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RESPONSE

THE PERILS OF EVIDENTIARY MANIPULATION

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Professors Bierschbach and Stein's observation that evidentiary rules mediate the age-old tension between retribution and deterrence is both fascinating and thought provoking.[1] The idea that the two hitherto balkanized fields are inextricably linked in this quirky but productive way is surely an impressive insight that will force criminal law and evidence scholars never again to look at their respective fields in quite the same way. In this Response, I want to focus on the broader normative question raised by their thesis—whether the legal system should use evidentiary rules to achieve substantive reform. Conveniently for me, I can leave the task of probing the relationship between the Bierschbach-Stein thesis and general criminal law theory to more qualified scholars, like my colleague Professor Mike Cahill.[2]

So "[a]re mediating rules a virtue or a vice?"[3] On this question, Bierschbach and Stein are nominally agnostic. For example, careful not to overstate their case, they acknowledge that such special evidentiary rules "might . . . be seen as illegitimately thwarting the ac-

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[1] This essay is a response to Richard A. Bierschbach & Alex Stein, Mediating Rules in Criminal Law, 93 Va. L. Rev. 1197, 1253 (2007).

[2] See Michael T. Cahill, Criminal Law's "Mediating Rules": Balancing, Harmonization, or Accident?, 93 Va. L. Rev. In Brief 183 (2007), http://www.virginialawreview.org/inbrief/2007/09/24/cahill.pdf.

[3] Bierschbach & Stein, supra note 1, at 1252.

cepted processes for resolving political agreement."[4] Put plainly, they recognize that evidentiary rules so conceived can become Trojan horses. The overall tenor of their essay[5] and longer article, however, takes a somewhat rosier view. They emphasize the ability of mediating rules to facilitate compromise and "promote a rough social consensus around criminal law in a moral universe that is diverse and pluralistic."[6]

I am far more skeptical. The use of evidentiary rules to achieve substantive goals strikes me as a Faustian bargain, and, given Bierschbach and Stein's acknowledgedly tentative position, I hope to dissuade them of the virtues of the practice. My goal therefore is to explore briefly the potential dark side of specialized evidentiary rules. The concerns of injecting substantive goals into evidence law extend far beyond the narrow legitimacy concerns Bierschbach and Stein raise. It is not simply the question of whether we aspire to a pluralistic or majority-take-all democratic society.[7] Rather, evidentiary manipulation threatens the legitimacy of criminal and evidence law.

A. CRIMINAL LAW

Bierschbach and Stein's descriptive thesis, which comprises the core of their fascinating piece, is surely right. In a number of instances, evidentiary rules seemingly mediate between conflicting positions in criminal law. In addition, as they carefully acknowledge, this synergy may be largely fortuitous. No grand social engineer purposely chose the evidentiary rules to effect a compromise. Rather, the "mediating" rules are "product[s] of diverse institutional inputs and eras."[8] The mechanisms that led to the current (happy) state of affairs may be simply too subtle and complex to discern.

The trouble begins, however, when we take up the normative torch and explore what might happen if evidentiary rules were

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[4] Id. at 1253.

[5] Richard A. Bierschbach & Alex Stein, Deterrence, Retributivism, and the Law of Evidence, 93 Va. L. Rev. In Brief 173 (2007), http://www.virginialawreview.org/inbrief/2007/09/24/bierschbach.pdf.

[6] Bierschbach & Stein, supra note 1, at 1253.

[7] Id. at 1257.

[8] Id. at 1258.

purposely used to achieve substantive objectives. We immediately encounter dangers well trodden in the procedural literature about draconian filing deadlines, onerous discovery rules, and other hidden traps. Perhaps evidentiary rules are different from procedural ones, but I struggle with finding a meaningful distinction, and Bierschbach and Stein leave the issue unaddressed.

In an ideal world, of course, political actors could use evidentiary law to further liberal democracy as Bierschbach and Stein suggest.[9] Legislators could use evidentiary compromises to respect pluralism and assuage their opponents. But a cynic could just as easily imagine the minority using evidence law to subvert the will of the majority. A crafty minority, sensing that it cannot win in an open substantive debate, could instead focus its efforts on arcane evidentiary rules that undermined the majority's position.

Now concededly this state of affairs may be precisely what Bierschbach and Stein mean by pluralism. Perhaps evidentiary rules are a safety mechanism for the minority, much like how the filibuster, minority-majority voting districts, and constitutional rights operate. The majority may rule, but the minority has room to extract concessions or subvert the majority position—it is all part of the democratic process.

The cynicism, however, can be taken one step further. Suppose now that public opinion clamors for a particular criminal doctrine, whether based on retributivism, deterrence, or a basic "get tough on crime" attitude. The legislature, however, would prefer the politically unpopular opposite result. Or, conversely, suppose that the legislature wishes to criminalize and target certain behaviors that are popular with the electorate. The best option for the legislature would be to bury its policies in the evidentiary law, a scarcely novel tactic in the annals of procedure. The law of presumptions and admissibility is arcane and beyond the ken (or interest) of the average citizen. The legislature could thus make strong public pronouncements, yet sabotage them quietly.

Professor Marty Redish and Christopher Pudelski discuss this problem of "legislative deception" at length in a recent article.[10]

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[9] Id. at 1253–55.

[10] Martin H. Redish & Christopher R. Pudelski, Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of *United States v. Klein*, 100 Nw. U. L. Rev. 437 (2006).

Grounding their theory in *United States v. Klein*,[11] they argue that it is unconstitutional when "the legislature leaves substantive law unchanged on its face, but alters it in a generally applicable manner by enacting procedural or evidentiary modifications,"[12] effectively turning the substantive law into a "shell game."[13] To be sure, the Redish-Pudelski scenario represents the extreme case, since their focus is on constitutionality, but there is no reason not to adopt the overarching concerns raised by legislative deception.

Indeed, because we are dealing with the criminal context, perhaps even more alarming than legislative deception is judicial legislation. To the extent that evidence law has traditionally been seen as the judiciary's bailiwick, judges may feel greater freedom to revise evidentiary rules within the common law process.[14] Judge-made evidentiary rules that temper or otherwise affect substantive criminal law arguably violate the legality principle. Of course, not all evidentiary rules are as easily subject to judicial manipulation. Where the legislature has prescribed specific evidentiary rules, the judiciary's hands are largely tied. In addition, certain evidentiary areas, such as presumptions, may give jurists greater pause because they more clearly implicate substantive policies and/or are subject to constitutional strictures. Nevertheless, the problem of judicial lawmaking in the criminal context exists.

These problems are hardly theoretical. For example, cases involving Battered Women's Syndrome ("BWS") provide a striking case study of the potential perils of evidentiary manipulation. Rather than directly tackling the substantive problem—the misfit between traditional, gendered definitions of self-defense and the realities of domestic violence—the legal system instead turned to evidence rules.[15] Faced with sympathetic defendants, courts relaxed their relevancy and reliability rules for BWS evidence, admitting it despite its dubious scientific validity and transforming it into a powerful tool for subverting the substantive policies found in self-

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[11] 80 U.S. (13 Wall.) 128 (1872).

[12] Redish & Pudelski, supra note 10, at 439.

[13] Id. at 440.

[14] For a debate about the constitutional limits of legislative rulemaking in the evidentiary area, see *McDougall v. Schanz*, 597 N.W. 2d 148 (Mich. 1999).

[15] See Robert P. Mosteller, Syndromes and Politics in Criminal Trials and Evidence Law, 46 Duke L.J. 461, 465–66, 485–87, 509–10 (1996).

defense doctrine.[16] The immediate results may have been laudable, but they left chaos in their wake. The apparent evidentiary solution opened a loophole in criminal law with regard to syndrome evidence, sending courts and scholars struggling to close it. Indeed, so awkward was the attempt to distinguish BWS from other syndromes on evidentiary grounds that Professor Bob Mosteller advocated outright acknowledgment of the politics in order to "inhibit the expansion of the principles developed in battered woman self-defense cases to more problematic situations."[17] Meanwhile, the legitimacy of the criminal system suffered serious harm, provoking discussions of the "abuse excuse" and public scorn over the infamous Twinkie defense.[18]

B. EVIDENCE LAW

Evidentiary manipulation not only harms criminal law's legitimacy, it also harms that of evidence law. Evidentiary rules arguably carry special legitimacy because they are—or are at least supposed to be—transsubstantive. Being transsubstantive ensures greater neutrality and honesty, because evidentiary doctrines are double-edged swords that can both help and hinder substantive objectives. And when evidentiary rules are not evenly applied, their substantive distortions are easily exposed and criticized. For example, the contrast between the *Daubert* regime's rigid scrutiny for scientific evidence in civil cases and the prevailing lax treatment of forensic evidence in criminal cases has called both apparatuses into question.[19] Evidentiary rules also merit greater respect because their overarching focus is on accuracy, and—even in a pluralist world with few absolutes—accuracy may be one of the universals. No one argues that higher error rates are good for the legal system.

Now before I send devout Realists into paroxysms, let me acknowledge that evidentiary rules are not always neutral—they can and do often carry ideological content. But at least the goal of ac-

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[16] See generally 2 David L. Faigman et al., Modern Scientific Evidence, 265–360 (2006–07 ed.).

[17] Mosteller, supra note 15, at 509–10.

[18] Alan Dershowitz, The Abuse Excuse: And Other Cop-Outs, Sob Stories and Evasions of Responsibility (1994).

[19] See, e.g., D. Michael Risinger, Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?, 64 Alb. L. Rev. 99 (2000).

curacy is a common one, and hopefully the commitment to it puts negative pressure on misguided, empirically dubious rules. If research shows forensic hair microscopy to be unreliable, then it should disappear. If hearsay rules do not lead to more accurate decisions, then they too should wane, whether by abolition or by the greater use of exceptions. Evidence law is not merely a clash of values. It has empirical roots, which is why, as Bierschbach and Stein acknowledge, evidence law provides "a less morally charged locus for public disagreement and debate than that provided by substantive rules."[20]

Specialized evidentiary rules, like mediating rules, threaten to destroy this important empirical commitment by turning evidence law into a subsidiary battlefield of substantive disputes. Frankly, the problems of proof and accuracy are sufficiently difficult without the added complication of worrying about substantive criminal law theory. So at the risk of going overboard and sounding like an isolationist, let the retributivists and consequentialists fight on their own playground. We have enough problems over here.

CONCLUSION

Some have remarked that the Internet culture has promoted more extreme and less well-considered viewpoints. Blogs are more entertaining perhaps, but less careful. As befits an online forum, I must plead at least partially guilty to the accusation. Perhaps I should not be as gloom-and-doom as I have been in this Response. Nevertheless, I think that my rant contains a significant core of truth, which is that mediating rules are potentially dangerous fare.

In closing, let me be clear that my remarks should take nothing away from the creative analysis that I have come to expect from Bierschbach and Stein. As they rightly note, legal thinking is only pushed by "breaking old dichotomies,"[21] and in this regard they deserve credit in spades. My question is only whether this particular dichotomy is one worth breaking.

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[20] Bierschbach & Stein, supra note 1, at 1256.
[21] Id. at 1258.

Preferred citation: Edward K. Cheng, The Perils of Evidentiary Manipulation, 93 Va. L. Rev. In Brief 207 (2007), http://www.virginialawreview.org/inbrief/2007/09/24/cheng.pdf.