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FOREWORD

EVIDENCE SYMPOSIUM: A COMPARATIVE STUDY OF FEDERAL AND NEW YORK EVIDENCE LAW

Honorable Frank X. Altimari*

> In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence.[1]

The Editors of the Touro Law Review, Professor Martin A. Schwartz, Professor Deborah S. Bartel, Professor Peter A. Zablotsky, and the Honorable George C. Pratt are to be commended on their Symposium, Comparing New York and Federal Evidence Law. The impressive panel of evidence

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1. JAMES BRADLEY THAYER, A SELECTION OF CASES ON EVIDENCE AT THE COMMON LAW 2 (2d ed. 1900).

scholars that participated in this Symposium, and whose articles follow, have vividly revealed the breadth and complexity of issues presented by modern evidence law. Given that the law of evidence is one of the basic structural underpinnings of our legal system, this issue of the Touro Law Review will be of great interest to the bench, bar, and law schools nationwide.

The accurate determination of facts is the fundamental objective of the law of evidence. Evidentiary doctrine provides a framework within which the most complete and trustworthy information can be ascertained in an effort to discover truth, enforce substantive law, and vindicate legal rights in a judicial tribunal. While evidentiary precedents, rules, and procedures are designed primarily to facilitate the proof of substantive claims, the law of evidence also serves to keep the judicial system fair and the power among the litigants, judges, and jurors balanced.

My experience on the bench has given me a unique perspective on the law of evidence. As a trial judge, I was keenly aware that, because evidentiary rulings play an important role in effectuating our law's substantive goals, the standards governing the evidentiary process must serve the overriding aims of the substantive law. At the appellate level, I recognize that meaningful review of the trial court's application of evidence law is necessary to secure coherent and consistent administration of justice. My view of the evidentiary process for the last twelve years has been distinctly federal-oriented, with great support for the Federal Rules of Evidence. However, my sixteen years of prior service on the New York State bench provided me with an appreciation for New York's common law of evidence and the difficulties surrounding the New York State legislature's attempts to enact a code of evidence based in part on the federal model.

Nearly a generation after the Federal Rules of Evidence were enacted, I am impressed with the level of refinement the Federal Rules have brought to the law of evidence. Many of the legal scholars at this Symposium agreed that the Federal Rules of Evidence have brought uniformity, predictability, and efficiency to the bench and bar. Others who participated in the Symposium, however, are cautious about whether codification of the law of evidence has achieved its goals of simplification and the

provision of clear, precise, and readily available rules for trial judges and litigants.

In any event, the distinguished scholars whose articles follow have substantially contributed to the current explosion of evidence scholarship, which seeks to analyze evidentiary problems under the federal model and state law to the end that exposure and critical commentary might improve the development of evidence law. While an emerging focus throughout their discussions is the current debate over the codification of New York's evidence law, other topics addressed include character evidence, coconspirator statements, former testimony, hearsay, rape shield laws, expert testimony, and hypnotically-refreshed testimony.

Advocates of codification, such as Professor Barbara C. Salken, set forth a number of arguments that justice is best served by consolidating the common law and statutory rules of evidence in a unified, accessible, handbook form. They assert that not only will evidentiary codification improve the quality of the bench and bar, but the drafting process itself will modernize and clarify New York's common law principles and statutory provisions. As in any debate, the opponents often present persuasive arguments which compel one to re-think his own position. Opponents view codification as an overstated reformation of some archaic evidentiary principles that will ultimately impede judicial progress. They fear that it will freeze the development of evidence law, will politicize the law of evidence, will vest too much discretion in the trial judge, and is unnecessary because the present system is working. Professor Salken discusses these issues and concludes that these fears are unfounded.

Sides have been taken in this debate. There are even those who have taken a middle ground, who believe that the differences between New York evidence law and the Federal Rules of Evidence are being over-emphasized. Professor Richard Farrell espouses this view, citing nuance differences. However, he does concede that the common law system is not as efficient as the legislative alternative. Accordingly, he predicts that the proponents of codification will prevail.

My dear friend Judge Pratt observes, and I wholeheartedly agree, that judges are extremely interested in an evidence code that is readily accessible in a single, authoritative volume. Such a manuscript enables litigants and judges to start from the same point and be guided by the same rules, while forcing litigants to categorize their objections. It also enables the judiciary to be more responsive to the suddenness with which evidence problems arise and the accompanying need for time-efficient determinations.

The question of admissibility of character evidence under federal and state law challenges us to evaluate the courts' different approaches. While the general rule is that proof of a person's character or trait of character is not admissible for the purpose of proving actual conformity on a particular occasion, Professor James Kainen examines the two limited categories of exceptions to this rule under New York and federal law, namely credibility character evidence and substantive character evidence. In his article, he considers specifically the problematic nature of the courts' approaches to the admissibility of a victim's character trait offered by a defendant in a criminal action.

Although the results under both the federal and New York evidence systems might be viewed as substantively the same, as Professor Richard Farrell posits in his review of hearsay evidence, closer examination of evidentiary actions in the Second Circuit and the courts of New York reveal sharply different outcomes. For example, evidence law governing the hearsay exceptions for coconspirator statements and former testimony differ dramatically in the courts of New York and the Second Circuit. Under federal law, you can consider a proffered coconspirator statement to determine the existence of a conspiracy, while under New York law you cannot. Professor Randolph N. Jonakait aptly analyzes these issues. He suggests that coconspirator statements are inherently unreliable and concludes that, because of the dangers posed by such biased evidence, meaningful reform of this hearsay doctrine should be attempted.

In addition, Professor Jonakait examines former testimony in light of the recent Second Circuit opinion, *United States v. DiNapoli*,[2] and explores the divergent approaches New York and the Second Circuit have taken in admitting such evidence. Professor Jonakait cautions that such evidence be admitted only when accompanied by a showing of particularized guarantees of trustworthiness. He finds the Second Circuit's similar motive test requirement of the former testimony exception narrower than the Sixth Amendment and New York standard, and offers the thought that perhaps former testimony is only trustworthy when the similar intensity test, requiring that the party resisting the offered testimony had a prior interest of similar intensity to challenge the same side of a substantially similar issue, is satisfied.

In another provoking presentation, Professor Deborah Bartel draws on the history of evidence scholarship to point out opportunity for reform, and examines five differences between the Federal Rules of Evidence and New York Criminal Procedure Rape Shield statutes.[3] She ultimately suggests that the Federal Rules of Evidence "catchall" exception be revised to model the New York approach, and that the New York legislature adopt notice requirements in its Rape Shield law to avoid unfair surprise of the victim and prosecution, thus providing the court with a more complete basis for evaluating the evidence.

The final two scholars in this Symposium draw on the multidisciplinary mosaic of law, science, and technology to consider expert testimony and hypnotically-enhanced testimony under federal and state law. Professor Barry Scheck explores the admission of expert testimony in the areas of psychiatry, medicine, tape recordings, scientific methods and techniques, handwriting analysis, DNA analysis, and sexual abuse and trauma situations. Professor Scheck posits whether a defect in a generally accepted technique is a matter of weight or a matter of admissibility. Considering this question under the *Daubert*[4] and

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2. 8 F.3d 909 (2d Cir. 1993).

3. *See* N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

4. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

Frye[5] analysis, he concludes that it is a matter of admissibility and suggests that such evidence be excluded.

Witness competency is the key issue where hypnotically-enhanced testimony is entertained by a court. Because hypnosis involves heightened suggestibility, confabulation and the suspension of disbelief, Professor Gary Shaw cautions that the admission of hypnotically-enhanced testimony at trial can be a dangerous impediment to the accurate discovery of the truth.

While a multitude of viewpoints interplaying with complex issues has been presented - all directed at ensuring an accurate determination of facts in evidence - no single academic analysis can adequately address all the facets of a judge's decision on allowing evidence. For nearly thirty years, I have struggled with whether or not to admit certain testimony. I must confess that I have been both consciously and subconsciously driven and guided by two precepts - relevancy and reliability. After all, we are in a search for truth. If the evidence is relevant and reliable, why not admit it? Why not let the jury weigh its probative value? It was once said, "Truth crushed to earth will rise again on the wings of angels." It may be that when we exclude certain testimony in a desire to slavishly comply with an evidentiary rule, we are crushing truth. It is the doctrinaire fixity of views, and the slavish compliance with the litany of rules which is most troublesome and continues to encourage me to rely on relevancy and reliability.

I have the utmost faith and trust in the ability of jurors to evaluate the evidence presented to them. The conscientious and intelligent nature of the vast majority of men and women who sit as jurors insures the just resolution of disputes through the presentation of the evidence. When we think of all the major judgments people make everyday after hearing all sorts of statements, it makes one think - why not let jurors hear testimony that is reliable and relevant? Indeed, given that the law of evidence is based upon certain assumptions that we make about people, such as their perceptions, memory, thought processes, and experiences, ordinary citizens are in the best position to

5. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

make impartial decisions. Jurors are well-schooled in discerning truth and verifying facts as well as recognizing exaggerations, misstatements, half-truths, and lies. They know by their very existence, by the weight of life's struggles, by experiences in the workplace, and by simply living in a purist society. I, for one, trust them. This trust is born of experience and necessity.

An ordinary citizen, when sitting as a juror sworn to do justice, somehow and in some way - in almost a mystical way - becomes a very special person. If it is relevant and reliable, let them hear it - their luminous, uncommon common sense and devotion to their duty as jurors will compel them to separate the wheat from the chaff and arrive at the truth.

This Symposium has provoked much thought and useful discussion concerning evidentiary problems under the federal model and New York law. The value of such professional debate, however, lies not simply in the resolution of the issues considered, but also in the uncertainty which compels one to remain open-minded and continue thinking. When thinking, one moves closer to the truth. Herman Melville once wrote that "[a]ll deep, earnest thinking is but the intrepid effort of the soul to keep the open independence of her sea," and to hold steadfast against "the wildest winds of heaven and earth [which] conspire to cast her on the treacherous, slavish shore."[6] While the treatment of the problems posed in this Symposium Issue may not leave the reader with clear answers, the proliferation of ideas concerning evidentiary doctrine presented has certainly placed the search for solutions on the high seas of thought.

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6. HERMAN MELVILLE, MOBY DICK 153 (1930).