

## Into Evidence

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ESSAY

INTO EVIDENCE

*Steven Lubet*†

A principal discontent among teachers of Trial Advocacy is our relative lack of professional controversy. Other disciplines have running disputes that emerge, take shape, grow, and endure for years or even decades. Evidence teachers can fight the good fight over the interplay of Federal Rules 702 and 703. Family Law teachers can argue over the consequences of no-fault divorce. Law and Economics teachers can debate just about any outlandish proposition, unconstrained by precedent or doctrine. Even Property teachers have their internecine wars. But we Trial Advocacy teachers are much more limited. We tend to teach what works, not what we idealize as the perfect state of the law. While this makes our classes effective, I often think that we are missing half the fun as we lumber along in wretched consensus.

I was utterly delighted, therefore, to see that Peter Murray, in his recent book *Basic Trial Advocacy*,<sup>1</sup> made the effort to caution students that exhibits are to be admitted “in evidence,” rather than the “currently more common but less grammatical ‘into evidence.’”<sup>2</sup> Mr. Murray, the director of Harvard Law School’s highly regarded trial advocacy program, points out: “Evidence is not a place into which something goes or is placed. It is a status or a state of being. A thing is either ‘in evidence’ or ‘not in evidence’; it is not ‘into evidence’ or ‘out of evidence.’”<sup>3</sup>

At last, a Trial Advocacy teacher who takes a stand in print.<sup>4</sup> How literate. How thoughtful. How elegant. How impressive. Take that, Roberto Unger. Here was the beginning of an epic struggle, a

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<sup>1</sup> PETER L. MURRAY, *BASIC TRIAL ADVOCACY* (1995). If you keep reading you will see that this is a humorous essay, but please do not let that detract from your appreciation of Mr. Murray’s book. It is an outstanding contribution to the literature on Trial Advocacy.

<sup>2</sup> *Id.* at 14 n.1.

<sup>3</sup> *Id.*

<sup>4</sup> Mr. Murray sticks by his principles. In a later section on “Offering the Exhibit” Murray provides two model formulations: “We offer Exhibit 1 for identification in evidence;” or “Your Honor, we move for the admission of Exhibit 24 for identification in evidence.” *Id.* at 280. And Murray’s judges, even in the face of an objection, will comply in kind: “Objection overruled. Exhibit 5 for identification is admitted as Exhibit 5 in evidence.” *Id.* at 283.

chance to divide our discipline into contending factions. I could see it spread across the pages of the learned journals: In or into, which side are you on?

I, of course, would be on Peter Murray's side. Who wouldn't want to be associated with Harvard? Besides, a quick trip to the library confirmed that almost everyone else was already locked up the other way. Mauet,<sup>5</sup> Tanford,<sup>6</sup> Haydock & Sonsteng,<sup>7</sup> McElhaney,<sup>8</sup> Rossi,<sup>9</sup> Bergman,<sup>10</sup> Imwinkelried<sup>11</sup>—virtually all of the giants turned out to be “into” freaks. Here was an opportunity I could not pass up.<sup>12</sup> Lubet and Murray (alright, Murray and Lubet—it was his idea) united against the unversed throng. I could see it in my dreams. A salvo on behalf of *in*, followed by a well-intentioned but analytically unconvincing retort for *into*, and then a devastating riposte. Careers have been made on less.<sup>13</sup>

And then I panicked.

I, too, am the author of a recent book on trial advocacy.<sup>14</sup> I, too, make my living by cautioning law students to avoid poor word choices and muddled language. I, too, am committed in writing to a set of formulations for offering exhibits. But I had absolutely no recollection of how I had dealt with this particular trope. Could it be that I had fallen prey to the offending phrase? Might I, through inattention or poor proofreading, have consigned myself to the unschooled “into evidence” crowd?

Heart pounding, I rushed to my bookshelf. I tore open the volume. And there it was, in boldface (a topic heading no less): OFFER THE EXHIBIT *into* Evidence.<sup>15</sup> Crushed, I sought solace. Alright, then,

<sup>5</sup> THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 156-57 (3d ed. 1992). Actually, Mauet uses both “in” and “into” in the same paragraph, which seems to imply that either is acceptable. Murray's point, though, is that “into” is unacceptable, so by my lights Mauet still finds himself in the opposition camp.

<sup>6</sup> J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 207 (2d ed. 1993).

<sup>7</sup> ROGER HAYDOCK & JOHN SONSTENG, *TRIAL: THEORIES, TACTICS, TECHNIQUES* 465 (1991).

<sup>8</sup> James W. McElhaney, *When Admissibility Is the Issue*, A.B.A. J., May 1995, at 92.

<sup>9</sup> FAUST F. ROSSI, *EXPERT WITNESSES* 138 (1991).

<sup>10</sup> PAUL BERGMAN, *TRIAL ADVOCACY* 132 (2d ed. 1989).

<sup>11</sup> EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 70, *passim* (2d ed. 1989).

<sup>12</sup> My most recent attempts to bring disputation to the field have met with silence. See Steven Lubet, *Ethics and Theory Choice in Advocacy Education* 44 J. LEGAL EDUC. 81 (1994); Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 NOTRE DAME L. REV. 72 (1991). Far worse, my initial provocation was greeted by—*horrors*—affirmation! See Edward J. Imwinkelried, *The Educational Philosophy of the Trial Practice Course: Reweaving the Seamless Web*, 23 GA. L. REV. 663, 663-69 (1989); Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123 (1987).

<sup>13</sup> Much less. In fact, incredibly much less.

<sup>14</sup> STEVEN LUBET, *MODERN TRIAL ADVOCACY* (1993).

<sup>15</sup> *Id.* at 297 (emphasis added, but still humiliating).

if I can't join Harvard, I guess I'll have to beat them. I will prove that *into* evidence is the term of choice. . But how?

#### IDIOM

My first refuge was my Chicago upbringing. Perhaps "into evidence" could be glorified as regional color. It works for Gerry Spence. We Chicagoans tend to do things differently from other folks. We have habits, customs, and locutions unknown to outsiders. We alone play sixteen-inch softball. We eat pizza with a four-inch, cornmeal crust. We expect the dead to vote on election day. We experience spring not as a season, but (if we're lucky) as a weekend. Yeah, that's the ticket: Chicago made me do it. Me and Carl Sandburg, together in defense of the "tall bold slugger, set vivid against the little soft cities."<sup>16</sup>

But reality struck me down again. Regional color is no way to teach Trial Advocacy. I even included a disclaimer to that effect in the preface to my book:

Lawyers in particular tend to consider the quirks and idiosyncracies of our own locales as universal practices. With the exception of one year, my entire legal career has been spent in Chicago, the only place in the country where lawyers refer to themselves as being "on trial" as opposed to "in trial." I have striven mightily to exorcise all similar Chicagoisms from *Modern Trial Advocacy*. To the extent that some have still slipped in, I apologize.<sup>17</sup>

Stepping away from my neighborhood roots, Mr. Murray's argument is exquisite: "Evidence is not a place into which something goes or is placed. It is a status or state of being."<sup>18</sup> Well, now that I think about it, that argument seems to make sense—even in Chicago. Murray is convincing. We put something *into* a location, but we place it *in* a status or condition.

#### USAGE

But wait. Consider the following sentence: "It started as a common cold, but quickly turned *into* pneumonia." Now, pneumonia is definitely not a place or location. It is at least a state of being, if not exactly a status. Perhaps the preposition of choice is determined by the nature of the transformation. We can agree with Mr. Murray that an exhibit is either "in evidence" or "not in evidence," just as a patient may be either "in a coma" or "not in a coma." Still, the process of becoming comatose is described as "slipping *into* a coma." Similarly,

16 CARL SANDBURG, *Chicago, in CHICAGO POEMS* 3 (1992).

17 LUBET, *supra* note 14, at xxv.

18 MURRAY, *supra* note 1, at 14 n.1.

an alcoholic may be *in* a state of denial, which, if untreated, will cause her to fall *into* clinical depression.

In the same manner, the process of becoming evidence involves the transformation of, say, a document from a mere “exhibit for identification”<sup>19</sup> *into* full-fledged evidence. In other words, the document is first offered by counsel and then admitted by the court *into* evidence. Once that happens, the document is *in* evidence. Or perhaps it simply *is* evidence.

But the plot is thicker than that. Try this sentence. “Peter was drafted *into* the Army, but Steven enlisted *in* the Marines.” Whatever their other differences, the Army and Marines are either both locations or both statuses, but the preposition seems to differ with the verb. The transitive verb “draft” takes *into*, while the intransitive verb “enlist” takes *in* as its preposition.<sup>20</sup> If that is our rule, then an exhibit should be admitted *into* evidence, since it is the judge, not the document, who effects the (transitive) act of admitting.

Do the authorities support this analysis? The University of Chicago style manual<sup>21</sup> is silent on the question. The *New York Times Manual of Style and Usage*<sup>22</sup> is cryptic, providing a single entry under the compound heading “in, into.” The *Times* gives us a warning, then an example, but no rule: “These words are often misused, especially in headlines. You jump *into* the swimming pool. You swim *in* it.”<sup>23</sup>

Well, that might help in Admiralty cases, but it still leaves us with the question of how to handle the admission of evidence. After all, you might jump *into* the swimming pool, but only adults will be allowed to stay *in* the deep end. And anyhow, a swimming pool is a place. The *Times* doesn’t say anything about statuses. You can get *in* trouble or you can find yourself *in* trouble, but you have definitely gotten yourself *into* it.

#### CULTURE

We have all seen how popular culture affects professional discourse. For example, I had always heard lawyers say, “May I approach the bench” when they wanted to be heard outside of the presence of the jury. Then *Hill Street Blues*, followed by *L.A. Law* popularized the shorthand version—“May I approach.” No doubt a New York localism,<sup>24</sup> “May I approach” soon became a nationwide hit. Of course, we

<sup>19</sup> See LUBET, *supra* note 14, at 294-95; MURRAY, *supra* note 1, at 272-73.

<sup>20</sup> The final phrase “as its preposition” is awkward, but it was necessary to avoid dangling the final *in*. Damn, I did it anyhow.

<sup>21</sup> THE CHICAGO MANUAL OF STYLE (14th ed. 1993).

<sup>22</sup> THE NEW YORK TIMES MANUAL OF STYLE AND USAGE 100 (1976).

<sup>23</sup> *Id.*

<sup>24</sup> *Hill Street Blues* (exteriors shot in Chicago) and *L.A. Law* (Los Angeles, of course) were both produced by New Yorkers.

law professors would never allow ourselves to be governed by television, but I still thought that a bit of empirical research might be in order. What is the current, educated usage with regard to prepositions and evidence?

A search of the Nexis magazine file<sup>25</sup> located thirty-nine uses of "admission *into* evidence" since 1990, in periodicals including *The American Lawyer*, *The Lancet*, *Sports Illustrated*, *Time*, *The National Review*, *Science*, and the redoubtable *Oil & Gas Journal*. During that same period, there were no reported uses of "admission *in* evidence."

Magazines, of course, tend to be trendy; newspapers are generally more interested in correct usage. A Nexis search of major newspapers<sup>26</sup> produced interesting results. True to my intuition, *The Chicago Tribune* uses *into* evidence. Perhaps as an inside-the-beltway effort to identify with the heartland, so does *The Washington Post*. Also lining up on the *into* evidence side were *The Cleveland Plain Dealer*, *The Toronto Star*, *The Houston Post*, and *The Pittsburgh Post-Gazette*. On the other hand, *The New York Times* prefers *in* evidence. So do London's *Financial Times* and *The Irish Times* although it is difficult to know what to make of this. Is the, shall we say, European usage preferred, erudite, or archaic? In any event, other *in* references were found in *The Los Angeles Times*, Denver's *Rocky Mountain News*, and (can it be?) *The Chicago Sun-Times*. Most interestingly, *The Los Angeles Times*, *The Orlando Sentinel Tribune*, *The Atlanta Constitution*, and *The Ft. Lauderdale Sun-Sentinel* all weighed in with an entirely new entry—admitted *as* evidence. And this is not strictly a sunbelt phenomenon. *The Boston Herald* (distributed, one assumes, in Cambridge as well) also uses *as* evidence.

#### LAW

As usual, the United States Supreme Court is not much help. Preposition choice seems to vary on a justice-by-justice basis. Justices Thomas,<sup>27</sup> O'Connor,<sup>28</sup> Stevens,<sup>29</sup> Blackmun,<sup>30</sup> Burger,<sup>31</sup> Warren,<sup>32</sup> and Rehnquist<sup>33</sup> have all used *into*. Justices Brennan,<sup>34</sup> Marshall,<sup>35</sup> and Fortas<sup>36</sup>, on the other hand, have used *in*. Lest anyone jump to

<sup>25</sup> Conducted April 26, 1995.

<sup>26</sup> Conducted April 21, 1995.

<sup>27</sup> See, e.g., *United States v. Alvarez-Sanchez*, 114 S. Ct. 1599, 1602 (1994).

<sup>28</sup> See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 308 (1989).

<sup>29</sup> See, e.g., *Johnson v. Mississippi*, 486 U.S. 578, 582 (1988).

<sup>30</sup> See, e.g., *Simmons v. South Carolina*, 114 S. Ct. 2187, 2191 (1993).

<sup>31</sup> See, e.g., *Nix v. Williams*, 467 U.S. 431, 437 (1984).

<sup>32</sup> See, e.g., *Townsend v. Sain*, 372 U.S. 293, 296 (1963).

<sup>33</sup> See, e.g., *Marshall v. Lonberger*, 459 U.S. 422, 424 (1983).

<sup>34</sup> See, e.g., *Davis v. Mississippi*, 394 U.S. 721, 723 (1969).

<sup>35</sup> See, e.g., *Anderson v. United States*, 417 U.S. 211, 219 (1974) (using *in* and *into*).

<sup>36</sup> See, e.g., *Dennis v. United States*, 384 U.S. 855, 858 (1966).

the conclusion that *in* is a liberal trope, Justice Scalia<sup>37</sup> favors it too. So did Justices Frankfurter<sup>38</sup> and Roberts.<sup>39</sup> The most interesting example is Justice White, who seemed to favor *into* when writing for the majority, but *in* when dissenting.<sup>40</sup>

No meaningful pattern emerges. Ideology is no guide; liberal justices use both *in* and *into*, and so do conservatives. Nor does there appear to be a temporal rule; *in* has appeared as recently as 1993 and as long ago as 1932; *intos* run stretches from at least 1957<sup>41</sup> through to 1994. True, the last three Chief Justices have all favored *into*, but the sample is too small to allow any firm conclusions. Perhaps the determining factor is the author's law school, or, more likely, the law school of the author's clerk.<sup>42</sup> In any case, the Supreme Court is no more definitive here than it is on, say, the issue of nativity displays in the public square.<sup>43</sup>

### TRUMP

Here is the academic drill. I have staked out a position, if not the one I would have chosen originally. I have demonstrated that Peter Murray got it wrong.<sup>44</sup> I have explained why the question is so damn difficult, worthy of discourse, and otherwise insoluble by ordinary intellects. I am now ready to play my trump:

And Moses called to all Israel and said to them . . . . That you should enter *into* covenant with the Lord your God and *into* his oath which the Lord your God makes with you this day.<sup>45</sup>

When a Prophet speaks, is deconstruction necessary? If so, consider that the Lord's covenant and oath are surely statuses or states of being. In Murray's terms, no concept is less place-like or territorial than a covenant with the Almighty. Surely the concepts of "covenant"

<sup>37</sup> See, e.g., *Kungys v. United States*, 485 U.S. 759, 764 (1988).

<sup>38</sup> See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 583 (1961).

<sup>39</sup> See, e.g., *Grau v. United States*, 287 U.S. 124, 127 (1932).

<sup>40</sup> See, e.g., *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2134 (1993) (*into*); *Mayor of Philadelphia v. Educational Quality League*, 415 U.S. 605, 645 (1974) (White, J., dissenting) (*in*). An alternative interpretation is that Justice White chose *in* during the 1970s, but switched to *into* by the 1990s. The resolution may have to rest on supposition, as I have not been able to isolate the variables.

<sup>41</sup> See, e.g., *Kremen v. United States*, 353 U.S. 346 (1957) (*per curiam*).

<sup>42</sup> Speaking of law schools, there are those that seem particularly relevant to this inquiry: Harvard, Northwestern and Cornell. A Westlaw search (conducted July 25, 1995) disclosed that the law review's at all three schools prefer "into evidence," though to varying degrees. At the Harvard Law Review the *into:in* ratio was a nearly even 13:9. The Cornell Law Review was 10:5, and Northwestern was an overwhelming 11:2.

<sup>43</sup> Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) with *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

<sup>44</sup> It is unlikely that he cares. I have, after all, just spent over 2500 words responding to a footnote.

<sup>45</sup> *Deuteronomy* 29:11 (emphasis added).

and "evidence" have a certain metaphysical comparability; indeed, each is preceded by the taking of an oath, so to speak. Moreover, note that Israel "should enter" into the covenant. That is, entry is not automatic, nor is it accomplished by the Lord alone. Rather, it is transformative of the Israelites themselves. They proceed from a non-covenanted to a covenanted state, just as an exhibit proceeds from a non-evidentiary to an evidentiary state. And so on.<sup>46</sup>

I rest, for now, the *into* case, impatient for responses.

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<sup>46</sup> I have another trump, which may be even better than this one. It is more definitive than *Deuteronomy* and more precise than *The New York Times*, though it is necessarily less authoritative than Moses. I have decided, however, to hold it in reserve in case I need it for rebuttal. We are, after all, discussing Trial Advocacy.