

## Symposium: Reimagining the Rules of Evidence at 50

### Introduction

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Prior to the eighteenth century, cartographers would often fill uncharted areas of maps with sea monsters, other artwork, or even rank speculation—a phenomenon labeled “horror vacui,” or fear of empty spaces.<sup>1</sup> For example, in Paolo Forlani’s world map of 1565, a yet-to-be-discovered southern continent was depicted with anticipated mountain chains and animals.<sup>2</sup> The possible explanations for horror vacui are varied, but one reason may have been a desire “to hide [the mapmakers’] ignorance.”<sup>3</sup> Not until “maps began to be thought of as more purely scientific instruments . . . [did] cartographers . . . restrain

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1. CANDICE MILLARD, RIVER OF THE GODS: GENIUS, COURAGE, AND BETRAYAL IN THE SEARCH FOR THE SOURCE OF THE NILE 95–108 (2022); see also Chet van Duzer, *Chet Van Duzer on Cartographers’ Fears of Blank Spaces: “With Savage Pictures Fill Their Gaps,”* YOUTUBE (Apr. 1, 2020), <https://youtu.be/Dg5UUGzossI> (providing lecture and visual evidence of the practice).

2. Chet van Duzer, *supra* note 1, at 20:34–21:19.

3. Greg Miller, *Why Ancient Mapmakers Were Terrified of Blank Spaces*, NAT’L GEOGRAPHIC (Nov. 20, 2017), <https://www.nationalgeographic.com/history/article/maps-history-horror-vacui-art-cartography-blank-spaces> [<https://perma.cc/9F8E-GUFE>].

their concern about spaces lacking decoration in the interest of presenting their work as modern and professional.”<sup>4</sup>

The law of evidence shares something of a kinship with those old maps. The Federal Rules of Evidence (“FRE”), perhaps the most successful codification project in the history of American law, have advanced the field in incalculable ways, but to treat them as the last word would be a grave mistake. For one thing, the FRE have significant gaps, empty spaces in need of exploration. The most obvious example is the law of privileges, where Congress rejected the rule writers’ proposed codification in favor of retaining the common law.<sup>5</sup> More fundamentally, the FRE are almost entirely about *admissibility*, the sifting of existing evidence. They say little, if anything, about how evidence is weighed, and they do not typically reflect a concern for party incentives to collect or preserve evidence in the first place.

The FRE also have their metaphorical sea monsters—elements that make the law appear complete but, in reality, are merely gap-filling myths and traditions. The rules of evidence codified in the FRE are old. Our understanding of psychology, epistemology, and other fields has changed immeasurably since many of the rules were formulated, and perhaps it is time we updated the evidence rules for the twenty-first century.

To mark the fiftieth anniversary of the FRE,<sup>6</sup> the goal of this *Vanderbilt Law Review* Symposium was to challenge a new generation of evidence scholars both to identify the gaps in the FRE as well as to critique existing ones that may be debunked, outdated, or otherwise problematic vestiges of the past. I charged the participants to be bold, to think outside the box, and to consider what the FRE could be for the next fifty years.

The contributions that follow offer a remarkably creative and varied set of responses to this charge. A number of scholars chose to address the empty spaces in evidence law. Rebecca Wexler, in *Second-Order Ignorance of the Rules of Omission: An Essay on Privilege Law*, discusses the most immediate gap in the FRE—privileges. Wexler calls

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4. Chet van Duzer, *Horror Vacui*, STAN. LIBRS.: BARRY LAWRENCE RUDERMAN CONF. ON CARTOGRAPHY, <https://exhibits.stanford.edu/blrcc/feature/horror-vacui> (last visited Oct. 24, 2023) [<https://perma.cc/SQW3-G3WR>].

5. See FED. R. EVID. 501 (“The common law . . . governs a claim of privilege . . .”); H.R. REP. NO. 93-650 (1974) (explaining that the House “eliminate[d] all of the Court’s specific Rules on privileges” and instead “left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States.”).

6. The original proposed Rules were adopted by the Supreme Court in November 1972, although it would take more than two additional years of congressional wrangling and amendment before they would have the force of law. The FRE took effect July 1, 1975. S. REP. NO. 93-1277 (1974); Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

not necessarily for the codification of privileges but at least their theorization. Andrea Roth, in *How Machines Reveal the Gaps in Evidence Law*, exposes the implicit assumption in the FRE that cross-examination will always be a meaningful way of challenging evidence. Roth notes that this assumption neglects nonhuman sources of information as well as testimony in which sincerity is not the primary problem. How to test nonhuman-based information is therefore a gap to be filled.

In *On Proving Mabrus and Zorgs*, Michael S. Pardo addresses another gap: how to determine the preliminary questions of fact necessary for applying the evidence rules themselves. In doing so, he marries the two dominant subfields of evidence study today: admissibility rules and theories of proof. And in *"Pics or It Didn't Happen" and "Show Me the Receipts": A Folk Evidentiary Rule*, Timothy Lau discusses gaps created by technology. Should the FRE evolve to account for the emergence of folk evidentiary rules like "pics or it didn't happen"? After all, to the drafters of the 1970s, the digital imaging technology of today would have been sheer science fiction.

Finally, the most glaring gaps in the law of evidence are found in contexts where either the FRE do not apply or where they were not designed to apply. In *One Size Does Not Fit All: Alternatives to the Federal Rules of Evidence*, Henry Zhuhao Wang warns against unthinking importation of the FRE into contexts that do not feature the FRE's three key assumptions: a jury; adversarial proceedings; and in-court, oral testimony. For these contexts, he explores alternatives to the FRE, expanding our perspective on evidence law generally. Maggie Wittlin, in *Binding Hercules: A Proposal for Bench Trials*, examines the application of the FRE to bench trials. She argues why (contrary to current practice) explicitly imposing the FRE in bench trials is important and how the Rules can be adjusted to better fit the bench trial context.

The other major set of Symposium contributions involve critiques of the Rules themselves—the clearing away of the old to make room for the new. Jeff Bellin, in *The Superfluous Rules of Evidence*, takes on this task wholesale by engaging in some statutory spring-cleaning. Bellin identifies a long list of superfluous Rules—Rules rendered unnecessary by the structure of the FRE but necessary historically to encourage adoption or to provide guideposts to judges—and asks what we should do about them. The remaining critiques look at specific rules of evidence and propose reforms through diverse scholarly perspectives. Using existing and confirmatory empirical studies, Justin Sevier, in *Evidence-Based Hearsay*, debunks the hearsay rule as an accuracy-promoting doctrine and instead reveals the

public's support for it as a dignitary rule. As such, Sevier attempts to recast hearsay along these more honest (and less fantastical) lines. Julia Simon-Kerr, in *A New Baseline for Character Evidence*, provides a feminist critique of the character rules, focusing on the types of character that the FRE permit as well as exclude. Bennett Capers, in *Race, Gatekeeping, Magical Words, and the Rules of Evidence*, uses a critical race theory perspective to rethink the expert evidence rules, while Anna Roberts, in *Models and Limits of Federal Rule of Evidence 609 Reform*, asks if an abolitionist perspective can inform efforts to reform the exception for prior convictions under Rule 609. Finally, Teneille Brown, in *Shifting the Male Gaze of Evidence*, critiques Rule 403, asking whether the FRE's adoration of rationality (and their disparagement of emotion) is consistent with neuroscientific research or a feminist perspective.

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I have long viewed with alarm the decline of evidence law within the American legal academy. While evidence was once a fundamental course and the subject of intense scholarly research by giants like John Henry Wigmore, today evidence is often an elective, and evidence scholarship generates the lowest number of citations among the top twenty-one legal fields of study.<sup>7</sup> It is as if the unparalleled success of the FRE has led scholars to think that there is little left to discuss. Nothing could be farther from the truth. To the contrary, the problem of how we find facts and convince others of their accuracy is important now more than ever.

For my small part, just as I challenged the Symposium participants to think creatively about gaps and alternatives, let me ask five questions as an ongoing challenge to the evidence community and future scholars yet to be minted:

- If we were to construct a set of evidentiary admissibility rules that were empirically justified, what would they look like?
- How can we best understand and optimize the process of legal proof? Can the Bayesian and story-based (or abductive) models be reconciled?
- What should the evidentiary rules look like for contexts outside the traditional jury trial? Why should they differ?

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7. Brian Leiter, *Citation Counts Vary by Field*, BRIAN LEITER'S L. SCH. REPS. (Aug. 9, 2021), <https://leiterlawschool.typepad.com/leiter/2021/08/citation-counts-vary-by-field.html> [<https://perma.cc/HB9B-YBJH>] (ranking Evidence last out of twenty-one legal fields in term of citations).

- How can the evidence rules help with the generation of evidence, as well as access and inclusivity for the parties and the fact finders?
- Should the evidence rules be codified? And if so, how do we structure rulemaking bodies at all levels to ensure sufficient experimentation and reform?

Facets of most, if not all, of these questions are touched on by the articles in this Symposium. Together, perhaps these questions and the articles that follow can begin setting a communal research agenda for the next fifty years under the FRE. With the extraordinary group of scholars that comprised this Symposium and others like them, I am hopeful and confident that brighter days for evidence scholarship lie ahead.