

**A Student's Guide to
Relevance, Character, Habit,
and Impeachment**

A Student's Guide to Relevance, Character, Habit, and Impeachment

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I dedicate this book to the thousands of students to whom I had the honor and privilege of teaching evidence. They helped me learn how to teach, and, over the years, taught me so much more.

I also dedicate this book to the students who will use it (and will use A Student's Guide to Hearsay) to learn challenging and difficult aspects of evidence law. (May they number in the thousands each year!)

Finally—rather, I should say, first, last, and always—I dedicate this book to Betty, my Editor for Life.

—CSF

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Preface: Short Important Comments¹ You Should Read First

§ P.1 Fishman Rule of Evidence 001

The law of evidence is not a precise science. Conscientious and diligent pursuers and transmitters of knowledge on the subject may disagree on one point or another. If your evidence professor should disagree about something I say in this book, apply the following:

Fishman Rule of Evidence 001.

If at any time and under any circumstance your evidence professor disagrees with something I have said in this book, your evidence professor is always right.

Until after the exam.

§ P.2 How to learn the law *and* get a good grade in evidence

You are using this book for two main reasons: to help you learn a challenging and important aspect of evidence law, and to help you get a good grade in your evidence course. The two are related, of course, but learning the law does not always guarantee a good grade in a course. It also helps to learn how to “read” your professor. This book from time to time provides suggestions how to do so.

Here’s the first gold nugget: we law professors crave positive feedback from students. We may seem self-assured and all-knowing, but in reality we are seething blobs of uncertainty and self-doubt. (Well, most of us are, and those who aren’t, should be.) So in class, on quizzes, and on exams, it’s important, yes, to demonstrate that you know the law, but it’s also important to demonstrate that it was your professor’s exceptional teaching that helped you learn it.

1. Well, most of the comments are important, anyhow.

This does *not* mean that your answer to every essay question should contain everything your professor ever said in class on any subject, in the hope that your prof will pick out the relevant parts.

More generally, remember that in evidence law, as in every other law course you take, there is often no “right answer.”² Quite often in classroom discussions and on essay questions, there are issues with plausible arguments on both sides.

And remember that while every *substantive* course (like evidence) you take in law school is dedicated to teaching you a particular aspect of the law, *every* course in law school—not just the “skills” courses—is also dedicated to teaching you “how to lawyer”: how to analyze the facts and applicable law in a case from both sides, come up with the best argument each party can make, and only then decide who should win and why. That’s what professors look for in class discussion.

For example, in each of my courses, if a student tended to be defense-oriented, I would call on that student to give the prosecutor’s argument, and vice versa. My goal was not to aggravate and annoy those students (although that was sometimes a fringe benefit); it was to force them to look at the question from “the other side,” so they would learn the law better—and be better able to represent their “own side,” having anticipated their opponent’s arguments.

The odds are that a law professor grading a high-point-value essay question will likewise look for a discussion of each side’s argument; an answer which fails to do so will receive fewer points. The answers to the practice questions throughout this book provide numerous examples of how to do so.

§ P.3 Another reason to use this book

When I was a law student back in the 19th 20th Century, I recall one professor used his own book for a course he taught—nothing inherently wrong with that, of course, but that book was the best cure for insomnia I’ve ever encountered: it put me to sleep before I’d read five pages.³ Most law books—in particular, books written for law students—are better than that, but let’s face it, they are not an easy read. This one isn’t, either—the topic is too complex and challenging to be easy. But I think this book will be more fun to read than most books about the law.⁴ It includes dozens of amusing⁵ and entertaining⁶ historical, cultural, and artistic references, puns, and useful nuggets of professional and personal advice. In fact, in § P.8, I provide a scavenger hunt-type list of them for you to search for, if you’ve the time and inclina-

2. Exception: on a well-written multiple-choice question, there is a single correct answer.

3. That mirrored his classroom performance, too. I managed a B-minus in the course—I’m still not sure how.

4. Off-hand, I can think of only one law book that can compare to it in the fun-to-learning ratio: *A Student’s Guide to Hearsay* (5th ed. 2019).

5. To me, anyhow.

6. I hope.

tion. Some of these are easy to spot; other clues are cryptic. Have fun searching for them (or don't bother, if that's your preference).

§ P.4 What to read in this book . . . and what you can skip

To properly teach everything you need to know about evidence would require a six-credit course. Most law schools allot only three or four credits, which means that most professors have to pick and choose what to omit or give a very light once-over, and what to emphasize. Since I have no way of knowing what your professor will emphasize, skim or omit, I've written this book assuming that each law professor will stress each rule or topic I cover in it. Read and skip accordingly.

§ P.5. Vocabulary: Parts of a question

The basic fact pattern in a question—the part that gives you the information (facts and law) you need—is called the “stem.”

The part of the question that tells you what you are asked to do is the “call.” Sometimes the call is quite specific, instructing you to apply specific provisions of the FRE, or asking how a particular litigant might respond to what has been set out in the stem. Sometimes the call is quite general: “Discuss the issues thus presented.” In that case, the applicable law includes any provision of the FRE which has been covered in the book so far. In answering such questions, as a rule, you should discuss how each side in the case might plausibly argue for or against the admissibility of the evidence or the propriety of a lawyer's question, before deciding how the judge should rule.

In a multiple-choice question, the answer choices are called “options.”

§ P.6 Historical perspective; progress; and vocabulary

My law school class (Columbia, 1969) had 270 students. Twenty-three were women. The class was overwhelmingly White. My law school yearbook included photographs of fifty-seven members of the full-time and adjunct faculty. All fifty-seven were White men.

In 1969, I was one of fifteen new Assistant D.A.s hired by the New York County (i.e., Manhattan) D.A.'s Office. All of us were White, and twelve of us were men. The three women were immediately assigned to the Appeals Bureau, because the men who ran the office “knew” that women did not have what it took to survive in the combative atmosphere of a courtroom or the fortitude to work with cops and informants in an investigations bureau.

I cite these facts not (I assure you) out of nostalgia for the “good old days,” but to give a bit of historical perspective: our profession and our nation have a long, long

way to go before they truly exemplify the ideals expressed in our founding documents, but we have made considerable progress in the past fifty years. As Dr. King was fond of saying, “The moral arc of the universe is long, but it bends toward justice.”⁷ That arc is not constant; it suffers periodic setbacks; but the law is an essential tool in the struggle to achieve a just society.

Our use of language reflects that progress, but that progress often poses challenges. Anyone who speaks or writes for public consumption must (or at least should) try to balance several sometimes-conflicting goals: to write clearly; to write with some degree of style or flair (for self-satisfaction, and to keep the reader engaged, or, at least, awake); to reflect reality; to avoid negative stereotypes and offending usages.⁸ I have tried my best to strike the right balance in this book.

§ P.7 A brief bio

I was born in New York City in 1945. In 1953, my family was among the first to move from the city to the suburbs (Long Island). I attended public schools K-12. I got my BA (and more importantly, met and fell in love with Betty, my Editor-for-Life) at the University of Rochester (1966).

I received my JD at Columbia University Law School in 1969. I graduated with a B average; I did not make law review. By then I was so sick of being a student all my life that I vowed I’d never set foot on a college campus again (well, at any rate not until my children, if I ever had any, would be applying to colleges). I became an Assistant D.A. in Manhattan; after three years there, I was assigned to the city’s Special Narcotics Prosecutor’s Office, where I tried dozens of cases, oversaw all our investigations (including the most expensive purchase of a kilogram of pancake mix in the history of law enforcement), and helped put some pretty bad people away for a long time.

In 1976, I set up an informal program to teach our first- and second-year A.D.A.s the basics—how to conduct direct examination, the basics of cross, how to work with cops on investigations. That became the most enjoyable aspect of my job; that’s what prompted me to think about teaching law. And I wanted to spend more time with Betty and our (first) daughter. In addition, almost by accident, I become the office specialist on electronic surveillance, and wrote an office manual on the subject, and thought: hey, maybe I should write a book on it.

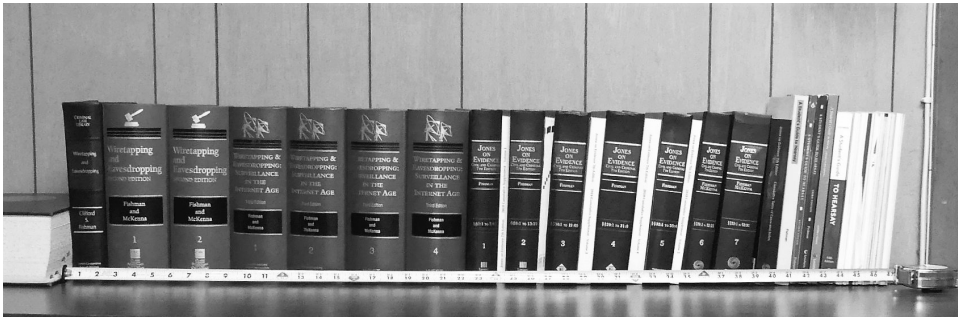
I interviewed at a number of law schools. Catholic University of America was the best school to offer me a job, and it was in the most interesting city (Washington DC). I had a few qualms—“will Catholic be a good place for a ‘nice Jewish boy from

7. This phrase is derived from comments by Theodore Parker, a 19th century Transcendentalist, Abolitionist and Unitarian minister whose works also inspired the closing sentence of President Lincoln’s Gettysburg Address.

8. See, e.g., §9.2. Also consider the current debate over the use of gender-specific pronouns.

New York?” Turned out, it was an excellent place to be. It has been a pleasure being at a school that takes religion seriously and respects all religions. CUA has gone out of its way to support me and other Jewish faculty members to bring Jewish speakers and programs to the law school.

I was on the faculty at CUA for 42½ years. I taught evidence, criminal law, and criminal procedure to thousands of students. I’ve written 11 law books by myself—the five editions of *A Student’s Guide to Hearsay*, the one-volume first edition of *Wiretapping and Eavesdropping*, and the first five volumes of the 7th edition of *Jones on Evidence*. Anne T. McKenna—my former student, and my professional partner and friend since 1994—and I have written an additional eight books—the second and third editions of *Wiretapping and Eavesdropping: Surveillance in the Internet Age*, and volumes 6 and 7 of *Jones*.⁹ These 19 books and annual supplements, and my 20 scholarly articles, take up 47 inches of shelf space.



If Carolina Academic Press prints this book on thick enough paper, it will bring my shelf-space total to an even four feet.

Will this be my last law book? As I write this, I think so. But then again that’s how I felt after each of the previous 19, too, so who knows?

§ P.8 The “scavenger hunt”

Here is the list of the puns, obscure references to history, music, art, sports, etc. This list does not include where they appear, but I will give you two hints. First, this is the order in which they appear in the book. And in the Afterword at the end of the book, I tell you where each is, and explain each, if an explanation is necessary.

The cosmic significance of 9:37 p.m., October 30, 2019.

9. The two treatises are published by another company whose name must not be mentioned here, but its initials are the same as those of the only twentieth century President enshrined on Mount Rushmore.

Don't it make that brown eye blue? No, it don't.

Why it is good to have a friend with a short attention span who knows nothing about the law.

"Could this be magic?"

Blake Shelton's 2004 hit song "Some Beach."

"Could this be magic?" (again).

Twenties questions.

Holodecks.

Professional advice: where not to interview a client.

Professional advice: where not to discuss a case.

Tissues and country and western music.

A business model you should *not* recommend to a client.

L. Frank Baum and Judy Garland.

Sir William S. Gilbert.

What Oliver Wendell Holmes, Eleanor Roosevelt, Linus Van Pelt, and Confucius have in common.

Charles Lutwidge Dodgson.

Lin-Manuel Miranda.

When would history buffs and lovers of Shakespeare make poor jurors?

Professor Fishman favorably compares himself to one of the greatest writers and statesmen in world history.

A vehicle pulled by three horses abreast.

Shar-peis.

Dog poop.

The official definition of "elderly."

Dog poop.

Professor Fishman favorably compares himself to the Bible.

A defensive tackle for the Dallas Cowboys.

Judy Garland.

Sainthood in everyday life.

What Rudolph does the rest of the year.

What "kemosabe" means in various Native American languages.

Charles Dickens.

Taking three wickets from three consecutive balls. Or else, an octopus.
Weather in the Heights.
A particularly bad way to pick up some extra cash fast.
Professor Fishman's pre-law school employment history.
Professor Fishman's efforts to insure domestic tranquility.
Eschewing pellucidity.
What Hollywood and Kansas City, Missouri, have in common.
Or well that ends well. (Or: the weather in April).
The professor channels his inner Roger Ebert.
Longfellow Deeds and the pixies; or, the professor again channels his inner Roger Ebert.
Roger Ebert, 3.0.
What do a Jabberwock, Mad Magazine and a witch doctor have in common?
The difference between beef wellington and beef stroganoff.
What the Dickens?
Pulitzer Prize for fiction.
A-B-C, easy as 1-2-3-4-5.
We don't care how miserable you feel, Victor: you go first.
Weather in the Heights.
Volleyball and Einstein's theory of special relativity.
Before you leave home ...
The prof quotes the Bard (but doesn't use quotation marks).
How not to apologize.
"Just when you thought it was safe to get back in the shower. ..."
Albert King (not the basketball player), Jimi Hendrix, Pat Travers, Cream.
"Sunrise, sunset; sunrise, sunset; swiftly fly the days..."
When would someone from, say, the Rockies, be referred to as a "Flatlander"?

Happy hunting.

Acknowledgments

Some people have likened having a book published to giving birth. I have not, myself, had the latter experience, although I was present on three occasions when a new child entered the world. (I have clear memories of the latter two; the first time, I was too young to appreciate the experience.) I doubt if anyone who has given birth would endorse the comparison. Still, there are similarities—the first stage of the process is often joyful and a cause for celebration; what follows is lengthy, awkward and uncomfortable; the last stage often involves so much hard labor that it sometimes seems amazing that anyone who has experienced it the first time would voluntarily go through it again. But people do! This is my twentieth. (Law book, not child.)

Another similarity: In each act of creation, the prolonged parts of the process are much, much easier if the creator has help, as I have for each of my books. So: my thanks to the Columbus School of Law, the Catholic University of America, for its continued support of my work, even after I ascended to the exalted status of Professor Emeritus. My thanks as well to Kathleen Soriano-Taylor and her staff at Carolina Academic Press for their work on the book (and their continued patience even after I missed the “nth” deadline). And of course, to Betty, my Editor for Life.

The Columbus School of Law, The Catholic University of America, has been my professional home since the summer of 1977. I taught there under a dozen deans and with several dozen faculty colleagues. We have worked, debated, laughed, celebrated and mourned together, and, occasionally, disagreed, vigorously but respectfully. We brought different backgrounds, beliefs and approaches to what we taught and how we taught, and these differences strengthened and enriched our lives and our community.

The law school’s administrative and support staffs contributed beyond measure to make the school a warm, welcoming and inclusive place to study, learn, teach, research and write about the law. It is impossible to name everyone to whom praise and thanks are due, but I will mention four special people here:

Joan Vorrasi, who for four decades was at the center of student life at the law school. I will always cherish our conversations about Judaism and Catholicism, and the energy and loving attention she gave to every aspect of student activities and events at the school. May her memory always be for a blessing.

Law school librarian Steve Young, for whom no reference is too obscure and no source is too daunting to track down. Steve not only found whatever I was looking for; often he anticipated what I would need before I realized that I needed it. If a law professor asked Steve to find the Lost Ark, I'm sure Steve would locate it in a day or two without any of that Indiana Jones fuss and bother.

Georgia Niedzielko received her JD from Catholic in 1981. Between 1988 and her retirement in 2021, Georgia served as our director of legal career services, as an assistant to the dean, as the assistant dean for academic affairs, and as the assistant dean for administration. Georgia and I worked together on the drafting and administration of the law school's honor code and on several other projects. We have all benefitted from her dedication to our students and to the quality and integrity of our educational program, and from her decency and honor and wisdom and sense of humor.

Julie Kendrick's years as my administrative assistant were my best years as a teacher and my most productive years as a scholar, and that was no coincidence. Julie created and administered a record-keeping system that enabled me to give multiple anonymously graded quizzes each semester; she reached out to students who missed classes or who did poorly on the quizzes. My students quickly recognized that they could trust and confide in her—as did I.

Thanks to you all.