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Michael S. Ariens

St. Mary's University School of Law, mariens@stmarytx.edu

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THE LAW OF EVIDENCE AND THE IDEA OF PROGRESS

*Michael S. Ariens**

I.

In discussing in essay form the issue "Does Evidence Law Matter?," it seems that there is a matrix of four responses, akin to the four responses the late Professor Robert Cover suggested were available to nineteenth century northern antislavery judges faced with deciding cases under the Fugitive Slave Act.¹ Professor Cover suggested that the judge could: (1) apply the law and disregard his conscience; (2) apply his conscience and disregard the law; (3) cheat, by restating the law to conform with his conscience, although disbelieving the law was truly as the judge stated; or (4) quit.²

Similarly, there are four obvious responses to the question, "Does Evidence Law Matter?" The first response is "Yes, evidence really matters." One problem with this response is that it will be greeted with a yawn. After all, for a teacher of evidence to suggest that the law of evidence matters appears to be another case of "subject-matter nearsightedness," a disease in which the teacher's ego is bound up with others' appreciation for the importance of the teacher's course offerings. The second response is to say, "No, evidence law does not matter." The advantage of the contrarian response is that it will receive attention. ("Look, an evidence teacher who says that evidence doesn't matter.") The advantage is also its disadvantage, for the contrarian is often more interested in the attention than in justifying the position taken. ("If I say that evidence doesn't matter then I will become better known than if I say that evidence matters. This might lead to another (better?) job, or at least to several conferences, where I can be the designated contrary thinker, invited for balance.") The third response is to say, "Yes, it does matter and no, it doesn't matter." This middle ground position suffers from the fate of all apparent fence-sitting positions. Critics from either

* Associate Professor of Law, St. Mary's University School of Law, San Antonio, Texas; B.A., 1979, St. Norbert College; J.D., 1982, Marquette University; LL.M., 1987, Harvard University.

1. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

2. *Id.* at 6.

side will be loath to hear or read your painstakingly mediated position. ("The center will not hold." Or, "You're so invested in the system that you won't say that the system is corrupt.") Others will want to know whether the author has arrived at this mediated position in order to avoid any possible obstacles to future career paths (the Bork-Souter-Thomas syndrome). The fourth response, apparent in many symposia, is to ignore, misinterpret or forget the question. ("I'm sorry, I must have misunderstood the question." Or, "Sorry, I forgot.")

If none of these responses is palatable, then what is left? Well, as Cover suggested, the matrix of four responses to questions of conflicts of law and morality is a "static and simplistic model of law."³ To ask the question, "Does Evidence Law Matter?," is to assume that some sets or groups of people believe it is important while others are challenging that view. In other words, the thesis is that evidence matters, the antithesis is that it doesn't, and this symposium is one effort to craft a synthesis. My assumption is slightly different. I assume that the question is asked because legal academics believe that evidence both does and does not matter, at either or both a narrow or broad level of generality and that those academics also believe that these are irreconcilable beliefs. What interests me is *how* we reached this point and *why* legal academics believe that evidence law both does and does not matter.

II.

Too much evidence scholarship is stultifying, intellectually barren and instrumentally valueless. In large part this is due to the fact that conventional evidence scholarship is based on an analysis of the rules of evidence. Conventional scholarship has focused on the rules of evidence for two historically contingent reasons. First, traditional scholarship, including evidence scholarship, is based on the assumption that finer analytical distinctions will enable the court (or legislature or trial lawyers or rest of academia) to better understand and make more rational the doctrinal issue(s) under discussion. Second, the particular efforts of evidence scholars since the 1920s have been guided by the progressive (and instrumental) ideal of reform of the rules of evidence.

A.

Even after Wigmore's overwhelmingly influential *Treatise on Evidence*⁴ was published, the state of the law of evidence was abysmal.

3. *Id.*

4. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE

There were rules that made little sense;⁵ those rules that did make analytical sense in one context were applied unbendingly to other contexts;⁶ and other rules needed to be "conformed" to the latest teachings of science and common sense.⁷ While Wigmore concluded that "[o]ur system of evidence is sound on the whole,"⁸ evidence scholars bemoaned the "infinitesimal, meticulous, petty elaboration [of the law of evidence] into a mass not capable of being perfectly mastered and used by everyday judges and practitioners."⁹ Therefore, the first goal of evidence scholars was to analyze (and implicitly rationalize) and order the rules of evidence. To make analytic sense of the common law of evidence, evidence scholars used "legal reasoning."

Today, the conventional view of legal reasoning is that it is a "grab bag" of techniques, including "anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience,' intuition, and induction."¹⁰ The "heart of legal reasoning"¹¹ in present legal discourse remains the techniques of analogy, induction and deduction.¹² These forms of reasoning were central to classical legal orthodoxy, popularized at Harvard Law School beginning with Langdell's appointment as Dean in 1870.¹³ Classical legal orthodoxy—that is, legal formalism—was concerned with a universally formal and conceptually ordered legal

IN TRIALS AT COMMON LAW (Tillers rev. 1983) [hereinafter WIGMORE, TREATISE]. The first edition was published in 1904-05, the second in 1923 and the third in 1940.

5. See EDMUND M. MORGAN ET AL., INTRODUCTION TO THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM at xvi-xvii (1927) ("Perhaps the most irrational of the exclusionary rules is that prohibiting the reception of so-called opinion evidence. . . . Certainly, as applied by the American courts, it seems unreasonable and arbitrary.").

6. *Id.* at xvi (discussing lack of flexibility of rules regarding impeachment and examination of witnesses); see also JOHN H. WIGMORE, CODE OF EVIDENCE at xiii (3d ed. 1942) [hereinafter WIGMORE, CODE OF EVIDENCE] ("But a rule [of evidence] need not be a steel-clad formula. The evil nowadays is that nevertheless we customarily treat it so.").

7. See, e.g., Charles T. McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 220 (1956) ("The findings of psychology and common sense [regarding recency and memory] are clear, but many evidence rules are justifiable only on the opposite assumption.").

8. WIGMORE, TREATISE, *supra* note 4, § 8c.

9. *Report of the Committee on Improvements in the Law of Evidence*, 63 A.B.A. REP. 570, 576 (1938) (ABA committee chaired by Wigmore).

10. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73 (1990).

11. *Id.* at 86.

12. See STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING chs. 2-4 (1985). I have discussed some of the recurrent justificatory techniques in constitutional law in Michael S. Ariens, *Dutiful Justice*, 22 ST. MARY'S L.J. 1019, 1020-21 (1991) (reviewing SHELDON I. NOVICK, HONORABLE JUSTICE (1989)). A casebook which approaches legal reasoning as a grab bag of rhetorical devices is THURMAN W. ARNOLD & FLEMING JAMES, JR., CASES AND MATERIALS ON TRIALS JUDGMENTS AND APPEALS (1936).

13. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 1-3 (1983). On

system.¹⁴ The analytic techniques of analogizing precedent and deducing specific rules from general principles were attempts to ensure the completeness of the system.¹⁵ Legal reasoning was not a grab bag or simply a set of techniques but a scientific method allowing the legal academic to order the doctrinal universe in which he was an expert.

Wigmore was a self-proclaimed progressive,¹⁶ but he was also an 1887 graduate of the Harvard Law School. While his work has not been viewed (correctly) as formalistic, Wigmore and other legal progressives retained a number of aspects of classical legal orthodoxy. In particular, legal progressives retained a faith in legal reasoning as providing analytic clarity which aided in the rationalization and conceptualization of the law of evidence. Rationalizing law, including the rules of evidence, required both the use of legal reasoning and a critical understanding of legal language. The more precisely scholars analyzed and clarified the rules of evidence, the more rationally they could order the rules. For example, Wigmore's *Code of Evidence*¹⁷ was an elaborate structure detailing both general rules of evidence and particular subrules analytically deduced from the general principles. Additionally, in order to clarify the meaning of rules of evidence and methods of proof, Wigmore coined new words to better describe the law of evidence.¹⁸

The techniques of legal (analytic) reasoning honed in the first half of the twentieth century are akin to analytic philosophy.¹⁹ That is, the

Langdell's appointment and its consequences for legal education, see Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 332 (1979).

14. See Grey, *supra* note 13, at 11.

15. *Id.* at 12 (classical legal orthodoxy "could derive the rules themselves analytically from the principles").

16. See John H. Wigmore, *The Model Code of Evidence: A Dissent*, 28 A.B.A. J. 23, 23 (1942) [hereinafter WIGMORE, *Model Code of Evidence*] ("In past times, my views on the law of Evidence have often been reproached as too radical, too advanced. But this time (for a change) it seems likely that I shall be looked upon as too conservative and too unprogressive."); John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark That Kindled the White Flame of Progress*, 20 J. AM. JUD. SOC'Y 176, 178 (1937) ("For many ensuing years the St. Paul speech [by Roscoe Pound] was the catechism for all progressive-minded lawyers and judges." Wigmore includes himself in that group.).

17. See WIGMORE, *CODE OF EVIDENCE*, *supra* note 6. The first edition was published in 1909. A second edition was published in 1935 and a third edition in 1942.

18. In a review of the first edition of WIGMORE ON EVIDENCE, Harvard Law School professor Joseph H. Beale, later reviled by the legal realists, effusively praised Wigmore's analytic approach but chided him for his use of neologisms. See Joseph H. Beale, *Book Review*, 18 HARV. L. REV. 478, 480 (1905) ("It is safe to say that no one man, however great, could introduce into the law three such extravagantly novel terms, and Professor Wigmore proposes a dozen."); see also Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. L. REV. 1097, 1098 (1984-85) ("I was never successful in making an 'autoptic preference' as a young trial lawyer. . . .").

19. DONALD C. GALLOWAY, *THE AXIOLOGY OF ANALYTICAL JURISPRUDENCE: A*

technique focuses on a rigorous, rationalistic charting and categorizing of different events. In particular, both classic (and still conventional) legal reasoning and analytic philosophy are concerned with clarifying the meaning and use of words.

I am not suggesting that legal reasoning is applied analytic philosophy, or even that twentieth century evidence scholars have been influenced by analytic philosophy. In both endeavors, however, there is a conscious effort to resolve problems of meaning by a more intensive analysis of language. Both efforts also are infused with logic and formal approaches. Analytic philosophy was a search for the purely formal aspects of the world.²⁰ Classical legal orthodoxy, and the legal reasoning that survived after the demise of classical legal orthodoxy, were intent on elucidating the autonomy (and formality) of law.²¹ Both are attempts to provide "tribunal[s] of reason."²² These links, if combined with the view of legal progressivism as "Anglophilic,"²³ suggest another vantage point from which to view the history of American evidence scholarship.

The ability of extremely intelligent evidence scholars like John Henry Wigmore, Edmund M. Morgan, John Maguire, Charles T. McCormick and others,²⁴ to analytically dissect and repack rules of evidence²⁵ was and is extraordinary. As these scholars worked their way

STUDY OF THE UNDERLYING SOCIOLOGICAL ASSUMPTIONS AND IDEOLOGICAL PREDILECTIONS IN LAW IN A SOCIAL CONTEXT 49 (Thomas W. Bechtler ed. 1978). Galloway's article examines the relationship between English analytic philosophy and analytic jurisprudence as exemplified by the English legal philosopher H.L.A. Hart in his book *The Concept of Law*. A primer is BARRY R. GROSS, *ANALYTIC PHILOSOPHY: AN HISTORICAL INTRODUCTION* (1970); see also RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 165-212, 257-312 (1979) (discussing "theory of knowledge" in analytic philosophy); cf. L. JONATHAN COHEN, *THE DIALOGUE OF REASON: AN ANALYSIS OF ANALYTICAL PHILOSOPHY* (1986) (reinterpreting rationales of analytic philosophy).

20. See RORTY, *supra* note 19, at 166-67.

21. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline*, 100 HARV. L. REV. 761, 762 (1987) ("Langdell in the 1870s made it [the idea of law as an autonomous discipline] an academic idea."). Progressive legal thought rejected the *a priori* theorizing of classical legal orthodoxy and believed law was an instrument for social control. See MORGAN et al., *supra* note 5, at viii ("Instead of relying upon opinion and *a priori* argument, assistants were employed by the committee to compile factual material with regard to the actual status of the law and rules of evidence in the various states. . . .").

22. RORTY, *supra* note 19, at 166.

23. See Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 940-41 (1983) (book review) (criticizing American "Progressive fetish for things English").

24. Mason Ladd, Judson Falknor, David Louisell and Edward Cleary also spring to mind.

25. Two examples, both from the scholarship of Harvard Law School professor Edmund M. Morgan, may be helpful. See generally Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935) (examining dividing line between hearsay and non-hearsay and justification for hearsay exceptions); Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV.

through the rules of evidence, the most striking aspect of the articles is their analytic clarity. The logical stress points of the "rules" are thoroughly exposed and subject to searching analysis.

Their work gave the appearance of a gigantic intellectual advance in understanding the common law of evidence. If one accepted the ideas that the legal system was (at least formally) rational, that judges were neutral and impartial and that the goal of scholarship was to aid in the construction of an ever more rational (hence progressive) legal system, the work of the above-named scholars has few peers.

The more specific purpose of analytic reasoning about the rules of evidence was instrumental:²⁶ evidence scholars analyzed rules of evidence in order to better "fit" the rules to the "truth" theory of the trial. The work of these evidence scholars was thus not only to "rationalize" the common law of evidence, but to assist in the reform of the law of evidence.

B.

In 1920 the Commonwealth Fund created a Legal Research Committee to recommend legal reform projects.²⁷ A Committee to Propose Specific Reforms in the Law of Evidence chaired by Morgan proposed five changes in the law of evidence. Only one, a business records exception to hearsay, was adopted. In the late 1930s, Wigmore, who had been a member of the committee chaired by Morgan, led an ABA Committee on Improvements in the Law of Evidence.²⁸ That Committee concluded that the rules of evidence were in need of "improvement."²⁹

In 1939 the American Law Institute (ALI), nearly finished with its

255 (1937) (examining two classes of presumptions excluded from traditional study). In memorializing Morgan, his colleague John Maguire wrote, "I know from completely reliable hearsay that [Morgan] was a strict classroom disciplinarian and a precise and relentless analyst, probing deeply into his subjects and demanding that his students do likewise." John M. Maguire, *Edmund M. Morgan as a Colleague*, 79 HARV. L. REV. 1541, 1543 (1966).

26. See Peter Tillers, *Webs of Things in the Mind: A New Science of Evidence*, 87 MICH. L. REV. 1225, 1226 (1989) [hereinafter Tillers, *Webs of Things*] (reviewing DAVID SCHUM, *EVIDENCE AND INFERENCE FOR THE INTELLIGENCE ANALYST* (1987)) ("They [Wigmore, Morgan, et al.] wanted to put their theories to work and they expected that their theorizing about inference would advance reform of the law of evidence.").

27. MORGAN et al., *supra* note 5, at vii. The attempts to reform and codify the rules of evidence are the subject of a forthcoming article, and are described in greater detail in Michael S. Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence* (unpublished manuscript, on file with author).

28. *Report of the Committee on Improvements in the Law of Evidence*, *supra* note 9. Morgan was an Advisory Member.

29. *Id.* at 571. In decrying the resistance of the bar to change, the Committee stated, "Hence, a decided division of opinion and prejudice favoring or opposed to the improvement

(First) Restatement of Law, received a grant to revise the rules of evidence. Named as Reporter to the ALI's Evidence Editorial Group was Edmund Morgan. Morgan chose his colleague John Maguire as his Assistant Reporter. Wigmore, then in his mid-70s, was named Chief Consultant to the Evidence Editorial Group. The Model Code was adopted by the ALI in 1942, but not until after Morgan and Wigmore's disagreements about the structure, form and purpose of the rules was made public. The 1927 report of the Commonwealth Fund's evidence committee was tempered with statements that so "radical"³⁰ a proposal as to discard the present law of evidence with an untried system of evidence was utopian. In discussing the Model Code, Morgan wrote in the very conservative ABA Journal that he believed, "[i]t is time, too, for radical reformation of the law of evidence."³¹ This change in approach, I have argued elsewhere, was Morgan's response to the challenge posed by the realists to the assumption of the rationality of the trial process.³² While Morgan's words were likely taken at face value, especially after Wigmore published his vehement disagreement with the Model Code,³³ the "radical reformation" of the Model Code was more an attempted compromise between the realist attack and conservative professional reaction.

In particular, Morgan believed that a code of evidence needed to be pitched at a medium level of generality. The explicit purpose was to structure a set of rules through which the trial court could exercise discretion to admit or exclude evidence. An appellate court was to reverse a trial court's decision concerning the admissibility of evidence only if

(disinterested persons would call it) of certain rules." *Id.* In the second edition of *Wigmore on Evidence*, Wigmore stated:

And so, much as we might wish to try the experiment [of abolishing the rules of evidence], it is futile to plan such a radical change. We may as well realize that the change will have to come as a growth—a growth of improvement both in the rules and in the men. And this is the way in which almost all legal progress, that was *progress*, has come about.

WIGMORE, TREATISE, *supra* note 4, at 124 (emphasis in original); *see also* MORGAN et al., *supra* note 5, at xiii (quoting same).

30. MORGAN et al., *supra* note 5, at xi.

31. Edmund M. Morgan, *The Code of Evidence Proposed by the American Law Institute*, 27 A.B.A. J. 539, 540 (1941). This was the first of four articles with the same title published in the September, October, November and December 1941 issues of the ABA Journal. The statement is also found in EDMUND M. MORGAN, FOREWORD TO AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE 6 (1942) [hereinafter MORGAN, FOREWORD].

32. *See* Ariens, *supra* note 27. In particular, the attack was "led" by Thurman Arnold and Jerome Frank, as well as the psychologist Edward Robinson, who taught a seminar at Yale Law School in the early 1930s with Arnold. *See infra* text accompanying note 38.

33. Wigmore, *Model Code of Evidence*, *supra* note 16. This article was published in the January 1942 issue of the ABA Journal, immediately after Morgan's four articles had been published.

there was an abuse of discretion. Wigmore, distrustful of the existence of any abuse of discretion standard, desired a much more particularized code of evidence which the trial court would apply to the particular facts of the case. The appellate court would reverse only if an issue of evidence law was before the court. Wigmore's approach was to canvass all prior applications of evidence rules, incorporate them into a code, and then allow the trial court to apply the facts to the law with little appellate oversight, thus creating a rigid dichotomy between law and fact. At its 1940 annual meeting the ALI adopted Morgan's approach in preference to Wigmore's approach.³⁴

The Model Code was instrumentally a failure, as it was never adopted by any state. It was successful, however, in altering the terms of the codification debate. Evidence was an instrument used to rationally adjudicate disputes.³⁵ The "sporting theory of justice,"³⁶ which limited the trial judge's ability to control the course of the trial, could be undone by granting the trial judge more discretion in making decisions to admit or exclude evidence. Granting the trial court greater discretion in presiding over trials properly allocated more power to the judge, who was the only impartial, neutral person in the courtroom.³⁷ Concomitantly, since it was clear that a number of judges were, at most, marginally competent, a trial court's decisions were subject to appellate review for abuse of discretion. A trial judge who abused this power was thereby subject to formal, legal constraints. At the same time, creating a rational set of evidence rules repelled the realist attack on the "irrationality" of the

34. *Discussion of Code of Evidence Tentative Draft No. 1*, 17 A.L.I. PROC. 66, 86-87 (1940). In addition, Judge Charles E. Clark, the Reporter to the Advisory Committee on the Federal Rules of Civil Procedure and former Yale Law School Dean, advanced a proposal that the code consist simply of a few general rules. *Id.* at 81-84. Clark suggested that the Morgan approach was too detailed. *Id.* at 81-89. The ALI rejected Clark's proposal as well. *Id.* at 96. The entire discussion is found at *id.* at 64-96. In recounting the debate, Morgan stated that the choice was "between a catalogue, a creed, and a Code. The Institute decided in favor of a Code." MORGAN, FOREWORD, *supra* note 31, at 13. Wigmore preempted the Model Code when the third edition of his "catalogue" Code of Evidence was published before the Model Code.

35. See Ariens, *supra* note 27 for a discussion of the displacement by the Model Code of the "truth" theory of adjudication, and the changing role of evidence from the "ascertainment of the truth" to the "rational" resolution of disputes.

36. A theme of progressive legal thought was that the American system of justice was flawed because a perversion of the adversary system obscured the search for truth in favor of creating grounds of error in order to permit appellate reversals. The most famous exposition is Roscoe Pound's 1906 St. Paul address to the ABA. Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A. REP. 395, 404-05 (1906) (noting that Wigmore agreed with his complaint about sporting theory of justice).

37. MORGAN, FOREWORD, *supra* note 31, at 540 ("Consequently, our code of evidence must assume a trial judge of reasonable ability and of unquestioned honesty.").

trial.³⁸ The form and structure of the Model Code served as the basis for the following two codification efforts, the Uniform Rules of Evidence and the Federal Rules of Evidence.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) began its codification efforts in 1949, and the Uniform Rules of Evidence were adopted by the NCCUSL in 1953. Since the purpose of the Uniform Rules was to create uniformity,³⁹ radical changes from the common law suggested by the Model Code were abandoned. The structure of the Uniform Rules was similar to the Model Code. Again, the rules were written in such a way as to encourage the trial court to exercise discretion in admitting or excluding evidence.

The impetus for reform, created by both the Model Code and the Uniform Rules, pointed evidence scholarship toward an intellectual cul-de-sac. Post-World War II evidence law scholarship might have proceeded in one of two directions: (1) a continuing "rationalist" analytic reevaluation of problematic areas of evidence, like hearsay, credibility, or character/habit evidence; or (2) an attempt to question the assumptions governing the structure, form or efficacy of the rules, including, more generally, the problem of proof.⁴⁰ While a few scholars undertook the former, none took on the latter task.⁴¹

Most evidence scholarship in the 1950s and 1960s proceeded on the assumption that the purpose of evidence scholarship was to smooth out a few wrinkles in the codification efforts so that the Uniform Rules could

38. See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 172-98 (1935); JEROME FRANK, *LAW AND THE MODERN MIND* 181 (1930) [hereinafter FRANK, *MODERN MIND*]. See generally ARNOLD & JAMES, *supra* note 12 (focusing on "pathological" decisions of courts to make point that both substantive and procedural law were forms of rhetoric, that is, argumentative techniques); cf. JEROME FRANK, *COURTS ON TRIAL* 80-102 (1949) (Frank, whose post-World War II writings differed from his "realist" writings, suggesting that "truth" theory of trial was better ideal than "fight" theory, and should be goal pursued in American legal system).

39. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *UNIFORM RULES OF EVIDENCE* 161 (1953) ("So with the objects of acceptability and uniformity in mind, this effort is devoted to the policy of retaining such parts of the Model Code as appear to meet the requirements of such objectives, and to reject, revise or modify the rest.").

40. See Peter Tillers, *Introduction, Symposium on Probability and Inference in the Law of Evidence*, 66 B.U. L. REV. 381, 383 (1986) [hereinafter Tillers, *Introduction*] ("Until about 1960 . . . evidence scholars debated about details and refinements rather than about foundations.").

41. Wigmore's particularistic approach was abandoned after his death in 1943, and Clark's "creedal" approach was neither adopted nor advanced during the 1950s and 1960s. The fading consensus remains "progressive proceduralism." CHARLES A. WRIGHT & KENNETH W. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5005 (1977); see Graham, *supra* note 23, at 946.

be adapted and adopted in a particular state.⁴² Law reviews in the 1950s and early 1960s are replete with symposia on reforming the rules of evidence.⁴³ Scholars might disagree with the particular analytical slant suggested by the Uniform Rules in favor of the slant approved by the Model Code (or, more often, vice versa) but all this was undertaken in an effort to move forward to reform. Progress was understood to mean the successful codification of evidence rules in the several states based on the Uniform Rules.

The progressive model of reform, which animated both the Model Code and the Uniform Rules, was premised on the belief in trial court discretion. Since by definition the trial judge was the only impartial, disinterested person at the trial, increasing the power of the trial court was a classic progressive—read nonideological—solution. While progressives like Morgan conceded that the judiciary⁴⁴ needed improvement, a suggestion by Professor David Louisell that real procedural reform lay in the selection of good trial judges was dismissed as utopian.⁴⁵ In a speech given at the University of Virginia in 1965, Oxford University Professor Arthur Goodhart traced the history and progress of the “Anglo-American” system of evidence and concluded that “the essential reform in the law of evidence is to give [the trial judge] more discretion.”⁴⁶

Since the Model Code (and, by implication, the Uniform Rules) was premised on granting discretion to the trial court, Goodhart’s histori-

42. An excellent example is Ralph Barnhart, *Institute on Evidence*, 15 ARK. L. REV. 7 (1960). In introducing a symposium on the law of evidence, Dean Barnhart wrote:

[W]e have tried to be hard-headed about the law of evidence. We wanted to expose the shortcomings of this branch of the law in order that steps may be taken to correct them. We wanted to develop those aspects of trial evidence that would be helpful to the practicing lawyers of the state; and we wanted to point out what modern legal thought is suggesting as the way into a better world, evidentially speaking. . . . But while we speculate upon the possibility that our rules of evidence are even worse than we may imagine, the day-to-day work of the trial courts must be done.

Id.

43. See, e.g., *Evidence: A Symposium*, 26 U. CIN. L. REV. 493 (1957); *Symposium on the Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479 (1956); *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U. L. REV. 481 (1954); *Uniform Rules of Evidence in California—A Symposium*, 2 UCLA L. REV. 1 (1954).

44. By and large the progressives were talking about state court judges, most of whom were elected. Progressive ideology discounted the abilities of state court judges due largely to the existence of judicial elections.

45. See Edmund M. Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725, 734-35 (1961) (Louisell’s suggestion resulted in “opposing a proposal for a reform which lies in the sphere of present probability by shifting to a proposal for a more far-reaching change that is beyond the range of adoption in the foreseeable future.”).

46. Arthur L. Goodhart, *A Changing Approach to the Law of Evidence*, 51 VA. L. REV. 759, 779 (1965).

cally-based conclusion allowed evidence scholars to conclude that progress was at hand. While the law of evidence had finally progressed, the Uniform Rules had only slightly more impact: only four jurisdictions adopted the Uniform Rules.⁴⁷

III.

In 1965, the same year as Goodhart's essay, the Supreme Court appointed an Advisory Committee on the Federal Rules of Evidence. Professor Edward Cleary was chosen as Reporter. The Federal Rules of Evidence, signed into law in 1975, are built on the same model as the Model Code and the Uniform Rules. "Style would strike a middle course between vague generalities and constricting particularity, except as individual situations might require a variation in treatment."⁴⁸ Like the Model Code and the Uniform Rules, judicial discretion was a centerpiece of the Federal Rules.⁴⁹

The first draft of the Federal Rules of Evidence was published in 1969.⁵⁰ Evidence scholars were then able to turn their attention to another set of evidence rules, this time focusing either on the federal aspect of the rules or on their applicability for state adoption. Additionally, during the 1960s and early 1970s the Supreme Court handed down decisions accelerating the constitutionalization of criminal procedure. Since a number of these cases restructured rules of evidence,⁵¹ scholars also

47. Kansas, New Jersey, Utah and the Virgin Islands adopted versions of the Uniform Rules. An argument can also be made that California adopted a version of the Uniform Rules. *But see* Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. L.A. L. REV. 279, 279 (1971) ("After studying the problem for nearly a decade the Commission came to the conclusion that what California needed was not the Uniform Rules but a Restatement of California Evidence.").

48. *Proposed Federal Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 91 (1973) (statement of Professor Edward W. Cleary).

49. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 414-16 (1989); *see* Waltz, *supra* note 18, at 1117-18 (suggesting that "discretion" available to trial court is limited, understandable form of discretion).

50. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969).

51. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979) (finding jury instruction presuming person intended ordinary consequences of his or her act unconstitutional); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (excluding trustworthy evidence based on hearsay rule deprived defendant of fair trial); *Barber v. Page*, 390 U.S. 719 (1968) (finding use of witness transcript violation of Confrontation Clause); *Douglas v. Alabama*, 380 U.S. 415 (1965) (prosecutor's use of prior confession of co-offender who refused to testify violation of Sixth Amendment); *Pointer v. Texas*, 380 U.S. 400 (1965) (finding use of preliminary hearing testimony at which defendant not represented by counsel violation of Confrontation Clause).

wrote about the "constitutionalization" of hearsay and presumptions.

The appearance of the Federal Rules of Evidence and the decisions of the Supreme Court suggested progress in evidence scholarship for several reasons. First, the Federal Rules of Evidence were adopted as a model for a number of states.⁵² Several states even adopted a version of the Federal Rules before they were enacted by Congress.⁵³ Since for over thirty years the goal of evidence scholarship had been to codify rules of evidence which granted trial court discretion in the admission of evidence, it was not surprising that evidence scholarship was undertaken in the service of effectuating that goal. Second, since Congress created evidentiary anomalies when amending the proposed rules, scholars were provided an opportunity to evaluate (and regularly disparage) congressional efforts. Third, the constitutionalization of certain evidence rules allowed for a greater concentration on the criminal rules of evidence. Both Morgan and Cleary were civil procedure scholars in addition to their work on evidence and McCormick was also a remedies scholar. While Wigmore was also interested in criminology, the application of the rules of evidence in criminal cases appeared an open area of research.

IV.

This temporary flush of excitement was not to last, however. During the late 1970s and 1980s the Supreme Court largely abandoned the constitutionalization of evidence.⁵⁴ Dissecting the Federal Rules of Evidence was the dominant model of evidence scholarship. Conventional evidence scholarship concerned itself, for example, with eliminating the conflict between Rule 403 and Rule 609.⁵⁵ While this scholarship was salutary insofar as it showed that codification is not the equivalent of

52. Thirty-four states have codified rules of evidence based on the Federal Rules model. See Edward J. Imwinkelried, *Evidence Pedagogy in the Age of Statutes*, 41 J. LEGAL EDUC. 227, 227 (1991).

53. See, e.g., WIS. R. EVID. (1973) (largely adopting Proposed Federal Rules of Evidence); N.M. R. EVID. (1973) (same).

54. See, e.g., *Bourjaily v. United States*, 483 U.S. 171 (1987) (evidentiary standard regarding Federal Rules of Evidence unrelated to burden of proof in criminal or civil cases).

55. For articles on interpreting Rule 609(a), impeachment by prior conviction, when applied to a witness other than a criminal defendant, see, e.g., Marlene B. Hanson, Note, *Balancing Prejudice in Admitting Prior Felony Convictions in Civil Actions: Resolving the 609(a)(1)—403 Conflict*, 63 NOTRE DAME L. REV. 333 (1988) (concluding that Rule 403 but not Rule 609 should apply to civil actions); Andrea R. Spirn, Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 COLUM. L. REV. 1267 (1986) (proposing legislative revision of Rule 609(a)). Rule 609(a) was amended in 1990 to clarify this conflict.

completeness,⁵⁶ and examined the problems of judicial interpretation,⁵⁷ it was scholarship with rapidly diminishing returns.

The revival of American evidence scholarship required an attack on evidentiary foundations. One attack, begun around 1970,⁵⁸ was by evidence scholars denominated "Bayesians."⁵⁹ These scholars are largely interested in probability and inference in the law of evidence, and not in the rules of evidence. In reductionist fashion, Bayesian approaches to legal adjudication are formal approaches based on assumptions about the rationality of the jury (or fact finder) and impartiality of the judge. However, like all "schools" of thought, the differences among the Bayesians may be greater than their similarities.⁶⁰ Professor Peter Tillers suggests the threads connecting this "new" scholarship include the following:

[I]t focuses more on logic and less on law; it focuses more on proof and less on rules of admissibility; and it emphasizes rigor rather than rhetoric. Moreover, much of this scholarship grap-

56. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 27-33 (2d ed. 1985) (comparing ideology of French Code Civil of 1804, which countenanced gaps, with German Civil Code, enacted in 1896 to become effective January 1, 1900, which was a failed attempt by Pandects to put their theory of completeness into practice); see also ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 48-79 (2d ed. 1977) (noting that German Civil Code was premised on "the view that a code, systematically using precise legal terms, could provide for a comprehensive and gapless system of justice.").

57. See Imwinkelried, *supra* note 52, at 229-41 (suggesting that evidence pedagogy incorporate techniques of statutory interpretation); see also Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 910-15 (1978) (suggesting interpretive methods for use in understanding Federal Rules).

58. Cf. William Twining, *The Boston Symposium: A Comment*, 66 B.U. L. REV. 391, 395-96 (1986) [hereinafter Twining, *Boston Symposium*] (noting that contributors to the Boston University Symposium on Probability and Inference in the Law of Evidence offer 1965 and 1971 as alternative starting dates, and suggesting that problem of judicial proof "can be traced back all the way to classical rhetoric—to Aristotle and Demosthenes, Quintillian and Cicero, and beyond"). The 1970 article is Michael O. Finkelstein & William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970). This article was subject to sharp rejoinder from Harvard Law School Professor Laurence Tribe. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1332 (1971).

59. It is well beyond this Essay to discuss Bayesianism. Collected articles are found in *Symposium on Probability and Inference in the Law of Evidence*, 66 B.U. L. REV. 377-1089 (1986). Peter Tillers, *Mapping Inferential Domains*, 66 B.U. L. REV. 883, 883-91 (1986) [hereinafter Tillers, *Mapping*], helpfully places the debate among the heterogenous group called Bayesians in historical and philosophical perspective. A critical, but in my view, explanatory article on Bayesianism is Craig R. Callen, *Notes on a Grand Illusion: Some Limits on the Use of Bayesian Theory in Evidence Law*, 57 IND. L.J. 1 (1982).

60. See Tillers, *Webs of Things*, *supra* note 26, at 1227 ("Although the new scholarship is now quite diverse, it does share some characteristic features. . . . Nevertheless, the new scholarship is more heterogenous than homogenous."). Similar problems arise in trying to discuss the "tenets" of American legal realism, or the "core" of analytic philosophy, or of any "kind" of thought or approach.

ples with fundamental problems of epistemology, apparently in the belief that they need to be reexamined. Also, a substantial part of the literature in this field employs 'technical' analysis, especially mathematics and formal logic.⁶¹

It has been suggested that Bayesian thought is a reaction to English empiricism.⁶² Since the "rationalist tradition" of evidence scholarship is believed based on that same empiricist tradition,⁶³ Bayesianism is suggested as an opposing approach to the problem of proof. "Legal literature on inference, however, has been largely dominated by just two schools: Bayesianism and the 'rationalist tradition' ('Baconianism')."⁶⁴

Instead of creating an opposition between Bayesian probability theory and the rationalist tradition, these traditions should be viewed as parts of a larger whole. Both the Bayesians and the Baconians are focused on foundations for the rational operation of proof. If the Baconians in evidence theory and scholarship are particular heirs to the empiricist tradition, the Bayesians are particular heirs to analytic philosophy. "[A]nalytic philosophy has become a discipline—or a subdiscipline?—whose competence has been restricted to the study of inferences."⁶⁵ More generally, both are heirs to the "Kantian picture of philosophy as centered in epistemology."⁶⁶ In jurisprudential terms both are concerned with preserving the ideal of the rule of law.⁶⁷

61. *Id.*

62. See Tillers, *Mapping*, *supra* note 59, at 883-84 ("The virtually unquestioned preeminence of the rationalist approach was broken by the rise of Bayesianism." (footnote omitted)); Tillers, *Webs of Things*, *supra* note 26, at 1231 ("The philosophical roots of Bayesianism are found in neo-Kantianism rather than in the sort of empiricist perspective that still dominates evidence scholarship in the Anglo-American world."); William Twining, *Boston Symposium*, *supra* note 58, at 396 ("[U]ntil a few years ago, nearly all Anglo-American discourse about judicial evidence had been rooted in a single, remarkably homogenous, intellectual tradition that can be loosely characterized as English empiricism. As Peter Tillers notes in his introduction, it is only recently that Anglo-American evidence scholars have begun openly to deviate from this tradition.").

63. William Twining, *The Rationalist Tradition of Evidence Scholarship in RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 32-33 (1990) [hereinafter Twining, *Rationalist Tradition*]; WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 1-18 (1985); Tillers, *Webs of Things*, *supra* note 26, at 1226 ("[T]he leaders in traditional evidence scholarship and almost all of their followers subscribed to a theory of inference impregnated with an epistemological perspective characteristic of nineteenth-century British empiricism.").

64. Tillers, *Introduction*, *supra* note 40, at 383 n.6 (emphasis in original).

65. ALASDAIR MACINTYRE, *AFTER VIRTUE* 267 (2d ed. 1984).

66. RORTY, *supra* note 19, at 133. See generally *id.* at 131-64 (describing development of epistemology from Kantian philosophy).

67. See Tillers, *Introduction*, *supra* note 40, at 381-82 ("The possible frailty of the fact-finding process in adjudication is an important and complex problem. . . . [W]hat one thinks about probability and inference in trials profoundly affects what one thinks about the 'rule of

If this relationship works, then the rationalist tradition and Bayesianism are not oppositional.⁶⁸ The only apparent opposition to this epistemologically grounded and rule-of-law based view might be Critical Legal Studies. Critics have adopted American legal realism as their intellectual forbearers. Some noted realists, particularly Thurman Arnold and Jerome Frank, were concerned about both the rationality of the adjudicative process and the rule of law.

In *The Symbols of Government*, Arnold stated that the rule of law is a myth.⁶⁹ He also contended that the civil trial system was our rationalization of the former system of trial by combat.⁷⁰ Frank concluded, "[t]he jury makes the orderly administration of justice virtually impossible."⁷¹ He also criticized the idea that judging was based on the ideal of the rule of law.⁷² Finally, in Arnold and James' 1936 casebook *Cases and Materials on Trials Judgments and Appeals*, the preface states:

[F]rom the point of view of this book, legal principles are regarded as argumentative technique—in other words, as an arsenal of offensive and defensive weapons to be used in litigation.

So long as our adversary method of litigation continues, so long as disputes are settled by means of trial by combat, this is the most effective point of view for the trial attorney. Inventiveness and ingenuity in the use of legal analogies are actually far more important in legal battles than scholarly learning.⁷³

The establishment's response to this "attack" on the American legal system was overwhelming.⁷⁴ Roscoe Pound claimed the realist position "rejects the conception of a government ruling according to law."⁷⁵

law.'"); see also Ariens, *supra* note 27, at 39 (concluding that Model Code's structure was effort to reconfigure rule of law and rational adjudication in face of realist attack).

68. See Tillers, *Mapping*, *supra* note 59, at 888-89 (suggesting multiplicity of probability theories must be used to comprehend problem of proof in adjudication process). It may be interesting to note that the philosopher of science L. Jonathan Cohen, whose book *THE PROBABLE AND THE PROVABLE* (1977), sets forth a "Baconian" approach to probability, and who is viewed as anti-Bayesian, is also the author of a recent book suggesting a revisionist interpretation of analytic philosophy. See COHEN, *supra* note 19.

69. ARNOLD, *supra* note 38, at 33-37, 216-19.

70. Chapter 8 of Arnold's book *The Symbols of Government* was devoted to the adjudication of civil disputes and was entitled *Trial by Combat*. *Id.* at 172-98. An earlier article on which chapter 8 was based is Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934).

71. FRANK, *MODERN MIND*, *supra* note 38, at 181.

72. *Id.* at 100-01.

73. ARNOLD & JAMES, *supra* note 12, at v-vi.

74. The still standard citation is EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 159-78 (1973).

75. Roscoe Pound, *The Future of Law*, 47 YALE L.J. 1, 2 (1937).

Other attacks by philosophers like Morris Cohen and younger scholars like Lon L. Fuller mined the same vein.⁷⁶

The realist attack on the rule of law has been adopted most thoroughly by the critics. The problem with this appropriation is twofold. First, even realists as "extreme" as Arnold and Frank are quite easily fitted within the philosophic tradition William Twining has named optimistic rationalism.⁷⁷ Second, while the critics have successfully attacked an ideal that was "ridiculously oversold,"⁷⁸ this attack begins from the same abstract level at which the rule of law ideal was pitched.⁷⁹ It tells us nothing about whether judges and juries, as human beings, are struggling (even if failing) with achieving some more modest form of justice.

V.

What Arnold wrote that should be taken more seriously, if not necessarily for the same reasons, is the idea of the courtroom as theater.⁸⁰ As Professor Milner Ball⁸¹ has recently suggested:

[T]he presentation of a case is a coincidence of reality and illusion, not in the sense of perjury, but in the sense of theatrical metaphor—the reenactment of relevant and material elements for reflection and judgment. Although elusive, this paradoxical interplay of reality and illusion does seem to correspond with the deeper truth of the way we experience life, which is to say that it is a strength, and not a weakness or fault,

76. PURCELL, *supra* note 74, at 161-64.

77. See William Twining, *Some Skepticism About Skepticism*, 11 J.L. & Soc'y 137, 157-61 (1984) (concluding that Jerome Frank fits within optimistic rationalism tradition); see also Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 STAN. L. REV. 1049, 1077-82 (1971) (concluding that Arnold's examination of symbols or "myths" was effort to make legal system more efficient, a classically progressive and "optimistically rationalistic" goal); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1673-74 (1982) (noting that Realists "employed analytic jurisprudence—the rigorous dissection and elaboration of legal concepts through traditional methods of legal reasoning" to critique legal abstractions and to promote legal reform).

78. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 105 (1977) ("The idea of law was ridiculously oversold, which led to great confusion in the public mind when it became clear that ours is a government not of laws but of men and that justice under law is notably unequal.").

79. See Note, *supra* note 77, at 1677-82 (1982) (suggesting that critics utilize techniques of analytic jurisprudence at broad level of generality to expose assumptions of traditional legal discourse).

80. Thurman W. Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 646 (1932).

81. MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 42-81 (1981).

in both the playhouse and the courtroom.⁸²

Evidence law might be understood as part of this play, as part of something both rational and irrational, and also nonrational. That is, evidence law may be perceived as permitting us both to accommodate paradox and accept the conflict of an abstract rule of law imposed by "concrete" persons.⁸³ This may deflate (but does not eliminate) the conception of the rule of law,⁸⁴ and might be antagonistic to optimistic rationalism,⁸⁵ but it also may evade the "law is politics" equation. To speak of a "holistic"⁸⁶ approach to evidence, or of the power of storytelling,⁸⁷ or to view the courtroom as theater may provide another way of "seeing" forms of proof and adjudication in which "[p]ersons speak to persons, heart unmasked to heart."⁸⁸

The difficulty with either the rationalistic or Bayesian approach is that they are both classically liberal conceptions of law—with its abstract focus—either in the form of rules or of proof. Rules exemplifying rationality and impartiality must remain abstract, just as progressive reform efforts necessarily defined the trial judge as impartial and neutral, even when they knew this was not so in courtrooms across the United States. Persons are reduced to rights-holders, and without a conception of the person, we cannot answer the question, "Does Evidence Law Matter?"

The abstraction of the rules from their use in actual trials and the abstraction of proof from "rhetoric" are continuing efforts to resolve the "dualistic" split between the ideal and the actual. The liberal ideal of evidence rules is summarized in Federal Rule of Evidence 102: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained

82. *Id.* at 50-51.

83. See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON AND WHITE AS MAKERS OF THE MASKS* at xi-xii (1976) ("The analytic bent of [academics] engaged [in legal history, legal philosophy and legal education] leads them to reduce 'person' to a congerie of 'rights,' with the highest ideal, if any is expressed, to do 'justice' by enforcing the rights. Evading analytical reduction, the whole person escapes them.")

84. See ARNOLD & JAMES, *supra* note 12, at 15 (reprinting published account in which Georgia judge halted lynch mob by deputizing all 100 men making up mob).

85. Twining, however, broadly defines "optimistic rationalism." See Twining, *Rationalist Tradition*, *supra* note 63, at 75, 159-61.

86. See 1 and 1A JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 1 (Peter Tillers ed., 1983).

87. See Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 425-37 (1986) (discussing narrative understanding of proof). See generally JAMES BOYD WHITE, *HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* (1985) (arguing that storytelling is most basic means of organizing experience and giving meaning to it).

88. NOONAN, *supra* note 83, at 167.

and proceedings justly determined.”⁸⁹ The actual was expressed fifty years ago by Edmund M. Morgan. In support of evidentiary reform, Morgan stated to the West Virginia Bar Association: “[A] really skillful trier can get admitted almost every piece of relevant evidence upon some issue in the action.”⁹⁰ What is left unstated but understood is that the skillful advocate can also direct the jury’s attention to “irrelevant” pieces of evidence. For there to be real progress, the idea of progress must be abandoned.

89. FED. R. EVID. 102.

90. Edmund M. Morgan, *Proposed Code of Evidence*, 57 ANN. REP. W. VA. B.A. 161, 166 (1941).