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Teaching Evidence: Something for Everyone
Bringing the Humanities into Teaching Evidence

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Students often react to what they believe is the artificiality and technicality of evidence law. Many times, students get mired in the details and lose the context. Whenever possible, I try to find ways to show that at least some aspects of the rules of evidence derive from common experience or social-cultural understandings. Following are two examples, both of which appear in my evidence textbook (co-authored with Victor Gold). I hope they help to provoke discussion.

1. "Words of Independent Legal Significance"

In explaining the concept of "words of independent legal significance," Victor Gold and I reprint a brief excerpt from Jonathan Safran Foer's Introduction to *The Diary of Petr Ginz: 1941-1942*. Petr Ginz was a Czech teenager who perished in the Holocaust. Foer's introduction deals with the creative power of words, or more specifically, of the act of *naming*. Here is part of what we say about "words of independent legal significance," including the Foer quotation:

> Suppose Plaintiff sues Defendant for breach of contract after Defendant refuses to pay for a set of evidence notes that Plaintiff transferred to Defendant. Plaintiff claims that the transfer was part of a sale of the notes, while Defendant claims that the transfer was a gift. At trial, Plaintiff calls a witness to testify that before Plaintiff handed the notes to Defendant, Plaintiff said, "I offer to sell you my evidence notes for $20," and that Defendant had responded, "I accept your offer." Are the words spoken by Plaintiff and Defendant hearsay if offered to prove that a contract existed?
>
> The answer is no, and the reason is that the words spoken by Plaintiff and Defendant are not *evidence* of the existence of the contract, *they are the very act of forming the contract*. Hearsay evidence consists of words or conduct *about* something; it is merely evidence of the fact asserted. But when the speaking of words constitutes an act to which the substantive law attaches legal significance, such as the formation of an oral contract, the words spoken are not mere evidence of the act, they are the act itself. In our example, when Plaintiff said to defendant, "I offer to sell you my evidence notes for $20," those words were not *about* an offer, they *were* the offer, a legally significant event. The same is true for Defendant's reply, which constitutes an acceptance of the offer.

> We call words spoken in situations such as these "words of independent legal significance" or "verbal acts." In such cases, it is the speaking of the words, and not the credibility of the person who speaks them, that counts….
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> You should not underestimate the importance of "verbal acts" in our society. The utterance or writing of words is often a significant act in itself. As one author has written:
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>> Giving a word to a thing is to give it life. "Let there be light," God said, "and there was light." No magic. No raised hands and thunder. The *articulation* made it possible….
>>
>> It's the same with marriage. You say "I do" and you do. What is it, *really*, to be married? To be married is to say you are married. To say it not only in front of your spouse, but in front of your community, and in front of God. I don't believe in God, but I believe in saying things to God. I believe in prayer. Or I believe in saying aloud what you would pray for if you believed in God. Saying it brings it into an existence that it didn't have in silence.
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>> I once read an essay by a linguist about the continued creation of modern Hebrew. Until the mid-1970s, he wrote, there wasn't a word for frustrated. And so until the mid-seventies, no Hebrew speaker experienced frustration. Should his wife turn to him in the car and ask why he'd fallen so quiet, he would search his incomplete dictionary of emotions and say, "I'm upset." Or, "I'm annoyed." Or, "I'm irritated." This might have been, itself, merely frustrating, were it not for the problem of our words being self-fulfilling prophecies: we become what we say we are. The man in the car says he's upset, annoyed, or irritated and becomes upset, annoyed, or irritated.
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>> Exactly a year ago today, my first child was born. After much debate—the single word was the most difficult piece of writing I have ever done—we named him Sasha, after his grandmother. He is not only identified as Sasha, he *is* Sasha. My son would not exist with another name.[1]

2. Parent-Child Privilege

As is true for many evidence teachers, I don't have much time to deal with privileges. I try to convey the basics and move on. But there are opportunities to draw from shared history to demonstrate the potential costs of not recognizing privileges. In 2003, Monica Lewinsky (of all people) published an op-ed in the Los Angeles Times discussing the need for a parent-child privilege:

[1] Jonathan Safran Foer, Introduction to *The Diary of Petr Ginz 1941-1942* (Chava Pressburger ed. 2004), at vii. Reprinted in textbook with permission.

MONICA S. LEWINSKY, *TELL MAMA ALL ABOUT IT? NOT WITHOUTA LAWYER: PARENTS AND CHILDREN SHOULDN'T BE REQUIRED TO TESTIFY AGAINST EACH OTHER*

Los Angeles Times, May 11, 2003 at M5[2]

On Feb. 12, 1998, my mother appeared before a grand jury at the federal courthouse in Washington, D.C. She was not subpoenaed to testify about a robbery she witnessed, or to describe some aspect of a securities fraud, but to be questioned about me — her only daughter.

I was horrified and sickened. Not unlike many young women, I had confided in my mom — to a certain extent — and expected our conversations to remain between us. In a million years I could never have fathomed a situation where we would find our bond — a deep, important and inviolate one — tested to the extent and in the manner that it was.

Few people are aware that, in our country, parents can be forced to testify against their children and vice versa. . . .

All of these existing privileges place value on certain relationships in order to foster and then protect them. Their inviolability is deemed more important than the truth-finding function of the courts.

Isn't the parent-child relationship every bit as important, if not more so? It is paradoxical that in a country where we often say that our children are our future, and every parent has said, at least once, "you can always come to me," that our system actually undermines the very values it extols.

Today, on Mother's Day, it seems appropriate to express hope that this privilege will soon be nationally afforded.

Just because a parent wants to protect her child's confidence doesn't mean that objectionable behavior is being condoned. But such protection does help ensure a haven as children negotiate the labyrinth of life.

It is completely unreasonable that discussions between parents and children are not protected — be it a teenager who has been caught at school with drugs or a parent who has been wrongly accused and needs to explain herself to her son. The Department of Justice Manual's guidelines discourage a prosecutor from compelling testimony from a defendant's parents or children. But without a formal parent-child privilege, a dodgy prosecutor is free to disregard the department's guidance — which is exactly what happened in my case. Trust me, the mere hint of a parent being subpoenaed — and it's often done just as a tactic to increase pressure on the defendant — is terrifying for a child. (It is a lesser-known fact that there was a threat to subpoena my father too.) While researching a paper for a Columbia University law and psychology class, I learned the term for the nightmare in which my mother found herself. It's called the "cruel trilemma," in which a person has a three-pronged choice: to commit perjury; testify truthfully and risk harming the relationship; or refuse to testify and go to jail for contempt of court without benefit of trial. No one in a society that calls itself civilized should have such a devastating Hobson's choice. . . .

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[2] Reprinted in textbook with permission.