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Adrift But Still Clinging to the Wreckage: A Comment on Damaška's *Evidence Law Adrift*

by
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In the introduction to his previous book on the administration of justice in modern states, Professor Damaška described his approach as one of looking at things from the outside, a peregrine from another world.[1] The great advantage of this approach is that it enables broad characteristics and patterns to emerge which had previously been obscured by a narrower and more parochial vision. As Damaška himself has put it, "an insider's eye, englobed by what it observes, must lack the proper point of reference."[2] This time the peregrine has directed his gaze in a more focused direction at the common law rules of evidence, but his approach, as ever, is to shed light by making reference to very different traditions, notably those of continental European evidence law.

I. The Three Institutional Pillars

The result is a masterly explanation of what have been described as those "slapdash, disjointed and inconsequent body of rules" which have come to make up the common law of evidence.[3] In the current skeptical tide it has been fashionable amongst certain evidence scholars to cast the rules of evidence as an unfortunate aberration from a truly rationalist system of free proof.[4] The complex, technical rules of evidence are seen as vain attempts to screen out certain types of evidence from the tribunal of fact and to structure the tribunal's analysis of evidence. What Damaška does is to provide a very plausible justification for these rules within the institutional environment of Anglo-American adjudication. Traditional analysis has focused on two competing theories to explain the common law rules, the lay nature of the tribunal of fact and the prominent role the

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1. MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 14-15 (1986).

2. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 4 (1997).

3. C.P. HARVEY, THE ADVOCATE'S DEVIL 79 (1958).

4. For the influence of the so-called rationalist tradition of free proof on evidence scholarship, see WILLIAM L. TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 32-91 (1990).

parties play in common law procedure.[5] But through a wider lens and from a comparative vantage point, Damaška suggests that there are in fact three institutional pillars supporting common law evidentiary arrangements. What he singles out is not so much the lay character of the tribunal as the bifurcated organization of the trial court and the temporal concentration of proceedings on the trial as well as the prominent role of the parties in legal proceedings.

If these are the pillars which have supported the common law evidentiary edifice, then it must follow that their erosion will lead to a crumbling in the edifice. Accordingly, Damaška develops a further theme of how, over the course of this century, each of the three pillars has shown evident signs of crumbling with the result that the entire evidentiary edifice of the common law has come under threat. So long as the functions of the court were divided between judges and juries, it made sense for judges to screen off certain kinds of unreliable evidence from the jury, but with the decline of the jury and the increased shift towards unitary courts, it becomes almost impossible to do this. Again, when proceedings are concentrated around a single trial, there is a need to limit the database of evidence and to impose some quality control on the evidence presented. As proceedings become more episodic, however, as on the continent, the sources of information can be checked at a number of procedural stages before trial and there is consequently less need for such rigorous controls at trial. Finally, a system in which procedural action is controlled by the parties justifies the need to be particularly skeptical about the information that is presented to the court and the need to impose rigorous testing devices and foundational requirements. Conversely, as the adversary spirit is dissipated by increasing judicial activism in trials, there is greater pressure on the parties to agree on evidence and rely less on the exclusionary rules of evidence.

There is little doubt that throughout this century the cost and complexity of modern litigation have increasingly brought into question the need for fully blown, concentrated trials dominated by the parties, presided over by judges, and decided by juries. Further, as attention has focused away from the trial and toward the pre-trial process, with greater emphasis on managerial judging, there has also been an increasing questioning of the need for the common law rules of evidence. But there remains something of a paradox in that, despite some relaxation of evidentiary restraints, many of the rules of

5. *Compare* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 47, 266, 509 (1898) (expounding the jury theory) *and* E. M. Morgan, *The Jury and the Exclusionary Rules of Evidence,* 4 U. CHI. L. REV. 247 (1937) (expounding the adversarial party theory).

evidence have shown quite a remarkable capacity for endurance, particularly in criminal cases. Sir Rupert Cross, who was once reported to have said that he lived for the day when his subject would be abolished,[6] might be astonished now to know that the latest edition of his famous textbook is almost a third longer than the edition he last edited.[7] In many common law countries, indeed, there has, if anything, been a burgeoning of interest in criminal evidence, with a plethora of texts devoted specifically to the subject.[8]

II. The Endurance of the Rules

A cynic might say that the explanation for this lies simply in the ability of academic lawyers to generate work for themselves. But it would seem to lie more in the process of law reform in the common law world. The common law system of evidence is a "grown" order, not a "made" order, as Ronald Allen has put it, and as such is susceptible to slow, evolutionary change rather than radical "magic bullets."[9] Rules of evidence that have disappeared, such as, to all intents and purposes, the best evidence rule, or more recently the ultimate issue rule, have rarely gone quickly. In an analogy invoked by William Twining, rather like Lewis Carroll's Cheshire Cat, they have appeared and disappeared over a considerable period of time before gradually fading away altogether.[10] What we are witnessing, therefore, is a gradual demise, helped along by statutory law, which in certain cases has spawned as much new case law as it has left behind.[11]

Another feature of the process of evidence reform is that it has too often been governed by lawyers' instincts rather than by hard social science evidence, with the result that anecdote and tradition have taken the place of cold analysis. One example lies in the way in which the rules of evidence have outlasted the decline in the jury.

6. TWINING, *supra* note 4, at 1.

7. *Compare* CROSS ON EVIDENCE (5th ed. 1979) (667 pages) *and* CROSS AND TAPPER ON EVIDENCE (8th ed. 1995) (845 pages).

8. *See, e.g.*, A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE (1989); RICHARD MAY, CRIMINAL EVIDENCE (3d ed. 1995); JOHN SMITH, CRIMINAL EVIDENCE (1995).

9. Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 991, 994 (1996).

10. TWINING, *supra* note 4, at 197.

11. One example has been in the area of hearsay reform. Attempts to reform the hearsay rule in criminal cases have led to a number of statutory changes in England and Wales. The latest attempt which is under further review is to be found in sections 23-26 of the Criminal Justice Act 1988. For the most recent commentary on these provisions, see MURPHY ON EVIDENCE 289-303 (6th ed. 1997). Further changes are now proposed by the Law Commission. *See* THE LAW COMMISSION, LAW COM. NO. 245: EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS 194-204 (1997).

Kenneth Culp Davis pointed out years ago how the legal profession had become fixated with an evidence law which was dominated by the needs of the 3 percent of trials rather by than the remaining 97 percent.[12] In our study of Diplock trials in Northern Ireland, Sean Doran and I mapped in some detail how the absence of the jury quite dramatically changes the context in which the rules operate.[13] Yet little concession is made for this fact in law reform. Discussion still gravitates around the jury trial and lawyers still cling to rules and doctrines which are in practice proving increasingly irrelevant in the absence of the jury.

Time lag can therefore explain the endurance of the rules, but another question is whether the erosion in the institutional pillars of support has been as persistent as Professor Damaška suggests. Damaška himself points to certain countervailing tendencies.[14] The discovery laws in the United States have expanded rather than contracted the volume of material assembled for trial, with the result that trials must continue to have strong mechanisms for evidentiary control;[15] and the sheer volume of litigation can also heighten rather than diminish party control through settlements and plea bargaining before trial.[16] One tendency which is not explored at any length is the continuing and expanding importance given to constitutional protection. The Sixth Amendment to the United States Constitution, section 11(f) of the Canadian Charter of Rights and Freedoms, section 25 of the New Zealand Bill of Rights Act, and section 80 of the Australian Commonwealth Constitution act as brakes on any demise of the jury. The confrontation right in the U.S. Sixth Amendment and the right of cross-examination under Article 6(3)(d) of the European Convention of Human Rights, guaranteeing everyone charged with a criminal offense the right to examine or have examined witnesses against him or her, act as brakes on the diminution of party control, particularly in criminal cases. Even before the British Government's announcement that the European Convention on Human Rights would be incorporated into U.K. law,[17] the English Law Commission proceeded on the principle that any particular measure of reform it proposes should conform with the Convention; in its recent review of the hearsay rule in criminal cases,

12. *See* Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 725 (1964).

13. JOHN D. JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM (1995).

14. *See* DAMAŠKA, *supra* note 2, at 131-34, 141-42.

15. *See id.* at 131-34.

16. *See id.* at 141-42.

17. HOME OFFICE, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL (1997) (white paper).

this acted as a brake on any radical free admissibility approach.[18]

What we see here is a strong counter-balance to any tendency towards diminishing adversariness in criminal cases. Although the European Court of Human Rights straddles civil and common law systems and has always refrained from choosing between the two traditions, it has been increasingly forcing civil law systems to adopt stronger adversarial elements and serving as a break towards the tendency in common law systems to dilute their adversarial tradition.[19] Besides the jurisprudence of the Court and the growing reliance on constitutional protection, however, there remain strong elements within common law systems reinforcing adversary party control, especially in criminal cases. As a result, the rules of evidence continue to endure, especially in these proceedings. As Damaška pointed out almost twenty-five years ago, the imbalance of power between prosecution and defense demands that evidentiary barriers to conviction are erected in order to safeguard the accused.[20]

III. The Adversary Tradition

If the adversary tradition justifies the continued need for evidentiary rules, however, this prompts a deeper question: what is the plausible justification for our adversary practices? The answer, according to Damaška, lies in the Anglo-American image of adjudication, which aims in both civil and criminal cases at resolving conflict between the parties, with the consequence that the parties must be given control over the procedural action and the triers of fact cast in the role of adjudicating neutrally between the two sides. As he puts it, "so long as the image of dispute resolution retains its hold on the Anglo-American legal sensibility, the adversary strand in evidence law will continue to enjoy powerful support."[21]

At this point, however, rational justification seems to come to an end. For it is far from clear why procedures that are driven by the notion of dispute resolution have to take the particular adversarial form of lawyer-dominated, concentrated trials. What *is* clear from Damaška's own account is that when they do take such a form, a heavy price must be paid in terms of accurate outcomes. Although Damaška attempts to find arguments that provide a "protective

18. *See* LAW COMMISSION, *supra* note 11, at Part V.

19. *See* Bert Stuart & James Young, *The European Convention on Human Rights in the Netherlands and the United Kingdom, in* CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 57 (Christopher Harding et al. eds., 1995).

20. Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 507 (1973).

21. DAMAŠKA, *supra* note 2, at 124.

scaffolding" for the common law evidentiary arrangements,[22] there are occasions when his outsider approach succeeds in raising fundamental questions about the foundations on which they rest. Unlike Mersault, the "outsider" in Camus's novel,[23] Damaška never displays any passion or bitterness towards the conventional practices he describes. But he does provide some startling images and metaphors to illustrate how poorly such practices serve as a foundation for rational fact-finding. One of the most striking of these metaphors, which recurs throughout the discussion on the adversary system, is that of a car driving at night illuminating the world by means of two narrow beams.[24] According to Damaška, it is the artificial and formalized method of supplying information through partisan search lights which distinguishes Anglo-American adjudication from the continental procedural tradition and indeed from other extrajudicial inquiries. The effect of this method is that the facts of the case remain heavily skewed towards the destination to which the parties wish to go, with the result that no light is shed on other information which could help provide a more global picture.

This light can be particularly skewed in criminal cases where one side is able to emit a much stronger beam than the other. But the strategy of erecting evidentiary barriers to protect the defense is fraught with difficulties from a truth-finding point of view. If the barriers are too high, guilty persons will be acquitted; if too low, innocent persons will be convicted. The rising concern in a number of jurisdictions about the outcome of many criminal cases—too many innocent persons being convicted and too many guilty persons being acquitted—exposes what a blunt instrument the erection of evidentiary barriers through the use of rules can be. For there are bound to be a number of cases in which the application of the rules will result in the exclusion of probative evidence or, conversely, the inclusion of unreliable evidence.

IV. Forces of Change

If the common law rules of evidence can do no more than curb in a very blunt way the excesses of the parties frantically and self-interestedly working towards a particular result, we are thrown back to questioning the entire adversary framework in which evidence is collected and presented. Are we to be forever in thrall to the adversary tradition? Why indeed, given its truth finding deficiencies, have we been in thrall to such a tradition for so long? If we were

22. *Id.* at 3.
23. ALBERT CAMUS, L'ETRANGER (1942).
24. DAMAŠKA, *supra* note 2, at 92, 100.

presented with the task of building structures of litigation around the notion of dispute resolution, from behind a Rawlsian veil of ignorance,[25] would we really adopt a system of fully blown adversary trials, dominated by lawyers, presided over by judges, and decided by juries? Here we see the limitations of an analytical and interpretive approach which seeks to provide a plausible justification for what has emerged and the strengths of an historical approach which would seek to provide an account of the social and cultural forces which, for example, have enabled the legal profession, and in particular the trial bar, to hold such a monopoly over dispute resolution.[26]

At the end of his book, Damaška suggests that new scientific methods of proof will prove increasingly ill-suited to traditional procedural arrangements and that a wider range of procedural forms will take their place. But can we be so sure that lawyer-dominated procedures which have proved so resistant in the past to rational inquiry should suddenly implode under the pressure of greater use of scientific information? Lawyers who have an interest in retaining a system of party control are unlikely to be eased out of the way by scientists. In her study of the relationship between lawyers and scientists, Carol Jones has shown how in the past the former have tended to win out.[27]

What is missing from Damaška's epilogue is any expression of the tide of public impatience with the traditional methods of dispute resolution which is sweeping through much of the common law world. Adjudication may still be regarded primarily as conflict resolution, but consumer groups, commercial companies, and victims of crime are losing patience with the traditional lawyer-dominated adversary trial. Many are attracted to alternative forms of dispute resolution which are less lawyer dominated. Others are demanding changes to the formal processes: less cost, less delay, and more judicial activism, which in time will result in a different evidentiary framework.[28]

It is difficult to gauge what effect these demands will have. In systems that are grown, not made, we cannot expect any revolutionary change. No imposed solution from the top is ever likely to work. But what can happen from time to time is that a

25. *See* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

26. For an account of the way in which professional groups are able to corner a market and keep other groups out, see ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988).

27. CAROL A.G. JONES, EXPERT WITNESSES: SCIENCE, MEDICINE, AND THE PRACTICE OF LAW (1994).

28. For an example of some of the radical ideas which are being suggested in England, see LORD WOOLF, ACCESS TO JUSTICE: REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996).

particular event can come to epitomize all that is wrong with a particular institution with the result that the institution is never seen in the same light again. Take as an example the remote way in which the British monarchy was seen to respond to the tragic death of Princess Diana, the "people's princess." This seemed to characterize in the people's eyes so much that was wrong with the British monarchy that the British people will probably never again regard their monarchy in the same deferential light. The miscarriages of justice in the cases of the Birmingham Six and the Guildford Four some years ago in Britain may similarly be seen as a watershed in the way in which British legal system came to be regarded. Until that time, the British criminal justice system was believed by many to be the best in the world. Thereafter, however, an "appalling vista" was opened up as it became clear that a number of people had been wrongly convicted.[29] Although the changes proposed by the Royal Commission set up in the wake of these miscarriages did not represent a radical departure away from adversarialism,[30] they did seek to curb its excesses and attempts have since been made to introduce greater judicial activism into the criminal process. It is not for me to say but it may be that the more recent O.J. Simpson trial marked a particular turning point in the way the American public regards its legal system. In all probability, institutions such as the British monarchy and the British and American legal systems will survive in a similar form, but the media, together with public opinion, can increasingly force the pace of change.

The beauty of Damaška's outsider view is that, from his comparative vantage point, he can see more clearly than most just how the objectives of common law adjudication have shaped the procedural environment; this has enabled him to provide a very powerful explanation for the common law rules of evidence. What such a viewpoint is less able to do is to recognize the particular social forces that also drive the way procedures are shaped. We are living in a time of great procedural change, wandering, as Damaška puts it, between two legal worlds, beyond the world where litigation is

29. The phrase "appalling vista" was first used by Lord Denning to describe a situation where the police were guilty of perjury, violence and threats, where confessions were involuntary and improperly admitted, and where convictions were erroneous: McIlkenny v. Chief Constable of the West Midlands [1980] 2 W.L.R. 689. Lord Denning thought such an occurrence was so inconceivable that he struck out a civil action brought by the Birmingham Six against the police officers who obtained their confessions. *See* JOSHUA ROZENBERG, THE SEARCH FOR JUSTICE: AN ANATOMY OF THE LAW 382 n.1 (1994). In fact the very "appalling vista" that Lord Denning considered so improbable was later opened up when the Six won their criminal appeal in 1991. *See id.* at 312-13.

30. ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT Cmt. 2263 (1993). For an exhaustive critique of the Commission's recommendations, see CRIMINAL JUSTICE IN CRISIS (Mike McConville & Lee Bridges eds., 1994).

conducted with the traditional adversary concentrated jury trial as the governing paradigm, but not yet settled into a new paradigm. From his vantage point, Damaška has helped us enormously to see where we are coming from, but it would take a very different kind of "insider knowledge" to tell us where we are going.