that factfinding process.

1. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, EDWARD J. KIONKA & KRISTINE STRACHAN, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 661 (4th ed. 1997).

FIGURE 1



The rectangle on the right hand side of the figure represents the range of issues legitimately in dispute in the case under the substantive law and pleadings.[2] To reach an accurate decision, the jurors must perform three tasks: They must properly assess the reliability of the proffered item of evidence; correctly gauge its probative value to establish the fact it is offered to prove; and avoid misusing the item as evidence of a fact that is not properly in dispute at trial.[3] To minimize the risk of misdecision by the jury,[4] the courts have imposed safeguards at each step of the jurors' reasoning process.

To begin with, the courts focus on the item of evidence itself. In the skeptical tradition of the common law,[5] the jurors are not allowed to accept the item of proffered evidence at face value. In general, the proponent of the item must authenticate the item,[6] and in particular the proponent must demonstrate that the item is reliable enough to serve as a

2. FED. R. EVID. 401.

3. FED. R. EVID. 403.

4. 6 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 105-09 (J. Bowring ed., 1962); Victor Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59 (1984).

5. CARLSON, *supra* note 1, at 184-85.

6. FED. R. EVID. 901.

basis for a rational finding of fact by the jurors.[7]

Next, the courts turn to the relationship between the item of evidence and the facts of consequence within the range of dispute. To prevent irrational decisions by the jury, the courts demand that the item be probative of at least one of the facts in the range of dispute.[8] If the item is irrelevant, the item cannot be submitted to the jury.[9] Even when the item possesses bare logical relevance to one of the facts of consequence, in his or her discretion the judge may exclude the item if the accompanying probative dangers substantially outweigh the probative worth of the item.[10] To exercise that discretion intelligently, the judge must assess the probative value of the item and consider such factors as whether the proffered testimony describes an incident remote in time and place from the events mentioned in the pleadings.[11]

Finally, courts consider the relationship between the item of evidence and facts beyond the proper range of dispute. Even if the item is technically relevant to a fact within the range of dispute, the judge must realistically evaluate the risk that the jurors will put the evidence to another, improper use.[12] Although the item possesses special relevance on an acceptable non-character theory,[13] there might be a significant danger that at a subconscious level the jurors will be tempted to simplistically treat the item as proof of a defendant's bad character and punish the defendant for his past misconduct rather than the present charge.[14] Or while testimony about an out-of-court statement might have some relevance on a nonhearsay theory,[15] there could be a grave danger that the jurors will employ the statement as substantive proof of a fact asserted in the statement—a forbidden hearsay use of the evidence. The judge balances these dangers against the probative value of the item. All the student presentations at this Symposium concern the judicial regulations of one of these steps in the jurors' reasoning process.

A further common denominator shared by most[16] of the presentations is that by and large, the students believe that the courts are getting

7. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

8. FED. R. EVID. 401.

9. FED. R. EVID. 402 ("Evidence which is not relevant is not admissible").

10. FED. R. EVID. 403.

11. CARLSON, *supra* note 1, at 296-97.

12. FED. R. EVID. 403 advisory committee's note.

13. FED. R. EVID. 404(b).

14. 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 8:23 (rev. ed. 1999).

15. FED. R. EVID. 801(c)

16. Alone among the student presenters, Mr. Dillickrath appears to believe that most courts are consistently reaching the right result when presented with proffers of expert testimony about the supposed unreliability of eyewitness identification evidence. Thomas J. Dillickrath, Comment, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059 (2001).

it wrong; the courts are regulating in ways that are unsound and ill-conceived. In some cases, the students believe that the courts are improperly assessing the reliability of the item of evidence. The courts are erring both in excluding trustworthy testimony about child sexual abuse accommodation syndrome[17] and in admitting co-conspirators' declarations of suspect reliability.[18] In other cases, the courts are going awry in gauging the probative worth of the item of evidence. For instance, in one student's view, the courts have set the probativity bar too high and are unjustifiably excluding powerfully exculpatory evidence that a third party committed the offense the accused is charged with.[19] In still other cases, the courts are underestimating the probative dangers posed by technically relevant evidence. By way of example, in the judgment of the student presenters, the courts have been blind to an intolerable risk of misuse posed by bystanders' statements introduced to explain police conduct[20] and accomplices' plea agreements.[21]

The fourth and final common denominator should come as no surprise to a Legal Realist: As a general proposition, the students conclude that the courts are misanalyzing these issues because the courts' policy biases and preferences are getting in the way. Of course, those preferences legitimately come into play in the areas of evidence law such as privilege doctrine which concern extrinsic social policy. In their presentations, however, the students are addressing the facets of evidence law that, at least on their face, relate only to the rationality of the jurors' factfinding process. In some instances involving federal case law, the students accuse the courts of pro-prosecution bias. In other instances involving Florida jurisprudence, the students believe that the courts have a pronounced defense bias that gets in the way of principled decision-making.

In effect, this Symposium is proof of the continuing vitality of Legal Realism. The students reject the hypothesis that the outcomes in the published opinions analyzed in their presentations are explicable

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17. Michael D. Stanger, Comment, *Throwing the Baby Out with the Bathwater: Why Child Sexual Abuse Accommodation Syndrome Should Be Allowed as a Rehabilitative Tool in the Florida Courts*, 55 U. MIAMI L. REV. 561 (2001).

18. Richard Sahuc, Comment, *The Exception that Swallows the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in* United States v. Williamson, 55 U. MIAMI L. REV. 867 (2001).

19. Brett Powell, Comment, *Perry Mason meets the "Legitimate Tendency" Standard of Admissibility (and doesn't like what he sees)*, 55 U. MIAMI L. REV. 1023 (2001).

20. Joelle Hervic, Comment, *Statements of Bystanders to Police Officers Containing an Accusation of Criminal Conduct Offered to Explain Subsequent Police Conduct*, 55 U. MIAMI L. REV. 771 (2001).

21. James D. Carlson, Comment, *Admissibility of Plea Agreements on Direct Examination–Are There Any Limits?*, 55 U. MIAMI L. REV. 707 (2001).

solely in terms of the formal relevance principles invoked by the courts.[22] Rather, in the Holmesian Realist tradition, the students believe that many of these opinions are driven by the judges' policy preferences and biases.[23] The students stop short of levelling the Critical accusation that "law is politics."[24] However, the students believe that even in this seemingly apolitical area of evidence law, the courts' decisions cannot be rationalized without taking into account the judges' policy biases.

It has been said that the real contribution of Legal Realism to the judicial process has been the insight that if the system of precedent is to operate effectively, the judge writing an opinion must present a reasoned articulation elaborating on his or her policy choice.[25] Otherwise, the opinion gives neither the lower courts nor practitioners adequate guidance for the future. If that is the case, the student presentations in this Symposium should be of great aid to jurists writing opinions about the judicial regulations critiqued today. These presentations bring the relevant policy issues much closer to the surface. By identifying the pertinent policy biases and putting them on the table, the presentations should help constrain the subjectivity of judicial decisions and thereby help "return law from the abyss (or abuse) of politics."[26]

22. BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 147-50 (1994) (a discussion of formalism).

23. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little, Brown & Co., 1946).

24. KUKLIN, *supra* note 22, at 175 (a discussion of Critical Legal Studies).

25. Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC. INQUIRY 213, 254-55 (1992); *See also* KUKLIN, *supra* note 22, at 159.

26. Ariens, *supra* note 25, at 254.