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FOREWORD

Peter N. Thompson†

"Hell, there are no rules here—we're trying to accomplish something."—Thomas Edison[1]

This issue of the *William Mitchell Law Review* presents articles relating to the rules governing the admissibility of evidence at trial. The articles address how rules impact the fairness of the trial process, how rules might affect behavior outside of the courtroom, and how rules can influence the perception of justice. Legal rules, of course, put limits on the tribunal's unfettered discretion. They require judges to reflect on the policy embodied by the rule, not the policy preferred by the judge. Many judges, including Minnesota Supreme Court justices, chafe at the restrictions imposed by rules and identify instead with Thomas Edison's more pragmatic approach suggested in the quote above.

Justice Simonett, one of the great Minnesota Supreme Court Justices, wrote about the constraining impact of legal rules in his frequently cited article about "result-oriented" judicial decision making.[2] Following legal rules requires that judges and justices subordinate their values and preferences for the values expressed in the rule. Of course he recognized the vital role legal rules played in limiting *ad hoc* decision making in our democratic government. Justice Simonett, quoting Alexander Hamilton, stated, "[t]o avoid an arbitrary discretion in the courts . . . it is indispensible that they should be bound down by strict rules and

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1. MICHAEL J. GELB & SARAH MILLER CALDICOTT, INNOVATE LIKE EDISON: THE SUCCESS SYSTEM OF AMERICA'S GREATEST INVENTOR 6 (2007).

2. John E. Simonett, *The Use of the Term "Result-Oriented" to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187 (1984).

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precedent, which serve to define and point out their duty in every particular case that comes before them."[3] Nonetheless, Justice Simonett argued that judges should not slavishly enforce rules; rules need to be applied with some flexibility, or as he phrases it, with "elasticity."[4] Flexibility and elasticity seem apt descriptions for the Minnesota Supreme Court's approach to applying rules of evidence.

Minnesota Courts followed common law rules of evidence until July 1, 1977, the effective date of the Minnesota Rules of Evidence. The process of developing Minnesota's first evidentiary code took three years. Chief Justice Sheran first convened the Advisory Committee in 1974. He instructed the committee to consider the newly enacted Federal Rules of Evidence as a model and to propose a rule that deviated from the federal rule only where a significant state policy conflicted with the federal approach.[5] After two years of monthly meetings and two public hearings the committee sent a recommendation to the court. The rules were promulgated by the court consistent with Minnesota Statutes section 480.0591 (1974).[6] The committee followed the direction of the chief justice. The promulgated rules were quite similar to the Federal Rules of Evidence with only a couple dozen differences.

The implementation of the new evidence rules appeared to cause very few problems in Minnesota trial practice. It was not until eleven years later that the Advisory Committee was reconvened to consider amendments.[7] The main concern then was to make the rules gender neutral. A few amendments were implemented with minor changes—adding gender-neutral language and modifying the rules to conform to judicial decisions. The rules were not reviewed or amended again for another decade. Remarkably, the Minnesota Rules of Evidence have been amended only twice in the past thirty years.

3. *Id.* at 201 (citing THE FEDERALIST No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

4. *Id.* at 203.

5. *See generally* PETER N. THOMPSON, 11 MINN. PRAC. EVIDENCE § 101.01 (3d ed. 2001) (describing the history of the development of the Minnesota Rules of Evidence).

6. *Id. See also* MINN. STAT. § 480.0591 (2008).

7. *See* Order Appointing Members to Supreme Court Advisory Committee on Rules of Evidence 1, 1 (1988) *available at* http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Rules%20of%20Evidence%20C3-84-2138/1988%20Rls%20of%20Evid%20Appt%20Orders.pdf.

As a participant on each advisory committee that recommended the rules to the court, I like to think that the rules were well crafted with nuanced attention to the culture and sound practices in Minnesota courts, and that, of course, they are acceptable and workable rules. I actually believe this is a fair conclusion based on my conversations with trial judges throughout the state. Once every dozen years, then, is sufficient to review the text of the rules. On the other hand, after years of reading Minnesota Supreme Court decisions, a second possibility has begrudgingly crept into my consciousness. The rules of evidence that I have devoted a career to teaching, drafting and chronicling really do not matter that much to the Minnesota Supreme Court. Elasticity and flexibility, not textual or policy analysis, are the linchpins of evidence law in the Minnesota Supreme Court.

The shift from common law rules to codified rules based on federal standards meant that the Minnesota Supreme Court was supposed to relinquish its central role in controlling the values and policies embedded in the rules of evidence in deference to advisory committees and federal authorities. Giving up power is a difficult thing to do.

The Minnesota Supreme Court in its order of promulgation[8] reserved the right to modify, supersede, or otherwise amplify specific rules of evidence in its decisions without resorting to administrative rulemaking procedures. Instead, the supreme court has largely ignored the rules of evidence,[9] or at best it treats the rules as general standards that do not really constrain judicial decision making, but set wide parameters for judicial discretion. The rules are like traffic signs on the highway. These signs are to be carefully followed by those unsure of how to get to a destination. They may be ignored, however, by those with a keen sense of where

8. *See* Order Promulgating the Rules of Evidence (Minn. Apr. 1, 1977), *reprinted in* 50 MINN. STAT. ANN. VII–VIII (West 1980), *cited in* Goeb v. Tharaldson, 615 N.W.2d 800, 813 (Minn. 2000)).

9. *See* THOMPSON, *supra* note 5, §301.03 (stating "[t]he adoption of Rule 301 [presumptions] has had little impact on the law of presumption in Minnesota. The rule is rarely cited by the appellate courts and has yet to be carefully analyzed by the Minnesota Supreme Court. Even after the adoption of Rule 301, courts continue to use the term presumption to refer to substantive rules of law and resolve presumption issues on an ad hoc case by case, presumption by presumption approach."). *See also* George v. Estate of Baker, 724 N.W.2d 1, 12–13 (Minn. 2006) (finding it proper to take judicial notice of American mortality tables but not Liberian mortality information from the CIA WORLD FACTBOOK without referring to Minnesota Rule of Evidence 201).

they are going and believe they know a shortcut.

For the most part, however, the process seems to be working tolerably well. The evidence rules were based on common law principles gleaned from the court's past decisions. They embody the longstanding view in Minnesota and elsewhere that the decisions whether to admit or exclude evidence should be committed to trial court discretion. So, the Minnesota Supreme Court's decisions, which are usually based on sound common law judgment, do not often directly conflict with the text and policy behind the rule. In these cases where the court's judgment squares with the text of the rules, the rules are helpful to the court in explaining its decisions.[10] But clearly the text or policy behind the evidence rules is not a starting point in the court's consideration.

Contrast the state experience with the history of the Federal Rules of Evidence. When addressing evidence issues the federal courts tend to focus carefully on the text and policy behind the evidence rule. The Federal Rules of Evidence are enacted by statute, which perhaps justifies a different approach in construction.[11] Involving the legislature in the process may also politicize the rules and the rulemaking process.[12] The Federal Rules of Evidence are in a constant state of reexamination and amendment. But where the text of the rules matters in federal

10. For example, Rule 403 is frequently cited by the court as justification for affirming the trial judge's admission of evidence. *See generally* James A. Morrow et al., *Weighing Spreigl Evidence: In Search of a Standard*, 60 BENCH & B. OF MINN. 23 (Nov. 2003). Rarely has Rule 403 been carefully analyzed. *Id.*

11. *See generally* Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 395–96 (1966) (arguing for a textual approach to interpreting the rules of evidence); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283 (1995) (arguing the court should rely on the Advisory Committee Notes in construing the rules of evidence); Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics,* 32 HARV. J. ON LEGIS. 329, 399 (1995) (calling for the court to be more candid in identifying the basis for construing the rules of evidence, recognizing the limitation of linguistics as an interpretive technique); Glen Wassenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539 (1999) (advocating that the rules should be construed from an historical perspective as a codification of common law).

12. *See generally* Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking*," 53 HASTINGS L.J. 843 (2002) (providing a history of the federal rules of evidence and discussing symposia articles on the topic of the Politics of [Evidence] Rulemaking).

courts, in Minnesota the text and underlying policy of the rule provide only a general standard that may or may not guide the Minnesota Supreme Court in the resolution of an issue.

The treatment of expert testimony presents a prime example of the contrasting approach to construing rules by the United States Supreme Court and the Minnesota Supreme Court. In the now famous United States Supreme Court decision *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[13] the United States Supreme Court strained to draw the workings of the new federal approach to expert testimony from the text of Federal Rule of Evidence 702.[14] The United States Supreme Court provided a definition of science drawn from the text of Rule 702 and carefully explained how this rule relates to the other evidentiary rules.[15] The recent Federal Vaccine Court cases regarding the possible link between vaccines and autism provides another opportunity to assess the role of science in the law, which Professor Joëlle Moreno addresses in this issue.[16] The Minnesota Supreme Court rejected the *Daubert* approach in *Goeb v. Tharaldson*.[17] In its opinion the Minnesota Supreme Court largely ignored the text of Minnesota Rule of Evidence 702, identical to the federal rule, except in acknowledging that the United States Supreme Court had relied on the text.[18] The Minnesota Supreme Court reasoned that it did not have to address Minnesota Rule of Evidence 702 because subsequent to the promulgation of Minnesota Rule of Evidence 702 the court "transformed the standard for admissibility in Minnesota into the two prong *Frye-Mack* standard[19] and reaffirmed adherence to *Frye-Mack* in *State v. Schwartz*."[20] In *Mack*, the court addressed the admissibility of novel scientific expert testimony, without a single reference to Minnesota Rule of Evidence 702, effectively ignoring the rules of evidence. In *Schwartz*, the Minnesota Supreme Court addressed the application of Minnesota Rule of Evidence 702, which the court referred to as a relevancy

13. 509 U.S. 579 (1993).
14. *Id.* at 588.
15. *Id.* at 589–90.
16. *See* Joëlle Anne Moreno, *It's Just a Shot Away: MMR Vaccines and Autism and the End of the* Daubertista *Revolution*, WM. MITCHELL L. REV. 1511 (2009).
17. 615 N.W.2d 800 (Minn. 2000).
18. *Id.* at 810.
19. *Id.* at 813–14. *See also* State v. Schwartz, 447 N.W.2d 422 (Minn. 1989); State v. Mack, 292 N.W.2d 764 (Minn. 1980).
20. *Goeb*, 615 N.W.2d at 810.

rule. Rather than focusing on the rule, however, the court reasoned that the issue had already been decided in *Mack*.

At best the Minnesota Supreme Court treats rules of evidence as general standards, not real rules constraining choices. Thus, policy choices are retained by the court and not given to an advisory committee or rulemaking body. But, as Hamilton warned, where there are no clear constraining rules, decision making can be *ad hoc* and inconsistent.[21] Of course this can lead to confusion, particularly if the court does not clearly articulate how its decisions deviate from the text and policy of the published rules.

Professor Sampsell-Jones recognizes this problem in the Minnesota Supreme Court's Rule 404(b) decisions, which he politely refers to as "not very sensible."[22] The Minnesota Supreme Court's expansive approach to the admissibility of uncharged misconduct renders the text of the rules of evidence meaningless. In my view, Professor Sampsell-Jones strikes at the heart of the problem when he suggests the Minnesota Supreme Court is not entirely sold on a key value expressed in the text and policy of Minnesota Rule of Evidence 404 that propensity evidence is to be avoided except in narrowly defined situations. Notwithstanding the rules of evidence, which severely limit propensity evidence, the Minnesota Supreme Court has never quite given up on the notion that the jury must be able to see the "whole person" when a defendant appears at trial.[23] Perhaps as recommended in the article, new legislation would constrain the court, but if the legislation did not conform to the court's core value and abolish

21. *See* THE FEDERALIST No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Id.*

22. *See* Ted Sampsell-Jones, Spriegl *Evidence: Still Searching for a Principled Rule*, 35 WM. MITCHELL L. REV. 1368 (2009).

23. The reference to seeing the whole person comes up in the context of admitting past convictions under Minnesota Rule of Evidence 609. While the rule contemplates admitting only convictions that are probative on the issue of credibility as a witness, the court takes an expansive approach to admitting past convictions under a pre-rules theory that the jury should see the "whole person." *See* State v. Davis, 735 N.W.2d 674, 680 (Minn. 2007) (referring to pre-rules "whole person" concept and concluding that a conviction has impeachment value because it allows the jury to see the "whole person"); State v. Smith, 669 N.W.2d 19, 29 (Minn. 2003) (using "whole person" concept to admit prior conviction). Professor Sampsell-Jones has also chronicled the Supreme Court's flawed approach in applying Rule 609. *See* Ted Sampsell-Jones, *Minnesota's Distortion of Rule 609*, 31 HAMLINE. L. REV. 405 (2008).

the propensity rule, I am not hopeful we will find the "principled rule" we all should be seeking.

Sugiska and Herr provide invaluable insight into specific evidentiary issues implicated by advances in electronic technology.[24] They note the Minnesota Court's reluctance to change established rules to accommodate new issues and trust in the continued good judgment of the judiciary. They do not recommend constraining judicial choices by promulgating new rules. In their article they discuss one of the Minnesota Supreme Court's few decisions on questions relating to authentication, *Furlev Sales & Associates, Inc. v. North American Automotive Warehouse, Inc.*[25] In *Furlev Sales* the court ignored the Minnesota Rules of Evidence and imposed an elaborate, highly technical seven-part foundational test for the admissibility of tape recordings. Requiring technical foundational elements[26] is inconsistent with the text and spirit of Minnesota Rule of Evidence 901.[27] Again the court did not refer to or cite the applicable rule of evidence.

Although the rules may not constrain the Minnesota Supreme Court, they likely affect the behavior of trial judges and may impact Minnesota citizens. Professors Jesson and Knapp provide their scholarly take on legislation aimed at creating an evidentiary privilege for a statement of apology in the high-stakes medical malpractice arena.[28] They note that thirty-five states have passed statutes providing some type of privilege in an attempt to encourage medical professionals to maximize the therapeutic value of the apology. The statutes are intended to allow medical personnel the opportunity to express heartfelt regret, remorse, sympathy, or even responsibility for an adverse outcome without

24. *See* Keiko L. Sugisaka & David F. Herr, *Admissibility of E-Evidence in Minnesota: New Problems or Evidence as Usual?*, 35 WM. MITCHELL L. REV. 1453 (2009).

25. 325 N.W.2d 20, 28 n.9 (Minn. 1982).

26. One of the *Furlev Sales* requirements is that there must be a showing that the taped testimony was voluntary and made without any inducement. *Id.* This may or may not be an issue relating to admissibility in criminal cases, but it should not be included as a general requirement for admissibility of a tape recording.

27. The Supreme Court has recently reaffirmed the *Furlev Sales* test while addressing the admissibility of taped telephone conversations. *See* Turnage v. State, 708 N.W.2d 535, 542 (Minn. 2006). The court actually quoted the text of Minnesota Rule of Evidence 901(a), but it provided no analysis or any discussion about how the technical *Furlev Sales* requirements square with the text or policy of the rule. *Id.*

28. *See* Lucinda E. Jesson & Peter B. Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies*, 35 WM. MITCHELL L. REV. 1410 (2009).

fear of triggering a large malpractice suit or judgment.

The authors fully document the therapeutic value of candid and honest doctor-patient communication following an adverse result. They are concerned, however, that providing a legal statutory privilege will embroil the apology in the midst of the adversary process, and the apology will lose its therapeutic and risk management benefit. They fear that apologies will cease to be a doctor's honest expression and will be delivered, and, perhaps more important, be perceived as part of a risk management strategy to avoid litigation. Apparently rules do matter.

Of course rules matter, particularly if American citizens perceive that the rules are crafted in an unfair and one-sided manner. Professor Hansen's timely article critiquing the Military Commissions Process reminds us of core values shared by most Americans: the adjudication process should be designed to provide all parties a fair opportunity to contest their charges.[29] The rules should be fair. While in time of war, and under threat of terror, Americans may be willing to put greater trust in the Executive branch or the military. But perhaps this trust was strained by the one-sided, seemingly unfair tribunals set up to try enemy combatants under the Military Commissions Act. Hansen suggests that the traditional evidentiary rules applicable in American tribunals, and as codified in the Military Rules of Evidence, should not be casually cast aside. Deviations from traditional evidentiary rules should be based on sound reasons, not unsupported assumptions or attempts to assure that the tribunal will return only guilty verdicts.

Professors Scallen and Cribari address constitutional rules.[30] They discuss different aspects of the United States Supreme Court's retake on the right to confrontation stemming from *Crawford v. Washington*.[31] Cribari probes the analytical roots of the decision, which includes dicta suggesting that the right to confrontation is not applicable to preclude dying declarations.[32] The Minnesota

29. *See* Victor Hansen, *The Usefulness of a Negative Example: What We Can Learn About Evidence Rules From the Government's Most Recent Efforts to Construct a Military-Commission's Process*, 35 WM. MITCHELL L. REV. 1480 (2009).

30. *See* Stephen J. Cribari, *Is Death Different? Dying Declarations and the Confrontation Clause after* Crawford, 35 WM. MITCHELL L. REV. 1542 (2009); Eileen A. Scallen, *Coping with* Crawford: *Confrontation of Children and other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558 (2009).

31. 541 U.S. 36 (2004).

32. *Id.* at 56 n.6.

Supreme Court has already ruled on that point and, according to the Minnesota Court, the admissibility of dying declarations is not affected by the right of confrontation.[33] The Minnesota Supreme Court did not address the difficult policy questions identified by Cribari, but relied on stare decisis to justify the result. Cribari makes the point that constitutional rulemaking can be complex in a pluralistic, multicultural society. As Cribari points out, simple constitutional rules cannot make the world simple.

The complexity of the "simple" new rule for confrontation rights is plumbed in Professor Scallen's article on confrontation and forfeiture in domestic and child abuse cases. *Crawford* has had its biggest impact in these cases. Prior to *Crawford* the repeated experience of child or domestic abuse victims who were unable or unwilling to stand up and provide trial testimony against a parent, spouse or "loved one" had led to evidentiary innovations and relaxed applications to permit hearsay statements to be admitted at trial. The simple rule in *Crawford*, that these testimonial statements are not admissible unless subject to cross-examination, may have had a devastating impact on prosecutions of abuse.

Recently in *Giles v. California*,[34] the United States Supreme Court held that forfeiture of the Sixth Amendment right to confront must include a showing that the defendant's actions were intended to prevent testimony or cooperation in criminal prosecutions. Justice Scalia may have thrown a lifeline, or a way out of "simplistic rulings," by suggesting that to prove forfeiture the court may consider "evidence that the abuse or threats were intended to dissuade the victim from resorting to outside help."[35]

The articles in this issue confront current evidentiary issues in a number of different contexts. An underlying premise of each

33. *See* State v. Martin, 695 N.W.2d 578, 585–86 (Minn. 2005) (admitting shooting victim's statement, "Call the police. Jeff and Lenair." as a dying declaration). To the court's credit the opinion includes both an analysis of Minnesota Rule of Evidence 804(b)(3) and a complete analysis of the *Crawford* opinion. On a related issue, the Minnesota court's conclusion that the Sixth Amendment provided some type of right to confrontation when facing non-testimonial hearsay proved to be wrong. *Id.* at 584. *See* Davis v. Washington, 547 U.S. 813, 822 (2006) (stating that the right to confrontation was not applicable to non-testimonial statements), *abrogation recognized by* State v. Moua Her, 750 N.W.2d 258, 265 n.5 (Minn. 2008).

34. 128 S.Ct. 2678 (2008). The decision was inconsistent with an earlier Minnesota Supreme Court decision that was subsequently vacated. *See* State v. Moua Her, 750 N.W.2d 258, *vacated*, Moua Her v. Minnesota, 129 S.Ct. 929 (2009).

35. *Giles*, 128 S.Ct. at 2693.

article is that the choice of the evidentiary rule to be used in the trial is an important decision. Evidence rules should not be applied on an ad hoc basis divorced from precedent, policy, text, and context. Rather than impeding just results, evidence rules should consistently produce just results.