

LAW and EVIDENCE



LAW and **EVIDENCE**

**A Primer for Criminal Justice, Criminology,
Law, and Legal Studies**

SECOND EDITION

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Dedication

For Eleanor, my oldest daughter—musical and wise in the arts, and a loving mother.

For St. Thomas Aquinas who said:

“To give evidence is necessary for salvation, provided the witness be competent, and the order of justice observed.”

Quod testificari est de necessitate salutis, supposita testis idoneitate et ordine juris. (Summa Theologica, II-II, Q. 70. Art.3, ad 3.)



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Preface

The study of evidence is often a forgotten component in justice studies. For some, evidence law is the province of lawyers and judges alone. For others, its technical and statutory nature makes it too complex for the average undergraduate. There are even those who fail to appreciate the relevance of evidence analysis. These perceptions are flawed for a host of good reasons.

In evidence law, the justice system reaches its fruition, its ending point, and its ultimate aim. Evidence is the stuff of conviction and judgment. Without it, the functions and roles of criminal justice are meaningless. Evidence is what drives the machinery of the justice system. Evidence convicts people. Evidence leads to verifiable damage claims in civil actions. Evidence provides the basis for the injunction or the protective or restraining order. Evidence serves as the underpinning in judicial case law and analysis. Evidence is what guides jurors as they carry out their profound responsibilities. Evidence opens up improper convictions, serves as the basis for appeals, and triggers judicial intervention. In short, why students and practitioners should be shortchanged in evidentiary analysis is a mysterious phenomenon in justice education.

This text hopes to change some of these erroneous preconceptions. It is an overview of evidence law, not a compendium or treatise. Readers will soon discover that its overall approach is primarily litigation driven. Why? Because evidence law lives, for the most part, in the environs of courthouses—not in the theoretical think tanks of justice policymakers. Evidence law commences its life on the street, as police and investigators toil in the collection. It then leaps to those entrusted with its evaluation and advocacy, whether they are private lawyers, prosecutors, public defenders, and judges or magistrates. Put another way, this text hopes to take you on a trip filled not only with concepts, but also with action: the action of litigation in judicial settings.

This is the best place for evidence law to come to life. For more than two decades, I have instructed hundreds of students in evidence analysis, and it is clear that theoretical evidence alone cannot convey the richness of these principles. Within this text, I have attempted to infuse energy, to vivify often very dull concepts, and to show you how the lawyer, the investigator, and the judge fend and contend with evidence principles. Additionally, I make a concerted effort to




portray evidence law in a realistic light, not as detached principles left to the *intelligentsia* to determine. How evidence is argued, how it is evaluated, how included or excluded, and how trials depend on its content are a few of the many means this work adopts. In this way, it is very different from its competition. I want you to leave this journey with a feel for how evidence law works in the place it lives: the courthouse.

Chapter 1 commences the journey with definitional parameters. Exactly what is evidence and how many types are there? Where does evidence law come from? How can we find the basis for an evidentiary principle? Is it custom, habit, common law, or statute, or have courts defined it? How much weight is given to particular types of evidence? Are some things presumed to be true? Who has the evidentiary burden to prove or disprove a case? Other introductory questions are sprinkled throughout this first chapter.

Chapter 2 zeroes in on real evidence, the most fundamental form of evidence. Are guns, blood, fingerprints, paint chips, physical injuries, and the like real evidence? Is real evidence the best type of evidence? When is it relevant, and when is it irrelevant? How does one assure its reliability and integrity? How can an advocate challenge it? When will police be on the defensive about its content? Who is responsible for its preservation?

The illustration of *demonstrative evidence* occurs in **Chapter 3**. Demonstrative evidence portrays or manifests the real form. Our litigation system heavily depends on the use of demonstrative evidence. How do police rely on the demonstrative form? Why is it an essential part of the investigator's arsenal? Why are cases more understandable with demonstrative evidence? How do lawyers employ the demonstrative means? What types of demonstrative evidence are there? Photographs, charts, diagrams, molds, casts, animations? And what evidentiary rules guide the use of demonstrative means? What legal challenges are successfully employed to deny admissibility?

Chapter 4 focuses on the documentary form as evidence. Documents are the most relevant form of evidence in many types of criminal and civil cases, such as fraud and forgery, official tampering, kidnapping, and commercial crimes. Documents instruct investigators on criminal profiles and identity. The chapter's thrust deals with traditional and expanding evidentiary principles applicable to documents. What is the *Best Evidence Rule*? What is an original? What is a copy? Who can attest to the authenticity of a document? What types of documents are automatically admissible? What documents are helpful during the investigative process?




Witnesses are not often termed evidentiary, but in fact, they are. **Chapter 5** covers the testimony of lay witnesses. Whether a law enforcement officer or security specialist, a coworker or neighbor, witnesses are evidentiary sources during the investigation and trial of cases. Lawyers use witnesses in and out of the courtroom. Cases are built or deconstructed using witnesses. Exactly what the admissibility requirements for lay witness testimony are is the central theme of this chapter. What makes a lay witness competent to testify? How can a lay witness be challenged before giving testimony? How is a lay witness prepared? What role does cross-examination play in the tug and pull of advocacy? Even though the lay witnesses lack scientific or specialized expertise, their testimony is just as probative as their expert counterparts.

Chapter 6 dwells in the land of expert evidence. An explosion of expert evidence has occurred in all American jurisdictions over the last 30 years. Experts—those holding themselves out as having specialized knowledge that is beneficial to the trier of fact—communicate their expertise in a host of ways including pretrial assessment, evaluation of damages, viability of defenses, and mental and physical competency reviews. During trial, experts often dominate the proceedings. Whether the expert testifies on mental health, ballistics, or any other area, the judicial system increasingly looks to specialized evidentiary presentations before issuing judgments. What qualifies an expert? Where do they come from? How are they to be utilized and prepared? How can they be challenged or puffed up? What are the pitfalls of expert usage in the trial environs? How much power do experts have in the adjudication of cases? How have our courts attempted to define or redefine their role?

Chapter 7 discusses *admissions and stipulations*. Evidence that can be agreed on is evidence without dispute. Evidence where both parties agree not to raise a challenge fosters efficiency in the courtroom environment and reduces the trifles and turmoil of objection and appeal. In this short review, the reader will see how effective these two tools of the justice system are in ferreting out evidence that should not be subject to challenge, and identifying those forms of evidence that are surely subject to disagreement. Admissions and stipulations eliminate contentiousness in the legal arena.

The world of *motions* and its intimate relationship with evidence law is the subject matter of **Chapter 8**. To move a court in a question of evidence covers a vast array of legal strategies. For example, defendants may wish to have evidence excluded or suppressed, or desire even more fervently for the admission of some avant



garde evidence form which will buttress their defense, e.g., PMS or Twinkie defenses. Motions address matters of dispute or controversy. When police acquire evidence in violation of a constitutional principle, a motion to exclude or suppress will be likely. When a defendant claims he or she is insane, a motion for a physical or mental examination, if granted, verifies the claim or lack thereof. When physical evidence has been tainted or corrupted, a challenge by motion makes perfect sense. Motions *in limine* are appropriate when new and controversial evidence will be introduced. Motions are as varied as the evidentiary subject matter. It seems ludicrous not to cover such essential concepts when motions often make or break the state's or the defense's case or support or refute the civil action.

Chapter 9 ends this long sojourn into evidence law by gazing deeply into the final resting place of evidence—the courtroom. Exactly how is evidence employed in the trial setting? What form and format is required? How is it packaged? What is an exhibit? What rules govern the use of evidence in the trial environment? How will the proponent of the evidence use witnesses to confirm or corroborate content? How does a litigation team prepare for trial? What administrative and organizational skills are essential to courtroom success?



Throughout the text, a globe icon will direct readers to visit the Criminal Justice on the Web box at the end of the chapter. This directs the reader to an up-to-date list of web links that will introduce students to some of the most important sites for finding law and evidence information on the Internet.

To be sure, the study of evidence law is a lifelong ambition. Even experienced litigators and investigators are stumped by the natural problems that emerge in the acquisition and advocacy of evidence. It is a highly technical enterprise. From documents to witness recollection, from serological specimens to photographic displays, from psychological profiles to forensic innovation, evidence law covers broad territory. It takes a person with a creative and eclectic mind to master it all.

This text begins that challenging and sometimes cumbersome excursion. When done, one hopes the reader will tangibly appreciate how evidence is used in the justice system and how heavily our justice operations depend upon it. Evidence, in its many forms, is what we need to see and discern in order to carry out justice. Hunches and surmises will not suffice. The beauty of evidence law is in its rigor and complexity, and that even after a lifetime of working with it, one never tires of it.

Good luck as your adventure unfolds.



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