PREFACE

I

This edition of our casebook traces its lineage back 125 years to James Bradley Thayer's Select Cases on Evidence at the Common Law, with notes, published in 1892. In 1900 came the second edition of his casebook, which had such vitality that it was still used by teachers in 1924–1925 and later. In 1925 Professor John M. Maguire, by special arrangement with the Thayer family, published a revision of the 1900 casebook. In 1934 Professor Edmund M. Morgan, together with Maguire, took over leadership of the series with what was referred to as the first edition; they also were authors of the second and third editions. The fourth edition was by Morgan, Maguire and Jack B. Weinstein. The fifth and sixth were by Maguire, Weinstein, James H. Chadbourn and John H. Mansfield. The seventh, eighth and ninth editions were by Weinstein. Mansfield, Norman Abrams and Margaret A. Berger.

While our goal has been to bring this tenth edition into the 21st century, we are sensitive to the legacy with which we have been entrusted and have tried to be faithful stewards and to remain true to its approach and standards of excellence. Responsibility for this new edition is wholly our own.

Our colleague, Peter Tillers, was intended to be a co-author of this new edition but to our great sadness, with his untimely passing, that was not to be. We wish to acknowledge his contributions through his stimulating ideas, comments and suggestions.

We wish to dedicate this volume to Margaret A. Berger and John H. Mansfield, collaborators on multiple previous editions, wonderful friends and colleagues who are no longer with us.

II

This edition is a thorough revision and updating of the 1997 edition, but, of course, like previous editions, it also continues to reflect significant inputs of our predecessors. The volume, of course, takes into account important intervening changes in the law through new judicial decisions, statutes and, most important, by application of the Federal Rules of Evidence and evidence rules variations in the states. A glance at almost any section of this volume will reveal a wealth of new cases and secondary materials and notes that have been expanded and enriched. More specific changes, innovations and additions are described below.

Overall, we have tried, without sacrificing quality or rigor, to make the book more user-friendly through new stage-setting introductory notes at the beginning of many of the sections. The tenth edition is lengthier than the previous edition, too long perhaps to treat in its entirety in detail in a single course. The commercial advantages of a shorter book have not convinced us that detailed treatment of related procedural, substantive, tactical, scientific, technological, psychological and sociological aspects should not be included. The philosophy of the book, through previous editions and to which we adhere, has been to provide a comprehensive and rich menu of topics and materials of this subject from which the instructor or the student can select those topics of most concern to them.

We have avoided extensive cutting of some cases, for example, Supreme Court decisions on constitutional rights (such as those involving the right of confrontation in the Hearsay chapter) and on burdens of proof and presumptions, in order to avoid

oversimplifying the problem and so that the student might better see the evolution of the doctrine and the inter-relationships of the cases. Substantive omissions in the text of cases are indicated by ellipses; some of the citations and many footnotes have also been omitted. The student should appreciate the fact that in many instances the entire case has not been reproduced so that if he or she wishes to study the matter in more detail, the original publication should be checked.

It is expected that the teacher will require the student to obtain an up-to-date statutory and rule supplement, such as the one which the co-authors of this volume produce, which contains the federal and California evidence codifications, the Uniform Rules, and excerpts from the Model Rules of Professional Conduct. This combination of casebook and supplement has numerous advantages: 1) Each of these important bodies of rules should be studied as a whole, to better understand its organization and connecting principles. 2) Having codifications in one place, such as the Federal Rules, the California Code and the Uniform Rules, guides the student to interesting comparisons and by this means facilitates an understanding of the different policy and legal approaches used in the several codes. 3) Including in the course some examination of the Model Rules of Professional Conduct allows attention to professional issues: Ethics, procedure and substance frequently encountered in evidence cases. 4) It enables the student to refer to the provisions without the inconvenience of constantly turning to the back of the book to consult an appendix.

III

The organization of the chapter topics in the 1997 edition (which included changes from the eighth edition) has been retained for this tenth edition, with the addition of a new Chapter 2, Advanced Reasoning about Evidence. No clear case has been made for a pedagogically sounder order of topics. In a number of instances, the order of subjects within a chapter has been changed; many of these changes are explained below. Although the present organization suits the tastes and teaching approach of the co-authors, some instructors may find it desirable to order the chapters or the topics within a chapter in accordance with a teaching sequence of their own choosing.

A selection of important changes and innovative materials, chapter by chapter, follows:

Chapter 1 collects a variety of materials dealing with relevancy that are basic to an understanding of any case; relevancy provides the framework of any rational system of proof. The chapter also stresses problems of probability that underlie determination of facts, how people think and decide issues of fact; how they integrate their own experience, information provided to them regarding the events in question, information derived from experts and other relevant sources. Some cases have been removed and others added, for example, the substitution of Butcher v. Kentucky (a modern DNA case) for State v. Rolls (a blood-typing case).

The most substantial change in this chapter is the addition of new material on the Logocratic Method, a system of formal analytics of reasoning with evidence which can compared with the Michael and Adler system which in previous editions of the casebook was described and illustrated with examples. The Michael and Adler system was written in the 1930's, long before substantial advances had occurred in the theory of argumentation. The new material describes the method and shows its application and explanatory and analytical power. The method itself and its utility

are anchored to very concrete examples: Knapp v. State (1907), a brief case which deals with logical relevance in a manner that is illuminating, and a few other cases are used to illustrate some aspects of the method, including Old Chief and a Seventh Circuit case, Sherrod v. Berry, which, as a Federal Rules case, provides an instructive comparison to Knapp's common law analysis. Chapter 2 provides more in depth and advanced material on the Logocratic Method

The evidence issues related to Real Proof in Chapter 3 have evolved significantly since the ninth edition because of the rapid rate of change in scientific and technological developments. Changes in this chapter include an augmented discussion of voice and hair comparisons; a new discussion of problems with the visual detection of "blood" evidence; a more extensive note on the involuntary administration of psychotropic drugs to make a defendant competent for trial; new material about the admissibility of digital photos/recordings and videos taken on smartphones as well as the implications for authentication issues of electronic "signatures"; and notes about applying the best evidence rule to electronically recorded data and textual material.

In Chapter 4, Testimonial Evidence, we have retained the extensive introductory materials from the field of psychology on the centrality, nature and weakness of proof coming from the testimony of witnesses. The material on the competency of witnesses in this chapter highlights how the system of testimonial evidence has evolved from many categorical rules of disqualification to more individualized determinations of whether a witness can contribute something to the issues in the case. Also included are treatments of some doctrines that supplement general rules of admissibility—doctrines that are also designed to help ensure the reliability of evidence.

Thus, material on the constitutional compulsory process doctrine is presented here: It serves to protect the right of criminal defendants to offer evidence in their defense, and in some contexts, the doctrine involves a determination that is at least in part based on whether the category of evidence in question meets a requisite standard of reliability. Also, somewhat surprisingly, an old rule of categorical disqualification, the Deadman Rule, continues to merit discussion since it still exists in a minority of states, including some of the largest (e.g. New York and California) and is the source of multiple judicial decisions each year. Rules requiring corroboration of certain categories of evidence, another type of mechanism intended to help ensure the reliability of evidence, are also treated in this section. Worth special mention is the inclusion of the Massachusetts decision in In re McDonough: Where the judge rules that a prospective witness may not testify because of testimonial incapacity, and that person raises claims, inter alia, under the Americans with Disabilities Act, does she have standing to seek judicial review of the judge's ruling?

Included in the Competency of Witnesses section are some of the book's numerous notes addressing issues relating to the child witness, with special attention to cases involving child sexual abuse. A number of such notes were added to the prior edition in response to increased public concern about that subject resulting from the higher incidence of reporting, prosecuting or litigating of such cases. The notes in this and later chapters address a variety of issues, for example, the testimonial capacities and competency of child victims to testify; the use of outside-the-courtroom videoed live testimony to protect the victim from being in the

same room with the accused perpetrator; the use of deposition videos of the victim at trial; the constitutionality of legislating a hearsay exception for statements of the child victim, and how similar sexual conduct evidence is handled.

The section on credibility has been updated, and more detail is provided. Some changes have been made in the ordering of the topics in this section. An example is that the material on impeaching one's own witness section has been moved to a position toward the end of the chapter because it is believed that it is useful first to be familiar with the different methods of impeachment before addressing own-witness issues.

Chapter 5 on Hearsay begins with a fictional Dialogue (and a note on Guantanamo-related proceedings) which focus attention on the choice between having a detailed system of exceptions to the prohibition against hearsay versus a case by case judge's-determination-of-reliability. A number of new principal cases have been added to the chapter, including the implied hearsay, Maryland case of Stoddard v. State. Some changes have been made in the order in which the hearsay exceptions are taken up, and introductions have been added to the sections to facilitate understanding and comparison of the various exceptions.

One of the important decisions made in organizing Chapter 5 was how to incorporate the substantial changes in constitutional confrontation doctrine that had occurred since the previous edition. The choice made was to have a separate section at the end of the chapter presenting Crawford v. Washington and its U.S. Supreme Court confrontation progeny. Additionally, early in the chapter a statement of the Crawford doctrine is set forth that helps to foreshadow the implications of Crawford for, and the relevance to, various hearsay exceptions at appropriate points in the chapter. Also, pre-Crawford constitutional case law continues to be referenced in the chapter where Crawford did not have the effect of overruling or undermining that prior law.

Chapter 6 which deals with Circumstantial Evidence continues exploration of problems to which the student was introduced in Chapters One and Two. Here will be found revised and updated materials on the much-litigated subject of character/propensity evidence, introduced for substantive purposes rather than for its bearing on credibility. New Fed.R.Evid. 413–15, dealing with a defendant's prior acts in sexual cases, as well as Fed.R.Evid. 412, the rape shield provision, are discussed. The debate over the admissibility of evidence of subsequent repairs in product liability cases and its resolution in amended Fed.R.Evid. 407 is noted. The emphasis of the chapter has been tweaked to focus more on Rule 404(b). The competing arguments for and against admission of propensity evidence in sexual assault cases, a highly charged issue in the context of some notorious sexual assault cases, are treated here.

It is worth noting how the subject matter of chapter 7, Expert Evidence has burgeoned—the fact that prior to the previous edition, the book did not contain a separate chapter on this topic. Major changes have taken place in the law governing expert evidence since the previous edition of the casebook. Accordingly, there is much new material reflected in, and based upon the Daubert and post-Daubert cases such as Kumho Tire and Joiner. In this, as well as other chapters of the book, we have also opted to retain a number of the older cases because they present interesting issues and are familiar to teachers of evidence.

Because so much of the material in this chapter is new in this edition, a significant amount of reorganizing and categorizing has been undertaken in order to give coherent structure to the notes after cases; new sections have also been created and labelled with headings. The device of marking sections indicating Before-Daubert and After- has been used. The hearsay problem involved in issues related to the basis for expert opinion testimony (Fed.R.Evid. 703) is treated, and is also addressed in section 14 of Chapter 5, through the Supreme Court's decision in Williams v. Illinois.

Much of this book focuses on the admissibility of evidence, for instance, whether hearsay statements may be admitted or a topic is appropriate for expert testimony. But Chapter 8 focuses on key procedural considerations that affect evidentiary issues in the litigation process—namely, the system of evidence rules and institutions that orchestrate the fact-proving and fact-finding process through the use of burdens of proof, production, and persuasion as well as through presumptions. In this edition, this material is examined through the lens of the logic of fact-finding developed in detail in the first two chapters of the volume.

In Chapter 9, Judicial Notice, there is a discussion of how restrictions of the judicial role may respond in part to theoretical and in part to practical limitations on the ability of judges to make findings of fact necessary for responsible legislative judgments. From a pedagogical point of view, we find it useful to put this material late in the course, because much of it is quite sophisticated and requires an understanding of the problems and limitations of proof through ordinary techniques. The material on judicial notice of law is limited, but sufficient so that the topic can be covered in this course if it is not taken up in courses in Civil Procedure or Conflicts.

Changes and updating that have been made include the insertion of source material and notes related to technological advances and judicial notice, especially with respect to (1) the hazards of judicially noticing online information and (2) the pros and cons of the judicial preference to notice information from government websites rather than private ones. A note has been added in the adjudicative facts section raising the issue about whether, in certain circumstances, judicial notice can infringe upon a criminal defendant's right to jury trial by removing certain questions from the factfinder.

The material on Privileges in Chapter 10 has been brought up-to-date and augmented with many new cases. Questions are raised why, as is suggested by many scholars, privileges are disfavored and whether the privilege is truly a "hindrance" or "blockade" to the fact-finding mission and, if so, whether that is justified.

The section on the privilege against self-incrimination traces in detail the doctrines governing the claim of the privilege by a witness or one to whom a subpoena duces tecum has been issued. This section also deals with the privilege of the criminal defendant but does not directly address the privilege of the criminal suspect outside of a courtroom setting. Thus, as in previous editions, Miranda v. Arizona and its progeny are not treated here, except in limited contexts such as in connection with admissions by silence after warnings. The assumption is that the Miranda doctrine is being given detailed coverage in the Criminal Procedure course.

As in other instances, account has also been taken of the new dimensions for some privilege issues arising out of technological, scientific and societal developments since the previous edition: Thus compulsory DNA collection laws pose

additional questions for the application of the privilege against self-incrimination, and private papers stored in electronic form present a new context for issues relating to subpoenaed documents. The note regarding the application of the spousal adverse testimony privilege to same-sex marriages has been updated and bolstered; similarly, information has been added regarding unmarried co-inhabitants. In connection with the "dangerous patient" exception to the psychotherapist-patient privilege, a note has been added about a possible application of a similar duty to warn school administrators in light of the spate of school shootings in recent years. A note has been added dealing with the enactment of Federal Rule 502 and, in particular, Federal Rule 502(b), which addresses the inadvertent disclosure of confidential attorney-client communications. Boston College's Belfast Project, and the forced disclosure of information about Sinn Fein leader Gerry Adams, also provided an interesting context for consideration of the scholar's privilege.

The book easily accommodates a three to six unit course and also advanced seminars. Alternative suggested syllabi providing page assignments that can be used in Evidence courses of varying length will be made available to instructors who plan to use the book for their courses. The comprehensiveness and currency of the book also makes it usable for many years as a basic one volume treatise and desk book for those who used the book as students, for practitioners and for judges and scholars of the law of Evidence.

For outstanding research assistance, Norman Abrams wishes to express his appreciation to the following then-UCLA law students: Tess Curet, Hunter Hayes, Kira Richards, Brigid Mahoney, Joshua Samra, Adam Whitaker, Kevin Whitfield, Ben Woolley and Hannah Woerner.

For their excellent research assistance in his chapters and sections of this book, Scott Brewer wishes to thank Michael Harbour and Ivano Ventresca, and for extraordinary superb work, Joseph Abboud and David Clark.

Daniel Medwed would like to thank the following law students from Northeastern University School of Law for their stellar research assistance: Elijah Bergman, Chrisiant Bracken, Cornelia Dean, Monica DeLateur, Eliza Lockhart-Jenks, Helen Martinez, Jason McGraw, Katherine Perry-Lorentz, Amy Pimentel, Ryan Rall, Katrina Rogachevsky, Justin Twigg, and Michael Varraso.

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May 2017