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## An Outsider's View of Common Law Evidence

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# AN OUTSIDER'S VIEW OF COMMON LAW EVIDENCE

Roger C. Park\*

EVIDENCE LAW ADRIFT. By *Mirjan R. Damaška*. New Haven: Yale University Press. 1997. Pp. x, 158. \$27.50.

*If the discovery of truth be the end of the rules of evidence, and if sagacity consist in the adaptation of means to ends, it appeared to me that, in the line of judicature, the sagacity displayed by the sages of law was as much below the level of that displayed by an illiterate peasant or mechanic in the bosom of his family, as, in the line of physical science, the sagacity displayed by the peasant is to the sagacity displayed in the same line by a Newton.*<sup>1</sup>

There have been improvements since Bentham's jeremiad. But Anglo-American evidence law is still puzzling. It rejects the common-sense principle of free proof in favor of a grotesque jumble of technicalities. It has the breathtaking aspiration of regulating inference by rule, causing it to exalt the foresight of remote rulemakers over the wisdom of on-the-spot adjudicators. It departs from tried-and-true practices of rational inquiry, as when it prohibits courts from using categories of evidence that are freely used both in everyday life and in the highest affairs of state. Sometimes it seems to fear dim light more than deep darkness, as when it tells judges to exclude hearsay even though the declarant cannot possibly give live testimony. At times it treats jurors as fools or bigots; at others it venerates them as sages. To top it all, evidence law's greatest scholars have been among its strongest debunkers.

The institutional context in which evidence law operates partly explains and partly justifies its approach to factfinding, as scholars and judges have recognized. Many of them subscribe to Thayer's view that evidence law is the "child of the jury system,"<sup>2</sup> and that exclusionary rules are needed to protect the jury against cognitive shortcomings. Others have thought of evidence law mainly as the child of the adversary system, viewing exclusionary rules as an attempt to achieve adversarial fairness — a game with even chances

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1. 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 5-6 (John S. Mill ed., 1827).

2. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 266 (1898); cf. Charles T. McCormick, *Law and the Future: Evidence*, 51 Nw. U. L. Rev. 218, 224-25 (1956).

— or to overcome or prevent adversarial distortions of truth.<sup>3</sup> Still others have explained its peculiarities as stemming from a desire to purify courts of perjury and fabrication,<sup>4</sup> or as an attempt to achieve public acceptance of verdicts whatever their accuracy.<sup>5</sup> Of course, these theories can be combined.<sup>6</sup>

Mirjan Damaška's *Evidence Law Adrift*<sup>7</sup> is a major addition to the literature of explanation and critique. Damaška brings an outsider's view — the perspective of one trained in Continental law — to the question why Anglo-American factfinding is "so peculiar" (p. 2). He applies an "analytical and interpretive" approach, one that mainly attempts to identify current justifications rather than historical causes (p. 3). In doing so, he separates Anglo-American institutions that evolved as a single organism — such as the bifurcated judge-jury system — into distinct elements. He then examines each element, testing the current support that it gives to the edifice of evidence law. Damaška's adroitness at isolating procedural features for separate analysis and at contrasting them with their Continental counterparts helps common law scholars see their system in a new light. He has written a book that every evidence scholar should read, and that will be helpful to anyone interested in trials and court procedure.

## I. THE THREE PILLARS

Damaška identifies three pillars of the common law of evidence: the bifurcated judge-jury system, the temporal concentration of proceedings, and the party-dominant adversary system. These three features, present in a much stronger and more pervasive form in Anglo-American systems than in Continental systems, are the necessary support for many of the common law rules of evidence. They are especially useful in explaining the otherwise puzzling intrinsic rules (like the hearsay rule) that purportedly protect the factfinder against misdecision. Damaška concludes that the American law of evidence is eroding because these pillars are crumbling.

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3. See, e.g., Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247 (1937); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988); cf. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

4. See Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069 (1992).

5. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1392 (1985). For a rebuttal, see Ronald J. Allen, *Rationality, Mythology, and the "Acceptability of Verdicts" Thesis*, 66 B.U. L. REV. 541 (1986).

6. See, e.g., RUPERT CROSS & COLIN TAPPER, *CROSS ON EVIDENCE* 1 (6th ed. 1985) (combining adversarial and jury-trial rationales).

7. Mirjan Damaška is Sterling Professor of Law, Yale Law School.

He agrees with the widespread view that jury trial is important, but parts with convention in his analysis of the source of its importance (pp. 26-57). He dissects jury trial in a way that invites us to see the centrality of features that are often neglected or taken for granted. He points out that the participation of *lay* factfinders is not, in itself, an explanation for evidence rules (pp. 30-33). Amateurs would use heuristics and strategies from ordinary life, not rules of evidence. Even the infusion of professional judges would not create a need for rules of evidence, so long as judges and jurors deliberated together, as in Continental environments in which lay factfinders work with professionals (pp. 26-29).

Damaška gives little credit to the argument that jurors need to be protected from their own cognitive shortcomings (pp. 29-33). Though this concern helps explain the origin of evidence rules, in order to justify them one must also show that the excluded classes of information have a greater potential to skew lay than professional judgment. There is no reason to believe jurors are less able than judges to assess the weight of hearsay, or are more vulnerable to the temptation of propensity inferences. Even for statistical and scientific evidence, the average trial judge may be as baffled by complexity as the average trial juror. At any rate, it is inconsistent to claim that jurors have cognitive shortcomings and at the same time expect them to follow complicated limiting instructions.

Damaška's debunking of this rationale of evidence law is often persuasive, but occasionally he seems to yield to a debater's temptation to push a point too hard. True, there is little reason to think that judges are better equipped to handle hearsay or character evidence than jurors. But to say that judges will be as baffled as jurors by novel scientific evidence seems to deny the value of general education.<sup>8</sup> At any rate, judges do *believe* that they know more than jurors. Their conduct is undeniably influenced by the fact that jurors are neither lawyers nor experts. Were the other half of the split tribunal a scientific panel or a fellow judge, the evidence screener would be much less likely to create barriers. As might be expected from an author convinced of the importance of neglected features, Damaška's nod to more pedestrian explanations is a somewhat grudging one (pp. 30-31, 128).

Having minimized the most obvious evidence-related feature of jury trial, Damaška turns to other aspects that might escape notice when thinking about reasons for evidence law. Consider the cryptic, unexplained verdict, which is anathema on the Continent

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8. Nor does use of limiting instructions necessarily show that judges have an inconsistent attitude toward jurors. The fact that judges give jurors complicated limiting instructions does not necessarily imply that they think them to be geniuses; limiting instructions could simply be the least of the evils, better than excluding the evidence and better than saying nothing.

but a nearly unavoidable feature of the Anglo-American jury trial. It is not practical to ask lay jurors to write findings that justify their decisions, but because of the absence of such findings, jury verdicts suffer from a legitimacy deficit. The common law handles this deficit by allowing challenges to the evidentiary database. On the Continent, there is less concern about the purity of the evidentiary input because legitimacy is maintained by giving written reasons for verdicts. The law's yearning to legitimize inscrutable jury verdicts may be "the single most neglected contribution of the jury to the rationale for evidentiary arrangements peculiar to the Anglo-American procedural tradition" (p. 46).

But bifurcation itself has the most profound influence (pp. 46-53). The splitting of the trial court into two bodies creates a seedbed for rules excluding evidence. In a unitary tribunal, exclusion is less practical. It is especially hard for a unitary court to enforce rules of exclusion that aim at guarding against the trier's weaknesses. The judges of a unitary court would have to exclude on grounds that they themselves might be prejudiced. Moreover, excluding is not the same thing as forgetting. For these reasons, bifurcation provides "the institutional black velvet on which the jewels of the common law's exclusionary doctrine can display their full potential and allure" (p. 52). Correspondingly, the lack of bifurcation on the Continent, even in cases in which lay people participate in factfinding, helps explain the absence of exclusionary rules.

After discussing the jury trial, Damaška turns to his second pillar, one that may not even occur to one schooled only in the common law system — the concentrated day-in-court trial (pp. 58-73). The English tradition of the concentrated trial, with parties bringing evidence that had not previously been scrutinized to court, created a need for evidence rules that would not otherwise have existed (pp. 68-70). Evidentiary practices appropriate in concentrated trials in which raw evidence is dumped on the table are not needed for episodic trials. Elaborate, during-trial authentication formalities are not needed if there is an opportunity to check authenticity beforehand. A ban on hearsay is harder to defend if the opponent has the opportunity to seek out the declarant for testimony in court, or to seek out information about him if the declarant is not available. Rules designed to prevent surprise or to abbreviate proceedings are less necessary. The gap between the Anglo-American concentrated trial and the episodic Continental trial is narrowing, and hence one of the pillars of common law evidence is deteriorating (pp. 58-73, 129).

Damaška's final pillar (a giant in an unequal group) is the adversary system, defined as "a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains

essentially passive [and in which] litigants and their counsel decide what facts shall be subject to proof" (p. 74). The parties investigate the facts, organize them, and present them to the tribunal. Lawyers coach witnesses, and they select experts tendentiously. Though the vouching doctrine has been repudiated, participants still find it hard to separate sources of proof from the party offering the proof (p. 76). Judges rarely call their own witnesses, and the system is uncomfortable with the turncoat witness. It is often unclear, for example, who is entitled to cross-examine a witness who wavers between sides.

In contrast, on the Continent, evidence is assembled by judges and other officials (p. 77). Damaška reports that though contacts between counsel and witnesses are increasing, they are still disfavored; if revealed, lawyer contact diminishes the witness's credibility (p. 77). Expert witnesses are appointed by the court as assistants to the judge rather than as true witnesses; in fact, they are allowed to pose questions to ordinary witnesses. The fission of evidence presentation into plaintiff's and defendant's cases is unknown or nearly so (p. 78).

Damaška agrees with those who believe that the adversary system helps explain the disapproval of hearsay (pp. 79-80). The association of evidence with parties makes hearsay problematic. With bipolarization comes increased concern about fabrication. Its supposed cure, cross-examination, is "enveloped with clouds of eulogy, almost apotheosized" (p. 79). It is easy to see an out-of-court declarant as the confederate of an enemy, unfairly kept from view and insulated from the test of cross-examination. Moreover, the practice is more important in a system in which a well-done cross-examination can diminish the credibility of almost any testimony. Thus, "the common law's hostility toward hearsay is not predicated on purely epistemic concerns: it also springs from principles of fairness that are applicable to a competitive fact-finding scheme" (p. 80). When the common lawyer's solicitude for adversarial fairness does not stand in the way (for example, when the evidence is the admission of a party), then hearsay is more freely received.

Damaška reports that, on the Continent, challenges to the accuracy of witness testimony are focused and subdued, seldom escalating into a broad attack on veracity. When hearsay is received, lawyers are less likely to feel that they have been cheated or that an enemy has unfairly been kept offstage and untested (p. 81).

In addition, there is a difference in the degree to which hearsay is dangerous to truthfinding. In the adversary system, hearsay is more dangerous because party competition does not always produce the best evidence. For example, a party might prefer to present hearsay in lieu of original testimony because the witness

who would testify to the hearsay evidence has a more persuasive demeanor, a higher social status, or a better sense of theater than the out-of-court declarant. A rule excluding hearsay provides that party with an incentive to find and call the original declarant (p. 85).

In an adversarial system, limits on heterodox expert testimony are more necessary because parties would otherwise present questionable experts for partisan advantage. Moreover, the rejection of otherwise probative evidence can actually help to protect truthfinding if exclusion prevents adversarial misconduct. For example, an exclusion for violation of a rule requiring pretrial disclosure of evidence may encourage fair disclosure in future cases. In addition, rules excluding evidence are more likely to be invoked by the parties under an adversarial system because an objection is a complaint about the behavior of the opponent, not about the behavior of the body that will eventually make the decision on the merits (p. 86).

The adversarial system also enhances party control over the application of evidence rules (pp. 87-88). Sometimes a party has the option of opening or closing a door to an opponent's evidence by offering or forgoing evidence of its own. Parties can stipulate to variations in evidence rules, or let them be modified by failing to object to an opponent's evidence. Damaška observes that features of party control that lawyers in Anglo-American systems take for granted seem amazing to outsiders. Parties can stipulate, for example, that a polygraph test is admissible, even when the test would otherwise be deemed insufficiently trustworthy. Because parties control objections to evidence, the Anglo-American system is occasionally more receptive to hearsay than the Continental system. On the Continent, in jurisdictions that prefer the use of original over hearsay proof, even if the parties are content with hearsay, a judge may require original proof. Ironically, then, Continental law is occasionally more strict in barring hearsay than the common law. Damaška considers the extent to which Anglo-American parties are permitted to agree to variances in rules of evidence to suit themselves in particular cases to be a "striking — though unremarked — idiosyncrasy of the common law fact-finding style" (p. 88).

In his discussion of the adversary system, Damaška reflects on the effectiveness of the system for truthfinding (pp. 88-103), and on what its uncertain regard for truth shows about the purposes of litigation (pp. 111-24). Readers may recognize echoes of his work in the 1970s and 1980s in this portion of the book.<sup>9</sup> With his usual elegance, he compares the Anglo-American adversary system to

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9. See MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986); Mirjan Damaška, *Adversary System*, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 24 (Sanford

Continental systems — or perhaps it would be more accurate to say that he compares models or conceptually purified paradigms. While he draws back from a firm conclusion, it is clear that he is skeptical about claims that the adversary system promotes truthfinding, and finds its departure from ordinary means of rational inquiry disturbing (pp. 92-103). The fission into two distinct cases cuts out investigation of other possibilities: “[A]s in a car driving at night, two narrow beams continue to illuminate the world presented to the adjudicator from the beginning until the end of trial” (p. 92). The sequence of your-case/my-case, one-story-at-a-time is artificial. Narratives are disrupted by technical objections and sidebars and by the question-and-answer method itself. Although passivity has some virtues, active inquiry is a better and more natural way to learn (pp. 96-97).

Damaška finds particularly troubling the role of biased, self-interested partisans in developing evidence (pp. 98-102). Partisan interviews can plant false memories. Information sources may be polluted in ways that cross-examination cannot cure. Witnesses, because they are aligned with a party, begin to feel like members of a team. They are coached by parties and, in the case of experts, paid by them. Parties present evidence selectively. They want only witnesses who will help them and only want part of what the witnesses know. Information that does not clearly help one or the other is filtered out. Moreover, the idea that hearing two partisan accounts helps the trier discover the truth only works where the contestants have equal resources, a condition not often met.

Though Damaška disclaims any final conclusion about which system produces better results, he would find it “unsurprising” if “some version of the officially dominated fact-finding model is found to be better suited for truth-discovery” (pp. 102-03). He doubts that even common law trial lawyers feel that the adversary system is best for discovering truth. The common law’s embrace of the adversary system shows how highly the common law values dispute resolution as the goal of all procedure. Even the criminal process is seen as an exercise in the settlement of disputes.<sup>10</sup> This ubiquitous dispute-resolving mission

erects the considerations of disputational fairness — such as the balancing of advantages between the litigants — to the status of values capable of interfering with the search for the truth. And it is the primacy of the conflict-resolving vision that explains why the competitive fact-finding system appears acceptable — or even desirable — in

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Kadish ed., 1983); Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975).

10. He reports that on the Continent, civil suits are seen as devoted to resolution of disputes, but criminal trials are venues for the realization of state policy about crime. Pp. 113-20.



Anglo-American countries, despite the departures it entails from ordinary fact-finding practices. [p. 124]

In this excursus, Damaška seems temporarily insensitive to possible virtues of the common law system. The common law's romance with the adversary system may be based not only on a dispute-resolution mentality, but also on a belief that it is a brake on abuse of power.<sup>11</sup> A nonadversarial, active-judge system has obvious advantages if one can take for granted that the legal environment will come equipped with judges who are unbiased, hard-working, delicate with the liberties of others, incorruptible, and impervious to the wishes of influential friends. If one doubts those assumptions, then the common law system could seem superior even to those who value accurate verdicts. Damaška's analytical method — disentangling the elements of the common law system and viewing them separately — has many advantages, but it can also obscure the synergy of some of the elements. The jury system (a bifurcated court with lay factfinders chosen randomly for the occasion) works together with the adversary system in limiting the power of officials; the strong role of the parties prevents the judges from sabotaging the safeguard of ad hoc, amateur factfinding.<sup>12</sup> If citizens of common law countries see the combination as a safeguard against oppression or corruption<sup>13</sup> — whether they are right or wrong — then Damaška's thesis that love of the adversary system reveals a preference for settlement above truth may need qualification.

## II. CRACKS IN THE PILLARS

Having identified the three pillars, Damaška chronicles their decline (pp. 125-42). Several common law jurisdictions have virtually eliminated the jury system (pp. 126-29). Even in its ultimate citadel — criminal cases in the United States — its importance is declining (p. 127). Jury trials are only a small proportion of the total cases in the system. Their main function is to serve as a bargaining chip in plea negotiations, because the defense can hold out the threat of going to trial. With the decline of the jury trial, skills of lawyers will atrophy, and the law of evidence will lose an argumentative justification. It will be harder to present evidence law as a necessary

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11. In *Adrift*, Damaška makes only a passing reference to "the classical liberal impulse to keep the state at arm's length." P. 118. Elsewhere he has explored the link between the adversary system and an ideology that fears state power. See Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 532-39 (1975).

12. In our grand jury proceedings we see an example of lay adjudication in the absence of adversarial protections, and with rare exceptions the grand jurors are under the control of the public official who presents evidence and guidance to them.

13. For a classic statement of this view, see *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

prophylactic against the foibles of lay reasoning (p. 128). There will be less need to compensate for the unexplained nature of jury verdicts. Most importantly, without bifurcation it will simply be harder to enforce rules of evidence because the trier of fact will also rule on admissibility. Damaška concludes that the oldest pillar is “more ornamental than functional” (p. 129).

Here I will pause for a caveat. I believe that Damaška is correct in saying that the functional end of jury trial would profoundly change the law of evidence. But for the American system, one may question his empirical conclusion. It is true that, compared to the total number of cases *filed*, the proportion of jury trials — or any trials — has decreased compared to cases settled or plea bargained.<sup>14</sup> That suggests a waning of influence, though one must remember that the jury throws a long shadow over everything else.<sup>15</sup> Considered as a percentage of cases *tried*, however, the jury seems to be holding its own. Federal jury trials have been a fairly constant proportion of all trials in the last three decades, in criminal cases comprising a majority of all trials.<sup>16</sup> The jury trial also seems to be holding on in state courts. Approximately eighty percent of tort claims and sixty percent of criminal cases that go to trial in state court are tried to a jury, and there are twice as many jury trials as

14. The percentage of federal criminal cases filed that went to trial was 14.9% in 1982, see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS in 1982 REPS. OF THE PROC. OF THE JUD. CONF. OF THE U.S. 310; it declined to 8.3% in 1996, see JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR, in 1996 REPS. OF THE PROC. OF THE JUD. CONF. OF THE U.S. 221 tbl.D-4 [hereinafter 1996 REPORT]. For a longer view, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 921-28 (1994) (describing and condemning the transition from trial to bargained pleas in the American criminal justice system since the 18th century).

15. For an interesting account of the strong role that civil jury verdicts still play in a system geared to settlement, see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

16. Damaška says that “[o]f those cases that are not disposed by bargained guilty pleas, an increasing portion is decided by judges sitting alone.” P. 127 (citing Stephen Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984)). Since the publication of Professor Schulhofer’s article in 1984, however, jury trials have held their own as a proportion of total trials, at least in the federal courts. In 1984 federal jury trials were 43.1% of all trials (56.3% of criminal trials); in 1996, the most recent year for which information is available, the figures are 48.3% of all trials and 56.6% of criminal trials. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, in 1984 REPS. OF THE PROC. OF THE JUD. CONF. OF THE U.S. 298-301 tbl.C-7; 1996 REPORT, *supra* note 14, at 171 tbl.C-7.

To take a more distant benchmark: In his well-known 1970 article on the declining need for evidence rules in bench trials, Kenneth Culp Davis wrote that “[d]istrict courts in [1968] completed 14,221 trials in civil and criminal cases, of which 7,278 were nonjury and 6,943 were jury trials.” Kenneth Culp Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362, 1363 (1970). For 1996, the most recent year for which data is available, the sentence would read: “District courts completed 17,545 civil and criminal trials, of which 9,068 were nonjury and 8,477 were jury trials.” The absolute number of jury trials has increased since Davis wrote, and the proportion has decreased only slightly (48.9% in 1968, 48.3% in 1996). See 1996 REPORT, *supra*, at 171 tbl.C-7.

bench trials.<sup>17</sup> Though jury trial seems anachronistic in certain types of cases, it will die slowly if at all. It has the protection of its constitutional status,<sup>18</sup> of the public's love of its drama, and of its continuing value in lending legitimacy to resolutions of otherwise ineffable credibility conflicts.<sup>19</sup>

Turning to the second pillar, temporal compression, Damaška postulates severe decay on account of extensive pretrial proceedings and discovery (p. 129). Such pretrial practices make it less important to check the authenticity of evidence (p. 130). Yet he recognizes that pretrial discovery is used adversarially, and that such phenomena as overproduction and concealment leave a residual need for checking and filtering. Moreover, criminal discovery remains primitive in many jurisdictions. His second pillar seems far less important than the others, both because it has less impact even when ideal archetypes are fully contrasted, and because the dimension and nature of the changes in it do not remove the need for evidentiary barriers. Litigation is more spread out, but safeguards are still needed so long as pretrial activity is adversarial. Nevertheless, the expanded opportunity for notice before trial and the practice of some courts in disposing of technical objections before trial has had an impact on authentication rules and provides opportunities for notice-based reform of rules such as the hearsay rule.

Damaška believes that the third pillar — the adversary system — is also cracking (pp. 135-42). He concedes that it still has strong support, and that some features of contemporary litigation — docket pressure, for example — actually shore up the common law's dispute-resolution mentality and its proclivity to delegate evidence development to parties. But there is at least a potential for reducing the role of parties. To begin with, he asks the reader to consider how subtle changes in the lawyer-judge relationship in bench trials weaken the adversarial climate. First, there is more interaction between trier and advocate. Judges, unlike jurors, can communicate with lawyers during trial. When judges become directly accountable for accurate factfinding, their sense of personal responsibility causes them to intervene more actively than they

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17. See Laird C. Kirkpatrick, *Evidence Law in the Next Millennium*, 49 HASTINGS L.J. (forthcoming 1998) (citing BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 30 (National Center for State Courts ed., 1996); BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1992, at 10 tbl.10 (1995)).

18. See U.S. CONST. amend. VI, VII. The Seventh Amendment protects the right to jury trial in federal civil cases, while the Sixth Amendment guarantees the right in federal and state criminal cases. See *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968).

19. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 705-07 (1997).

would when supervising jury trials.<sup>20</sup> Lawyer-against-lawyer arguments are supplemented with arguments between the lawyers and the increasingly active judge. Second, contests over evidentiary objections become more tame. Lawyers know that the ultimate trier will learn the substance of the evidence whether or not an objection is sustained; in fact, attempts to keep out valuable evidence can themselves annoy the judge. Moreover, pointless struggles over unimportant evidence are less likely to occur in judge-only trials, because exchanges between the judge and the lawyers make it easier for lawyers to surmise what matters to the trier of fact. Overall, when the roles of factfinding and of evidence-screening are united, the judge's power is increased and that of the parties diminished, and the adversarial climate becomes more subdued.

Damaška also postulates that increasing state activism will influence the procedural framework (pp. 136-38). The strong role of the parties in a common law trial is associated with the laissez-faire state and its minimalist goals. With the rise of an activist state, with its social policies and programs, litigation would be used to implement state policy rather than merely to settle disputes.

When government has an activist agenda, even bilateral arrangements are seen as affecting social policy. Virtually all private contracts can be significant in terms of some government policy, such as protecting the environment, preventing abuse of market power, or encouraging fair employment practices (p. 137). A firing can be an act of discrimination or sexual harassment. "Adjudication itself may turn into a governmental program [that] calls for a strategic vision reaching beyond the particular case before the court" (p. 137). Where externalities such as an impact on the environment are of concern, the court is less likely to want to be a passive umpire and more likely to want to develop its own facts. Also, where implementation of state policy is the goal, courts are less willing to treat two clashing possibilities defined by the parties as the full range of reality (pp. 136-37).

Here the reader may recognize echoes of Damaška's *The Faces of Justice and State Authority*<sup>21</sup> and may wonder whether the prospects for an expanding activist state in the United States are as firm now as they were when that work was written. Damaška concedes that pressure from this source may be temporarily dormant, and recognizes that there are signs in many countries of transfer of authority away from the central state, a development that he characterizes as a "neomedieval movement" (p. 139 n.27). But he believes

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20. P. 135. For observations, partly based on the Diplock trials, that reinforce this point, see Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 26-30 (1995).

21. MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 231-39 (1986).

that increased state involvement is inevitable anyway. Technological advances mean that events such as ecological disasters are more likely to affect large numbers of people. Strong economic pressures exist for collective lawsuits. In multiparty cases, plaintiff-against-plaintiff and defendant-against-defendant disputes will undermine the bipolar paradigm (p. 140). The growing complexity of factual issues about markets or hazards “resists being fitted into the corset of two partisan evidentiary cases” (p. 140). Investigative services of government agencies are needed and there is an inclination to use the results at trial.<sup>22</sup>

Damaška believes that these influences may weaken the adversary system, but he recognizes that this third pillar is still fairly robust (p. 141). The system has habit and tradition behind it, and in the United States it has a measure of constitutional protection. These forces are bolstered by the needs of judges with clogged dockets who welcome private procedural enterprise as a means of reducing the number of trials. The goal of dispute resolution thus remains important, perhaps still dominating the goal of accurate policy implementation. Because a damn-the-facts, end-the-fight mentality supports greater party control, the adversary system is likely to be with us for a while longer.<sup>23</sup>

Despite the qualifications he noted along the way, Damaška ends the heart of his book — his three pillars analysis — with a fairly strong conclusion: that “[w]ith jury trials marginalized, procedural concentration abandoned, and the adversary system somewhat weakened, the institutional environment appears to have decayed that supplied distinctive features of common law evidence with a strong argumentative rationale” (p. 142). Therefore, the rules of evidence “face the danger of becoming antiquated period pieces, intellectual curiosa confined to an oubliette in the castle of justice” (p. 142).

### III. THE WHIRLWIND

In his Epilogue, Damaška looks at another change — the “creeping scientization of factual inquiry” (p. 143) — and assesses its impact on evidence law and on the three pillars thesis (pp. 143-52). He notes that testimony derived immediately from sensory perception has declined in importance, to be supplanted by expert testimony, including testimony about the results of scientific testing.

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22. P. 140. For example, agency reports are admitted under the public records exception to the hearsay rule as expansively interpreted by the Supreme Court. P. 140 n.29.

23. Pp. 141-42. The rise of “managerial judging” in the civil context suggests a possibility that does not sit comfortably with Damaška’s linkage of party dominance to a dispute resolution mentality — viz., the bossy, initiative-taking, inquisitorial judge whose goal is not policy implementation but dispute resolution. Of course, the managerial judge usually does not get involved until after considerable party activity.

The trial system must more and more deal with information that only experts can understand easily.

The "scientization of proof" (p. 145) puts additional strain on the three pillars. The lay jury's understanding is challenged. It has a harder time with scientific evidence than would an expert panel or even a judge, who at least has the opportunity to acquire familiarity through repetition. The use of experts makes it harder to have a continuous proceeding that leads without interruption to a definitive climax. Complex information is hard to assimilate in day-in-court proceedings; a sequence with intervals would make more sense. And the party-dominant adversary system is not a good way of dealing with scientific information. Parties will be selective, looking only for favorable information. Cues and strategies used in ordinary life can lead the trier astray. Parties with weak cases may find the most credible-looking experts. And jurors cannot test conflicting scientific testimony by assessing how it fits with the rest of a party's story. Establishing truth by examining consistency is difficult because scientific evidence rarely fits into story-like narratives (p. 146).

Moreover, the fission into two cases "bedevils" the presentation of scientific data (p. 146). Experts on different sides usually cannot be examined "back to back" (p. 146). And the use of oral testimony presented in response to questions may actually be inferior to the study of written materials. In short, the common law procedural environment is not well suited for the effective and accurate presentation of scientific information. Because the law follows the prevailing "epistemological temper" (p. 147), there eventually will be legal change to accommodate scientific inquiry.

Though Damaška believes that only the general direction of change can be predicted, he ventures a few suggestions about the form that change might take (pp. 147-52). He predicts the growth of a diverse menu of trial mechanisms, both unitary and bifurcated. The responsibilities of the lay jury will probably be reduced. Blue-ribbon juries may find acceptance. Judging will more often be delegated to special masters. Proceedings will become more episodic and document-driven. Decisionmakers will be allowed to study evidentiary material beforehand. Party control will be less pervasive.

In the new age, the lawyer-dominated jury trial will no longer be seen as the paradigm for which all evidence rules are designed. Accordingly, there will be less emphasis on evidence screening. Witnesses will gain greater freedom to tell what they know. But Damaška doubts that Continental systems will be adopted, because of the absence of a civil service judiciary or neutral official investigators. There will be "indigenous remedies" for the illnesses of the common law courts (pp. 151-52).

Damaška predicts that Continental systems will also have problems dealing with experts (pp. 151-52). He indicates that Continental proceduralists are beginning to worry about the dominance of court-appointed experts. Judges, who have difficulty comprehending the arcane findings of some experts, may be seen as delegating decisionmaking powers to an outsider who lacks legitimacy. Damaška believes that the tension between the impenetrability of science and the adjudicator's postulated freedom to decide using ordinary reasoning will cause great changes on the Continent. It may mean that one of the main precepts of Continental evidence law — the principle of free evaluation of evidence — will need to be rethought.

Damaška believes that all justice systems will face great transformations, changes that could be as momentous as the changeover from magical forms of proof at the end of the Middle Ages. And he sees some advantages in the common law tradition that might help it survive the expected storms with less disruption than Continental systems. The common law's bifurcated court has created "habits of fragmenting authority" (p. 152). Those habits might facilitate the division of decisionmaking authority between scientific experts and others. Even the much-criticized practice of partisan selection of experts may lessen the stress of change. Because the common law is accustomed to resolving battles of experts, its judges may not yield so blindly to the authority of science as would judges who use their own chosen experts. At any rate, "the cracking pillars of common law evidence" will be repaired or replaced "by domestic masons and by indigenous building material" (p. 152).

I have summarized Damaška's main themes. But of course all summaries select and omit. The reader of the full book will find much more than an elaboration of the points I have sketched. I have concentrated on the Anglo-American system, passing over many of his interesting and useful observations about Continental law. Where I have noted features of Continental law, I have sometimes omitted Damaška's qualifications; he recognizes that systems are mixed and that features of adversarial practice appear on the Continent. Moreover, I excluded as subsidiary some of Damaška's most original and intriguing points. One example is his discussion of how bifurcation cuts so deeply that it even influences the concept of relevancy — causing common law thinkers to make what would otherwise be a highly artificial distinction between the credibility of the source of evidence and the probative value of evidence if credibility is assumed (pp. 56-57).

## IV. A READER'S CRITIQUE

I think that Damaška is mainly right about the pillars of common law evidence. The jury system is obviously important, and its decay would have strong consequences. Similarly, many of our evidence rules would make no sense in a nonadversarial system — although as he recognizes, the adversary system is likely to be with us for a long time to come.<sup>24</sup> The Anglo-American concentration of proceedings — the most slender of Damaška's three pillars — probably also has some effect. Finally, science, the approaching whirlwind discussed in his Epilogue, will shake the three pillars, changing evidence law in the course of changing everything else.

Even if Damaška is mainly right, evidence teachers need not fear that they will lose their jobs. Damaška's thesis applies mainly to intrinsic rules of exclusion, those that seek to prevent misdecision by the trier of fact. Changes in the three pillars will have less effect on extrinsic exclusionary rules that pursue other goals. The rules of privilege, which sometimes sweep more broadly on the Continent than in the United States (pp. 12-13), are one example. They are enforceable even in a unitary tribunal. Unless the party seeking to pierce the privilege lays an affirmative foundation for doing so, not even the evidence screener learns the privileged information.<sup>25</sup> They are not founded on ideas of jury incompetence or dependent on concentrated proceedings. Nor do they thrive only in the adversary system — although, as Damaška points out, the involvement of lawyers with witnesses may in some situations make the invocation of privilege more likely (p. 13 n.16). Rules based on extrinsic policies have continued to flourish in America, most recently with the recognition of the therapist-patient privilege,<sup>26</sup> the expansion of the remedial measures rule,<sup>27</sup> and the enhanced protection given rape complainants against revelation of sexual history.<sup>28</sup>

The shape of the intrinsic exclusionary rules, such as the rules against hearsay and character evidence, will undoubtedly be affected by the forces that Damaška identifies. But as is always the

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24. For an adept account that leaves one thinking that the adversary system is perhaps too much alive in contemporary American criminal process, see Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 431-32 (1992).

25. See *United States v. Zolin*, 491 U.S. 554, 570-72 (1989).

26. See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

27. See FED. R. EVID. 407 (as amended Dec. 1, 1997). The new rule makes it clear that the exclusionary provision applies in strict liability cases as well as negligence cases.

28. See FED. R. EVID. 412 (the "rape shield" rule). Though the rule is partly based on the concept that juries may be prejudiced by the evidence — an intrinsic exclusionary principle — it also draws strong support from its goals of encouraging witnesses to report and of protecting them from unnecessary humiliation. See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 568 (1994).



case with authors who present strong themes and a memorable message, Damaška does not cover everything. Other hypotheses about what will change the law of evidence are also attractive. Damaška rationalizes procedural rules by reference to their procedural environment, and makes the benevolent assumption that when their rationales definitively fail, the procedural rules will wither away (p. 142). He may be right, but along the way substantive influences are also likely to have an important impact. They certainly deserve acknowledgment in telling the story of recent changes in American evidence law.

Perhaps recent reforms that have lowered evidentiary barriers succeeded because they encountered three crumbling pillars instead of a solid edifice, but their immediate genesis was substantive, and the effect of the procedural environment was indirect and speculative. Fear of crime and empathy for crime victims have been key substantive influences. These influences account for changes in evidence law that have been adopted by popular initiative as victims' rights measures — from the California "truth-in-evidence" amendments of the 1980s<sup>29</sup> to the recent Oregon initiative calling for all relevant evidence to be admissible against criminal defendants.<sup>30</sup> Along with increased concern for women's rights and for female victims of crime, these substantive influences also account for the recent changes in the character evidence rules that allow prior sex offenses of the defendant to be admitted<sup>31</sup> and that exclude

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29. CAL. CONST. art. I, § 28(d). For an account of the effect of public initiatives on evidence law, see Eleanor Swift, *Does it Matter Who is in Charge of Evidence Law?*, 25 LOYOLA L.A. L. REV. 649 (1992). California's 1982 victims' rights initiative would (under a generous interpretation) have allowed free impeachment of criminal defendants with prior convictions, and would have considerably increased the admissibility of character evidence. The measures were diluted by a combination of restrictive judicial interpretation and legislative retrenchment. See *People v. Ewoldt*, 867 P.2d 757 (1994); *People v. Ballard*, 16 Cal. Rptr. 2d 624 (App. Div. 1993).

30. See OR. CONST. art. I, § 42(f). Provisions that give the victim procedural rights — such as the right to be heard at proceedings in which the defendant might be released from custody — suggest a strengthening of the dispute-resolution, victim-satisfaction model rather than progress towards Damaška's model of the policy-implementing state. For an account of a proposed federal amendment that would give procedural rights to victims in criminal proceedings, see Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997) [hereinafter Mosteller, *Victims' Rights*].

31. FED. R. EVID. 413-415 were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 ("Crime Bill"). Senator Biden, the Senate Judiciary Committee Chair, had opposed Rules 413-415, partly on the grounds that they had not been through the Judicial Conference process, and the rules were dropped from the version of the Crime Bill that emerged from the House-Senate Conference committee. Representative Susan Molinari refused to vote for the larger Crime Bill without those provisions and succeeded in having them reinstated. See Katharine Q. Seelye, *Negotiators Work on Details That Could Save Crime Bill*, N.Y. TIMES, Aug. 20, 1994, at A9; Jill Zuckman, *Negotiators in House Outline Deal on Crime Bill*, BOSTON GLOBE, Aug. 21, 1994, § 2, at 1, available in LEXIS, News Library, Bglobe File; see also *Clinton Finally Gets a Crime Bill*, MINNEAPOLIS STAR TRIB., Aug. 26, 1994, at 1A, available in

evidence about the sexual history of the complainant.<sup>32</sup> There is much to be said for these provisions, but it is hard to pretend that their political genesis lay in a muted weighing of evidentiary considerations. In some instances, the pure and simple desire to increase conviction rates is as strong an explanation.

The substantive influence of crime fear, which has been so powerful in the recent past, is possibly waning now; even the popular media is carrying stories about the decline of crime.<sup>33</sup> So the procedural pillars, strong or cracking, may for a time face only a diminished assault from substantive storms. Even a pig whose house is made of straw will have shelter a while longer if no wolf comes to blow it away.

Though Damaška does not specifically address the impact of popular perceptions about crime, crime victims, and women as crime victims, a belief that these considerations influence evidence law is broadly consistent with his framework. Substantive attempts to aid victims or dampen crime could be seen as examples of an activist state taking a policy-implementing perspective and hence, because the focus on dispute resolution has been relaxed, discarding evidence rules rooted in an adversarial dispute-resolution mentality. Thus, procedural reformers do not see a rape trial as an occasion for adjusting a dispute between the rapist and the victim, but as one in which the safety of women and their willingness to report rape must be broadly guarded. As another example of the triumph of the policy-implementing ideal, one could point to

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LEXIS, News Library, Stribe File. The Crime Bill as enacted contained a proviso that the effective date of Rules 413-415 would be delayed to give the Judicial Conference a chance to respond to them. During the waiting period, the Judicial Conference issued a report opposing Rules 413-415 and recommending no change in existing law; as a second choice, it recommended a flexible approach that would give judges greater power to exclude sex-crime evidence. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 56 *Crim. L. Rep.* (BNA) No. 19, at 2140 (Feb. 15, 1995). The American Bar Association House of Delegates also passed a resolution opposing Rules 413-415. See Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, reprinted in 22 *FORDHAM URB. L.J.* 343 (1995). Congress took no action on these recommendations and the Crime Bill version of Rules 413-415 took effect.

32. See FED. R. EVID. 412. Substantive influences have also played a strong role in the dispute over admissibility of expert testimony about battered women's syndrome. See Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 *DUKE L.J.* 461 (1996) [hereinafter Mosteller, *Syndromes*].

33. For example, see *Major Crimes Drop for 6th Straight Year, Police Report*, CHI. TRIB., Jan. 19, 1998, § 2, at 3; Rene Sanchez, *Nation's Murder Rate at a Low, Other Serious Crimes Down*, WASH. POST, Oct. 5, 1997, at A9; *NBC Nightly News: Drop in Crime Rates Across Country, Including Murder Rates, Attributed Partly to Increased Police Presence* (NBC television broadcast, Dec. 30, 1997); *CBS Morning News: New FBI Figures Show Decline in Crime for the Fifth Year in a Row* (CBS television broadcast, Oct. 6, 1997).

changes in the hearsay rule that aid the prosecution of spousal abuse cases though the victim ceases to cooperate.<sup>34</sup>

Other changes seem to be aimed at helping victims in ways that defy an easy connection to the activist state thesis. In this category one might include statutes giving the victim a stronger role in proceedings, which could be seen as a step away from policy implementation and back to party satisfaction,<sup>35</sup> and rape shield legislation that protects the victim from revelation of sexual history in court, even in situations in which the evidence might be somewhat probative.<sup>36</sup>

On the American scene, the future of evidence law will also be affected by the increasing politicization of procedural rulemaking. Procedural rulemaking will become less and less the province of legal experts. Of course, the judges and lawyers will continue to play a substantial role, both through traditional case-by-case lawmaking, and through expert judge-and-lawyer advisory committees. But legislators and lobbyists will become more influential in shaping evidence law. Even in the arcane field of pretrial civil procedure, the once-prevalent model of apolitical rulemaking — under which an expert elite, free of partisan pressures, promulgated neutral transubstantive rules — is in steep decline.<sup>37</sup> In that context, politicization has shown itself in the activities of interest groups such as court reporters, psychologists, and of course lawyers, who have sought to obtain procedural favors from Congress and from the Advisory Committee.<sup>38</sup> In the evidence context, politicians and their constituents have long been active in the creation of extrinsic rules of exclusion. Privileges have been a subject of state legislation for some time, and of course interested professional groups have had a say in their creation.<sup>39</sup> The making of intrinsic rules, by

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34. See, e.g., CAL. EVID. CODE § 1370 (West Supp. 1998) (providing for admissibility of hearsay evidence in certain circumstances in which evidence describes infliction or threat of physical injury to an unavailable witness).

35. Cf. Mosteller, *Victims' Rights*, *supra* note 30, at 1691.

36. See FED. R. EVID. 412; Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 807, 812-13 (1986).

37. See Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

38. See Mullenix, *supra* note 37, at 840-57.

39. For an interesting account of the professional interest in one privilege, see Justice Scalia's dissenting opinion in *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

Political involvement in evidence rulemaking went beyond the privilege area, however, when, through the joint operation of zeitgeist and bad luck, the Federal Rules of Evidence ended up in Congress. Perhaps because the Supreme Court's Advisory Committee overreached by setting forth detailed and controversial rules about privilege (including executive privilege in the Watergate era), Congress prevented the rules promulgated by the Court in 1973 from going into effect. See 1 WIGMORE ON EVIDENCE § 6.3 (Tillers Rev. 1983). It then proceeded to debate and change not only extrinsic evidence rules, but also some of the intrinsic ones, including the details of hearsay exceptions. Ironically, Congress ultimately decided

contrast, has traditionally been viewed as the prerogative of judges. One would think that, especially as applied to bench trials, the setting of guidelines for fair inference falls in the core of the judicial function. After all, evidence rules deal with the raw materials of adjudicative reasoning, the database that may be used for the factfinder's conclusions.<sup>40</sup>

But Congress and the state legislators have not left even intrinsic rules wholly to judicial rulemaking. The most recent manifestation of Congress's interest was the proposed amendment to Rule 702 in the Common Sense Legal Reforms Act<sup>41</sup> which was introduced in the House as one of the of the ten bills that made up the Republican "Contract With America."<sup>42</sup> Part of a tort reform package, it would have codified *Daubert*<sup>43</sup> in a way aimed at further limiting the admissibility of expert testimony in civil cases.<sup>44</sup> On the state level, legislative interest in the details of intrinsic rules extends from laws dealing with the admissibility of DNA evidence and of expert testimony on battered women's syndrome<sup>45</sup> to tailored

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to dodge the privilege issues and delegate them back to the older process of case-by-case decision. See FED. R. EVID. 501 (instructing courts to use state law and the principles of the common law, considered "in the light of reason and experience").

40. Hence some state supreme courts have suggested that, as a matter of state constitutional law, the separation of powers gives the judiciary the last word on the rules of evidence, whatever the legislature tries to provide. See, e.g., *State v. Larson*, 453 N.W.2d 42, 46 (Minn. 1989).

41. H.R. 10, 104th Cong. § 102 (1995). The House passed the proposed amendment to Rule 702 as part of the Attorney Accountability Act of 1995. H.R. 988, 104th Cong. § 3 (1995). The bill was introduced in the Senate but it was never considered by that body during the 104th Congress. In 1997, the bill was reintroduced and is currently pending in the House. See the Alternative Dispute Resolution and Settlement Encouragement Act, H.R. 903, 105th Cong. § 4 (1997). A similar, though more broadly worded, proposed amendment to Rule 702 was introduced in the Senate and is also currently pending consideration. See Civil Justice Fairness Act of 1997, S. 79, 105th Cong. § 302. For an account of the proposed legislation, see Nancy S. Farrell, Comment, *Congressional Action to Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 13 J. CONTEMP. HEALTH L. & POLY. 523, 543-46 (1997).

42. See *Attorney Accountability: Hearings Before the Subcomm. on Courts and Intellectual Property of the Committee on the Judiciary*, 104th Cong. 15 (1995) [hereinafter *Attorney Accountability Hearings*] (statement of Rep. Ramstad testifying in support of H.R. 10).

43. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

44. Congressman Ramstad remarked to the House Judiciary Subcommittee that H.R. 10 [Common Sense Legal Reforms Act] provides concrete steps to restore efficiency, accountability and fairness to our Federal civil justice system.

Our bill also . . . reforms rule 702 of the Federal Rules of Evidence so that expert testimony is not admissible unless based on scientifically valid reasoning. What we are trying to do here is merely codify the *Daubert* case to exclude junk science. *Attorney Accountability Hearings*, *supra* note 42, at 16-17.

45. See CAL. EVID. CODE § 1107 (West 1995) (providing for the admissibility of expert testimony on battered women's syndrome); Mosteller, *Syndromes*, *supra* note 32, at 484-91. For examples of DNA statutes, see MINN. STAT. ANN. § 634.25 (West Supp. 1998) (making DNA analysis admissible in evidence without antecedent expert testimony that method is trustworthy); MINN. STAT. ANN. § 634.26 ("[S]tatistical population frequency evidence, based

exceptions to the hearsay rule aimed at child abusers<sup>46</sup> and spouse abusers.<sup>47</sup>

Perhaps faith in governance by neutral procedural experts is declining because of a shift in the intellectual climate. Elite rulemaking teams of judges and lawyers may have become victims of the death of Progressivism, of the final triumph of legal realism, or of postmodern skepticism about objectivity.<sup>48</sup> At another level of intellectual climate, it seems likely that popular interest in improvement of the trial process has been fanned by the media. Cameras in the courtroom and media attention to notorious trials have exposed evidentiary rules and practices to public view and encouraged televised debate on topics such as the admissibility of prior rape convictions or the wisdom of the parent-child privilege. Other aspects of the political climate may also have made trial reform attractive to legislators; perhaps an emergent anti-statist, anti-tax consensus has led politicians to look harder for wrongs that can be righted without any budgetary consequence.

Where the involvement of politicians and their constituents in the making of evidence law will lead is unclear; it need not lead to free proof or a more rational system. It may, however, lead away from rules that are of special convenience to lawyers and judges,

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on genetic or blood test results, is admissible to demonstrate the fraction of the population that would have the same combination of genetic markers as was found in a specific human biological specimen.”). The Minnesota Supreme Court had a more conservative approach to the admissibility of DNA statistical population frequency evidence than did the Minnesota legislature, and that difference of opinion, coupled with the court’s view that the separation of powers gave the court the final word on evidence law, caused a curious constitutional confrontation. Frustrated with the court’s unwillingness to follow statutory mandates on the admissibility of DNA testimony, legislators prepared an amendment to the Minnesota Constitution providing that DNA evidence was admissible. See David Shaffer, *High-tech DNA Evidence Spawns Legal Showdown, State High Court Balks on Effort to Ease Rule*, ST. PAUL PIONEER PRESS, Jan. 9, 1994, at 1A. While the amendment was pending, the court capitulated in *State v. Bloom*, 516 N.W.2d 159 (Minn. 1994).

A curious California example of substantive influences on rules limiting the admission of scientific evidence is the “Gotch Bill,” which prohibits use of evidence of live animal experiments in product liability actions involving motor vehicles. See CAL. EVID. CODE § 1159 (West 1995). The sponsor’s aim was to stop General Motors from using live animals in crash tests. See Ralph Frammolino, *Wilson Signs Law Barring GM Animal Test Evidence*, L.A. TIMES, July 15, 1992, at B2.

46. See, e.g., CAL. EVID. CODE § 1228. For a discussion of statutory innovations, see Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691.

47. See CAL. EVID. CODE § 1370 (West Supp. 1998). This provision was enacted partly in response to the court’s exclusion of hearsay evidence of threats, stalking, and physical abuse in the O.J. Simpson case. See *infra* note 53 and accompanying text.

48. By the sentence in text, I mean only to suggest an intellectual climate in which faith in professionalism, expertise, neutral principles, and objectivity may be fading. Cf. Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEXAS L. REV. 929, 940-48 (1983) (book review) (attacking “progressive proceduralism” from viewpoint of trials as theater and political struggle rather than as effort at rational inquiry); Kenneth W. Graham, Jr., *“There’ll Always be an England”: The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1220-22, 1228-34 (1987) (book review) (same).

and toward ones that favor victims, witnesses, or other participants. One might see, for example, a reduction of the power and influence of lawyers in a professionally dear role, that of cross-examination. To the extent that the rulemaking influence of lawyers and judges is reduced, rules like the hearsay rule and the ban on character evidence are in peril. Trial lawyers are the lovers of such rules, treasuring their hard-won knowledge, defending their traditions, and valuing the dominant role that the rules give them.

The joint effects of politicization and of substantive influences could become more potent if criminal rules of evidence become unpacked from civil rules. The transubstantive nature of the rules of evidence and the drafting role of life-tenure judges may have given the rulemakers greater allegiance to a neutral-rationalist ideal, and lessened their concern about the impact of the rules upon particular constituencies.<sup>49</sup> If the criminal and civil rules were separate codes drafted politically, one could easily imagine different rules for expert testimony in criminal and civil cases.<sup>50</sup> Prosecutors might lobby for a more relaxed regime for experts in criminal cases, so that traditional forensic experts could continue to testify despite a shaky scientific basis,<sup>51</sup> while manufacturers might lobby for a rigorous regime in civil cases, to protect them from the depredations of lawyers using "junk science" to show the ill effects of products.

## CONCLUSION

The intrinsic exclusionary rules are in peril, but only partly because of Damaška's three crumbling pillars. The rule against character evidence is likely to be influenced as much by public attitudes

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49. Cf. Paul D. Carrington, *Aim of Mandatory Disclosure Was to Save Judicial Rulemaking*, INSIDE LITIG., May 1994, at 10, 14 ("Capitol Hill is a different kind of place from committee rooms of the U.S. Judicial Conference. One thing you can admire about the life tenure of federal judges is that it does liberate them from a sense of obligation to constituencies. . . . [T]hey are not particularly interested in whose ox is being gored by a particular rule.").

50. Such a division was attempted in H.R. 988, 104th Cong. § 3 (1995), *supra* note 41. See David L. Faigman, *Making the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony*, 35 WASHBURN L.J. 401, 404 n.7 (1996) ("[T]he most outrageously political provision in the Bill [H.R. 988] is section (d), which limits the rigorous review of scientific evidence to civil cases. Since prosecutors are the biggest consumers of science in court, it is not difficult to see the politics behind this provision. In effect, given the values supposedly behind this law, it allows prosecutors to use junk science, while civil litigants must demonstrate valid science.").

51. See, e.g., 2 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE 188-224 (questioning the scientific basis for talker identification); *id.* at 79-123 (handwriting identification). Cf. Michael J. Saks, *What DNA "Fingerprinting" Can Teach the Law about the Rest of Forensic Science*, 13 CARDOZO L. REV. 361 (1991) (proposing that other forensic sciences be subject to the same scrutiny as DNA fingerprinting). The proliferation of civil and criminal forensic experts raises the disturbing prospect that, with the politicization in intrinsic evidentiary rules, these experts will seek and acquire legislative protection from assaults on the admissibility of their expertise.

toward crime as by any change in the three pillars, though of course a deterioration of the pillars could weaken resistance to politically inspired changes in the rules. The rules limiting expert testimony are likely to be more affected by scientization than by changes in the three pillars. The exclusionary barriers may be raised in an attempt to protect against "junk science" while the system readies itself for some of the more drastic changes that are likely to occur if real scientists become regularly involved.

That leaves the hearsay rule. One might expect that an increased use of unitary courts (making it harder to prevent the factfinder from learning the content of excluded statements) and the spreading out of trial proceedings (making it possible to give the opponent of hearsay an opportunity to seek out the declarant or information about the declarant) would lead to further relaxation of the rule. But it is unclear, at least in the United States, that jury trial is really abating,<sup>52</sup> so we will have to await events to see whether unitary trials will dominate. Moreover, hearsay is less vulnerable to tinkering by reformers with substantive agendas because it is hard to foresee which way the hearsay rule will cut — sometimes it helps the prosecution, sometimes the defense, sometimes business, sometimes the consumer. Although the hearsay ban occasionally attracts political attention,<sup>53</sup> usually it is unaffected by sensational trials and changes in public opinion. So trial lawyers will probably retain their influence over the shaping of the rule, and lawyers tend to support the ban on hearsay evidence.<sup>54</sup> It enhances their professional role, glorifying cross-examination and increasing the opportunity for it. At any rate, lawyers of all stripes tend to be procedurally conservative,<sup>55</sup> disfavoring any change in the rules of

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52. See *supra* text accompanying notes 14-19.

53. Consider CAL. EVID. CODE § 1370 (West Supp. 1998), inspired by the O.J. Simpson case. The amendment, expedited legislation that became effective before the Simpson civil trial, was partially a response to the exclusion of Nicole Simpson's diary entries in the criminal trial. The Senate Rules Committee Report stated that there was a "deficiency" in hearsay law and that the "most notable recent examples of this deficiency in California law is the exclusion of hearsay statements made by Nicole Brown to her diary and to others, describing threats and physical abuses by Orenthal Simpson." SENATE RULES COMM., Senate Floor Bill No. AB2068: Committee Analysis (Cal. Aug. 14, 1996) available in LEXIS, Legis Library, Cacomm File; see also 1996 CAL. LEGIS. SERV. 416 (West); William Claiborne, *For Simpson Civil Trial, New Players and New Rules: Away from TV Cameras, Defendant to be Compelled to Testify Before Santa Monica Jury*, WASH. POST, Sept. 16, 1996, at A1 (discussing application of new law on hearsay evidence to Simpson civil trial); Duke Helfand, *Defense Bid to Question Clark, Darden Rejected*, L.A. TIMES, Sept. 5, 1996, at B3.

54. On lawyers as opponents of hearsay change, see Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 67-68 (1987).

55. Bentham put it uncharitably in his continuation of the unfavorable comparison between lawyer factfinders and peasant factfinders: "The peasant wants only to be *taught*, the lawyer to be *untaught*: an operation painful enough, even to ordinary pride, but to pride exalted and hardened by power, altogether unendurable." 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 8 (John S. Mill ed., 1827) (emphasis in original).

the game. The hearsay rule will be with us for a long time to come, perhaps as long as the adversary system itself.<sup>56</sup>

In closing, I wish to add a heartfelt salute to Damaška's graceful English. He complains about being "homeless in a borrowed tongue" (p. x), but he writes with remarkable precision and ease. His use of an adopted tongue may even be an advantage, adding to the originality and freshness of his writing. He conveys a sense of fascination with the language and what it can do. His vocabulary is engaging and educational — I kept my dictionary at my side and learned several new words. The reader will enjoy his metaphors and allusions. He illustrates his points with satisfying concreteness. But most of all, he presents his ideas clearly and effectively, telling a story that holds together in a way that makes it hard to resist.

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56. For a remarkable instance of the emergence of an elaborate hearsay rule with dozens of exceptions in the context of agency determinations in unitary but adversarial proceedings, see Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353 (describing United States Department of Labor evidentiary rules for formal adversarial adjudicatory hearings). So perhaps a relaxed hearsay rule would survive even the final demise of bifurcated proceedings. Concededly, as Professor Graham recognizes, many administrative agencies follow more relaxed rules. *Id.* at 354-55.