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Articles

CLINICAL AND THEORETICAL APPROACHES TO THE TEACHING OF EVIDENCE AND TRIAL ADVOCACY

*By Richard A. Posner**

I am very pleased to be here. I am not a specialist in evidence, and have learned a great deal from the conference. I am especially pleased to have encountered at the conference Professor John Mansfield of the Harvard Law School, who taught me evidence forty years ago. If I have made any errors in my evidentiary rulings as a judge, or in these remarks, I am sure they can be referred to his instruction.

I did not take any systematic interest in the field of evidence until I began to conduct an occasional civil jury trial as a volunteer in the district courts of the Seventh Circuit, shortly after I was appointed to the U.S. Court of Appeals for the Seventh Circuit in 1981. Never having been a trial lawyer, naturally I brushed up on the rules of evidence as carefully as I could before my first trial. But I soon discovered that knowing the rules of evidence and applying them are two very different things, and that in fact you can learn them only by applying them, and not by studying them (just as you can learn to ride a bicycle only by doing it, and not by studying the pertinent rules of physics), because their

* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the lightly revised text of a luncheon talk given in Alexandria, Virginia, on June 4, 2002, at the "Conference on Evidence," sponsored by the Association of American Law Schools. I thank Ronald Allen, Richard Friedman, Peter Tillers, and the other participants in the conference for their helpful comments.

meaning and significance emerge only in the context of a trial.

Several years ago, in the course of conducting a civil RICO trial in which it seemed to me that in all likelihood none of the principal witnesses was testifying truthfully, I suddenly realized that I had no idea whether the American type of trial was actually a rational method of resolving factual disputes, and I resolved to investigate the issue systematically rather than be guided by impressions and prejudices. This investigation eventuated in a long article (long by my standards at any rate) on the economics of evidence,¹ which Professor Park mentioned disapprovingly yesterday;² it is now two chapters of my book, *Frontiers of Legal Theory*, published last year.³

I am going to stick closely to the title of my talk, and so avoid any extensive discussion of evidence scholarship; but evidence teaching and evidence scholarship are inseparable, a point I will have to expand on, but not until the end of this talk. For the investigation that I embarked upon bore another fruit, and that was a decision to teach evidence, and—because I was persuaded that the subject could not be taught successfully by the usual method of law teaching—I decided to do so clinically, by utilizing the excellent, fully equipped courtroom of the University of Chicago Law School for the site, and the wonderful case files of the National Institute of Trial Advocacy (“NITA”) as the principal materials for the course, along with the Federal Rules of Evidence and some very limited secondary material, some by Professor Richard Friedman, who is at the conference.

Initially, I planned to use the clinical method only in the first two-thirds of the course, and in the last third switch to a theoretical perspective, in which I would ask the students to reflect on their experience in the clinical phase of the course with the aid of excerpts from the now extensive scholarly literature that takes an external perspective to evidence law. Or, rather, perspectives, for that literature, as usefully surveyed by Professor Park in his talk, includes works written from psychological, statistical, philosophical, economic, and even literary perspectives, and also very useful empirical work, whether theoretically guided or unguided. But the clinical phase of the course engulfed the entire time available, since the NITA materials, with their orientation to-

1. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999).

2. See Roger C. Park, *Posner on Teaching Evidence*, 21 QUINNIPIAC L. REV. 741 (2003).

3. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* Chps. 11-12 (2001).

ward trial advocacy, virtually compel the teacher of evidence who uses them as the principal course materials to make the course in evidence a course in trial advocacy as well—which seems to me entirely appropriate because strategic considerations so dominate doctrine in the actual use of the rules of evidence in a trial.

My course adheres to the clinical model strictly, for better or for worse. All the roles in the NITA trials are occupied by students: trial judge, trial judge's law clerk, trial lawyers, witnesses, jurors, appellate panel (appeals being limited to points of evidence), and the panel's law clerk. Students are very good at role-playing; it has not been unusual for a student playing the role of a plaintiff or a member of a plaintiff's family to cry on the stand. The principal departure from realism, apart from occasional comments that I make to keep the trials on track and from the pretty elaborate post-mortem that we conduct at the end of each trial, is that the jurors deliberate under a tight time constraint (usually forty-five minutes), and in the hearing of the rest of the class. In addition, although there is a regular voir dire of prospective jurors, I sometimes allow jurors who have been struck by means of peremptory challenges to rejoin the jury.

I lay considerable emphasis on the utility of motions in limine to exclude or admit evidence. The trial lawyers in the case prepare such motions and they are ruled on by the trial judge. This gives the students a chance to do some in-depth research, in preparing their motions and (for the judge and law clerk) in ruling on them.

I limit the class to about thirty students. Almost a third of the students are women, which is important because half the witness roles are for women. When I first taught the course, four years ago, few women signed up for it and I thought this might reflect differences in career preferences of men and women. But by now I have almost as high a percentage of women in the course as their percentage of the student body of the law school.

Speaking of women, and recalling the panel Sunday on teaching Rules 412 through 415 of the Federal Rules of Evidence, I am pleased to say that although one of the cases I use in my course is a sexual harassment case and another involves a plaintiff who had had an abortion arguably relevant to the case and is complaining, in part, about loss of sexual enjoyment caused by the accident for which she is suing, none of my students has registered the slightest discomfort with any of the roles to which they have been assigned in these cases, or with any of the examination, cross-examination, deliberations, or rulings in them.

The course runs for nine weeks (the University of Chicago Law School is on the quarter system) and consists of two classes each week, each class being two hours long. The first week I lecture on the Federal Rules of Evidence, not all of them, of course, but the most important, which happily are those that figure prominently in the cases I use. Then the trials begin. Usually there are three or four—a simple slip and fall case to begin with, then the sexual harassment case, then a complex multi-party medical malpractice case, and then maybe a simple criminal case, or perhaps the slip and fall case rerun under the Continental inquisitorial system if I have foreign students in the class who can orchestrate such a trial. I give a conventional law school type of exam but it includes questions on trial strategy as well as on the law of evidence.

The course has, I think, the following advantages:

1. The students get a real feel for the trial process; they learn whether it is their cup of tea.

2. The students are very lively and engaged; they interact more freshly and vividly with each other than they do with a teacher in the conventional classroom setting in which the students face the teacher rather than each other.

3. I learn *much* more about the students than I would in an ordinary class, specifically about their likely effectiveness as trial lawyers, but also (though relatedly) about their judgment and their maturity. I can thus make more informed recommendations to prospective employers than I could just on the basis of a written exam and the normal classroom participation. Some of the students in the course show a real knack for the courtroom and I am able to recommend them in unusually strong terms to employers, private or public, who have a substantial litigation practice.

4. I *think* (no stronger word is possible) the students get a better grounding in the law of evidence than they would if they studied it as a soon-to-be-forgotten typical upper-class law school offering. I think this is true even for students who will never get near a courtroom but who will still have to know something about the rules of evidence in order to protect their clients from the hazards of litigation. What they need to know is not the rules as such but, precisely, what goes on in a courtroom, and I think my course gives them a good sense of that. I am a great admirer of the NITA course files, and in my experience trials based on them are extremely realistic, differing from real trials only in being compressed, yet not compressed to the point where the flavor of a real trial is lost.

I must acknowledge that my conclusion that students get a better grounding in the law of evidence from a course such as this than from a conventional course in evidence may reflect my own conception of the law of evidence as it operates in the federal courts today, the conception flagged by Professor Swift in her talk yesterday; a conception at the other extreme from that expressed by Professor Imwinkelried in his very interesting remarks on Sunday;⁴ a conception, moreover, that reflects a more general view of law that I hold and that is at odds with the view held, I believe largely for career reasons, by most law professors. I am an unrepentant legal pragmatist or, if you will, a legal realist, who believes that doctrine is overemphasized as a determinant of case outcomes. I think what judges try to do in deciding a case—I don't mean just myself—is to come up with a result that is sensible in light of the situation that confronts them in the particular case, and to try to make that result square with precedent, statutory language, and the other formal materials of legal decision making. They can't always do that, but usually they can. In evidence we see this most clearly in Professor Swift's description of the tendency of judges to treat the Federal Rules of Evidence not as a rigid code but as suggestive variations on the theme sounded in Rule 403, the balancing of probative value against cost, or as an economist would put it, trading off accuracy against cost.

I acknowledge, returning to more narrowly pedagogical issues, that some of the students in my course will encounter the same NITA cases in litigation-training programs conducted by law firms and trial institutes, or in separate trial advocacy courses in law school. I don't know how serious the risk of duplication is, but I wish to flag it as an issue warranting further consideration by anyone thinking of taking the clinical route to teaching evidence. I plan in future years not to permit students to enroll who have taken or are taking a trial advocacy course.

The students seem to like my course. They make two principal suggestions for its improvement (as they see it):

1. They want *me* to be the trial judge; they don't have much confidence in the student trial judges though some of them have been excellent.
2. They want me to lecture more on the rules of evidence. They don't like my telling them that they can learn enough about the rules to use them in the courtroom by reading them carefully, thinking about them, and reading the committee notes and other commentary. They

4. Edward J. Imwinkelried, *Using the Evidence Course as a Vehicle for Teaching Legsprudential Skills*, 21 QUINNIPIAC L. REV. 907 (2003).

want some spoon-feeding.

I may make some modifications in future years to meet these concerns. The biggest shortcoming of the course is the omission of that promised theoretical segment, the planned last third of the course. It would be great to be able to immerse the students in the theoretical literature (including in this term empirical work—everything that is non-doctrinal) after they have gotten entirely un-theorized clinical experience in the conduct of the trials. If it is true that the law of evidence is, and rightly so, increasingly focused on the issues of probative value and cost flagged by Rule 403, which are issues of fact on which the theoretical literature bears centrally, that literature deserves a central place in a course on evidence. But there is no time.

And this brings me to the implications of my experience for broader issues of legal education. First, there is a tendency to one-size-fits-all course time allotments. I need more time than a one-quarter (equals one-semester) course has to combine the clinical with a theoretical approach, as I would like to do. But I do not need two quarters (which is equal to a full year in a school on the semester system).

Second, the conventional configuration of the law school curriculum works against a rational structure of instruction in evidence. It seems to me that civil procedure, evidence, and trial advocacy are inseparable and should somehow be combined, not necessarily in one course but in one structured sequence.

Third—and I hope I won't be treading on anyone's corns here—the conventional approach to teaching evidence illustrates what seems to me a common, though by no means universal, characteristic of legal education: that it tends to be at one and the same time both insufficiently practical and insufficiently theoretical. The traditional course in evidence manages, on the one hand, to avoid giving the student the flavor of the courtroom or the strategic dimension of evidence law and, on the other hand, to avoid giving the student the theoretical perspectives on evidence law, the sort of thing one finds, for example, in Peter Tillers' recent edited volume.⁵ The result is a course that many students find boring and useless. I don't wish to generalize too rashly, however, so let me acknowledge that a modern problem-oriented evidence course with dollops of theoretical materials may do the trick as well as the kind of expanded clinical course that I envisage. But I have my doubts, because problems don't give the student a sense of a trial as a distinctive, or-

5. THE DYNAMICS OF JUDICIAL PROOF: COMPUTATION, LOGIC, AND COMMON SENSE (Marilyn MacCrimmon & Peter Tillers ed. 2002).

ganic whole.

Fourth, the infusion of a course in evidence with a theoretical perspective is hampered by the very richness, but more important by the frequently esoteric character, of that perspective, or rather those perspectives. What I *will* say in defense of the economic approach to evidence—for it is what largely explains the undoubted success of the economic approach in other law school courses, such as torts and contracts and property—is that it provides a unifying framework in which to draw together the various strands of theoretical (and empirical) reflection on the law of evidence. If one thinks of a trial as a way of generating information, and the law of evidence as the means of structuring the information search in a way that will (ideally) minimize the sum of error costs and of the costs of conducting the search itself, the various rules and doctrinal curlicues of evidence law tend to fall into place and the psychological, statistical, philosophical, and empirical studies can be seen as contributing to a more careful evaluation of the relevant costs. From this perspective, the balancing test in Rule 403 plays the same central unifying role as the Hand Formula in tort law when tort law is approached in economic terms.⁶

Professor Park suggested yesterday that my article on evidence focuses unduly on the effect of evidence law on behavior outside the courtroom. That is not correct. I touch on that effect, but my focus is on the effect of the law on the trial process itself; hence the centrality of Rule 403 to my analysis. What is true is that the accuracy and cost of the trial process surely has a significant effect on conduct outside the legal system itself, as do some of the privileges, such as the lawyer-client privilege and the self-incrimination privilege. But doubtless Professor Park is correct that the marital privileges don't affect the marriage rate very much.

One can imagine using other scholarly fields to provide the unifying framework in lieu of economics. But the advantage of economics is that it is intuitive in a way that Bayes's Theorem, frequentist theories of probability, artificial intelligence, epistemology, and even decision theory, are not. It is just very easy to approach each type of evidence—hearsay, bad acts, subsequent repairs, etc.—by asking whether it adds more to the likelihood of a factually accurate result than it subtracts in

6. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* Chp. 6 (6th ed. 2003).

terms of cost, with “cost” understood broadly, thus encompassing, for example, delay, impairment of extrinsic values, and tendency to confuse the jury—though this last cost, jury confusion, can be thought a reduction in the benefits of the evidence in question rather than as constituting a separate cost. Bayes’s Theorem, and other theoretical approaches to proof, fit in nicely here on the probative-value side of the Rule 403 balancing test.

It is also natural to evaluate institutional features of our system, such as the role of the jury and the structure of the judiciary and of the profession, by reference to considerations of incentives, constraints, principal-agent problems, and the division of labor that economists are familiar with from other contexts in which issues of compensation and organization are addressed. In reference to the institutional dimension of the law of evidence, let me emphasize the great importance of a comparative perspective. We undoubtedly have much to learn from the streamlined Continental system of trials.

The scholarly esotericism of which I am complaining has implications that go beyond the teaching of evidence. I hold a pragmatic, and it may seem a philistine, view of legal scholarship, which is that such scholarship has little intrinsic interest and should, therefore, be oriented to service to the profession. Legal scholarship’s only, or certainly its main, value is to guide legal reform. It seems to me to follow that every legal scholar in the field of evidence, as in the other fields of law, should constantly be asking himself or herself whether there is a path that connects evidence scholarship to the world of trial practice. Bayes’s Theorem is interesting and important, but is there any way in which its implications for the actual conduct of litigation can be communicated effectively to lawyers, judges, the members of the advisory committee on the federal rules of evidence, and other participants in the litigation system at the operational level, and thus be incorporated into a feasible proposal for improving our system? We heard yesterday from Professor Park that recent psychological work on lineup evidence has already changed the way lineups are being conducted. That is exemplary of the kind of scholarship that we need. I suspect that much more work is needed to translate the scholarly findings of the evidence experts into practical reform. It is the ability to make such translations that largely explains the success of the law and economics movement in fields in which, unlike, as yet, evidence, it has gained a strong footing.

I hope I will not be misunderstood as expressing doubt about the intellectual significance of Bayesian analysis. I am speaking only of the

problem of communication or implementation. The best normative analysis in the world is useless from a practical standpoint if it is not communicated effectively to the people who can do something to bring about the reform, who in the case of evidence law are judges, legislators and their staffs, members of the federal rules of evidence advisory committee, and trial lawyers. Some progress has been made in conveying the elements of economic analysis of law to such people because economics is really pretty intuitive, isomorphic to a considerable extent with law, and consistent with American values, which are predominantly commercial and individualistic. The communication problem is more difficult in the case of, to take a prominent example in the modern scholarly literature on evidence, Bayes's Theorem, which when pushed on the laity quickly encounters math block and (a related point) is for most people counterintuitive. I have a sense (possibly uninformed, I admit) that much of the analytically most sophisticated work in evidence, based on statistical theory, psychology, and epistemology, just is not getting through to the decision-making class. Embedding some of this work in a broadly economic framework might help make it more accessible to the people who have the power to implement proposals for legal reform.

