

## Forensics, Chicken Soup, and Meteorites: A Tribute to Michael Risinger

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It is a privilege to introduce this symposium in honor of my dear friend and colleague, Michael Risinger.

Formally, Michael is the John J. Gibbons Professor of Law at Seton Hall Law School, where he has taught for over forty years. Michael has been a past chair of the Association of American Law Schools (AALS) Section on Evidence and the Section on Civil Procedure, and he is a longtime member of the American Law Institute and the New Jersey Supreme Court's Committee on Evidence.

But formalities aside, to the vast majority of people in the world of evidence, Michael needs no introduction. For years, Michael has been the lifeblood of the evidence world. He has been the wise Jedi Master for many a young professor and an instrumental member of the AALS Section on Evidence. Michael has also injected energy into our gatherings year in and year out. He's the one who knows everyone, reaches out to everyone, and enlivens the discussion. It does not really matter what the topic is—Michael is always there standing up, microphone in hand, ready to ask a question or offer a useful comment.

At the same time, Michael's scholarship has had a profound impact on our field. And while his work has run the gamut in evidence law, I think it is clear that Michael's true love has always been expert evidence, and more specifically, forensics. So let me take a moment to revisit "an oldie but a goodie": his 1989 article entitled *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* published in the *University of Pennsylvania Law Review*, and co-authored with Mark Denbeaux and Michael Saks.<sup>1</sup> For those of you who have not read the article, you should. For those of you who read it long ago,

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<sup>1</sup> D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* 137 U. PA. L. REV. 731, 733 (1989) [hereinafter Risinger et al., *Exorcism*].

I think you will find it stands the test of time.

The article was one of the first I read in the evidence literature when I started out as an academic, and for me, it was an epiphany. Disturbing, exciting, eye-opening—all in one package. That article set me on my path, and for that, I will always be grateful.

For the field of evidence, the article was no less profound. Today, the problems that plague the forensic world may seem like old hat. But *Exorcism of Ignorance* was published in 1989, before *Daubert*, and Michael's article was ground zero. It was path-breaking: one of the first critical looks at the empirical foundations—or as it turned out, the *lack* of empirical foundations—of a traditional, well-accepted forensic technique. The article was the ultimate expose.

Even at that early stage, Michael and his co-authors foreshadowed many of the ideas that have become important mainstays in the quest for forensic reform: testing,<sup>2</sup> blinding,<sup>3</sup> the use of diagnostic theory,<sup>4</sup> and the need for a critical and systematic review of the empirical literature.<sup>5</sup> The article also asked the question we still ask of many accepted forensic techniques—if it is all a house of cards, how on earth did we get to this sad state of affairs?<sup>6</sup>

Given my limited space, I regret that I cannot detail more of Michael's scholarship, which has spanned presumptions, relevance, and observer bias, among other things. I would be remiss, however, if I did not offer a few reflections on Michael's distinct scholarly style.

First and foremost, Michael is a scholar's scholar. The problems of proof are in many ways timeless, and you can always count on Michael's articles not only to find the oldest literature on the subject, but also to provide a history lesson as a bonus. And here, I am not talking 1950, but 1700 or 1500, exhibiting his vast knowledge base. His work has featured references to:

- The *Malleus Maleficarum*—the 1486 treatise on how to determine if someone is a witch;<sup>7</sup>
- Sir Francis Bacon;<sup>8</sup>

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<sup>2</sup> *Id.* at 735–38.

<sup>3</sup> *Id.* at 743.

<sup>4</sup> *Id.* at 737.

<sup>5</sup> *Id.* at 738–51.

<sup>6</sup> *Exorcism*, *supra* note 1, at 751–71.

<sup>7</sup> *Exorcism*, *supra* note 1, at 731.

<sup>8</sup> D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1, 6 (2002) [hereinafter Risinger et al., *Observer Effects*]

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- Reverend William Paley and Sir Samuel Romilly—18th and 19th Century philosophers who differed on their views of wrongful convictions;<sup>9</sup> and
- The *Eumenides*—the Greek Furies.<sup>10</sup>

Second, despite his comfort with the esoteric, Michael knows when to roll up his sleeves. His work almost always includes practical suggestions for reform. And these suggestions are not just a throw-away policy section meant to appease law reviews. Michael carefully considers political practicality and institutional strengths, and in the case of legal tactics, he has often tried them himself.

Finally, binding the scholarly and the practical together is Michael's wit and charm, in which no metaphor or hypothetical is too outlandish if it makes the point. Michael knows how legal scholarship can be dense and dry, and so these witticisms are the equivalent of Michael slapping us in the face and yelling, "Wake up!"

Thus in Michael's writing, we have references to practical plumbing,<sup>11</sup> John Hancock's Windsor Chair,<sup>12</sup> vaudeville punchlines,<sup>13</sup> chicken soup,<sup>14</sup> cows jumping over the moon, and bricks turning into potatoes.<sup>15</sup>

Now, since Michael has often co-authored, I must concede that there is no *conclusive* evidence that Michael is the source of any of these references. But let me make clear: for those of us who know Michael, we *know*. You can hear him on the page. Who else would begin a hypothetical with:

"Suppose a visitor from the central Asian steppes, who speaks only an obscure Turkic dialect, observes an assault."<sup>16</sup>

Or argue that:

"It is not irrational . . . to decide that margarine will likely work

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<sup>9</sup> D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 763–64 (2007) [hereinafter Risinger, *Wrongful Conviction*].

<sup>10</sup> 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, 446 (1998) [hereinafter Risinger, *Old Chief*].

<sup>11</sup> *Exorcism*, *supra* note 1, at 739.

<sup>12</sup> *Old Chief*, *supra* note 10, at 434.

<sup>13</sup> *Observer Effects*, *supra* note 8, at 43.

<sup>14</sup> *Wrongful Conviction*, *supra* note 9, at 796 n.71.

<sup>15</sup> *Old Chief*, *supra* note 10, at 435 n.84.

<sup>16</sup> *Old Chief*, *supra* note 10, at 432.

like butter, if the meal must be made and the store is closed.”<sup>17</sup>

Or my favorite:

“They happen so rarely that worrying about them is like worrying about being struck by a meteorite.”<sup>18</sup>

One wonders about what cajolery or subterfuge Michael had to resort to in order to prevent the various law review editors from taking these nuggets out. Regardless of the means, I for one am grateful that these “Risingerisms” stayed in.

In closing, let me touch on Michael’s 2007 article in the *Tulsa Law Review*, in which he chronicles the origins of his watershed handwriting article and its aftermath.<sup>19</sup>

Reading the article, you get a sense of Michael’s frustration, and exasperation, at how nothing has happened over the last twenty-five years. Michael and his co-authors were never so naive to believe that the law would change overnight, but they thought surely some defense counsel or *someone* would take up their analysis and force improvements in handwriting expertise. Yet instead, as he excruciatingly details, a wall of adverse appellate precedent has arisen over time. He concludes, “Game over.”<sup>20</sup>

This rather depressing tone is not typical Michael. In fact, he takes some of it back before the end of the article.<sup>21</sup> But as Michael heads into retirement, I want to assure him that he’s wrong. It is most emphatically not “Game Over.”

While the pace of legal change may sometimes be too glacial to see in a single career, Michael should rest assured that he has set the agenda. And most importantly, he has inspired an entire new generation of evidence scholars who will continue his fight. So it’s not “Game Over,” but rather, “Player 1 Ready!”

We salute Michael on a remarkable career.

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<sup>17</sup> D. Michael Risinger & Michael J. Saks, *Rationality, Research and Leviathan: Law Enforcement-Sponsored Research and the Criminal Process*, 2003 MICH. ST. L. REV. 1023, 1030–31 (2003).

<sup>18</sup> *Wrongful Conviction*, *supra* note 9, at 765.

<sup>19</sup> D. Michael Risinger, *Goodbye to All That, or a Fool’s Errand, by One of the Fools: How I Stopped Worrying About Court Responses to Handwriting Identification (and “Forensic Science” in General) and Learned to Love Misinterpretations of Kumho Tire v. Carmichael*, 43 TULSA L. REV. 447 (2007).

<sup>20</sup> *Id.* at 475.

<sup>21</sup> *Id.*