

BIFURCATION AND THE LAW OF EVIDENCE

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

That the law of evidence is the child of the jury system is not only oft-repeated but also, as a historical matter, probably true. As James Thayer put it in his 1898 treatise, “the greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English ‘Law of Evidence.’”¹ To be sure, historians disagree about the relative importance of the jury system, the adversarial process, the rise of lawyers, and the nature of the judicial role in bringing about our modern law of evidence, but there is little disagreement that the existence of a lay fact finder is one of the key ingredients in that murky stew.

In Fred Schauer’s important article, *On the Supposed Jury-Dependence of Evidence Law*,² he accepts the argument that the jury’s existence was central to the creation of our rules of evidence. But he takes issue with a claim that many have seen as a corollary: that trial by jury and our rules of evidence are therefore intermeshed, a matched pair, that they go together like stars and stripes or peanut butter and jelly. According to this conventional wisdom, when we lack one component—the jury—we don’t really need the other one—the rules of evidence. This perspective is shared not only by a number of academic commentators, but also by judges themselves, who—when sitting in bench trials—typically treat the rules of evidence with a fair degree of casualness, especially in civil trials.

Schauer’s significant contribution is to make us pause to consider this commonly held view more carefully. He suggests that the histori-

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¹ JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 180 (Boston, Little, Brown & Co., 1898).

² Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165 (2006).

cal origin story is beside the point: even if our complex rules of evidence came into being as a consequence of having a lay fact finder, epistemic evidentiary regulation might be a good thing, even apart from the jury. That our constellation of rules emerged out of a judicially regulated jury system does not necessarily limit their utility to a jury system. Schauer draws upon the view—shared widely over a variety of legal philosophical traditions—that for substantive rather than procedural law, it is appropriate for judges to be bound and constrained by rules. He asks why we should believe that all of the implicit and explicit justifications for substantive legal rules ought not to apply equally to prescriptive rules about making factual determinations. Importing insights from cognitive psychology and from the rather limited amount of empirical evidence on the issue, Schauer casts a skeptical eye on the assumption that judges will be exempt from the kinds of cognitive deficiencies, blinders, and limitations that may make the law of evidence necessary for trials before a lay jury.

Certainly there is an implicit logical fallacy in the common sense wisdom that, because the rules of evidence were invented for juries, judges in bench trials need not be bound by them. Even if (1) lay juries require epistemic regulation in order to make accurate and socially acceptable determinations of legal fact, and (2) judges are not lay juries, that does not, in and of itself imply that (3) judges sitting as fact finders do not require epistemic regulation in order to make accurate and socially acceptable determinations of legal fact.

What then explains the widespread intuition that trial by judge and formal rules of evidence are incompatible, or at least an awkward fit? Schauer assumes that courts often do not apply evidence rules to themselves because they think they do not need to—that judges, as expert legal evaluators, figure they can appropriately consider the evidence “for what it’s worth”—their ability to weigh the evidence serving, at least in theory, as a substitute for the operation of exclusionary rules. No doubt judges’ confidence (and quite likely overconfidence) in their ability to discount information when appropriate partly explains the free and easy attitude toward the rules of evidence so common in bench trials.

But there are several other important reasons why judges may not tend to apply the rules of evidence to themselves. First, unless there is some kind of bifurcation—one judge making evidentiary assessments to create the factual record that another judge then evaluates—the judge may be weighing the evidence in actual practice, no matter what she does with it formally. If Judge A decides to exclude an item of

evidence as hearsay or as impermissible character evidence, she has still heard about it. She still knows that it exists. Her evidentiary ruling means that she believes that it should be excluded, and hence she believes, as a matter of evidence law, that it should not be considered by her in evaluating the rest of the evidence. Presumably, especially given that this decision to exclude is her own ruling, she will try to adhere to it in good faith.

But can she really? She knows about the item of evidence. She probably cannot truly forget about it, even though she has excluded it. Suppose that the item corroborates other evidence, legitimately admitted, but not especially dispositive. When evaluating the likelihood of this other piece of evidence, can she really keep the excluded piece of evidence entirely out of mind? Might she not tend to have somewhat more faith in the admitted piece of evidence that is consistent with the excluded hearsay than she would have had if the hearsay evidence had not existed (or had not been known by her to exist)? From a Bayesian perspective, the evidentiary value of the excluded piece of evidence is probably not zero. Even if excluded, the judge's assessment of the prior odds of guilt or liability might have shifted, thanks to the evidence's existence. Even if she tries to not let the excluded item of evidence affect her subjective belief about the overall odds of guilt or liability, the judge may tend to value other items of evidence differently because of the non-zero probative value of the excluded evidence.

Let's make this concrete. Imagine that Mark wrote in his diary that he ran into Samantha, an old acquaintance of his, at the neighborhood bar on July 1, the night before he wrote the entry. Since that time, Mark has passed away. The diary isn't a present sense impression, nor an excited utterance, nor a business record, and fits into no other hearsay exception. The judge hears about the diary entry and rules it inadmissible hearsay.

Suppose that the night of July 1, someone who met Samantha's description was seen breaking into a car half a block away from the bar in question. Samantha presents an alibi defense. She claims to have been watching a movie on the other side of town all evening, and has two witnesses who back up her story. However, two other patrons of the neighborhood bar also testify that they saw Samantha there on July 1, but one of them admits he was three sheets to the wind at the time, and the other has had a long-standing feud with Samantha's sister.

The diary is excluded. The judge knows she shouldn't consider it. She may well genuinely try not to consider it. And yet, isn't it possible—perhaps even likely—that the existence of the diary entry will color her evaluation of the two witnesses who claim to have seen Samantha at the bar? The Federal Rules of Evidence, which tend to evaluate evidence in an item-by-item, atomistic fashion, may require exclusion; but certainly as a matter of logic, the existence of the diary entry makes the claims of the other two witnesses more credible than they would be without it. Putting aside the question of whether the exclusionary principle at work in the Federal Rules with respect to hearsay that fits within no exception is justified, the point is that, as a cognitive matter, the judge may not be able to ignore the excluded evidence entirely. Or, to put it differently, she may even think that she *is* ignoring it; and yet, her evaluation of the credibility of the two other bar witnesses might be different than it would have been if she didn't know of the diary entry. She just might find one or both of them especially believable, for reasons that she can't quite express.

The significant point here is that without bifurcation, evidence rules may be impossible to apply rigorously. The general impossibility of “unringing the bell”—that is, forgetting about the excluded evidence—may mean that even if judges applied the Federal Rules of Evidence more conscientiously in bench trials as a formal matter, in actual practice they might nonetheless be doing something that looks more like weighing the evidence for what it's worth. While the formal act of exclusion may sometimes matter—certainly for a sufficiency determination, but also in regulating the attorney's witness examinations or closing argument—much of the time, even if the judge did follow the letter of the Federal Rules of Evidence, items formally not in evidence might still be taken, in some sense, as evidence.

Perhaps, then, there is another way to understand the reluctance of judges to apply the rules of evidence rigorously in bench trials. Instead of viewing it as the result of cognitive overconfidence or a belief in their own expertise, we might see judges' cavalier attitude as a knowing nod to their own cognitive frailties. Judicial disregard of the rules of evidence thus might result from the recognition that in practice, no matter what they *claim* to be doing, judges who wear two hats—both making admissibility determinations and finding facts—might inevitably be considering even formally excluded evidence for what it's worth, and pretending otherwise is disingenuous.

This implies that if we want the rules of evidence to be applied in bench trials, some kind of bifurcation may be absolutely necessary.

While Schauer does mention bifurcation as a possible mechanism for getting judges to take evidence rules seriously, he puts it forward as one of several possible approaches, another of which is to increase the use of occasional appellate slaps on the wrist to trial judges who ignore the evidence rules too blatantly in nonjury proceedings.

But to whatever extent the judge operating in both roles literally cannot, cognitively, comply with her own rulings, appellate review simply will not provide an effective enforcement mechanism. Because we almost entirely lack formal rules about weight or probative value, a judge's inability to ignore formally excluded evidence would typically be invisible to appellate review. To return to our earlier example, if the judge excluded the diary, but nonetheless determined that Samantha had been at the bar near the crime scene on the evening in question, no appellate court would be able to say that this determination was unjustified. Assessing credibility is quintessentially a judgment made by the fact finder at trial, not on appeal. The appellate tribunal would be extremely unlikely to second-guess the trial judge's judgment that the two alibi witnesses were insufficiently credible, and that the patrons of the bar were worthy of belief. That the trial judge's assessment of the admissible evidence was colored by her knowledge of the excluded diary would be, in essence, written out of the case.

Without bifurcation, then, judges might be unable to ignore the evidence that they themselves know they should ignore. But even if we imagine that judges could somehow follow their own rulings to a tee, excising from their brains any consideration of the evidence that they had deemed inadmissible, there would still be another difficulty with having judges apply the rules of evidence to themselves. Many of the Federal Rules of Evidence have flexibility and discretion built into them, frequently providing questions more than clear-cut answers, fuzzy balancing tests rather than bright-line rules. Even hearsay, one of the more rule-like of the Rules of Evidence, not only permits voluminous delineated exceptions but also offers a residual, "catch-all" exception that permits judges to admit, in some circumstances, hearsay evidence that cannot be fit into any of the other categories.³ And many other important areas of evidence are governed by "rules" that

³ The admissibility of hearsay is governed by FED. R. EVID. 801-806; FED. R. EVID. 807 is the residual exception.

are even more like standards. With the exception of Rule 609(a)(2),⁴ courts apply a balancing test when deciding whether or not to admit evidence of prior crimes committed by a witness. For expert evidence, federal courts assess reliability under *Daubert*,⁵ its progeny,⁶ and Rule 702,⁷ but reliability is itself a sufficiently capacious concept that it is fair to say that often what is required by the Rules is an inquiry rather than a particular outcome. And we cannot forget the important and overarching Rule 403, which instructs courts to balance probative value against a range of other considerations, including the danger of undue prejudice.⁸ Since the Rules themselves do not provide either insight or instruction about how to assess either probative value or prejudice, this balancing act becomes a matter of common sense about which the judge has enormous discretion.⁹

Schauer describes how many of the ordinary rules—hearsay, character evidence, best evidence, and expert evidence—are taken by judges sitting without juries “as being, at best, hints (or rules of thumb) about how much weight to give the evidence, rather than as genuine rules demanding categorical exclusion.”¹⁰ In a footnote, he further explains:

To make clear what is implicit in my entire analysis, I do not consider totally transparent (to their background justifications) rules-of-thumb (what some might call “guidelines”) to be variants of (real) rules. . . . [A] rule that can be set aside whenever its background justifications would indicate a contrary outcome is hardly a rule at all.¹¹

Later in his article, Schauer defends the idea that there may be real benefits to rules qua rules: rules of evidence that “have a point”

⁴ Rather unusually for the Federal Rules, FED. R. EVID. 609(a)(2) tells judges that evidence that witnesses have been convicted of a crime that involves dishonesty or false statement “shall be admitted,” precluding any application of a balancing test or discretion.

⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁶ *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

⁷ FED. R. EVID. 702. In the wake of *Daubert*, *Joiner* and *Kumho*, Rule 702 was amended in 2000 to emphasize the need for expert opinion evidence to have a sufficient and a reliable basis.

⁸ FED. R. EVID. 403.

⁹ It is fair to say that Rule 403 rulings are not frequently overturned on appeal, but the discretion to balance prejudice against probative value is not wholly unlimited. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 180-84 (1997) (discussing the operation of Rule 403).

¹⁰ Schauer, *supra* note 1, at 179.

¹¹ *Id.* at 179 n.63.

and are not just “epistemic rules of thumb,” that is, rules that actually constrain judgment rather than operate as heuristics to bear in mind while making “all-things-considered” decisions.¹²

What Schauer does not quite recognize here is that many of the Federal Rules may not genuinely be rules in this sense—certainly not in bench trials, but not in jury trials either. Quite a few of the evidence rules are, in fact, designed as epistemic rules of thumb, and often—though not always—overtly permit the judge to make what Schauer calls “all-things-considered” decisions. If this is right, then when judges in bench trials treat the rules of evidence as mere guidelines rather than as serious constraints, they may be engaging in a practice not different in kind from what they do when they make evidentiary determinations before a jury.

There are some differences to be sure: sometimes in bench trials, judges do not even rule on admissibility at all, figuring they will consider the evidence for what it’s worth in the end. Obviously, in a trial before a jury, such a total failure to rule would not be an option. But still, when a judge decides whether or not to permit a witness’s prior conviction under Rule 609(a)(1); or when a judge decides whether a piece of evidence offered for a legitimate purpose under Rule 404(b), should nonetheless be excluded because of the danger that the fact finder will consider it for a prohibited purpose, such as making an inference about the defendant’s character; the judge is engaged in a kind of considered balancing about which she is granted a great deal of discretion. To put it differently, there are an enormous number of evidentiary determinations in which either answer would be allowed—not only because of the harmless error doctrine, but because neither judgment would be error at all. With this great degree of overt indeterminacy—when either outcome is within the judge’s sound discretion—the Rules are not actually operating as rules. It is not so much that the judge can set aside the rule whenever the background justification for the rule does not support its application in the particular instance; it is, rather, that the constraint provided by the rule was, by design, to shape the inquiry the judge makes, but not necessarily the answer she reaches. The rules of evidence thereby often constrain by providing frames for analysis rather than by determining the ultimate judgment.

¹² *Id.* at 182.

Here again, applying the rules rigorously without bifurcation seems problematic. When the rules have this much flexibility and discretion built into their very structure, there is something more than a little fictional about making them strictly applicable without a separation of powers, so to speak, between the judicial role and the fact finder. Or to put it differently, even if judges paid greater lip service to the application of the rules of evidence in bench trials, a legal realist would probably find a great deal of grist for the mill.

These observations raise interesting questions about the extent to which our rules of evidence imply—or rely upon—an epistemology of bifurcation. How much do the rules in their present form depend on a separation of functions between the evidence umpire and the fact finder? If we wanted to develop rules that could work without bifurcation—rules that a judge could apply to herself in bench trials—would it be possible? What might such a system look like?

Trying to design a system of rules that envisions the same person as rule-enforcer and adjudicator might lead us down one of several paths. First, we might want rules that are more rule-like than the Federal Rules tend to be—rules that would generate stricter answers about admissibility and would, if not eliminate, at least reduce the degree of overtly built-in indeterminacy. That is, we might want rules that at least were designed as rules, rather than as “all-things-considered” guidelines. When judge and jury are separate, evidence rules that have a certain “rule of thumb” quality might be optimal, at least for each trial taken individually. Perhaps when one decision maker creates the field of information that the other will be able to consider, vesting considerable judgment in the first can lead to better factual determinations by the second.¹³ But when umpire and evalua-

¹³ Though this seems intuitively plausible, it also might not be the case at all. It might be that more rule-like rules would be optimal even with bifurcation, for all the reasons that rules in general might be defended over standards. To whatever extent we value predictability and consistency, rules this flexible—coupled with very little appellate review—may be problematic quite apart from bifurcation. But a judge applying standards rather than rules when deciding how much the jury should know in a particular case would be able to make the necessary determinations in a nuanced, case-specific way that broader-brush rules would not permit. This, of course, replicates in very brief form the classic debates over rules versus standards. Some of the classics in the voluminous “rules versus standards” literature include (in chronological order): Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645 (1991); FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22

tor are merged, rules that are actually standards may functionally become equivalent to a system without rules at all. And once again, this would likely be operationally true even if judges did pay greater lip service to the rules of evidence in bench trials.

However, while more rule-like rules might bind the discretion of the judge when engaged in the judicial role (rather than wearing her fact-finder hat), they still would not solve the first problem discussed above—the reality that the judge, even operating in good faith, could probably not wholly forget what she knew, not even when she herself made the decision to exclude it from evidence. The other possible design direction for regulating judges serving both as rule-enforcers and adjudicators would be through formal rules for assessing evidentiary weight. Indeed, it might be that without a bifurcated tribunal, the only rules of evidence that could genuinely operate as rules during a bench trial would be rules of assessment rather than admissibility. We might then have the opposite of what we have at present: to borrow Bentham's language, instead of a "Technical System" determining what jurors could consider, coupled with virtually unregulated evidence assessment, we might have a "Natural System," or free proof with respect to admissibility, but constraint in the form of assessment rules.¹⁴ This harks back to Roman law and its system of full proofs and half proofs—but whatever the particulars, we might imagine a system in which we attempted to develop what John Henry Wigmore always longed for: a "science of proof."¹⁵

Of course, this is hard to fathom—both institutionally and intellectually. Institutionally, it is difficult to imagine the emergence of formal rules of weight and sufficiency, for they are deeply at odds with the very institution out of which our evidence rules partly emerged: the jury as fact finder, the jury as the black box into whose operation we do not—nay, cannot—peer too closely. Even putting aside the institutional impracticality, it is equally difficult to imagine intellectually precisely because evidence evaluation is so particularized, so fact-

(1992); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000).

¹⁴ See generally JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (John S. Mill ed., Fred B. Rothman & Co. 1995) (1827); WILLIAM L. TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 19-108 (1985) (summarizing and discussing Bentham's views).

¹⁵ See generally JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d. ed. 1937).

intensive, and so variable. What could such rules of weight possibly look like? Could we come up with any sensible rules that would not easily invite hypotheticals that would make the rule look misplaced, or even silly? Even if we were willing to live with rules that sometimes got it wrong in the name of increased accuracy over the aggregate of cases, it is not clear that such rules could be easily designed. Thinking through what they might look like—taking into account insights from cognitive psychology both about the process of evidence evaluation and about credibility—might be genuinely quixotic: both noble and doomed to fail.

Lest all of this seem a backhanded defense of our current system, it is worth noting that bifurcation between judge and jury certainly has its own set of problems. I am reminded of *Doubt*, a *New Yorker* article by William Finnegan which ought, in my view, to be required reading for students of evidence.¹⁶ The journalist was a juror in a second-degree robbery and third-degree assault case, in which the defendant was charged with participating in a subway mugging in which two men were beaten up badly and had their wallets stolen. The police located a suspect almost immediately: Martin Kaplan was found near the crime scene shortly after the attacks, with blood on his hands, wearing large black combat boots that resembled those described by the victims to police. Both the victims and an eyewitness bystander identified the defendant as the perpetrator. At trial, Kaplan's alibi was that he was in a restaurant with some friends, and these friends testified on his behalf, insisting that he'd been at the taco bar with them until mere moments before his arrest.

The jury convicted, and after the trial Finnegan decided to shift roles, transforming from juror to journalist. He began to investigate the case, the witnesses, and the back-story. He soon learned a great many details of which the jury was never told, including the fact that the defendant was a heroin addict with a long history of trouble with the law. But the more he learned, the less convinced he became that Kaplan had actually committed the crime for which he had been convicted. His criminal record included many convictions for breaking into empty cars and for narcotics use, but a violent attack with co-conspirators was a far cry from his typical modus operandi. Moreover, the blood on his hands may well have been from shooting up, and Finnegan learned that the photos of his arms taken after arrest were

¹⁶ William Finnegan, *Doubt*, THE NEW YORKER, Jan. 31, 1994, at 48.

never shown to the jury because the blood didn't look very dramatic in the pictures.

Much of the information discovered by Finnegan the reporter was, of course, purposefully kept from Finnegan the juror, precisely because of the operation of the Rules of Evidence. And yet it wasn't as if the jury hadn't wondered about many of the same issues. Notwithstanding the judge's firm instruction to the jury to consider nothing outside the evidence presented, and "not, under any circumstance, [to] indulge in speculation or guesswork," the jury's "favored pastime" was "speculation and guesswork." According to Finnegan:

[T]he impossibility of considering only "the evidence" was so obvious it was hardly mentioned. As jurors, we had been kept firmly in the dark throughout the trial, allowed to hear only what the judge deemed fit for our ears. We had no idea who Martin Kaplan really was. . . . [but] the disputed facts before us would make sense only if we could imagine the worlds around them. And so we told each other stories.¹⁷

When information—about drug use, about webs of social relationships, about prior convictions, about backgrounds and contexts—is kept from juries, this does not prevent them from speculating, imagining, and inventing. The basic idea behind our rules of evidence—that the jury must be protected from certain items of information in order to improve the quality of its decisions—is fundamentally challenged if we believe that juries are likely to infer—and often incorrectly—about these very questions, based both on what they hear and on what they do not.¹⁸ If blindfolding the jury does not prevent its members from fanciful speculation and erroneous assumptions, it may sometimes be a cure worse than the disease.

In this sense, it is possible that judges are, indeed, better at thinking through evidence than juries. We do not inform juries about what we do not inform them about: in other words, we do not say, "we are self-consciously choosing not to tell you whether or not the defendant has prior convictions, and here is why we do not want you thinking about it." Whether this kind of meta-information would have any effect on deliberations is an interesting empirical question. But it is at least plausible that judges—who (hopefully) do understand the pur-

¹⁷ *Id.* at 51-52.

¹⁸ For a striking example of this same phenomenon in a civil context, see Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1876-82 (2001) (discussing frequency with which juries discuss insurance issues even in the absence of any insurance-related evidence).

poses of the rules of evidence—would, in a bifurcated bench trial, attempt to rein in their natural narrativizing tendencies and instead try to build a story firmly grounded upon the bricks handed to them. For them actually to succeed in this endeavor would be, strictly speaking, impossible—story-making by its nature involves a supplement, a going-beyond the bare facts to create meaning. Nonetheless, perhaps judges' story-making would be more mindful, more thoughtful about the dynamics of inference and assumption, than the narrative proliferation engaged in by a jury who does not even know how or why they have been blindfolded. Perhaps even without bifurcation, judges in bench trials are sometimes able to self-regulate precisely because they understand the reasons for the regulations.¹⁹

In any event, the shift away from jury trials is an empirical reality. Given this trend, it is high time to consider what kinds of epistemic regulation are justified when the jury leaves the stage. Schauer is undoubtedly right that it is far from obvious that rules of evidence have no place in a nonjury trial, and I share his instinct that epistemic regulation of some kind may be desirable regardless of whether the fact finder is lay or professional. Perhaps he is also right that our current rules—simply because they are already there—are about as good as anything else we could manufacture, especially considering the inevitable costs of change. But it also may be that trial by judge—especially if we do not reinvigorate the commitment to a bifurcation between umpire and adjudicator—invites a significant rethinking of both the rules of evidence and their purposes.

¹⁹ Of course, if this is correct, it might also be that informing juries about the rules of evidence and their purposes could have a similar effect.