



What Evidence Scholars Can Learn From the Work of Stephen Yeazell: History, Rulemaking, and the Lawyer's Fundamental Conflict

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ABSTRACT

This short Essay draws three lessons for evidence scholars from Stephen Yeazell's justly celebrated work in civil procedure. The first lesson is to take history seriously but to be realistic about what it can tell us: to use history to gain perspective, not to recover lost wisdom. The second lesson is to take rulemaking seriously: to think about the processes through which evidence rules are formulated and reformed. The third lesson, and the most important, is to take lawyers seriously, not just as the agents through which procedure is implemented but as drivers and obstructers of reform.

This last lesson is an especially critical one for evidence scholars, because the complexity and opacity of evidence law has meant that lawyers are generally the only ones in a position to improve it. Lawyers' interests, though, diverge in important ways from society's interests. In particular, lawyers tend to view uncritically, and sometimes even to celebrate, the extraordinary degree to which our system of adjudication, and evidence law in particular, makes a party's prospects in litigation hinge on the skills of the party's lawyer. That feature of evidence rules and of our procedural system more broadly usually passes unnoticed, in large part because lawyers find it not only unobjectionable but deeply attractive. But from society's standpoint, procedural rules work best—all things being equal—when they make the outcome of litigation turn on the merits of the case, not on the relative skills of the lawyers involved: on who is right and who is wrong and on what justice demands. We ask too rarely whether our procedural rules, including our rules of evidence, place too large a premium on lawyerly skill, and whether the culture of the legal profession, and its attachment to a certain heroic image of the trial lawyer, has warped the way that lawyers have struck that balance.

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This Essay was written for a January 2013 symposium at UCLA in honor of Stephen Yeazell. I thank the organizers for allowing me to join in celebrating Professor Yeazell's extraordinary career. I wish I had the words to thank Professor Yeazell properly for his inestimable contributions to legal scholarship and legal education—and, on a more personal note, for his warm friendship, patient tutelage, and inspiring example over the past nineteen years.



Stephen Yeazell has never taught evidence law, nor has he written much about it. This is a shame, at least if you ignore the opportunity costs. The subject is such a natural for him: steeped in history; at once philosophical and intensely practical; full of tensions, contortions, and “back eddies in the current of legal thought.”¹ And, of course, the rules of evidence are a central part of the procedural system that has benefited so richly from Professor Yeazell’s attention over the past four decades. One could argue it is the most important part of that system, because evidence law structures the finding of facts, and in litigation as elsewhere, Yeazell reminds us, law comes cheap but facts are dear.²

It is understandable that Yeazell has not spent more time on evidence law. It would have taken him away from civil procedure, which probably would have been the greater shame. Moreover, he has spent his career at a law school unusually rich in evidence scholars. Then, too, it has not escaped Yeazell’s attention that the Anglo-American law of evidence is, from any kind of comparative perspective, a freak—or, to use his more precise term, a “monster.”³ One can hardly blame him for not wanting to spend more of his time on the subject. But perhaps those of us who do teach and write about evidence law can be excused for envying the attention that Yeazell has lavished on other, less grotesque parts of procedure.

He has, in fact, given the monster some thought. He has reflected on the causes of the rise of evidence law in the eighteenth century, attributing it to efforts by judges to enforce substantive law at a time when juries, no longer self-informing, had become dependent on proof presented by the parties.⁴ He has noted some of the ramifications that evidence law has had for the legal system: longer trials, greater power vested in lawyers, and new responsibilities for judges.⁵ He has commented on the role that the Federal Rules of Evidence played first in

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1. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 7 (1987).
 2. See Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 244 (1998) [hereinafter Yeazell, *Judging Rules*]; Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 89 [hereinafter Yeazell, *The New Jury*]. Most evidence rules operate only when a case gets to court, and fewer and fewer cases do that—a trend about which Yeazell has written with great insight. See, e.g., David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 696–705 (2006); Yeazell, *Judging Rules*, *supra*, at 241–42; Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632–39. But some evidence rules—privilege rules, in particular—directly constrain discovery, too. And, of course, all evidence rules affect settlements, because settlement is shaped by expectations about what will happen at trial.
 3. Yeazell, *The New Jury*, *supra* note 2, at 88.
 4. See *id.* at 93.
 5. See *id.* at 95–96.

politicizing and then in bureaucratizing and judicializing the promulgation of new federal rules of procedure.⁶ And, with a junior coauthor in tow, he has contrasted the strongly transsubstantive nature of Anglo-American evidence law with the more general tendency, both in our system and even more strikingly in the civil law tradition, to craft separate rules for civil and criminal cases.⁷

But all of this just whets the appetite for what Yeazell could say about evidence law if he had a spare career to spend on the subject. Since we lack, alas, that alternative-reality body of work, the best we can do is to try to imagine it—to extrapolate it from his actual body of work. That is what I propose to do here: to ponder what lessons Yeazell’s scholarship—not just the relatively little he has written about evidence law, but his work more generally—offers to those of us who teach and write about evidence law.

There are obvious hazards associated with an exercise of this kind. I have been fortunate enough to know Yeazell and to work alongside him and I am fully aware that despite his kind and generous disposition he is not in the habit of nodding his head politely simply because he has been flattered. Extrapolating outward from Yeazell’s work, particularly at a symposium in his honor, risks a comeuppance like the one that greeted the guy in the ticket line in *Annie Hall*, bloviating about what Marshall McLuhan would say. But I will push forward, because I think the rewards are large enough to justify the dangers.

It seems to me that Yeazell’s work offers at least three major lessons for evidence scholars. First, to take history seriously but not to expect too much from it. Second, to take rulemaking seriously and, more specifically, to treat rulemaking as part of procedure rather than something separate from and apart from it. Third, to take lawyers seriously—as insiders worth listening to but also as drivers of and impediments to reform. I am most interested in the third lesson, but before addressing it, let me say a few words about what Yeazell can teach us about the uses and abuses of history in legal scholarship and then a few words about rulemaking as part of procedure.

Yeazell’s scholarship has always been heavily historical. This is someone who believes that to think sensibly about class certification provisions of Rule 23 of the Federal Rules of Civil Procedure, it is best to begin in the year 1199.⁸ That is an extreme example. The history he consults does not always stretch back that far. But he does characteristically take the long view, and the long view for Yeazell tends to be really long.

6. See Yeazell, *Judging Rules*, *supra* note 2, at 235–38.

7. See Sklansky & Yeazell, *supra* note 2, at 728–33.

8. See YEAZELL, *supra* note 1, at 38.

The reason that Yeazell's histories tend to go back pretty far is that he uses the past for a particular purpose: to gain perspective. He is interested in what stays constant and what changes because it helps him to identify what features of our current legal arrangements are more contingent and less inevitable than we might otherwise assume, and what tensions, dilemmas, and tradeoffs seem to be with us for good. He traces modern class actions back to medieval litigation practices to illustrate the historical contingency of our current ideas about representation: how those ideas are embedded in a commitment to individualism that did not begin to emerge until the Renaissance and took a good many twists and turns in the succeeding centuries. But he also wants to highlight the enduring tension between the ideal of individualism and older, competing social visions centered around collectivities and to show that this tension runs as a unifying thread through the widely variant approaches taken to group litigation since the close of the Middle Ages.

What runs as a unifying thread through Yeazell's own work—not just his magisterial genealogy of the class action, but nearly all of his scholarship—is the same approach to history: consulting the past for perspective but not expecting definitive answers. So, for example, he examines the history of jury trial not to learn how juries “should” be constituted or how they are “properly” used, but to understand both the comparative novelty of the jury's current contours and the antiquity and enduringly political nature of controversies about the jury's proper role.⁹ He does not aim to settle debates about jury trial but to improve them—to make them better informed and more reflective. Similarly, when Yeazell traces the history of policing and public prosecution and lays these alongside the development of modern systems of civil discovery, his goal is not to suggest that we need to recapture lost wisdom or recognize the true nature or hidden logic of the status quo but rather to highlight the choices we have made, the paths that were not taken, and the conflicts and commitments lurking beneath the surface of our institutional arrangements.¹⁰

Occasionally, Yeazell does suggest that we have lost our way. That is the gist of his argument about the implementation of the Rules Enabling Act:¹¹ The

9. See Yeazell, *The New Jury*, *supra* note 2, at 87–88, 117.

10. See Sklansky & Yeazell, *supra* note 2, at 687–96. See generally Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691 (2006) [hereinafter Yeazell, *Socializing Law*]; Stephen C. Yeazell, 13 LAW & HIST. REV. 444, 446 (1995) [hereinafter Yeazell, *Constable Review*] (reviewing MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994)) (warning that lawyers, “who profess always to be looking backward, can lose sight of the real past and thus misunderstand the materials with which they work”).

11. 28 U.S.C. § 2072 (2006).

Advisory Committees that propose new rules of federal judicial procedure have become too dominated by judges and that the rulemaking process has become too elaborate. Yeazell argues that “we need to return from a system of judicially *created* rules back to a system of judicially *scrutinized* rules,” and from complicated, bureaucratized system back to “a nearly private and relatively simple enterprise.”¹² But even here he uses history chiefly to suggest possibilities, not to provide a pedigree for his favored course of action. He thinks a simpler rulemaking procedure involving fewer judges would be better, and he thinks we used to have it, but he does not think it would be better because we used to have it.

Evidence law could use more of Yeazell’s kind of history. We do not need more history. There is plenty of that in evidence cases these days, particularly in the cases decided by the U.S. Supreme Court, and there is lots of history in evidence scholarship too. But invocations of the past in evidence law and scholarship tend all too often to take the form of appeals to lost wisdom. Certainly that is true at the Supreme Court. The dramatically new approach to the Confrontation Clause that the Court announced eight years ago is thoroughly rooted in history, but it is a very particular kind of history. The Court’s theory is that criminal defendants in the eighteenth century had a well-defined, common law right to exclude certain kinds of hearsay statements unless the people who made them came to court to testify under oath and that the language in Sixth Amendment about criminal defendants “being confronted with the witnesses against” them should be understood as an elliptical effort to constitutionalize that common law right in precisely the form it existed at the time that Bill of Rights was ratified. Implicitly, the Court also assumes that the Fourteenth Amendment, adopted in 1868, can best be understood as intended to extend to state court prosecutions the common law restrictions, circa 1791, that the Sixth Amendment codified for federal prosecutions. The historical evidence for all of this is shaky to nonexistent, but the Court’s historical claims have largely been treated seriously and respectfully, even by critics who quarrel with the Court’s ideas about the precise details of eighteenth-century common law.¹³

Much of that is likely due to how snugly the Court’s claims fit a narrative pattern that itself has ancient and perennial allure: the story of a noble past—or at least a past less confused and corrupted than the present.¹⁴ This is a narrative pat-

12. Yeazell, *Judging Rules*, *supra* note 2, at 229.

13. See, e.g., David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 3–4.

14. On the long history of appeals to lost wisdom in Anglo-American law, see, for example, J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30–55 (1957), Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1687–89 (1994), and

tern that the Court's recent Confrontation Clause cases share with a good deal of legal scholarship, including (to pick just one example) the best and most bracingly original book published over the past decade about the law of criminal procedure.¹⁵ That example alone should make clear that the narrative pattern of lost wisdom has appreciable power. Sometimes wisdom is lost. Sometimes older ways of doing things really were better. And it can be helpful to have a corrective to the old Whig narrative of onward and upward—a narrative that itself has perennial appeal in judicial opinions and a good deal of legal scholarship. Still, the history-as-progress and the history-as-decline narratives are both well represented in evidence law and scholarship. What we could use more of is history of the nuanced, Yeazellian sort: history that assumes the past has something to teach us, if only because it was different, but that resists simple storylines, either of progress or of decline.¹⁶

That is the first lesson that Yeazell's work has for evidence scholars. The second lesson is to take rulemaking seriously, as a part of procedure rather than something separate and apart from it. Evidence scholars have not completely ignored the mechanisms through which evidence rules are promulgated. There was a good deal of discussion in the mid- to late twentieth century about the relative merits of developing evidence law through codified rules as opposed to case law;¹⁷ those discussions continue today, episodically, as the few states that still do not have codes of evidence consider adopting them.¹⁸ There is also an ongoing debate about the best way to think about the task that judges face in interpreting and applying codified rules of evidence: for example, how much leeway judges should give themselves to depart from the strict, literal language of the rules and how, if at all, the interpretation and application of evidence rules should differ from the interpretation and application of statutes.¹⁹

David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1752–53, 1753 n.73, 1762 (2000).

15. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

16. Which is not to say that the field lacks strong examples of that kind of work. See, e.g., T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499 (1999); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1 (1998). But we could use more.

17. See, e.g., Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989).

18. See, e.g., Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992); cf. Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809 (2004).

19. See, e.g., Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909, 921–22 (1992); Andrew E. Taslitz, *Interpretative Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329 (1995); Glen Weissenberger, *The*

These are valuable discussions, but they tend to view evidence codes statically and at the macro level.²⁰ What we largely lack, for evidence law, is what Yeazell has helped to create for civil procedure: a body of scholarship about the practical details of how law gets made. Evidence scholars tend to be critical (often with good reason) of rules developed outside of the Advisory Committee, especially rules with a provenance that smacks more of politics than of expertise.²¹ But the Advisory Committee process itself is rarely scrutinized the way Yeazell has scrutinized the parallel process for modifications of and additions to the Federal Rules of Civil Procedure.²² That is a loss, and not just because some of the concerns Yeazell has raised in the context of civil procedure may be equally if not more applicable in the context of evidence.²³ It speaks to a larger tendency to view evidence rules as less about procedure than about logic and methods of rational inference.²⁴ As long as evidence law is considered an exercise in epistemology or applied mathematics, it makes sense to worry less about how evidence rules are developed than how close they come to what they, in theory, should be. The failure to take rulemaking in evidence law seriously is often part and parcel of a failure to recognize that evidence rules are procedural rules—rules about how trials are conducted and lawsuits are adjudicated.²⁵

Proper Interpretation of the Federal Rules of Evidence: Insights From Article VI, 30 CARDOZO L. REV. 1615 (2009).

20. The same may be said of efforts to determine the proper “organizing principles” for evidence codes. See, e.g., Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U. L. REV. 1080 (1984–1985).
21. See, e.g., Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1504–06 (2005); Eleanor Swift, *Does It Matter Who Is in Charge of Evidence Law?*, 25 LOY. L.A. L. REV. 649 (1992); Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153 (2008).
22. See Yeazell, *Judging Rules*, *supra* note 2.
23. Yeazell worried that the rulemaking process has become increasingly bureaucratized and increasingly judge centered—trends that are reflected in the procedures and composition of the Advisory Committee on Evidence Rules no less than in the procedures and composition of the Advisory Committee on Civil Rules. The original Advisory Committee on Evidence Rules had three judicial members and six lawyer members; the current committee has six judicial members and four lawyer members. Yeazell worried, too, about the declining presence of academics on the Advisory Committee on Civil Rules, and that trend is even more pronounced in the Advisory Committee on Evidence Rules, which had three academic members in its original incarnation and currently has none. See COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 235 (2012); Weissenberger, *supra* note 19, at 1627 n.60.
24. See, e.g., Kenneth W. Graham, Jr., *What’s the Matter With Evidence?*, 25 LOY. L.A. L. REV. 773 (1992).
25. For an exception tending to prove the rule, see 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE §§ 5001-5009 (2d ed. 2005).

There is a further reason for evidence law to take rulemaking seriously and it ties into the third lesson we can learn from Yeazell's example: taking lawyers seriously. Lawyers and lawyers turned judges dominate the crafting and recrafting of evidence rules, and that has been true for a very long time in part because the rules are so technical and abstruse that it's almost impossible for nonlawyers to understand them. This is one of the undeniable satisfactions that many students experience when studying evidence law: They are finally mastering professional arcana, rules that are wildly unintuitive in their operation and difficult even to describe to the uninitiated. But the obscurity of evidence law has the consequence that lawyers are just about the only people reasonably situated to reform it, or even to discuss whether reforms are desirable. The opacity of evidence law to outsiders has other consequences, too, and I will return to them shortly. For now, the important point is that evidence law—even more so than other branches of law—is the product as well as the domain of lawyers. Evidence law regulates how lawyers—especially but not exclusively trial lawyers—go about their work, and people with legal training have long been, and for the foreseeable future will continue to be, virtually the exclusive architects of evidence law.

Much the same can be said, of course, about civil procedure—which is why Yeazell has long been insistent that understanding civil procedure requires understanding lawyers. He is not the only one to have had this insight, but he is unusual in the nuance and balance of this thinking about the legal profession and its practitioners. Yeazell clearly likes lawyers, or at least many of them, and he admires the practicality, entrepreneurship, and sophistication with which the best lawyers approach their work. But he also understands the blinders that lawyers can wind up wearing—blinders that come not just from their professional ambitions but sometimes from their ambitions for the profession.²⁶ Even legal method itself, he warned early on, has served the bar as a “bulwark against leveling attempts to make every man his own lawyer.”²⁷

Yeazell has never fully shared Jeremy Bentham's dark view of “Judge and Company”; he likes too many lawyers and judges and thinks with too much nuance for that caricature to seem entirely satisfying. But neither has he ever lost sight of the kernel of truth in Bentham's account.²⁸ It is not just that lawyers' interests can diverge from society's interests. Yeazell has stressed that lawyers work within organizations and professional cultures inevitably shape their worldviews, sometimes for good and sometimes for ill. Taking lawyers seriously means keep-

26. See, e.g., Stephen C. Yeazell, *Roscoe Pound and the Strategy of Professionalism*, 3 REVIEWS AM. HIST. 354 (1975) (reviewing DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* (1974)).

27. *Id.* at 356.

28. See, e.g., Yeazell, *Judging Rules*, *supra* note 2, at 230–31, 245–52; Yeazell, *supra* note 26, at 356.

ing in mind both their characteristic strengths and their characteristic weaknesses, as individual practitioners and as members of a modern-day guild. Parts of that guild, Yeazell has pointed out, have taken on the virtues and the vices of bureaucracies; other parts have grown increasingly entrepreneurial and have lost some of their sense of public mission. A signal lesson of Yeazell's work is that we need to understand the sociology as well as the economics of the profession if we want to understand lawyers and that we need to understand lawyers if we want to understand procedure.²⁹

If anything, these lessons are even more important for teachers and scholars of evidence law than for specialists in civil procedure. We forget at our peril that evidence law is a branch of procedure, not an offshoot of epistemology. And even more so than civil procedure, evidence law is the domain and the responsibility of lawyers, if only because it is so supremely impenetrable to outsiders. I recognize that every subdiscipline is prone to think its own subject matter particularly demanding, but, really, in terms of forbidding mystery is there any parallel to the law of hearsay anywhere in the law school curriculum?³⁰ Lawyers own evidence law lock, stock, and barrel.

That makes it all the more vital for evidence scholars to take lawyers seriously and to take seriously, in particular, the ways in which the interests, preferences, and presuppositions of lawyers may differ from those of the broader society. For there is good reason to worry that those divergences may be sharp and that they may have shaped, and may continue to shape, the content of evidence law. If one thinks of the legal profession as society's agent for purposes of crafting and reforming evidence law, it is obvious the agent has powerful conflicts of interest.

Some of those conflicts are financial. For example, all things being equal, complexity and technicality in evidence law are undesirable from society's point of view. They help force litigants to rely on lawyers, they boost the amount of work lawyers in any particular case need to perform, and they put pressure on litigants to hire the fanciest and most expensive lawyers they can afford. But if all of this is a cost from society's point of view, it is a boon for lawyers. Lawyers therefore have a vested interest in precisely those features of evidence law that many of its critics have long believed is one of its greatest flaws. Bentham was one of those critics, of

29. See, e.g., Sklansky & Yeazell, *supra* note 2; Yeazell, *Socializing Law*, *supra* note 10; Yeazell, Constable Review, *supra* note 10; Stephen C. Yeazell, *Professional Lives and the Life of a Profession*, 4 REVIEWS AM. HIST. 483 (1976) (reviewing MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976)).

30. Hearsay's traditional "partner in terror, the rule against perpetuities" may be one exception. PETER MURPHY, *EVIDENCE & ADVOCACY* 22 (4th ed. 1994). But that is a rule that "may be on its last legs," LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 134 (2009), and that fewer and fewer students are asked to learn.

course, and he blamed the perversities of evidence law—including its opacity to laypeople—squarely on the fact that they served the mercenary interests of lawyers.³¹

Precisely because the financial interest of lawyers in procedural complexity is so obvious, conscientious lawyers can and do try to set it aside when assessing the merits of proposed reforms to evidence law. It is easy to find examples of lawyers advocating against their apparent professional interests for simplification of evidence rules. The recent restyling of the Federal Rules of Evidence, designed to work no substantive changes but simply to make the rules easier to understand, may be a case in point³²—although I have to confess that I do not find the new wording consistently more transparent than the old. That is one reason that Yeazell is far from alone in finding Bentham's remarks about "Judge and Company" a little overdrawn.

But the financial interests that Bentham identified may not be the most powerful conflict that lawyers face in thinking about evidence law. There is a deeper conflict pertaining to the role and the self-conception of lawyers in an adversarial legal culture. From society's point of view, procedural rules work best, all things being equal, when they make the outcome of litigation turn on the merits of the case: on who is right and who is wrong and on what justice demands. It is very much a flaw of procedural rules if they make the outcome of a case turn on something extraneous to the merits—like the relative skills of the lawyers involved. A good procedural system, from society's point of view, should make the outcome of a case relatively insensitive to the comparative skills of the lawyers.

Much of what trial lawyers and other litigators find exciting and rewarding about their work depends precisely on the ways in which the comparative skills of lawyers do matter. Lawyers, of course, may exaggerate how much they matter; merits may drive outcomes more than trial lawyers like to think. But it is not all a matter of self-delusion. Outcomes in our legal system are highly and notoriously dependent on the skills of the lawyers involved: not just on whether each side's lawyers are minimally competent, but on which side's lawyers are better than the other's is.

That is bad for society, in much the same way that it is bad for society if receiving decent outcomes from the medical system depends too heavily on finding

31. See generally JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE (General Books ed. 2012) (1827).

32. See, e.g., Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435 (2012).

not just a good doctor but an extraordinarily good doctor.³³ But the sensitivity of American trial outcomes to the relative skills of the lawyers is something that the lawyers themselves generally like, and not just for financial reasons. For most American trial lawyers and litigators, much of what they like about their jobs and much of their professional self-image has to do with how heavily the outcomes of their cases depend on their judgment calls and strategic choices, on the rhetorical flourishes, crafty maneuvers, and on the shrewd gamesmanship they bring to bear—on their ability to outperform their opponents.

That predisposes lawyers to view uncritically, and even to celebrate, the extraordinary degree to which the American system of justice makes a party's prospects in litigation hinge on the skills of the party's lawyer. Much but not all of this work is done by the law of evidence. It is not just that the law of evidence is so complicated that even well-trained, experienced trial lawyers can find it difficult to understand. The very architecture of evidence rules—in particular the large significance they place on the ostensible purpose for which evidence is offered—places a premium on the ability of a lawyer to devise a legitimate but wholly fictional purpose for evidence that would otherwise be banned and then to finesse a way to make the real but unstated significance of the evidence loom as large as possible with the jury. So, too, the heavy preference for in-court testimony over documentary evidence—the preference at the heart of the hearsay rule—and the related glorification of cross examination as “beyond any doubt the greatest legal engine ever invented for the discovery of truth”³⁴—put a large premium on the forensic skills of a party's hired advocate.

These examples hardly begin to exhaust the ways in which evidence law makes trial outcomes more dependent on the relative skills of the trial lawyers. Usually that feature of evidence rules passes unnoticed, because it seems unobjectionable—particularly to lawyers. Think, for example, about the venerable rules disallowing straightforward proof of certain kinds of misconduct but allowing lawyers to ask, with theatrical flair, whether a witness is “aware” of or has “heard” about the misconduct.³⁵ That rule has long been criticized, appropriately, for al-

33. Some of the most important reforms of the medical profession over the past few decades have sought, often with considerable success, to make health outcomes less dependent on the skills of individual physicians. None of these reforms make doctors unimportant or erase the advantages of being treated by an extraordinary physician rather than simply a competent one, but they reduce those advantages by leveling up the quality of care. *See, e.g.*, Atul Gawande, *Big Med*, *NEW YORKER*, Aug. 13, 2012, http://www.newyorker.com/reporting/2012/08/13/120813fa_fact_gawande.

34. 5 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1367, at 29 (3d ed. 1940).

35. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469 (1948).

lowing innuendo to substitute for proof, but the fact that it puts a premium on forensic talent is almost never raised as an objection.

Maybe it really is in society's interest to have the outcome of trials depend so heavily on the skill of the lawyers involved. Maybe it provides incentives necessary to the proper functioning of the adversary system. But that is far from clear. Everyone knows that evidence law puts a premium on lawyerly skill; this is why the Supreme Court long ago recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."³⁶ What is too rarely asked is the proper extent of that premium—and whether the culture of the legal profession, and its attachment to a certain heroic image of the trial lawyer, has warped how lawyers have struck that balance. Those are Yeazellian questions, and they are questions that evidence scholars might profitably ask more often.

36. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).