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Law in the Backwaters: A Comment on Mirjan Damaška's *Evidence Law Adrift*

by
SAMUEL R. GROSS*

The most problematic part of Professor Mirjan Damaška's fine book is the title.¹ Professor Damaška does an excellent job of situating American evidence law in the procedural context in which American trials occur. He identifies three major procedural elements. First, juries are traditionally cited as the primary or sole explanation for our extensive set of exclusionary rules, which are said to express mistrust of lay adjudicators. Professor Damaška points out as well that lay juries permit a divided court, with a professional judge who has exclusive control over "questions of law," and that this division is necessary for the operation of exclusionary rules because it makes it possible to keep the excluded evidence from the notice of the trier of fact. Second, our privatized system of factfinding is based on party control over the production of evidence, which polarizes the presentation and makes the evidence itself suspect. Finally, the use of one-time, single-case juries requires concentrated trials that take place in a continuous and comparatively compact period of time. Given this temporal concentration, questions about the reliability of evidence must be resolved quickly—frequently on the spot—which limits the possibility of additional investigation or rebuttal, and favors exclusion as a remedy. Professor Damaška's argument (to which I have not nearly done justice) is rich and for the most part persuasive. But why call it *Evidence Law Adrift*? A stronger case could be made that evidence law is fixed in place, or at least tightly tethered.

When the Federal Rules of Civil Procedure were enacted in 1938, they sparked a revolution in civil litigation. When the Federal Rules of Evidence went into effect in 1975, they changed little. Even now, twenty-two years later, there are only slight differences in practice between jurisdictions which use the Federal Rules, states like California which continue to use earlier codifications, and the few remaining states, like New York, which have no codified rules of evidence at all. If a lawyer from 1897 were transported to today's San Francisco to litigate a civil case, he (and it almost certainly would be

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1. MIRJAN DAMAŠKA, *EVIDENCE LAW ADRIFT* (1997).

a man) would be lost in a strange world of pre-trial discovery, settlement, and motion practice. But if he were transported to a trial—the last stage of one of the few cases that go the full nine yards—he would feel tolerably comfortable. Trial practice, and evidence law in particular as an aspect of trial practice, have changed far less in this century than the procedural and substantive legal framework that surrounds them.

Professor Damaška, of course, does not claim that evidence law has changed greatly in the recent past. The eponymous “drift” is something else. Professor Damaška argues that the three pillars that generated and support our evidence law—juries, concentrated trials, and party control—are rapidly eroding; he predicts that major but unspecified changes will follow. I wonder.

In the long run—three hundred or five hundred years—it is very likely that our system of trial practice will change dramatically, if it is not superseded entirely. It could happen more rapidly if there are major social or technological transformations in our culture. But changes of that order can rarely be foreseen. The only question we can hope to address is whether the current status is likely to change in a reasonably predictable manner in the foreseeable future. For evidence law, I would bet on “No”.

Professor Damaška makes a convincing case that the use of jury trials is on the decline. Trials have become increasingly rare over the course of the twentieth century; they now account for only a small percentage of filed cases, and an even smaller fraction of all civil disputes, many of which are resolved before a complaint is ever filed.² Economic forces are probably the main reasons for the increasing dominance of settlement³—changes in insurance coverage, and in the economic structure of litigation. But pre-trial discovery and the other procedural reforms initiated by the Federal Rules of Civil Procedure have played a role as well, by making trials more predictable. In most civil cases (and some criminal cases) documents are produced, witnesses testify, and issues are sharpened and narrowed in an extended sequence of pre-trial disclosures, interrogatories, depositions, and motions. As a result, the bulk of the initial presentation of evidence—and some of the initial evaluation—has shifted away from trial, which undermines Professor Damaška’s second pillar: the trial as a temporally concentrated event.

But Professor Damaška does not make a convincing case that party control over factfinding—the third and most important of his procedural support structures—is in any danger at all. Quite the op-

2. See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996).

3. See *id.* at 50-56.

posite. As he points out, settlement has become the dominant mode of disposition of litigated cases, and settlement is the epitome of private control of litigation. It is true, of course, that more settlements means fewer trials, and that in the limiting condition—if trials stopped happening entirely—the rules of evidence would go out like a snuffed candle. But trials have not stopped and will not any time soon, and while they last—however rare—the evidentiary rules that apply are likely to continue to remain remarkably stable.

A system of dispute resolution dominated by settlements requires trials in order to function. Professor Damaška seems to overlook this point. For example, he writes:

Practically speaking, the main use of the constitutional right [to a jury trial in a criminal prosecution] is presently to serve as a defense bargaining chip in securing concessions in exchange for the waiver of this right.⁴

This is certainly true, if by “main use” he means the most common use. But this is not the only use of the right to trial, and in some respects it is not the most important. In some criminal cases no bargaining is possible because the prosecution will concede nothing. These cases are uncommon, but they are also uncommonly important; many capital cases, for example, fall in this category. More important, we need a steady trickle of trials in ordinary cases—even 2% of the total might do—so litigants can set the terms for the bargains they strike in the remaining 98%. We need information, however imperfect, on basic questions about what might happen if bargaining fails. How do jurors react to eyewitness identification testimony? How they are affected by a defendant’s criminal record? Are they sympathetic to addicts who steal? Without some current data on issues like these, the two sides would not know how to talk about what they would be giving up by agreeing to a pre-trial deal. As a result, some negotiations would break down—and we would get more trials.⁵

4. DAMAŠKA, *supra* note 1, at 127.

5. In cases where the stakes are well below the process costs of going to court, trial is only a theoretical option, and the outcomes of trials—if there are any—have little impact on pre-trial dispositions. For example, almost all motorists pay traffic citations without regard to what might happen at trial, because trial itself is a worse penalty than the stipulated fine, regardless of the likelihood of winning. Similarly, in his classic study of automobile accident cases, H. Laurence Ross found that “[r]outine cases [those without permanent injuries] frequently would be worth so little in court that the costs, including the attorney’s time, rule out recourse to litigation The value of routine cases before a jury may thus be considered irrelevant to evaluation for settlement. In contrast, the serious cases [those involving residual impairment] can generally be expected to bring a verdict sufficient to justify the expense of litigation, and the value before a jury becomes a central concern in evaluating such cases for settlement.” H. LAURENCE ROSS, *SETTLED OUT OF COURT; THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 112 (1980).

But this means only that our settlement-dominated system needs some trials. It does not mean we need the type of trial we are used to, and it certainly does not mean we need trials subject to the Federal Rules of Evidence, or anything similar. Will changes in the context of trials inevitably translate into changes in the rules that govern their content? Maybe, but not predictably, and certainly not rapidly. For example, consider the hearsay rule in civil cases. The prevailing rules of pre-trial civil discovery give each party the opportunity not only to depose its opponent's witnesses, but also to depose any available hearsay declarants whose statements those witnesses might relay in their testimony.⁶ Does not this power to depose sufficiently address the reliability concerns that underlie the hearsay rule, and justify a general relaxation of the rule in civil cases—at least for hearsay statements by declarants who are available to testify for either side? But no general trend of this sort has in fact developed in the fifty-nine years since the Federal Rules of Civil Procedure were adopted. Why not?

The rules of evidence that we work with are to a great extent arbitrary. Professor Damaška's explanation for these rules is certainly interesting and useful—the structural conditions he describes may even be necessary for the development of rules such as these—but these conditions are hardly a sufficient explanation for the rules we have inherited. Much of the content of our exclusionary rules must be attributed to historical or doctrinal accident. And yet, arbitrary or not, they are tenacious. Why do we admit an “excited” hearsay statement by an anonymous member of a crowd,⁷ but exclude a written report by a witness who can be cross examined about its meaning and basis under oath, in the presence of the jury?⁸ This makes no more sense in 1997 than it did in 1900, and is probably no more likely to change.

I can think of two explanations for the impressive persistence of the common-law exclusionary rules of evidence. The first is a product of the nature of the adversary process these rules regulate. Consider Justice Jackson's famous statement in *Michelson v. United States*⁹ about the use of reputation evidence to prove a defendant's good character in a criminal case:

6. See, e.g., FED. R. CIV. P. 26(b)(1), 30(a)(1).

7. See FED. R. EVID. 803(2).

8. See FED. R. EVID. 801(d)(1). There are three limited exceptions to this exclusion: if the prior statement is inconsistent with the witness's testimony and was given under oath; if it is consistent with the testimony and “is offered to rebut an express or implied charge . . . of recent fabrication or improper influence or motive”; or if it is a statement of identification. *Id.*

9. 335 U.S. 469 (1948).

[M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other. But somehow it has proved [] workable To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.¹⁰

I am not so much interested in Justice Jackson's argument—that piecemeal change will not work—as in its premise: that the structure is defined by a balance between opposing interests. Justice Jackson's unstated assumption is that in this competitive enterprise there are stable coalitions on opposing sides. Changes in the rules typically hurt one set of interests and help another: restrictions on the use of criminal records for impeachment hurt prosecutors and help criminal defendants; exclusion of evidence of insurance hurts civil plaintiffs and helps civil defendants; relaxation of hearsay restrictions typically helps plaintiffs, criminal and civil, and hurts defendants; taking issues away from the jury and giving them to the judge is usually believed to hurt criminal defendants and civil plaintiffs, and to help their opponents; and so forth. The rules that we have ended up with mark the cease-fire lines in the conflicts between these various opposing camps. Since it usually takes a great deal more power to change the status quo than to maintain it, once rules are generated they are likely to become locked in place.

This argument, however, applies to all of the procedural rules that govern litigation, and the rules of evidence seem more firmly fixed than most—which requires a second explanation. Trial is very much a formal competitive game. This is true to an extent for all stages of litigation, but the formal game-like aspect of the process is at its apex in court, and especially in front of a jury.¹¹ Trial work is an art form, a skill we teach and admire, and—as the emergence of Court TV has once again demonstrated—a form of entertainment. There seems to be a tendency to conservatism in setting the rules of formal games. The rules of chess have not changed in centuries; the rules of tennis and golf are much the same as they were one hundred years ago. Imagine what would happen if Babe Ruth at the height of his career were transported across time to the New York Yankees of 1997. He would find that many aspects of baseball had changed almost beyond recognition: television, free agency, astronomical salaries, jet travel, night games, African American and Latin American

10. *Id.* at 486.

11. For an interesting discussion of this issue, see Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1136-42 (1982).

players, a players' union, and so forth and so on. What would have changed least is the game itself. There would, of course, be some changes on the field—designated hitters, for example—but once the game started, he would fit right in.

Conservatism in the content of the rules of games cannot be explained by the interplay between competing interests. Although a particular player may do better under one set of rules than another, there are usually no stable interests that would benefit over the long haul from confining a pawn's initial move to one square, or requiring a football team to advance the ball ten yards in three downs rather than four in order to maintain possession. The reason, rather, is taste: players and fans who grow accustomed to a particular set of rules become committed to them. In part this preference reflects the time and effort they have invested in mastering the existing game, and in part it is simply the familiar feeling that the old rules are the right rules. We see this process played out in debates over the rules of evidence. For example, for decades commentators—mostly academics—have predicted and advocated major revisions, if not total abolition, of the hearsay rule. But every attempt at sweeping reform has been scuttled by the lawyers and judges who actually use the rule in practice.

When the rules of a game are changed it is usually done to serve or to attract outside interests. Inter-league play is initiated in baseball to draw new spectators; three-point field goals are added to professional basketball to add excitement and fans.¹² The same thing has happened in evidence law, from time to time. The passage of Federal Rules of Evidence 413 to 415, over the nearly unanimous opposition of the representatives of the bench and bar,¹³ reflected political pressure from outside the legal system to do something about sexual assault and child molestation. For the most part, however, trial practice remains undisturbed. Trials are essential to our system of adversary justice, but, as Professor Damaška points out, they have become an isolated outpost. For most lawyers and claimants and insurance adjusters—the working stiffs who file and settle cases—it matters only

12. Kelly D. Patterson, *Interleague Play Expected to Lure More Baseball Fans*, DALLAS MORNING NEWS, Jun. 8, 1997, at 1A; Thom Loverro, *Sparking Interest and Debate, Interleague Play About to Begin*, WASH. TIMES, Apr. 1, 1997, at E7; David DuPree, *3-Point 'Bomb' Near for NBA; NBA Coaches, Managers Back 3-Point 'Bomb'*, WASH. POST., June 14, 1979, at F1.

13. See REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, 159 F.R.D. 51 (1995). ("It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.")

that we have some trial outcomes, regardless of how they are reached. But the players who conduct these uncommon rituals do care about the rules, and rarely want them to change, and—since nobody else is nearly as interested—their voice is usually decisive. To revert to Professor Damaška's metaphor, precisely because the institution of the trial is no longer in the mainstream of litigation, the rules of evidence that govern trials are sheltered from the currents of change.