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Evidence Scholarship, Old and New

Roger C. Park*

INTRODUCTION

There is no real debate over whether legal scholarship should make use of insights and methods from other disciplines. That debate was won, in principle at least, by the Legal Realists in the 1920s. The question now is whether traditional legal scholarship still has important value in light of what has been called "the decline of law as an autonomous discipline." In this Essay, I will examine that question in the context of scholarship on evidence.

As in other fields, modern evidence scholarship has made use of techniques and insights from disciplines other than law. The best-known interdisciplinary movements have, however, had little or no influence on evidence scholarship. For example, law and economics scholars have written virtually nothing on evidence. One rarely sees evidence problems expressly analyzed in terms of economic efficiency, opportunity costs, or the demand for a legal good. This silence cannot be based on the idea that evidence is in some way a non-economic subject. In other fields not traditionally considered economic, such as criminal law, law and economics scholars have applied economic approaches to non-market behaviors. Another major movement, critical legal studies, has not touched evidence at all. No one has attempted to deconstruct the hearsay rule, or to show that

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2. Of course, "virtually nothing" is not the same as "nothing." For a recent evidence article that uses insights from law and economics scholarship, see Kaplow & Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 576-93 (1989).
it is incoherent or a mask for illegitimate hierarchies. Similarly, members of the practical legal studies movement\(^3\) have not yet written explicitly about how its tenets apply to evidence law, and no member of the law and literature movement sought to apply theories of literary criticism to a critique of evidence law.\(^4\)

Because the major scholarly movements are motivated at least in part by ideology, members of these movements tend to devote their time to the legal subjects that they believe raise the most important issues of social policy. That tendency may explain why they have overlooked the subject of evidence. Evidence, like other procedural subjects, is often seen as a technical subject primarily of interest to judges and trial lawyers. Considering critical legal studies in particular, there may be other reasons why that movement has not taken hold with evidence scholars. Perhaps evidence scholars are so thoroughly imbued with the tradition of optimistic rationalism\(^5\) that they are not attracted to the movement. Perhaps faculty members who choose to teach evidence feel a degree of fondness for our existing trial system, just as those who teach securities regulation tend not to hope for the end of capitalism.

The lack of activity by members of these contemporary scholarly movements does not mean, however, that scholarship on evidence consists solely of traditional writing about rules of law. Nondoctrinal scholars have made many significant contributions. In this Essay, I will try to give generalists a sense of the nontraditional work that has been taking place in evidence scholarship. I will also comment upon the continuing role of doctrinal scholarship, and on its future in a scholarly commu-


nity that contains many evidence scholars who are willing and able to use other tools.

I. SCHOLARSHIP ON THE SOCIAL PSYCHOLOGY OF EVIDENCE

Scholars who study the social psychology of evidence have investigated how rules of evidence affect jury decision-making, how juries react to evidence, whether psychological assumptions underlying rules of evidence are valid, and what factors influence the reliability of evidence given by witnesses. These topics tie in with the interest of social psychologists in human perception, human memory, and group processes. Examples of their work include studies on whether juries follow limiting instructions, studies on the impact of prior convictions on the trier of fact, and studies on the impact of exclusion of evidence upon jury decisionmaking.

Sometimes a lawyer will approach social science research with inflated skepticism. When research results are inconsistent with conventional common sense, the lawyer is likely to say that something is wrong with the research; and when results are consistent with common sense, the lawyer will see the project as the elaborate demonstration of the obvious by means that are obscure.

My friends who are social scientists probably do not feel any need to respond to legal philistines, or for me to do so in their stead. Nonetheless, I will give an indirect response. It takes the form of an example that avoids both prongs of the seemingly inescapable dilemma: a study that is neither counterintuitive nor obvious.

In introducing this study, I will ask readers to consider a hypothetical. Suppose that the police are attempting to help a


8. E.g., Borgida, Legal Reform of Rape Laws, 2 APPLIED SOC. PSYCHOLOGY ANN. 211 (1981); Wolf & Montgomery, Effects of Inadmissible Evidence and Judicial Admonishment to Disregard on the Judgments of Mock Jurors, 7 J. APPLIED SOC. PSYCHOLOGY 205 (1977).

robbery victim identify the robber, and they show the victim a photospread that consists of three photos mounted on a sheet of paper. Is there a problem with this method of eliciting an identification? Common sense provides some answers — for example, perhaps the photospread would be better if it contained more than three photos. One would have to think long and hard, however, before coming up with the idea that the identification would be more accurate had the victim been shown the photos one at a time, and asked to make a yes/no decision on each photo before going on to the next one. And even those who thought of that idea would not have any means of testing it without using social science methods.

A recent study by Brian Cutler and Steven Penrod indicates that when suspects are presented sequentially in a lineup or photospread instead of being presented simultaneously, the accuracy of identification is enhanced.10 In the experiment, subjects were shown a videotaped reenactment of an armed robbery and later were asked to identify the robber from a lineup or a photospread. Some of the subjects were shown all the lineup or photospread members simultaneously, and were asked whether the robber was present. Other subjects were shown lineup or photospread members sequentially, and asked to give a yes/no answer for each member as he was produced.11 The subjects who saw the lineup or photospread members sequentially were less likely to make false identifications.12 One might expect that there also would be a loss in correct identifications among the second group of subjects, because they might be less ready to make any identification at all. The experimenters, however, found no loss in correct identifications.13

Studies that deal with the topic of eyewitness identification testimony are probably the most widely known category of evidence-related social science studies. The eyewitness studies address questions such as: How reliable are eyewitnesses? What are the factors that affect reliability? How accurate are jurors in evaluating reliability? The researchers, principally using laboratory experiments in which subjects are asked to perform identification tasks, have made a number of important findings about eyewitness identification.

11. Id. at 281, 286.
12. Id. at 286, 288.
13. Id.
Findings about unconscious transference are one example. Unconscious transference is a phenomenon that can cause erroneous identification of suspects. In one case, a ticket clerk who had been robbed firmly identified a sailor as the robber. The sailor, however, turned out to have an airtight alibi. The ticket clerk evidently recognized the sailor because the sailor had bought tickets on three occasions from the clerk, not because the sailor was the robber. The social psychology scholars have demonstrated in the laboratory that unconscious transference is a common phenomenon, and that it may infect identifications when, for example, a witness saw a photo of the suspect as part of a photospread before identifying the suspect in a lineup. At the lineup, the witness may recognize the suspect because of the photo, transfer that recognition to the robbery scene, and erroneously identify the suspect as the robber.

In other studies, social psychologists have found that a witness's confidence in the identification — whether the witness will say “I'm certain he's the one” — has a modest relationship at best to the accuracy of the identification, and the relationship is weakest when the conditions for identification are poor. They also have found that witnesses are much less accurate when doing cross-racial identifications than when identifying members of their own race; that when a weapon is present, “weapon focus” often interferes with witness's ability to identify faces; that moderate levels of stress enhance a witness's ability to acquire, retain, and retrieve information but that higher levels interfere with it. Social psychologists also

15. Id. at 142.
16. See id. at 151.
20. E.g., E. Loftus, supra note 14, at 33.
have discovered that we overrate our own ability to identify, and that jurors are ill-equipped to assess the accuracy of identification testimony.

Although research on the social psychology of evidence focuses primarily upon evidence, not the rules of evidence, much of it has relevance to the rules. Studies of the impact of character evidence or limiting instructions have direct relevance to issues of rule reform and interpretation. For example, whether eyewitness identification experts should be allowed to testify has itself become a controversial doctrinal issue.

II. “NEW EVIDENCE SCHOLARSHIP”

A second group of evidence scholars has embraced the term “new evidence scholarship” to describe their work. As one might infer from inclusiveness of the name under which the school marches, the boundaries of its work cannot be precisely defined. The work of the new evidence scholars, however, is often characterized by use of academic tools derived from study of logic and mathematics. Its scholars commonly use mathematical notations, non-word symbols, and graphic representations to express their thoughts. They tend to be interested in the science of proof, rather than in evidence as a system of rules, although some of the new evidence scholars have modeled or evaluated specific rules.

Many of the scholars in this area use probability theory as a tool in examining evidence issues. Among American law professors, scholarly interest in probability theory received its most significant boost from a celebrated case, People v. Col-

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lins, a 1968 decision of the California Supreme Court. The trial prosecutor in Collins had sought to bolster shaky eyewitness identification testimony by introducing expert testimony indicating that the accused couple had characteristics present in only one couple in twelve million. The testimony, and the prosecutor's use of it, involved some fundamental statistical errors. In a discerning opinion that has found its way into many of the evidence casebooks, the California Supreme Court held the evidence inadmissible.

The Collins case inspired an article in the Harvard Law Review arguing that although Collins was correct on its facts, experts in other cases properly might use probability theory, in particular Bayes' Theorem, to aid the jury in making identifica-

27. 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968). Collins was not, of course, the only significant influence. For an example of an important work that preceded the California Supreme Court's opinion in Collins, see Kaplan, Decision Theory and the Factfinding Process, 20 STAN. L. REV. 1065 (1968).

28. The eyewitnesses had testified that the robbers were a black man with a beard and moustache and a blond-haired white woman with a ponytail who escaped in a partly yellow car. Collins, 68 Cal. 2d at 325-26, 438 P.2d at 36-37, 66 Cal. Rptr. at 500-01. At trial, the victim was unable to identify the defendants and the other witness's identification was impeached by his testimony at the preliminary hearing that he was uncertain about the identification. As a result, the prosecutor asked an expert to assume that one car in ten was yellow, one man in four had a moustache, one man in ten was a black man with a beard, one woman in ten had a ponytail, and so forth. Id. at 325 n.10, 438 P.2d at 37 n.10, 66 Cal. Rptr. at 501 n.10. The expert then applied the product rule, multiplying the probabilities of each trait to determine the probability of them all occurring together. The expert arrived at the conclusion that only one couple in 12 million would share the six characteristics identified by the witnesses. Id. at 325, 438 P.2d at 37, 66 Cal. Rptr. at 501.

29. The prosecutor turned the expert's conclusion into an argument that there could be but one chance in 12 million that the defendants were innocent. Id. The expert's testimony and the prosecutor's argument were quite misleading. First, the prosecutor pulled the probabilities out of thin air. There was no evidence, for example, that one car in ten was yellow or that one woman in ten had a ponytail. Id. at 327, 438 P.2d at 39, 66 Cal. Rptr. at 502. Second, even if the assumed probabilities were correct, multiplication under the product rule was a statistical error because the prosecutor failed to show that the traits were independent. Id. at 328-29, 438 P.2d at 39, 66 Cal. Rptr. at 503. Finally, even if it had been true that only one randomly chosen couple in 12 million would have the six characteristics, the prosecutor erred in equating that number with the chance that the couple was innocent. Id. at 330, 438 P.2d at 40, 66 Cal. Rptr. at 504. If there were 20 million couples in southern California and the chance of any couple having the six characteristics were one in 12 million, the chance that two couples sharing those characteristics were present in the area would be closer to one in two than one in 12 million.

30. Id. at 330, 438 P.2d at 41, 66 Cal. Rptr. at 505.
The authors suggested a hypothetical case in which the defendant is accused of murdering his girlfriend. A partial palmprint was found on the knife that was used in the murder. It matches the defendant's palm. Yet the palmprint would also match the palm of one in a thousand people chosen at random, which means that in a metropolitan area hundreds of people would have the same palmprint characteristics. How is the jury to use that one in a thousand figure? Bayes' Theorem, which provides a way of determining how an evaluation of probability based upon initial evidence should be modified in light of additional evidence, could serve as a guide to the jury. If the trier of fact believed that the prior probability of defendant's guilt (before taking the palmprint into account) was 25%, Bayes' Theorem indicates that the trier should believe the posterior probability of guilt (after taking the palmprint into account) is 99.9%. The method often yields higher probabilities than intuition would yield. For example, if the prior probability is 25% and the frequency of the palmprint is one in a hundred, the posterior probability of guilt is 97%.

The proposition that the jury should be instructed about Bayes' Theorem attracted the attention of a talented and resourceful debater, Laurence Tribe, then a young assistant professor at the Harvard Law School. Tribe pointed out a host of problems. It would be difficult for jurors who are not familiar with formal probabilities to arrive at a consistent understanding of what they are supposed to do in formulating a prior probability. There is also a danger of the jury "dwarfing soft variables," that is, that the jury might overlook issues that cannot be quantified as it became mesmerized with those that could. Moreover, uncertainty about predicate facts can require the jury to make so many quantification decisions about so many issues that use of the theorem would be more confused.

32. Id. at 497.
33. Id. at 500.
34. Id.
36. Tribe, supra note 35, at 1358-59. Tribe pointed out that to some jurors a probability of 50% might stand for what the chances were before any evidence was introduced, while to others it might mean that the search has to be narrowed to two suspects. Id.
37. Id. at 1361-65.
ing than helpful.\(^3\)

Although Tribe's view seems to have carried the day with regard to the use of Bayes' Theorem in instructing the jury,\(^3\) the debate did stimulate interest in Bayes' Theorem and probability theory. It has spawned a considerable body of scholarship that explores how probability theory might be used as a means of proof or as a way to help scholars model and evaluate trial processes.\(^4\)

A comprehensive description of topics that the new evidence scholars have examined is beyond the scope of this Essay and the scope of this author. Some of the more accessible articles, however, have dealt with the following issues: whether Bayes' Theorem can be used to model relevance as a way of helping law students and others understand the meaning of Federal Rules of Evidence 401 and 402;\(^4\) whether the technique of route analysis can aid in understanding and analyzing hearsay problems;\(^4\) whether Wigmore's "chart method" of organizing and evaluating evidence should be revived and refined;\(^4\) whether judicial instructions to find for a plaintiff who has established each element by a preponderance are misguided (under the product rule this instruction might, when there is doubt about more than one element, result in a verdict for the plaintiff even though the chances of all elements being true are less than 50%);\(^4\) whether judicial reluctance to allow verdicts

\(^3\) Id. at 1364. For Bayes' Theorem to be helpful in the situation hypothesized by Finkelstein and Fairley, one has to assume that the handprint expert is accurate and that the person whose print is on the knife is the killer. The juror who does not accept these two facts as absolutely certain has to discount the probability figure obtained by using Bayes' Theorem; and giving instructions about how to do this would be too complicated to be feasible. Id.

\(^4\) Lempert, supra note 25, at 62. I do not mean to suggest that Bayes' Theorem has no place in the courtroom. Expert witnesses can and do use it in calculating probability in certain contexts, as in using blood tests to determine paternity. See, e.g., Imms v. Clarke, 654 S.W.2d 281, 287 (Mo. Ct. App. 1983) (upholding use of Bayes' Theorem to determine probability of paternity).

\(^4\) See generally PROBABILITY AND INFERENCE, supra note 24 (collection of papers addressing the uses and limits of Bayes' Theorem in adjudication factfinding originally presented at a symposium on probability and inference in the law of evidence).

\(^4\) See Lempert, supra note 26.


\(^4\) Allen, supra note 26, at 24-25; Lempert, supra note 25, at 69-70.
to be based on “naked statistics” is justifiable. 45

III. SCHOLARSHIP ON LAW AND FORENSIC SCIENCE

Another school of nondoctrinal evidence scholarship examines issues of law and forensic science. These scholars include those who write about subjects such as DNA profiling, the polygraph, voiceprints, and questioned document examiners. A prominent recent example of this scholarship is a 1989 article in the University of Pennsylvania Law Review, by three law professors (one of whom also has a doctorate in psychology), entitled Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification “Expertise.” 46

This article examines several studies addressing the reliability of questioned documents examiners — for example, studies based upon sending a sample of handwriting of known origin to examiners and asking them to pick from several exemplars a writing executed by the same person. The authors are severely critical of documents examiners, concluding that “[a] rather generous reading of the data would be that in 45% of the reports forensic document examiners reached the correct finding, in 36% they erred partially or completely, and in 19% they were unable to draw a conclusion.” 47 Omitting one test that the authors characterized as unrealistically easy (so easy that it was comparable to a lineup consisting of four beefy white policemen and a skinny black person), they said that a less generous reading of the data was that the examiners were correct 36% of the time, erroneous 42%, and unable to reach a conclusion 22% of the time. 48 In tests in which disguised handwriting was used — in which the exemplars contained some attempts to forge documents — the accuracy levels were abysmally low. 49 The authors concluded that the acceptance of documents examiner testimony was an example of an attempt to “exorcise ignorance.” The legal system, when it has to wrestle with having to make decisions that cannot be made rationally, exorcises igno-

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47. Id. at 747.
48. Id. at 748.
49. Id.
IV. DOCTRINAL SCHOLARSHIP

The next class of evidence scholar is the one into which I fall myself. We are often called “doctrinal analysts.” I am not completely happy with this label. It connotes that all this class of scholars does is analyze and synthesize, tear apart cases and put them back together again. But I have not been able to come up with a better label (“law-centered legal scholarship” is not wholly satisfactory), so I will stick to the conventional one. The label refers to those of us who write about what the rules are and how they ought to be improved. Our primary tools for analysis and critique are the ones we picked up in law school: the ability to analyze and synthesize doctrine and an understanding of legal processes and institutions.

Doctrinal scholars typically write articles that argue the law is confused and should be reconceptualized; articles that describe the law, find fault in it, and then suggest a specific reform; or articles that say courts are not following a rule they purport to follow, and suggest that a new rule is emerging sub silentio. Doctrinal scholarship also includes a body of work that simply describes the state of the law, but this work is more likely to be found in practice manuals than in law review articles.

A classic example of one type of doctrinal scholarship is an article that the great evidence scholar Edmund Morgan published in the *Yale Law Journal* in 1922. Some detractors of doctrinal scholarship would regard it as almost a parody of the

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50. *Id.* at 782.
51. Thus, Judge Posner defines doctrinal analysis as “the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies between cases, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis.” R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 324 (1985). Elsewhere, however, he amplifies in a fashion that more fully captures the role of the traditional legal scholar:

[The doctrinal analyst, in evaluating a judicial opinion, has long considered not only whether the opinion is clear, well reasoned, and consistent with the precedents, the statutes, and the Constitution, but also whether it is right in the sense of being consistent with certain premises about justice and administrative practicality. *Id.* at 325. Posner notes, however, that doctrinal analysts “do not go far” beyond the logic of the opinions they examine. *Id.*

52. Probably the most famous example of this last type of article is Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (arguing that tort action for invasion of privacy was emerging under cover of other doctrines).
enterprise. The title of the article is *A Suggested Classification of Utterances Admissible as Res Gestae*. Morgan attacked a Latin catch-phrase that the courts used as a substitute for thinking about what they were doing, or at least as a substitute for explaining their reasons for what they were doing. He looked at the types of out-of-court statements that courts had been receiving as *res gestae* evidence, suggested a functional reclassification of those cases with different labels, and explained why as a matter of policy each of the classes he suggested should be admissible in evidence.

Unlike many law review articles, this one had an effect. Morgan's attack on *res gestae* was successful. Morgan, Wigmore, and McCormick chased the term out of the codifications and even out of the judicial opinions. As the Maryland Court of Appeals wrote in 1989: "The discredited shibboleth *res gestae* is no longer uttered in polite legal society."

Morgan's *Hearsay Dangers and the Application of the Hearsay Concept* is another prototype of doctrinal scholarship. Morgan looked at the conventional definition of hearsay as assertions "offered for the truth of the matter asserted" and examined the way that courts had applied it in a number of cases. He concluded that some statements whose use involved hearsay dangers — that is, risks of reliance on the sincerity, narrative ability, memory, or perception of an out-of-court declarant — were being classified as nonhearsay under the definition. Morgan therefore suggested that the courts examine whether the use of a statement entailed hearsay dangers in deciding whether it was hearsay, instead of mechanically applying the "truth of the matter asserted" formula.

Morgan's view on the concept of hearsay has not swept the field, though a declarant-centered definition consistent with his
view has been adopted in at least one state, and some courts have adopted his view as a matter of common-law interpretation. It has had, however, an unusual degree of influence on the scholarly literature about hearsay.

Doctrinal scholarship on evidence has had important professional accomplishments. It laid the foundation for abolition of the rules of disqualification, the dead man’s statute, rule against impeaching one’s own witness, rules excluding lay opinions, and the requirement of the hypothetical question. All these changes were influenced by doctrinal scholars whose goal was to simplify and rationalize practice. Of course, the work of codifying the laws of evidence was also vastly helped by the existence of a body of systematizing scholarship. Knowledge of the ins and outs of legal doctrine, coupled with common sense and some contact with practitioners, can give a scholar the tools to help rationalize and simplify a procedural system.

In the law in general, the work of doctrinal scholars laid the groundwork for the systematization and clarification of the law through the adoption of such codes as the Uniform Commercial Code (UCC) and the Federal Rules of Civil Procedure. These efforts were empirical in a sense, but they were not scientifically empirical; the drafters used informal inquiries and inferences from experience to answer factual questions. For example, in preparing for his drafting role on the UCC, Karl Llewellyn would visit banks and ask questions such as: “If I

were a cheque and I arrived in your bank where would I go? . . . What would be done to me first? Why?" There was no attempt, however, either in drafting the UCC or the Federal Rules of Civil Procedure, to do large-scale quantitative studies, nor is it clear that such studies were important or necessary. Llewellyn and Charles Clark were both legal realists, and hence sympathetic to the cause of systematic empirical research, but they both also liked to get things done.

Despite some outstanding recent works, doctrinal scholarship on evidence seems to be on the decline. Certainly it is perceived as declining. I believe the perception is widely shared, but have no definite proof. There is, however, one source of data, that is suggestive. In a recent compilation of most-cited law review articles, no articles on any evidence topic were in the top fifty. I interpret this statistic, somewhat subjectively, as meaning that doctrinal scholarship has waned and the new evidence scholarship has not yet waxed, although I suppose that it could be interpreted to mean that evidence simply is not a big enough scholarly field to make the list in any case. Yet it seems that a field that once elicited a five-volume work by Jeremy Bentham and that called forth the greatest English-language treatise ought to have been able to make the list in its prime. In the sister field of civil procedure, there is healthy and contentious doctrinal scholarship on subjects such as class actions, public law litigation, managerial judging, sum-

71. Id. at 317-18; Clark, Fundamental Changes Effected by the New Federal Rules, 15 TENN. L. REV. 551, 556-57 (1939).
73. See Lempert, supra note 25, at 61.
74. See Shapiro, The Most-Cited Law Review Articles, 73 CALIF. L. REV. 1540, 1549-51 (1985). Although many of the "most-cited" articles are on constitutional law or legal philosophy, the list also includes topics such as the Erie doctrine, conflicts of law, and unconscionability under Article 2 of the Uniform Commercial Code. See id.
75. J. Bentham, Rationale of Judicial Evidence (J.S. Mill ed. 1827).
78. See, e.g., Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) (number 11 on list of 50 "most-cited" law review
mary judgment, personal jurisdiction, pleading, and sanctioning of frivolous claims.

The golden age of doctrinal scholarship in the law reviews on the rules of evidence seems to have been from about 1904 to about 1954, from the first edition of Wigmore to the first edition of McCormick. It was during this period that greats like Morgan, McCormick, and Maguire were writing in the law reviews, and Wigmore’s treatise was at the peak of its influence. Between the mid-1950s and the passage of the Federal Rules of Evidence in 1975, there was a notable lull. The Federal Rules revived interest in evidence. Many of the articles, however, had a specialized focus, allowing one skeptical scholar to characterize them as following the model: “What’s Wrong with the Twenty-Ninth Exception to the Hearsay Rule and How the Addition of Three Words Can Correct the Problem.”


J. WIGMORE, supra note 76.

C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE (1st ed. 1954).


Of course, there are exceptions to this statement, both in this period and in the one following it. For fear of missing someone, I have not attempted to include a list of these exceptional articles in this Essay.

88. Lempert, supra note 25, at 61.
It is possible that there really has not been a decline in doctrinal scholarship in evidence, but merely a shift in the place of publication away from the law reviews to the legal treatises. We now have four excellent multi-volume treatises on evidence, three single-volume textbooks, and two first-rate student hornbooks — and here I am only counting the publications produced by law professors; practitioners and in-house writers for publishing houses have produced many more. In the field of teaching materials, there are at least twelve up-to-date casebooks or case and problem books published by leading law professors, with more appearing every day. Treatises and hornbooks, however, are not really considered by law faculties to be higher-order scholarship.\(^8\) Indeed, one noted scholar recently wrote that "[t]he treatise is no longer even a credit to those competing on the leading edge of legal thought."\(^9\) It is true that what appears in the law reviews is usually more ambitious and creative than what appears in treatises and coursebooks.

The decline in publication of doctrinal articles on evidence partly may be due to the decline of faith in the law as an autonomous discipline; the lack of self-confidence among scholars that they can solve problems in the legal system through doctrinal analysis; the increasing number of true intellectuals in academic law; the fact that the economic and social sciences now have more to offer; and even market forces that have driven potential or actual Ph.D.s into the law professor market.\(^91\) These factors help explain a decline in doctrinal scholarship in general, but do not explain its comparatively greater decline in the field of evidence. In our sister fields of civil and criminal procedure, a busy and influential set of scholars are writing traditional law review articles.

I think that the reason for the relative decline is related to certain characteristics of traditional doctrinal scholarship. I will describe those characteristics, and then say why I think that they have contributed to the decline.\(^92\)

\(^{89}\) Sometimes I think that one could operationalize the definition of higher-order scholarship applied by tenure and appointment committees by saying that scholarship is that which is difficult to do, but which has no market value. Work is not scholarship if it can be sold to a book company that will make a profit selling it to lawyers or law students.

\(^{90}\) Priest, Social Science Theory and Legal Education: The Law School as University, 33 J. LEGAL EDUC. 437, 437 (1983).

\(^{91}\) See Posner, supra note 1, at 766-77.

\(^{92}\) My ideas about the characteristics of traditional doctrinal scholarship have been influenced by an excellent essay by Edward L. Rubin. See Rubin, The Practice and Discourse of Legal Scholarship, 86 MICH. L. REV. 1835 (1988).
1. Doctrinal scholarship is *authority-centered*. Its subject matter is a critique of legal authority and its raw materials are the law in the books — cases, statutes, court rules, records of legislative proceedings. One might add that doctrinal scholarship is almost always disparaging of existing law. The critical faculties honed in law school are directed at faultfinding in judicial opinions and legislation, which are criticized, belittled, and deprecated.

2. Doctrinal scholarship is usually *prescriptive*, that is, doctrinal scholarship advocates law reform. In order to be regarded as higher-order scholarship, standard doctrinal scholarship must suggest an improvement in the law. It is not enough to say what the law is, one must say what the law ought to be. This may not always have been true. When Wigmore published the first edition of his treatise in 1904-1905, the mere work of organizing and systematizing was considered to be almost a work of genius — although of course Wigmore also distinguished himself with his vigorous advocacy of doctrinal improvement. Prescription is not required or even desired in many other fields of scholarly endeavor. A social scientist, for example, can study phenomena without prescribing some sort of improvement.

Why is describing and systematizing the law not enough, even among those who recognize the value of doctrinal scholarship? Perhaps the work of describing and systematizing law is simply easier than it used to be, now that we have the aid of excellent indexing systems, computer-aided retrieval, and judges who preside over the production of hornbook-like opinions. For whatever reason, to be recognized as a creative doctrinal scholar and to avoid being stigmatized as a mere drudge,

For an astute defense of doctrinal scholarship that is generally consistent with the views expressed in this Essay, see Cramton, *Demystifying Legal Scholarship*, 75 Geo. L.J. 1 (1986).

93. See Rubin, supra note 92, at 1848.
94. See id. at 1847.
95. In this respect the goal of most doctrinal scholarship differs from what at least one prominent legal philosopher has defined as the goal of scholarship in general. Tony Kronman has said that "the scholar seeks knowledge for its own sake, not for some further purpose, although the knowledge he acquires may be instrumentally useful for other ends. To understand the world as it truly is — this, and nothing else, is the goal of scholarship." Kronman, Foreword: Legal Scholarship and Moral Education, 90 Yale L.J. 955, 967-68 (1981) (foreword to issue containing articles prepared for a symposium on legal scholarship at Yale Law School).
96. J. Wigmore, supra note 76.
one must not only describe the law, but offer an affirmative thesis, an idea for reform or reconceptualization.

When making proposals for law reform, doctrinal scholars use “fireside inductions” — a term I have borrowed from the psychologist Paul Meehl to describe inductions we draw from everyday experience, from introspection, from anecdotal evidence, and from culturally transmitted ideas. They are usually aided by a good general education, by an understanding of the legal process, by knowledge of social facts described in cases, and by nonacademic experiences as law practice and serving on law reform committees — everything known from every source other than academic disciplines outside the law. Of course, traditional legal scholars also will use the work product of other disciplines, when it is presented in a way that makes it accessible.

To be recognized as valuable, doctrinal scholarship must be concerned with the social impact of rules of law. References to doctrinal scholars as “analysts” and as believers in a “closed system” or an “autonomous discipline” may to some readers carry the connotation that doctrinal scholars are formalists, that is, that they believe the law is self-contained and that legal reasoning is a process of finding first principles (“discovering the law”) and then drawing deductions from them, without regard to social impact. Modern doctrinal scholars cannot justly be charged with formalism or conceptualism. Certainly there is no twentieth-century evidence scholar who had the qualities that have been attributed to formalists like Beale, Williston, and Langdell. Perhaps this orientation is due to the influence of Bentham, who never had any doubt that evidence law had to serve some social purpose. Perhaps adjective law in the courtroom so clearly is an adjunct to accomplishing something else, such as truth-finding, that no one is tempted to believe it is an end in itself. In any event, the modern doctrinal scholar is quite willing to look to experience as well as logic, to take societal impact into account in construing a rule instead of assuming that the internal logic of the law will solve the problem of interpretation. Policy issues are freely considered, although they might be resolved in a somewhat different, more eclectic way than would be the case had the same issue been given to a social psychologist or to a law and economics scholar.

3. Doctrinal scholars write for an intended audience of lawmakers, not primarily for other scholars. In this respect

97. Meehl, supra note 9, at 65-66.
doctrinal scholarship differs markedly from the newer forms of legal scholarship, which are rarely read by or intended for persons other than a small circle of similarly inclined scholars. Doctrinal scholarship is ultimately addressed to lawyers, legislators, and judges. Its immediate audience may be other scholars, and indeed the individual scholar may only care how the work is received by other scholars. Yet because doctrinal scholarship is prescriptive (it advocates law reform), the enterprise only makes sense if the scholar’s ideas are picked up by rulemaking bodies, legislatures, or courts. Sometimes doctrinal scholars make direct attempts to cause their prescriptions to become law, as when a scholar writes an article about evidence and then advocates its prescriptions as a member of an advisory committee whose charge is to revise rules of evidence.

4. Doctrinal scholarship is noninteractive and noncumulative, at least in comparison with other disciplines. Doctrinal scholars usually do not build elaborate structures based upon each other’s scholarship, or generate articles that themselves give rise to other articles. Doctrinal scholarship has no equivalent to Coase’s article on social cost, which generated an enormous body of law and economics literature on the “Coase Theorem.” Cites by doctrinal scholars to other doctrinal scholars are often cites for authority-collections — as when a scholar cites another for a proposition such as “a majority of states follow the subjective test.” Sometimes doctrinal scholars cite other articles merely to show that their own ideas are different from those of predecessors. Another scholar’s name may be mentioned in a footnote, but it rarely appears in text. The fact that a topic has been written about by other doctrinal scholars usually does not give rise to a desire to respond or reply, but rather to a fear that the topic has been “pre-empted.”

5. Doctrinal scholarship is very time-consuming. The scholar who produces a major doctrinal article every year is quite productive. One reason is that doctrinal scholars are highly concerned with comprehensiveness and documentation.

The scholar feels that he or she must collect all relevant authorities, meet all arguments, and cite authority for everything. Moreover, the scholar writes in areas where law-makers, using the same tools the scholar uses, have already tried to meet all objections. Unlike scholars in other disciplines, the doctrinal scholar usually gets no help from graduate students. Contrast the law and economics scholar, who can take a single hypothesis and apply it to different areas of the law without doing additional research, or the social science scholar who works with other scholars, has graduate students, and who can spin several short articles out of the same basic experiment.

6. Doctrinal scholarship has a tradition of single authorship. Treatises and casebooks — usually regarded as lower-order scholarship — are often co-authored, but law review articles usually are not. Partly, this tradition may be attributable to the fact that a division of labor makes less sense for doctrinal scholars than for others. Different doctrinal scholars often bring the same tools to their work, because of similar training and interests. Of course, the virtual absence of graduate students in law must also be a factor. Law students with an academic bent usually produce their first published writing in corroboration with other students (law review editors) and not in corroboration with their teachers. Finally, the law school tenure system may have played a role. In law, untenured faculty members routinely are advised not to write with co-authors because they will be blamed if the article is bad and will not get credit if it is good. This advice may be partly an artifact of a now-abandoned tenure system under which the tenure decision was made less than three years after the candidate first started teaching. Typically, because of the time-consuming nature of doctrinal scholarship, the candidate had only written one article at the time of the tenure decision. If the piece had been co-authored, the faculty would feel that it had no basis on which to assess the candidate's individual merits. In other

100. Cf. Priest, supra note 90, at 439 (discussing the possibilities in combining law and behavioral science). Priest states:

This approach makes possible rapid insights in comparison with ordinary legal scholarship, as should well be expected. A well-drafted set of rules will have anticipated most objections that derive from the ideas that dominate standard legal thought. But such rules will be as vulnerable as an alien who cannot speak the native language to the criticisms of a science with different presumptions and organizing thoughts.

Id.
fields, a candidate has a longer track record, often with different co-authors, at the time of the tenure decision.

Earlier in this Essay, I said that I would attempt to explain why there has been a relative decline in doctrinal scholarship on evidence, and I now will make that effort. I think that the lack of doctrinal writing on evidence can be attributed to one principal cause: lack of doctrinal change. Because of the six characteristics that I have just listed, doctrinal scholarship needs doctrinal change in order to flourish. Doctrinal scholarship deals with law on the books and when the law on the books itself does not change, there is no grist for the mill. It is prescriptive and addressed to judges and lawmakers, and so scholars run out of sensible proposals for reform sooner or later if the law remains static. When judges and lawmakers consistently reject reform proposals, there is a sense of demoralization and unreality. Doctrinal scholarship is noncumulative so the work of prior scholars doesn’t provide a basis for further work — the scholarly dialogue that occurs in other fields is muted here. Doctrinal scholarship is time-consuming and its practitioners do it alone, so they are less likely to embark on the risky venture of writing in a field that might be pre-empted. It takes a gambler to do research and preparation to write about something in an area that has not changed.

The recent history of evidence reform has contributed to the lessening of the output of doctrinal scholarship. The Model Code of Evidence, a product of the best doctrinal scholars of the first half of this century, would have made important doctrinal changes. It was an utter failure, however. It drowned in a flood of procedural conservatism. No state ever adopted it. The Federal Rules of Evidence, by contrast, were closer to being a restatement of existing law than a radical reform. The Federal Rules of Evidence’s advisory committee was more cautious than the Model Code’s authors, and Congress’s pre-enactment changes further moderated the modest reforms proposed by the committee. Since their enactment by Congress, the

101. The causal path, of course, is probably two-way to some extent.

102. See MODEL CODE OF EVIDENCE (1942). For example, the Model Code contained a simple but sweeping reform of the hearsay rule — hearsay would have been admissible whenever the declarant was either unavailable or on the witness stand. See id. Rule 503.

103. The dying declarations exception to the hearsay prohibition provides a good example. The common law only allowed into evidence statements by victims offered in a prosecution for criminal homicide. FED. R. EVID. 804(b)(2) advisory committee’s note. As submitted to Congress, the proposed exception
original rules have survived virtually unchanged, with very minor tinkering.¹⁰⁴

Scholars who are primarily equipped to write doctrinal articles, and who love the law of evidence, will need to have determination or patience. They can go ahead with their work at the risk that they will not be able to offer novel insights, or they can wait for doctrinal change and write about something else while waiting.

Of course, changes in the traditions of doctrinal scholarship would help the plight of doctrinal scholars to some degree. For example, a move in the direction of scholarly free proof, under which the scholar was freed from the burden of exhaustive citation, and was allowed to make greater use of lawyer's reports, journalistic methods, and personal experiences, would ease the burdensome and time-consuming nature of the enterprise. Furthermore, if doctrinal scholars became more willing to support as well as attack existing authority, that change might open the way to scholarship elaborating reasons for existing law that judges themselves have not had the leisure or specialized expertise to appreciate. The traditions of doctrinal scholarship, however, are not likely to change easily, nor is it clear that they should.

Even when not blessed with conditions that encourage pure doctrinal scholarship, the traditionally trained scholar can still play useful roles. One such role is that of collaborator with a scholar who has nontraditional training. For example, there is plenty of room for fruitful collaboration with social psychologists and other social scientists. Empirical research on the rules of evidence is still in its early stages. For example, empirical research on the hearsay rule, despite some promising beginnings during the early realist era,¹⁰⁵ has hardly begun. Scholars can employ methods of social science to attempt to answer questions such as whether the hearsay rule really has an impact or whether juries really overvalue hearsay. Of course this work can be done, without the help of doctrinal scholars, by social scientists with legal training. Yet there are sensible rea-


sons for a division of labor. The fields of evidence law and of social psychology are large enough so that it is difficult to be an up-to-date expert in both. Doctrinal scholars can play an invaluable role in helping social scientists to formulate legally relevant questions, and to execute the research in a way that makes it pertinent to law reform. For example, research studying how juries would evaluate hearsay that is now excluded is more relevant to the issue of whether the hearsay rule should be relaxed than is research studying of how juries treat hearsay that is now admitted. Moreover, research that studies how juries evaluate hearsay under the system of procedural safeguards that would accompany major reform of the hearsay rule is more relevant than research that ignores such safeguards. The scholar who is thoroughly familiar with evidence doctrine can be of great help in making sure that studies focus upon areas that are relevant to reform.

CONCLUSION

Before long, external events are likely to check, or even reverse, the relative decline of doctrinal scholarship on evidence. Doctrinal change may finally be accelerating. The United States Supreme Court has recently taken an unusual interest in evidence law. The American Law Institute has shown renewed interest in the attorney-client privilege. Social changes have brought new rules of evidence protecting rape victims and facilitating child abuse prosecutions. The expert witness explosion, and complaints about the misuse of experts, surely will have an effect on evidence doctrine sooner or later.

Law schools should continue to nurture and encourage doctrinal scholarship on evidence as on other legal subjects. One reason is that doctrinal scholarship fits in well with law teaching. A law professor who has written a treatise on evidence

will be a master of the subject. The scholar's writing will enrich his or her teaching, and insights from the classroom can be used in writing. By contrast, the legal scholar who writes on Bayes' Theorem will not be able to use it extensively in class, however important it may be in other ways.

One of the differences between a professional school and a graduate school is that our students do not want to be what we are. Law students want to be lawyers. They are not ready to follow us wherever we want to go. We cannot use law students in the way that graduate schools use graduate students, nor can we expect them to stand still for being used in that fashion. In the new world of legal scholarship, some of the best scholars do not really have the calling to teach in a professional school. Nonetheless, they are required to teach law students, and they rely upon students and the profession for financial support. For them, teaching can become an unpleasant duty. The presence of doctrinal scholars on a law faculty gives students teachers who are closer to the profession and helps reduce alienation between students and faculty.

It is important that doctrinal scholars maintain a connection with evidence students. Evidence is a bar subject, and virtually every student in the country takes the course. Changes in evidence law, except in some special areas like the protection of rape victims, tend to come from, or at least be filtered through, the bar and academic lawyers. The bar tends to be procedurally conservative and to want to retain the system that it has learned. The recent history of evidence reform has been one in which reforms were advanced by academic lawyers and their allies, and rejected because of the influence of the trial bar. By maintaining communication with students and imbuing them with a questioning attitude toward evidence doctrine, doctrinal scholars can help lay the foundation for doctrinal improvement.

Doctrinal scholarship will continue to be important for law reform, in evidence as in other fields. Rationalization and improvement of evidence law often occurs through the medium of bar committees and advisory groups. Academic lawyers who are members of these groups have the most leisure to analyze and the greatest detachment from the biasing effect of client representation. Of course, academic lawyers armed with tools derived from other disciplines will make important contributions. There will, however, always be room for studying the
structure of doctrine, and for making recommendations for reform based upon fireside inductions, practical experience, common sense, and general education.