

THE 2008 PROGRAM OF THE SECTION ON EVIDENCE  
OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS

**Guilt vs. Guiltiness: Are the Right Rules  
for Trying Factual Innocence Inevitably the Wrong  
Rules for Trying Culpability?**

**Introduction**

*D. Michael Risinger\**

One of the great privileges that falls largely to the chair of any section of the Association of American Law Schools is setting the topic for the presentations at the annual meeting. The chair then gets the pleasure of enlisting some of the best minds in the academic community to explore the questions presented by that chosen topic.

Most of us who are members of the AALS Evidence Section teach the basic course in Evidence. Since that course is generally three or four credits, and since Evidence law, as instantiated in the Federal Rules of Evidence and their practical context and judicial interpretation, is a subject on the multi-state bar examination, most of us of necessity teach a heavily doctrinal course meant to deliver to our students a competence about this system and its lore appropriate for both the purposes of the bar examination and for conducting conversations on evidentiary issues with judges and other lawyers. But in our seminars and advanced courses, and in our scholarship, most of us try to go beyond doctrinal exposition in any narrow sense. In this pursuit, we often take a view of the subject of Evidence broader than the rules of admissibility in contested litigation, and move out toward the edges of Bentham's "adjective law"<sup>1</sup> to examine

---

\* John J. Gibbons Professor of Law, Seton Hall University School of Law.

<sup>1</sup> COLLECTED WORKS OF JEREMY BENTHAM: OF LAWS IN GENERAL (H.L.A. Hart ed., 1970) (1782). The 1782 date of completion is given in Hart's *Introduction*. *Id.* at xxxi. For a discussion of Bentham's taxonomy of laws, see D. Michael Risinger, "Substance" and "Procedure" Revisited, *With Some Thoughts on the Constitutional Problems of Irrebuttable Presumptions*, 30 UCLA L. REV. 189, 190-94 (1982).

all parts of procedure that have arguably accuracy-distorting or accuracy-enhancing effects on the products of the legal system, whether through trial, settlement, plea bargain, or alternative dispute resolution. In doing so we seek to examine and critique “evidence in context” broadly conceived, moving from evidence law strictly defined to Wigmore’s “science of proof,”<sup>2</sup> or, more specifically, to how the law should be structured to enhance the efficacy of the process of proof. In setting the agenda for this year’s program I have attempted to focus the inquiry on some of these broader questions of enduring mystery.

It is an asserted principle of ancient lineage dating at least to the seventeenth century that, while standards of proof may vary depending on the kind of case or issue involved, rules of admissibility (at least those not explicitly based on policies extrinsic to rectitude of decision) ought ideally to be the same in every context, civil or criminal.<sup>3</sup> It was an explicit policy of Wigmore to bring the rules of evidence more in line with this ideal.<sup>4</sup> The reason given has always been

---

<sup>2</sup> See the discussion in WILLIAM TWING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 63–65 (2d ed. 2006).

<sup>3</sup> The earliest reference I have discovered (or stumbled across) is in an anonymous French dissertation on handwriting identification published in Paris in 1704, but not translated into English until 1755, *A DISSERTATION SHEWING THE INVALIDITY OF ALL PROOF BY SIMILITUDE OF HANDS IN CRIMINAL CASES*.

The Advocates for this kind of Proof in Criminal Matters, first lay it down for a Principle that Custom has established it in civil Cases; and thence conclude that it ought to be admitted likewise in criminal Matters; because, say they, in Matter of Proof, there should be no Distinction between civil and criminal Cases; Proof being nothing else but the Means of discovering Truth.

*Id.* at 20. Of course, as long as the general principle has been espoused it has been contested, as indeed it was the object of the Anonymous Advocate Author of this little dissertation to do.

<sup>4</sup> JOHN H. WIGMORE, *A TREATISE ON EVIDENCE IN TRIALS AT COMMON LAW* 10–13 (1st ed. 1904). This is the essence of what has come to be called the trans-substantive ideal of evidence law, and of procedure in general. See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989). Of course, Wigmore would not have used the term “trans-substantive.” That useful term was coined by the late Robert Cover in a 1975 article in the *Yale Law Journal*. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 733 (1975). While Cover claimed no neologistic credit for the word in that article, a full search on Westlaw, Hein Online, and JSTOR reveals no earlier usage. While Cover’s coinage was new, the essential idea was not, tracking as it does traditional divisions between substantive subjects within the broad categories of criminal law and civil law. On reflection, however, “trans-substantive” may not prove sufficiently fine-grained to capture the cleavages where different rules or approaches ought to prevail, and thus I will often refer to “trans-contextual” rules in an attempt to better capture the right level of magnification.

that information tending to prove a fact has that same tendency whether the fact is a material issue in a criminal case or in a civil case, for the plaintiff, prosecution or defense.

If all we asked the “factfinder” to do in our system of litigation was to deal with fact reconstruction strictly speaking, and if contextual pressures on factfinders attempting to evaluate evidence were the same in every context, there would be some force to this argument. But it is clear that our trial system assigns other important functions to the jury besides fact reconstruction strictly defined, and that the pressures and potential distortions of contextual atmosphere in which we expect factfinders to work vary greatly from case to case.

To be sure, we ask factfinders to determine the empirical details of “facts in the world.” But we also ask “factfinders” to make some determinations which are clearly not “facts” (e.g., negligence; insanity), but are rather value judgments about facts.<sup>5</sup> And we ask “factfinders” to determine other things (states of mind) the factual status of which are epistemically different from (and less clear than) exterior “facts in the world,” and which are generally inseparable from normative evaluations of responsibility and guilt.<sup>6</sup> Might the kinds of information that are appropriate for one function be inappropriate to the proper performance of other functions? In addition, in the criminal setting, might the mindset which is directed toward investigating and producing evidence of “guiltiness” not be that best suited to investi-

---

<sup>5</sup> The role of the jury in the ordinary determination of negligence is the most widespread and clearest example. No amount of fact specification could eliminate the need for the value judgment entailed in the concept and final conclusion of negligence. For a discussion of this and other issues our system submits to juries which inevitably entail warrants to decide issues of value, see D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1295–1301 (2004).

<sup>6</sup> The importance to the criminal trial, and to theories of relevance and admissibility, of the contrast between “guilt” and “guiltiness” was an explicit part of Justice Souter’s reasoning for the majority in *Old Chief v. United States*, 519 U.S. 172, 188 (1997). Professor Swift has made this a focus of her contribution. Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants’ Post Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975 (2008). Other reflections on the implications of *Old Chief* can be found in D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”—Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403 (1997); James Joseph Duane, *“Screw Your Courage to the Sticking Place”: The Roles of Evidence, Stipulations and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463 (1997), and Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 564–69 (2004). See generally Richard O. Lempert, *Narrative Relevance, Imagined Juries and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15 (2002).

gating and producing reliable evidence of guilt?<sup>7</sup> Can the proper structuring of the trial, and adjustments in the rules of evidence, help resolve this and similar conflicts, or by the time the trial starts is it already too late, given the potential for the distortion of information that is inevitably a part of a system run largely by partisan adversaries? And if reforms might help sort out the informational tension between determining guilt and guiltiness, are any such reforms practically possible?

For myself, cogitation about these general questions has precipitated a constellation of intertwined and somewhat tentative responses:

1. A belief that the standard model of adjudication does not describe very well either what goes on in a trial, or what ought to go on.<sup>8</sup>
2. A rejection of the traditional law-fact distinction as sufficient to capture appropriate decisional roles of judge and jury.<sup>9</sup>
3. A foregrounding of the legitimate value-judgment authority (or lack thereof) of the so-called “factfinder” in regard to particular issues as a proper consideration in determining what evidence the factfinder ought (and ought not) to be given in deciding cases where those issues are the practically triable issues.<sup>10</sup>
4. A sensitivity to the distorting effects of adversariness at both the evidence investigation and assembly stages and the evidence production stages of the trial, in regard to case-relevant information in general, and particularly in regard to asserted expert testimony.<sup>11</sup>

---

<sup>7</sup> The “standard model” is the general orthodox account of the trial system. It has also been referred to variously as the “official ideology” of the trial, the “search for truth” model, “progressive proceduralism,” the “rectitude of decision” model and the “received view of the trial.” See Risinger, *supra* note 5, at 1283–84, 1283–84 nn.5–10. The leading distiller of the standard model (which he refers to as the view of the “rationalist tradition”) into an efficient and elegant set of descriptors is William Twining. See WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 71–82 (1990); WILLIAM TWINING, *THEORIES OF EVIDENCE, BENTHAM AND WIGMORE* 1–18 (1985).

<sup>8</sup> See Risinger, *supra* note 5, at 1290–95 (2004).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See *id.* at 1311–13. On the pretrial aspects of information distortion by our current adversary structuring, see RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008); Keith A. Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–40; and Professor Findley’s contribution to this volume, Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science and the Search for Truth*, 38 SETON HALL L. REV. 893 (2008).

5. An emphasis on system reform upstream from the trial to obtain more complete and less distorted information.<sup>12</sup>
6. A suspicion of free proof and trans-substantivity, or perhaps more appropriately, trans-contextuality, of evidence rules.<sup>13</sup>
7. A corollary belief that decisions on admissibility should be heavily affected by contextual variables—criminal/civil, fact/value, etc.—and particularly in criminal cases, by whether the only practically triable issue is the identity of the perpetrator, or whether the case is one where perpetration is not practically in issue, but which turns on issues of normative guiltiness rather than factual guilt.<sup>14</sup>

These were the general issues and hypotheses that the panelists were asked to consider, though of course they were free to select one or more for special examination, or otherwise shape their responses in any way that appealed to them. When you enlist giants to aid in a project, you should stay out of their way as much as possible. And giants we have, some whose stature has been long established, and some only recently emerging. I will call them on briefly, in Morris dance manner, and then let their contributions speak for them.

First comes our emerging scholar, Keith Findley, Clinical Professor of Law at the University of Wisconsin and co-founder and co-director of the Wisconsin Innocence Project. Professor Findley comes to scholarly reflection and writing from inside the process, having served for many years as a public defender in Wisconsin. His current experiences with the Wisconsin Innocence Project give him an important lens through which to view the documented failures of the proof process in criminal cases and to give some account of the systemic factors that lead to such miscarriages. He is the author (with Michael Scott) of *The Multiple Dimensions of Tunnel Vision in Criminal Cases*.<sup>15</sup> This examination of the phenomenon of systemic tunnel vision from the point of first contact of the criminal justice system with a case involving an alleged criminal act, through investigation, trial, and conviction, through appeal and to the end of efforts for post-conviction relief, is destined to become a classic. His current contribution, entitled *Innocents at Risk: Adversary Imbalance, Forensic Science*

---

<sup>12</sup> See, e.g., D. Michael Risinger, Michael J. Saks, William C. Thompson & Robert Rosenthal, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 20 CAL. L. REV. 1, 45–52 (2002).

<sup>13</sup> See, e.g., D. Michael Risinger, *The Irrelevance, and Central Relevance, of the Boundary Between Science and Non-Science in the Evaluation of Expert Witness Reliability*, 52 VILL. L. REV. 679, 699–701 (2007).

<sup>14</sup> See Risinger, *supra* note 5, at 1290–95.

<sup>15</sup> Findley & Scott, *supra* note 11.

and the Search for Truth,<sup>16</sup> is a worthy follow-on to that article. The opening catalogue of structural advantages our criminal justice system bestows upon the prosecution should be required reading for anyone who believes that the system is designed to protect the innocent from conviction. Thereafter, he turns to one of those imbalances, access to forensic expertise, and effectively makes the case that there is a need for substantial reform in the way forensic expertise is generated.

Next comes Eleanor Swift, Professor of Law at the University of California, Berkeley (Boalt). Professor Swift is a co-author/editor of the most recent edition of McCormick's classic treatise on the law of evidence,<sup>17</sup> and also of a leading evidence casebook.<sup>18</sup> In addition to evidence, she teaches civil procedure and professional responsibility, and she was also instrumental in the establishment of Boalt's Center for Clinical Education. Her scholarship reflects her broad perspective on the adversary system, both in regard to its strengths and its excesses.<sup>19</sup> In her current contribution, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post Crime State of Mind Hearsay*,<sup>20</sup> Professor Swift identifies an anomaly in the treatment of criminal defendants' declarations relevant to their current state of mind, which in turn would be relevant to their previous mens rea under normal probabilistic notions of relevance. She shows that, functionally, special doctrines have been generated for the treatment of such evidence that systematically disadvantage criminal defendants, buttressing her conclusions with empirical research on such patterns of decision. Her piece is a major contribution to the growing body of scholarship on asymmetries that disadvantage criminal defendants, contrary to the claimed ideals of the criminal justice system.

The third to come in is Christopher Slobogin, Steven C. O'Connell Professor of Law and Affiliate Professor of Psychiatry, University of Florida. Professor Slobogin is also shockingly prolific, the author of numerous books and articles on Criminal Law, Criminal Procedure, Law and the Mental Health System, and Evidence. Perhaps most important for our current proceedings are his works on

---

<sup>16</sup> Findley, *supra* note 11.

<sup>17</sup> MCCORMICK ON EVIDENCE (Kenneth S. Broun et al. eds, 6th ed. 2006).

<sup>18</sup> RONALD J. ALLEN, RICHARD B. KUHN, ELEANOR SWIFT & DAVID S. SCHWARTZ, EVIDENCE: TEXT, PROBLEMS, AND CASES (4th ed. 2006).

<sup>19</sup> Her interest in such topics extends back decades. See Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1341 (1987); see also Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437 (2000); Eleanor Swift, *Rival Claims to "Truth,"* 49 HASTINGS L.J. 605 (1998).

<sup>20</sup> Swift, *supra* note 6.

the Regulation of Police Investigation,<sup>21</sup> and most particularly, his recent book on the epistemic mysteries of asserted expertise about mental states, *Proving the Unprovable*.<sup>22</sup> In his article here, *Experts, Mental States, and Acts*,<sup>23</sup> Professor Slobogin expands upon some of the themes from the book, explaining in detail his positions concerning when reliability thresholds for asserted mental state expertise should be low and when not, with illustrations to decided cases he believes were decided wrongly.<sup>24</sup>

Last but certainly not least is Edward Imwinkelried, Edward L. Barrett, Jr. Professor of Law and Director of Trial Advocacy at the University of California, Davis. Professor Imwinkelried is an evidence generalist with many specialties. His first treatise, *Uncharged Misconduct Evidence*,<sup>25</sup> was a treatment of the mysteries of the propensity rule in the grand style of the classic treatise, accessible to practitioners and valuable to theorists alike. Since then he has co-authored a leading treatise on scientific evidence<sup>26</sup> and a well regarded casebook,<sup>27</sup> taken on the theory of privileges,<sup>28</sup> and also served as a co-author/editor of *McCormick on Evidence*, all the while publishing such a floodtide of journal articles that he stands as evidence law's answer to Richard Posner. In his article for this volume, *The Case Against Abandoning The Search For Substantive Accuracy*,<sup>29</sup> Professor Imwinkelried raises a concern that Professor Slobogin's approach to reliability standards for the introduction of mental health expert claims, constrained though

---

<sup>21</sup> CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE—REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS (2002).

<sup>22</sup> CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS (2006).

<sup>23</sup> 38 SETON HALL L. REV. 1009 (2008).

<sup>24</sup> I have previously taken the position that one desirable reform for our system of criminal trial would be the adoption of narrower and more stringent admissibility standards for evidence, and especially prosecution-proffered expert evidence, in cases involving the single practically triable issue of the defendant's identity as the perpetrator of the charged crime. See, e.g., Risinger, *supra* note 5, at 1313. In *Proving the Unprovable*, Professor Slobogin has called for broader and less stringent admissibility standards when evidence, especially defense-proffered expert evidence, is offered to establish mental states inconsistent with guilt of the charged crime. See generally SLOBOGIN, *supra* note 22. His current essay helps to determine the extent to which we agree or disagree about these two positions and their relative priority.

<sup>25</sup> EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1984).

<sup>26</sup> PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE (4th ed. 2007).

<sup>27</sup> RONALD L. CARLSON & EDWARD J. IMWINKELRIED, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES (6th ed. 2007).

<sup>28</sup> EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES (2004).

<sup>29</sup> 38 SETON HALL L. REV. 1031 (2008).

it is in Professor Slobogin's systematization, may in fact be interpreted in such a way as to result in the admission of low quality expert information where higher quality information might reasonably be expected.<sup>30</sup>

The presentation of these papers at the annual meeting of the Association of American Law Schools precipitated commentary primarily on Professor Swift's article by Professor Paul Rothstein of Georgetown University Law Center, which will appear in the next issue, along with a response by Professor Swift. I know that I speak both for the AALS Section on Evidence and for the *Seton Hall Law Review* in saying that we are proud to be able to lay before you such a distinguished collection.

---

<sup>30</sup> In his piece, Professor Slobogin responds to Professor Imwinkelried.