

WHICH EVIDENCE LAW? A RESPONSE TO SCHAUER

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In Response to Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006).

As usual, Frederick Schauer raises profound issues in his insightful essay, *On the Supposed Jury-Dependence of Evidence Law*.¹ Schauer is surely right that judges are not always as smart as they think they are, that judges are subject to many common cognitive deficiencies (including many of the same deficits as juries), and that judges, like other mortals, often overestimate their abilities to overcome their limitations.² These observations strongly support Schauer's conclusion that judges should be restricted by at least some rules of evidence, even when they hear cases without juries.³ These points are both timely and important, because of recent trends in courts away from jury trials and among theorists against exclusionary evidence rules and towards free proof.

As Schauer acknowledges, however, "that the law of evidence should plausibly be a rule-based enterprise says nothing about what those rules should be."⁴ It also says nothing about which rules of evidence should bind judges in particular.

Some cases seem obvious. Of course judges should be bound by evidence rules that govern burden of proof. When a criminal defendant waives the right to a jury trial, the judge still should not find the defendant guilty unless the prosecution proves beyond a reasonable doubt that the defendant is guilty. As when juries are so restricted, this rule leads judges to find some defendants not guilty even when the judge truly believes for good (but not good enough) reason that

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¹ Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006).

² *Id.* at 187 & n.86.

³ *Id.* at 200-01.

⁴ *Id.* at 194.

the defendant committed the crime. The usual rationale for this burden of proof is that old saw, "Better ten (or a hundred) guilty people go free than one innocent person be punished." That rationale applies to bench trials as much as to jury trials. Thus, at least this much in evidence law does and should apply to judges in bench trials. I doubt that even Schauer's opponents—"free proofers"⁵—would deny this. But then they do not really oppose all rules in evidence law.

On the other hand, it is hard to imagine how some other rules of evidence could in practice apply to judges. Tests for admissible expert testimony, for example, require judges to determine whether potential witnesses are experts in the area in which they will testify. That depends on what they will say, as well as on their credentials, their methods, their acceptance by the scientific community, and so on. A judge cannot determine whether the relevant tests of admissibility are met in a particular case without hearing testimony about the potential witness, that witness's field and methods, and that witness's testimony, or at least some of its main content. But then the judge has already, in effect, heard much of that evidence before ruling on admissibility. The judge can promise to disregard it after finding it inadmissible, but, as Schauer points out, judges are unlikely to be much better than other people at disregarding what they have already heard.⁶ To solve this problem, the legal system might require a second judge to decide on the admissibility of expert testimony in the trial presided over by the first judge. Unfortunately, that would be so cumbersome and inefficient that it hardly seems practical in our already overburdened courts. Thus, at least some evidence law cannot in practice be applied to judges. I doubt that Schauer would deny this. If he does, then he needs to tell us how such a restriction on expert testimony before judges would work in real legal systems.

Given that some rules of evidence should apply to judges and others should not, the question comes down to *which* rules of evidence should be applied to judges in trials without juries. One of Schauer's main examples is the hearsay rule. Unfortunately, as Schauer points out, there are "numerous exceptions to the categorical exclusion of hearsay."⁷ The rule, then, is not just "Hearsay is excluded" but "Hearsay is excluded except under conditions 1-30," which is a different rule than "Hearsay is excluded except under conditions 1-29" or "Hearsay is excluded except under conditions 1-31." Thus, "the hearsay rule" should apply to judges only if this rule with all and only these excep-

⁵ *Id.* at 175-80.

⁶ *Id.* at 189 & n.94.

⁷ *Id.* at 176.

tions should apply to judges. Maybe some of the hearsay exceptions are necessary in jury trials but not in bench trials. Maybe some more exceptions should be added in bench trials. To assess these different rules, we need to look at details of the rule and its exceptions as well as the particular differences between judges and juries, some of which Schauer admits. We might possibly conclude that all and only the established exceptions are justified for juries and also for judges, but such perfection would be surprising. Schauer admits as much before arguing for the advantages of sticking with the established rules, but he also admits that these advantages can be overridden by other considerations. No argument can show that either side overwhelms in all of the actual or potential exceptions. In the end, there is no alternative to inspection of exceptions one by one.

Still, let's talk for now about the hearsay rule in general. Schauer lists several considerations in favor of some restrictions on hearsay: "the epistemic losses coming from a non-first-hand account, from the want of an oath, from the lack of an opportunity to cross-examine the declarant, and from the absence of the ability of the trier-of-fact to observe the declarant's demeanor."⁸ "By excluding hearsay evidence . . . the hearsay rule compels the parties to search for more rather than less direct accounts, and to locate and bring forward the most immediate and cross-examinable witnesses."⁹ Other rationales could be added, such as that the exclusion of hearsay adds efficiency by reducing repetition, since lawyers could and would often call an awful lot of witnesses to provide hearsay evidence, if they were allowed to do so.

Many of these rationales seem to apply to judges as much, or almost as much, as to juries. The "epistemic losses" from hearsay in place of direct testimony will be losses for judges as well as jurors, and I already agreed with Schauer that judges might underestimate those losses or overestimate their ability to compensate for those losses.

Nonetheless, judges still seem to have some advantages over juries with respect to other rationales. Consider the hearsay rule's effect of compelling the parties to search for "more rather than less direct accounts, and to locate and bring forward the most immediate and cross-examinable witnesses." It is not clear that judges need to be restricted by a hearsay rule in order to compel the parties in this way. After all, judges are judges. They can openly demand such evidence from the bench, or they can just make it clear that, as a matter of policy, they will put much more weight on direct evidence and cross-

⁸ *Id.* at 177.

⁹ *Id.* at 196.

examinable witnesses. Lawyers will have to respond or lose. Hence, it is not clear how much this rationale for a hearsay rule extends to bench trials.

Similarly, if allowing hearsay leads to too much repetition, judges in bench trials will be able to limit lawyers simply by signaling their displeasure. In general, any rationale regarding controlling lawyers could be accomplished in bench trials by judicial actions without a hearsay rule that restricts judges. Since juries have much less opportunity to shape the presentation of the cases, this rationale for a hearsay rule seems to apply more to jury trials than to bench trials.

Other rationales might point in the other direction. Schauer mentions “the absence of the ability of the trier-of-fact to observe the declarant’s demeanor.” The ability to observe demeanor increases accuracy, of course, only to the extent that the observer is good at inferring truthfulness from demeanor. Juries might not be as good as judges in some kinds of cases. Consider, for example, victims of spousal or sexual abuse, who often look down or away as they testify about the abuse that they have suffered. Many jurors have never before seen such a victim testify, and similar body language is often seen as a sign of intentional deception, so many jurors might be likely to infer from such demeanor that the victim is lying about the abuse. This mistake comes from lack of familiarity, but judges will be more familiar with such witnesses. Judges who have seen many victims of abuse in their courts before might be less likely to misinterpret victims’ demeanor. Indeed, they might worry about witnesses who testify about being abused without looking down and away.

This admittedly speculative possibility has implications for the above-mentioned rationale for the hearsay rule from the value of observing demeanor. If jurors are likely to misinterpret testimony by victims of abuse, but the demeanor of second-hand witnesses would be less likely to mislead them, then jurors might be more likely to discover the truth if they heard hearsay from second-hand witnesses rather than direct testimony from victims. Of course, other possible remedies to misleading demeanor would have to be considered as well. However, without other changes, a hearsay exclusion in jury trials might actually reduce accuracy. In contrast, if judges are good at assessing direct testimony by victims of abuse, then excluding hearsay from bench trials might increase accuracy. Surprisingly, then, the demeanor rationale might support a hearsay exclusion in bench trials but not in jury trials.

My main point is not about the particular case of hearsay. Hearsay only illustrates a more general problem for Schauer’s approach. In this case and others, there are some differences between judges and

juries, as Schauer admits. Some of these differences are relevant to the rules of evidence and their rationales, as Schauer also admits. The problem is that, for any particular rule of evidence, some of these considerations suggest that juries and judges should be subject to the same rule of evidence, other considerations suggest that the rule of evidence should restrict juries more than judges, and yet other considerations might suggest that the rule of evidence should restrict judges more than juries. How can we weigh these various considerations in order to reach a reasonable overall conclusion about which rules of evidence should be applied to judges in bench trials? I do not know how to answer this question, but it does seem crucial in applying Schauer's general view to any particular case.

To apply Schauer's approach to particular cases, we also need to move far beyond the kind of rough speculations I have engaged in here. As Schauer points out, we need more and better empirical research on judicial deficiencies and abilities. In particular, we need research in more realistic circumstances.¹⁰ That research is difficult to conduct, but there is no other way to resolve these important issues.

Such empirical research might end up supporting Schauer's view that most rules of evidence should apply to judges as well as to juries. Or it might not. That remains to be seen. What is already evident, in any case, is that Schauer has asked the right question and has pointed towards the right methods for answering it. That in itself is a very important contribution.

¹⁰ *Id.* at 199.