1957

Book Review (reviewing Zelman Cowen & P.B. Carter, Essays on the Law of Evidence (1956))

Bernard D. Meltzer

ments, contains an informative account of the origins and effects of the Crossed Cheques Act of 1906.[5]

Many books and articles deal with various aspects of the history of the law of commercial paper in England and on the continent, and occasionally one deals with the subject comprehensively. To this reviewer, Mr. Holden's book is the best that we have. It deserves a place in every law library, and many copies deserve a place in every law school library to the end that students of the law of bills and notes, with or without promptings from instructors, may become aware of the happenings in centuries now gone.

I hope Mr. Holden's book may stimulate Beutel to consolidate and expand his researches into the history of the law of commercial paper in America. Teachers need it. Or if there is some, to me, unknown commercial law historian who will do the same job, the teachers of the law of commercial paper in America and, we hope, their students, will be better teachers, better lawyers, and better judges.

A knowledge of legal and other classifications of history, a philosophical awareness of the creative processes observable in the evolution of the law, a consciousness of fluctuating economic and social facts, in the law with respect to which, in the language of Pound "there will always exist a need for stability and a need for change," and which, in the tautological language of Chief Justice Marshall, are "indispensably necessary" to an harmonious fusion of the needs of changing business with the needs of a changing society, are lines along which Mr. Holden's book provides much knowledge and will stimulate much thinking.

WILLIAM E. BRITTON.

University of California,
Hastings College of Law.

ESSAYS ON THE LAW OF EVIDENCE. By Zelman Cowen and P. B. Carter. New York: Oxford University Press, 1956. Pp. xvii, 278. $5.60.

This useful and well-written book contains essays (some of which have already graced the law reviews) on a broad range of topics in the law of evidence. They deal with hearsay and the English Evidence Act 1938; confessions confirmed by subsequent "facts"; evidence procured through illegal searches and seizure; the opinion rule; criminal convictions in subsequent civil proceedings; unsworn statements by defendants; compellability and privilege under section 32 of the Matrimonial Causes Act, 1950; and the burden of persuasion in criminal and matrimonial cases. Although several of them elaborate essentially local matters, of little interest to American readers, most of them illuminate difficulties which have persisted throughout the common-law world. This is true of the three essays about which I propose to comment in some detail—those dealing with (1) illegal search and seizure, (2) illegally obtained confessions and the doctrine which Wigmore somewhat inelegantly labeled "confirmation by subsequent facts," and (3) similar-fact evidence.

[5] 6 EDW. 7 c. 17.

The essay on illegally-acquired evidence briefly reviews leading American cases and surveys the authorities in the United Kingdom and the nations of the British Commonwealth.[1] It explicitly annotates Mr. Justice Frankfurter's observation in *Wolf v. Colorado*[2] that the ten jurisdictions in the United Kingdom and the British Commonwealth passing on the question have uniformly rejected the exclusionary rule. And although the authors question the Justice's reliance on an unclear South Australian case[3] and his failure to refer to South African cases,[4] their survey reveals the substantial correctness of his observation as of the time of the *Wolf* decision. Scottish cases subsequent to *Wolf* reveal, however, a sudden swing toward the exclusionary rule. The authors applaud this development and suggest the approach adopted in the case of *Lawrie v. Muir*[5] as the model for other Commonwealth jurisdictions.

In making this suggestion, the authors do not consider statements in the *Lawrie* opinion which reverse the thrust of distinctions applied under the *Weeks*[6] doctrine and generate doubt as to the court's rationale. Thus, the court, after announcing a vague totality-of-circumstance-approach, suggested first, that the rule would be applied more readily to evidence procured by private, as opposed to police, investigators;[7] and, secondly, that the rule would be applied less readily to highly incriminating evidence offered against one charged with a serious, rather than a petty, crime.[8] The first suggestion is plainly inconsistent with the limitation of the *Weeks* doctrine to official misconduct, and both suggestions run counter to one of the standard justifications for the exclusionary rule, namely, that it is the only effective deterrent of police impropriety. The court, moreover, failed to suggest any other rationale compatible with the distinctions it emphasized.

Before commenting on the authors' treatment of the broad issues raised by the exclusionary rule, it is convenient to refer to their essay on confessions, which sets forth their general approach. This thoughtful essay shows that in the Commonwealth, as in the United States, a single theory will not

1 I shall use "Commonwealth" to refer to "the United Kingdom and the nations of the British Commonwealth."

2 338 U.S. 25, 30, 39, 69 Sup.Ct. 1359, 1362, 1367, 93 L.Ed. 1782 (1949).

3 Miller v. Noblet, [1927] S.A.S.R. 385.

4 Among other cases, they refer (p. 97) to Rex v. Maleleke, [1925] T.P.D. 491. This case excluded evidence obtained by compelling the defendant to compare his foot with footprints at the scene of the crime, on the questionable ground that the defendant's privilege against self-incrimination had been violated. Mr. Justice Frankfurter's omission of this case is not surprising, since under American doctrine, evidence secured in violation of this privilege is usually inadmissible even in jurisdictions which reject the *Weeks* doctrine. The authors also (p. 97) refer to later cases which show that South Africa should have been included in the list of Commonwealth jurisdictions which have rejected the exclusionary rule as to evidence procured by illegal search and seizure. *Cf.* Wolf v. Colorado, 338 U.S. 25, 30, 69 Sup.Ct. 1359, 93 L.Ed. 1782 (1949).

5 1950 Scots L.T. 37.

6 Weeks v. United States, 232 U.S. 383, 34 Sup.Ct. 341, 58 L.Ed. 652 (1914).

7 ". . . the two inspectors who in this instance exceeded their authority were not police officers enjoying a large residuum of common law discretionary powers, but the employees of a limited company acting in association with the Milk Marketing Board, whose only powers are derived from contracts between the Board and certain milk producers and distributors, of whom the appellant is not one." 1950 Scots L.T. at 40.

8 *Ibid.*

explain all of the cases and that the classic objective of excluding unreliable confessions has been increasingly supplemented by the objective of enforcing proper standards on the police. The authors reject the test of reliability as too limited, and they question rule 505 of the *Model Code of Evidence* and strikingly similar provisions of recent New Zealand legislation,[9] on the ground that reliability is made the only test except where force, actual or threatened, is involved. They criticize the general failure of current confession doctrines to implement fully and consistently the objective of enforcing proper police standards, and they endorse suggestions made in the American literature that a coherent doctrine requires that evidence derived from an otherwise inadmissible confession should neither purify the confession nor itself be admissible.

The authors' general approach to the issues raised by the exclusionary rule is reflected by the following statement in their essay on confessions:[10]

> . . . If it is not possible, and we do not believe it to be possible, to control police practices in the matter of obtaining confessions by penal sanctions imposed directly on the police themselves, we have to ask whether society is the better for insisting on certain standards of police practice even at the cost of allowing some guilty persons to escape, or whether conviction of the guilty ought to be of paramount importance in all cases. This is a crucial question. It may be that in a primitive or lawless society the problem of maintaining order and security will loom so large that insistence on decent police methods may be regarded as too great a luxury. However, such considerations do not apply to the society in which we live. It is our opinion that in a stable and comparatively law-abiding community such as our own it is better that a few guilty men and women should go unpunished than that the encroachments of the police state should be tolerated or accepted. Such encroachments inevitably involve the use of improper methods upon all suspects without possibility of discrimination between the guilty and the innocent. What constitutes an improper method will itself depend upon the degree of stability and civilization which the society in question has reached. In no society should a merely technical, and, from the point of view of the *mores* of that society, completely unobjectionable, contravention of the law justify exclusion.

And in an accompanying footnote, they indicate that the case for the exclusionary rule is independent of the merits of the police standards which it is to implement:

> "It is not necessary to enter into a discussion here as to what standards are desirable, or to ask whether the Judges' Rules set the right standard, though it is noteworthy that Lord Porter has recently expressed doubt as to whether these Rules are not in certain respects over-zealous in their protection of guilty persons. (2 CURRENT LEGAL PROBLEMS 22–24(1949)."

Even those who (like this reviewer) are sympathetic to the exclusionary rule may feel that advocates of its adoption in the Commonwealth might well have elaborated on the difficulties which that rule raises. Since these diffi-

9 Evidence Act, 1908, § 20, 8 EDW. 7 (New Zealand) (as enacted by Evidence Amendment Act, 1950, § 3, 14 & 15 GEO. 6 (New Zealand).

10 Pp. 69–70.

culties have recently been illuminated by Professor Allen and Professor Barrett,[11] they will not be developed here.

The authors' proposed distinction between purely technical violations and those which violate the mores raises a set of questions which also may have merited fuller development. What universe is to be examined or to be emphasized in searching for the mores: the lawyer's attitudes, the policeman's practices, the layman's opinions, the traditions enshrined in "constitutional documents"? Is the rule of exclusion to be suspended or reshaped in accordance with shifting judicial views as to increased community tolerance of police improprieties—*e.g.*, when the general problem of law enforcement becomes more acute or when a particularly savage crime has been committed? Assuming, moreover, that the mores of a community can be sufficiently identified for this purpose, are they the appropriate source of police standards? The "community," especially where serious or dramatic crimes are involved, is often ambivalent and impatient about procedural regularity. It may be that the Anglo-American tradition of restraints on government calls for police standards higher than those which are included in the "mores" current at any particular time. Indeed, the principal meaning and the principal problem of a constitutional regime, whether written or unwritten, would seem to lie in the restrictions which the past imposes on the translation of current mores into law.

In any event, the authors' distinction may produce even more administrative difficulties and uncertainty in the Commonwealth than its American prototype, the civilized standards test, has produced under the Fourteenth Amendment. This is true, first, because of the relative mildness of police improprieties challenged in the Commonwealth cases when compared with the excesses involved in the American cases; and, secondly, because of the doubts as to the wisdom of some of the police standards which would be implemented by the exclusionary rule. Such doubts—*e.g.*, those which have been expressed concerning the English rules governing the interrogation of suspects—make a prediction of which rules reflect the mores highly speculative. Furthermore, if police violations which would bring the exclusionary rule into play should turn out to be frequent, the authors' formula will doubtlessly breed complexities, which will, in turn, deepen the uncertainty.

It is true that an uncertain judicial formula is not necessarily an unwise one. And even an uncertain exclusionary rule may curb police impropriety, because it makes clear at least that any departure from theoretical police standards involves the risk of exclusion. It is doubtful, however, that these general considerations put to rest the questions raised by the substantial uncertainties inherent in the authors' formula. In this connection, it should be noted that the authors favor the exclusionary rule primarily because they assume that it will deter police impropriety. But the lack of information about the actual impact of that rule has prompted thoughtful questioning of that assumption.[12] And where the rule is stated so ambiguously as to

[11] See Allen, Review of Beisel, *Control over Illegal Enforcement of the Criminal Law*, 69 HARV.L.REV. 1167 (1956); Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF.L.REV. 565 (1955).

[12] Irvine v. People of State of California, 347 U.S. 128, 135–36, 74 Sup.Ct. 381, 384, 98 L.Ed. 561 (1954) *rehearing denied*, 347 U.S. 931, 74 Sup.Ct. 527, 98 L.Ed. 1083; Allen, *supra* note 11, at 1168.

lack a reasonably clear warning quality, there is even more reason to question this assumption. Such ambiguity may invite the police to gamble on the prosecution's ability to find the rule inapplicable to the case at hand.[13]

As Professor Allen has observed,[14] questions about the actual impact of the exclusionary rule (regardless of the details of its formulation) cannot be answered by syllogisms unchecked by empirical investigation. Such investigation is obviously a formidable task because of the many variables affecting the decency and effectiveness of law enforcement. It is unlikely, moreover, that such investigation would resolve the crucial issues posed by the exclusionary rule. These issues cut too deeply into competing values to be resolved by even the most comprehensive data. Nevertheless, investigation may illuminate the actual impact of the rule on the institutions whose functioning it is supposed to control. It may, moreover, suggest the elements of a larger program necessary for decent and effective law enforcement.[15]

Even if one concludes that the adoption of the exclusionary rule should not wait upon time-consuming and perhaps unrewarding "studies," the question remains whether legislation would be preferable to the judicial innovation which the authors envisage. Although I hesitate to speak about the Commonwealth, legislative action seems desirable for a variety of reasons, including the clash of values involved, the possibility of a systematic examination not dependent on the accidents of the adversary process, and the desirability of avoiding new sanctions with retrospective effect. Legislation would also reflect a serious commitment to the ideal of restraints upon official power. Such a commitment, along with the preceding debate, might well contribute to the understanding and acceptance of such restraints by the police and the community.

Legislative consideration of the merits of the exclusionary rule should, I believe, be coupled with a review of the police standards to be implemented by that rule. This is not to question, as a matter of logic, the argument that rules regulating the police should be enforced, regardless of their content. Nevertheless, a plea for more effective enforcement is, as a practical matter, related to the merits of the standards being enforced. Moreover, the application of the exclusionary rule, if American experience is a guide, will probably result in a reshaping of the theoretical standards.[16] These considerations suggest that the adoption of the exclusionary rule without a searching re-examination of police standards would deal with only one of a group of interrelated questions. Furthermore, it would side-step an un-

[13] The police's willingness to take this gamble is naturally increased if evidence procured by a violation of *A*'s rights may not be challenged on that ground by *B*. This doubtful limitation of the exclusionary rule, although recognized by the federal courts, has been rejected by California. See People v. Martin, 45 Cal.2d 755, 761, 290 P.2d 855, 857 (1955); People v. Jager, 303 P.2d 115 (Dist.Ct.App.1956). The authors are somewhat ambivalent in their treatment of this limitation, questioning it at one point, p. 74; but relying on it at another in criticizing Mr. Justice Frankfurter's discussion of Miller v. Noblet, [1927] S.A.S.R. 385. P. 95.

[14] See Allen, *supra* note 11, at 1168.

[15] Empirical investigation might be especially fruitful in jurisdictions such as Scotland and California, which have just swung over to the exclusionary side.

[16] See, *e.g.*, United States v. Rabinowitz, 339 U.S. 56, 70 Sup.Ct. 430, 94 L.Ed. 653 (1950); Note, *Two years with the Cahan Rule*, 9 STAN.L.REV. 515 (1957).

derlying problem, namely, the basic reasons for any gap which may exist between police standards and police practices. Such a gap may result from the usual distaste of any group for restrictions which interfere with desirable ends. It may, however, result from deep-seated and justifiable convictions on the part of the police that particular restrictions are incompatible with the demands of their job. In the latter event, it is doubtful that the exclusionary rule would contribute materially to closing the gap. A more likely development would be a quasi-official condonation of police irregularities and of the evasions necessary to avoid the sanction of the exclusionary rule.[17]

The third essay about which I would like to say something is the one on "similar facts." It is long and complex, but rewarding. It analyzes in great detail the recent leading English decisions. It exposes the inadequacy of prevalent but empty verbal formulas and the difficulties and confusions which such formulas have produced. It is guided by a useful insight, sometimes disregarded in the cases, that all of the so-called rules should not be permitted to obscure the essential problem—*i.e.*, the balancing of probative value against the risks of undue prejudice.

The authors' "major thesis" is the need to differentiate between two categories of similar-fact evidence. The first category is described as evidence the "primary relevance" of which is via propensity; the second is a residual category that includes all similar-fact evidence which has "substantial relevance" other than via propensity. The authors would, in general, require greater probative value for the admissibility of evidence in the first category. Although the authors' thesis is a familiar one, they make a significant analytical contribution by showing that the propensity category is broader than previous treatments of the problem, including the comment on rule 311 of the *Model Code of Evidence*, have suggested. Thus, for example, evidence which courts often describe as "common plan" or "system" generally is, on analysis, evidence of propensity, albeit of a particularized or a strong propensity.

The authors, however, seem to push their insight too far by urging that evidence of knowledge also falls within the propensity category. I venture to suggest that, for this purpose, a sharp distinction must be drawn between knowledge and intention. Knowledge, apart from the possibility of forgetfulness, is not a propensity, but a constant characteristic. For example, the defendant's knowledge of the poisonous quality of a substance is not more or less "propensity" evidence than the defendant's having red hair. This definitional point is not entirely pedantic because of the operational consequences which the authors attach to their categories.

The authors' basic test for distinguishing between the two categories of evidence depends on "the mental processes involved in using the evidence as probative material." [18] In the residual category, the reasoning underlying relevancy involves an inference from the objective probabilities and not

[17] *Cf.* RICHARD M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 136–37 (2d ed. 1953); *Letter from English Policeman on Use of Judges' Rules* (Oct. 20, 1950), in WILLIAM T. FRYER, SELECTED WRITINGS ON EVIDENCE AND TRIAL 845 (1957).

[18] P. 133.

from the defendant's propensity to act in a particular way. This distinction is considered crucial by the authors, who say:[19]

> . . . *Propensity relevance is dangerous because its probative value depends, and depends always, entirely upon the assumption that the propositus has not mended his ways. That he may have done so is a possibility to which a lay trier of fact is often unwilling to give due regard.*

I would refer also to the familiar danger that the jury will not be concerned solely with whether the defendant has mended his ways, but also with whether his total career shows that he is a "bad man," who should be in jail regardless of the proof of the offense charged—*i.e.*, regardless of whether he had mended his ways on the occasion in question. I would also emphasize that "nonpropensity" evidence, relevant because of the objective improbability of a coincidental cluster of similar accidents or similar events, involves a danger essentially similar to that involved in propensity evidence. This is true because, as the authors recognize, the strong improbability that *all* of a series of similar and unusual events (*e.g.*, the bath tub drownings of the defendant's successive spouses) were accidental does not necessarily apply to *each* event and, in particular, to the event charged. The authors, however, appear to neglect the danger that the jury will not make that discrimination. This danger is important because it undermines, or at least weakens, the contention that similar-fact evidence falling within the propensity category involves a significantly greater risk of undue prejudice than does such evidence falling within the residual category. And it is this contention which is the basis for the suggestion that greater probative weight should be required for the reception of similar-fact evidence relevant primarily via propensity.

One may question not only the operational consequences of the authors' classification scheme, but also whether it is workable. The authors suggest the difficulties involved by recognizing that most similar-fact evidence falls into both of their categories. But they do not explicitly recognize that this duality produces such difficulties in the application of their formula as substantially to diminish its utility.

The basic source of this difficulty arises, I believe, from the fact that the authors' test turns on "mental processes," which are not further described. "Mental processes"—*i.e.*, various forms of argument supporting relevancy—may vary both in their starting points and in their explicitness. As a result, an argument for relevancy which does not appear to involve an inference from propensity may, on more explicit analysis, appear to be a propensity argument in disguise or, at least, to fall with equal logic into either category. This point can be illustrated by Wigmore's example: If A, while hunting with B, is almost shot by a bullet from B's gun, B's explanation of bad aim or accidental tripping, etc., is plausible. But if, on a second occasion, there is a second shot from B's gun which is a near miss; and if, on a third occasion, a shot from B's gun kills A, the inference that B shot A intentionally is strong because the chances of an inadvertent shooting on three successive occasions are extremely small. In this form of argument, there is no explicit inference from B's propensity. One could, however,

[19] P. 139.

argue that the first two shots, because of the objective improbability of two successive accidents, reflect *B's* propensity deliberately to shoot at *A* and that the increased probability that the third shot was intentional is based on the proposition that prior events have established *B's* propensity. Thus, the objective improbability inference becomes the basis for a propensity inference, and there is no *a priori* reason for labeling such similar fact evidence as nonpropensity, rather than (primarily) propensity, evidence.

Two English cases discussed by the authors reflect the difficulty of working with the categories. The first is the celebrated *Makin* case,[20] where the defendants were charged with the murder of an infant who was left in their care, under arrangements for support payments which were inadequate, and whose body was found buried in the garden of a house occupied by the defendants. Evidence was admitted that bodies of other infants also committed to the defendants' care for inadequate payments had been found in gardens of other houses formerly occupied by the defendants. The authors find that "the relevance [of the similar facts] depended upon the unlikelihood of the defendants' having occupied several houses in the gardens of which bodies of infants happened to be buried." [21] But this unlikelihood does not fasten guilt on the defendants without a further inference as to their propensity. This point is reenforced by the absence in the *Makin* case of any evidence of the cause of the death of the child for whose murder the defendants were tried. The inference as to the defendants' criminal responsibility seems to have been based on the defendants' propensity—their propensity to accept the care of infants for an inadequate stipend and to conceal infants' corpses in a particular way, which gave rise to the inference of a propensity to murder actuated by greed.

Hales v. Kerr [22] illustrates the same point even more sharply. In that case, the plaintiff contended that he had contracted an infectious disease because of the practice of the defendant, a barber, of using unsanitary equipment. To support this contention, the plaintiff offered evidence that two other persons had contracted a similar disease in the defendant's shop. The authors properly urge that this evidence was propensity evidence on the issue of whether the defendant's equipment was unsanitary. They urge also, however, that if the defendant had conceded that his equipment was dirty but had questioned only the issue of causation, the similar-fact evidence would have been "substantially relevant otherwise than via propensity." "It is improbable," they contend, "that several customers who contracted the same disease after being shaved by the same admittedly dirty razor should have each done so as a result of something other than their being thus shaved.[23] The authors' argument would, however, be patently fallacious if it were not based on the implicit premise that dirty equipment has an infectious tendency.

The final question I wish to raise about this essay relates to the function of judge and jury when similar-fact evidence is offered. The authors appear to attach importance to an instruction that evidence of other misconduct should not be considered unless the jury finds that the other misconduct

20 Makin v. Att'y Gen., [1894] A.C. 57.
21 P. 137.
22 [1908] 2 K.B. 601.
23 P. 138.

occurred. Such an instruction would, however, not serve any analytical purpose unless it were accompanied by an additional instruction requiring a higher degree of persuasion for similar fact evidence than for other links in the evidentiary chain. It is doubtful, however, that even such an instruction would materially affect the jury's deliberations. This is true because of the familiar difficulty of applying varying standards of persuasion to proof of different intermediate propositions and because of the unlikelihood that an instruction will cause a jury to disregard evidence which has been admitted. It is these considerations which presumably move prosecutors to oppose severance where each independent act of misconduct is the subject of a separate charge and which have also moved some American courts to hold a preliminary hearing for the purpose of determining whether similar-fact evidence which is provisionally admissible has sufficient weight to justify its reception.

The questions that I have raised about some of these essays reflect the difficult and complex task which the authors undertook. They are not a proper measure of the authors' achievement, which is an impressive one.

BERNARD D. MELTZER.

University of Chicago.

FREEDOM, EDUCATION, AND THE FUND. Essays and Addresses: 1946–1956. By Robert M. Hutchins. Selected and Edited by Arthur A. Cohen. Meridian Books, 1956. Pp. 241. $1.25.

This is a collection of some fifteen essays and speeches by Robert M. Hutchins over the past decade. Three of the essays were written in 1956 specially for this volume, and about half the speeches date from 1955. It is, therefore, for the most part, very recent Hutchins and relates either to his last days as Chancellor of the University of Chicago or to his recent experiences as President of the Fund for the Republic.

A collection of speeches makes for a somewhat unsatisfactory book to read, and to review. And this book is no exception. The speech, even in Mr. Hutchins' hands, is not a vehicle for sustained, tight analysis; it is likely to be too short and too simple. And a collection of speeches is likely to suffer from a lack of over-all coherence and to be repetitious of leading ideas without, in the repetition, developing them further.

There is an additional reason, in the case of Mr. Hutchins, why such a book is unsatisfactory. I have had the good fortune of being first a student and later a colleague of Mr. Hutchins, and it is time for me to disclose that my affection and admiration for him are such as virtually to disqualify me as a reviewer. It is my strong hunch that like legal heroes such as Holmes and Hand, Mr. Hutchins' power, stature, and impact cannot be measured by what he has, from time to time, written. In these cases, the man is larger than his works, and there is something in his personality and style that makes him at times seem larger than life.

But like Holmes and Hand, the style of the man is reflected in his literary style. Mr. Hutchins, too, is a great stylist. The style, as I see it, rests on three components: a stunning use of the really short, simple declarative sentence; a flair for the generalization uncompromised by the usual qualifying