



AALS

# AALS Evidence Section Newsletter

spring/summer 2006

## In This Issue

- Message from the Chair, Aviva Orenstein
- Samuel Gross on *Holmes v. South Carolina*
- Craig Callen & John Jackson on the E-journal INTERNATIONAL COMMENTARIES ON EVIDENCE
- Conferences, Listserv's Posting services and more...

Send contributions to the fall/winter 2006 newsletter to:

[csanchir@law.upenn.edu](mailto:csanchir@law.upenn.edu)

## Message from the Chair

Dear Section Members,

I hope you're having a wonderful and productive summer. What follows are the Section's plans for the AALS Conference and my goals for the Evidence Section this year. I would sincerely appreciate your feedback, particularly because, as you will see below, there is still significant opportunity to participate in planning programs and informal events.

### ANNUAL CONFERENCE

This year the Section is sponsoring a number of events at the AALS, which has been moved to Washington, D.C.

### **Evidence Section Panel, Thursday, January 4, 2007 at 4:00, Children and Evidence Law: Special Rules of Competence, Hearsay and Confrontation**

Children raise special issues of reliability and vulnerability that make the tough issues of competence, hearsay and confrontation even more difficult. Our panel will consider how problems posed by children's testimony reflect larger issues in evidence. In turn, it will explore how evidence law's special treatment of children illuminates our understanding of childhood.

Our panel, which offers a multi-disciplinary approach, promises to be terrifically ambitious and rich. Professor David Tanenhaus, a legal historian from UNLV who specializes in children's rights, will talk about historical attitudes towards children's testimony and provide a case study of children on the witness stand. Professor Tom Lyon, a law professor and research psychologist from USC, will discuss his work on children's reactions to threats and abuse, and consider how forfeiture by wrongdoing doctrine might be invigorated in light of *Crawford's* new approach to Sixth-Amendment confrontation. Professor Robert Mosteller from Duke will address the special challenges of, and need for, children's out-of-court statements. He will explore the extent to which these statements are "testimonial," thereby triggering confrontation-clause concerns. As moderator I will make sure to secure ample time for questions and audience

participation.

The *Indiana Law Journal* will publish the papers associated with this panel. There may be room in the *Journal* for responses to the panel (though timing would be very tight). Please let me know if you are interested.

Section Elections will take place immediately after the program.

### **Posters**

I have also registered our section to do Posters at the AALS conference. Section Members should have already received an email from the AALS. My thought was that the posters would be an excellent vehicle for sharing Teaching Tips – summaries of one good class, a useful assignment, or a means of reinforcing a difficult concept. They are also a great way to share scholarly work, though obviously they cannot convey a lot of detail, but would serve more as abstracts to entice viewers to learn more. Poster authors do not make an oral presentation. Instructions for the posters were sent out by the AALS and can also be found at <http://www.law.indiana.edu/webinit/evidence>. I encourage Section members to participate in this low-stress and efficient way to share information about Evidence.

### **Lunch, Friday January 5, 2007 at 12:15**

We have a Section lunch scheduled at the conference. I could not in good conscience encourage you to come for the bland, overpriced fare, but I feel confident in urging you to come meet old friends and greet new Section members. In past years, the lunch has featured lectures by authors of new books or discussions of important cases. I haven't planned the program for lunch yet, so please feel free to email me with ideas ([aorenste@indiana.edu](mailto:aorenste@indiana.edu)). I was toying with asking Mimi Wesson to talk about the exhumation of whomever is buried in Hillmon's grave, but that may not constitute appropriate table conversation.

### **Mentoring/ Schmoozing**

In addition to these formal events, I hope to find time for informal mingling and for fostering opportunities for mentoring. I am particularly interested in encouraging attendance by new evidence scholars and those who are new to teaching evidence.

### **PROPOSAL FOR AN EVIDENCE CONFERENCE**

About every five years, the Evidence Section sponsors a mid-year, three-to-five day conference to discuss evidence developments and teaching strategies. In proposing a conference for June 2007, I noted recent significant developments in evidence law. The proposed conference would provide needed updates, offer fresh teaching techniques, and present a forum for serious substantive discussion. The goal is to inspire new scholars and teachers, and to keep veteran evidence teachers engaged and up-to-date. The full proposal can be found at <http://www.law.indiana.edu/webinit/evidence>.

If the AALS decides to sponsor the conference, it will be selecting a planning committee. As the person proposing the conference, I am ineligible to serve on

the planning committee (I will avoid the grandiosity of any references to Moses at the mountaintop). The planners will formulate the program and select the panelists. If it is approved, there will be much need for participation from Section members. Look for information on our listserv. Thanks to Professor Myrna Rader, who first suggested that I put in a bid for an evidence conference.

## **GOALS FOR THE SECTION**

The following are my goals as Chair of the Section

### **Mentoring New Scholars**

We currently have a mentoring program. I will try to evaluate how it is working and try to improve and expand it.

### **Expanding the Executive Committee**

Currently our executive committee is small. I hope that we can expand it and involve more members. Please let me know if you are interested. Even if we cannot accommodate you this year, we can pass on information concerning your interest to future Section leaders.

### **Encouraging More Section Members to Subscribe to the Listserv**

Those of us who follow the Section Listserv know that it is an excellent source of information and Evidence chat. Participants stay on topic and the level of discussion is generally high. I would like to encourage all Section members to join and to have listserv members announce publications, perhaps with abstracts attached. Information on how to join is provided in this newsletter.

Looking forward to hearing from you and seeing you at the AALS,

*Aviva Orenstein*  
Indiana University School of Law

---

## *Holmes v. South Carolina, 126 S. Ct. 1727 (2006)*

**By Samuel Gross (University of Michigan; [srgross@umich.edu](mailto:srgross@umich.edu))**

Bobby Lee Holmes was convicted of a brutal rape murder and sentenced to death. The only evidence that connected him to the crime was forensic: a palm print, and blood and fiber evidence. (Biological samples taken from the victim for two rape kits were compromised and yielded no identifiable evidence.)

Holmes claimed that the state's forensic evidence was planted and mishandled,

and that the rape and murder were committed by another man, Jimmy McCaw White. At a pre-trial hearing three witnesses testified that they saw White near the victim's house at about the time of the crime, and four others testified that they heard White admit his guilt. White testified at the hearing and denied that he had committed this crime or made the statements to which the defense witnesses had testified. The trial judge excluded all evidence about Jimmy White from Holmes's trial.

The South Carolina Supreme Court upheld the trial court, and the Supreme Court granted cert on the claim that this ruling violated Holmes's Sixth Amendment right to compulsory process, and his due process right to present a defense. (The Court denied cert on a related due process claim: After successfully objecting to all this evidence of White's guilt, the prosecutor argued to the jury, in effect, "If Holmes didn't commit this atrocious crime, who did?")

I filed an amicus brief in support of the defendant on behalf of 40 evidence law professors. We argued that the exclusion of the defendant's evidence violated his Sixth Amendment right to trial by jury. Here's why:

The trial court excluded all testimony about White's admissions as hearsay on the ground that they didn't qualify for the exception for statements against penal interest. (The trial judge then excluded the other evidence about White as insufficiently probative, given that hearsay ruling.) This hearsay ruling was insupportable. For one thing, the exception for statements against penal interest – codified as South Carolina Rule of Evidence (SCRE) 804(b)(3) – had no application to the case since it requires that the witness be unavailable, and White testified at the hearing. More important, the South Carolina rule on inconsistent statements, SCRE 801(d)(1)(A) is broader than its federal counterpart; it excludes from the definition of hearsay *any* statement by a testifying witness that is inconsistent with his testimony. Since White testified and denied involvement in the crime, his prior statements to the contrary were not hearsay under South Carolina law.

The South Carolina Supreme Court ignored the trial court's hearsay ruling entirely. Instead, it affirmed under South Carolina's "third-party-guilt evidence rule," which it modified for the occasion. It upheld the exclusion of the defendant's evidence of innocence because, in its view, the prosecution's evidence of guilt was overwhelming:

[Holmes] simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence.

\*\*\*

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

*State v. Holmes*, 605 S.E.2d 19, 24 (South Carolina, 2004).

That's quite a holding: a criminal defendant is not entitled to present evidence of innocence to his jury if the judge (or in this case, the state supreme court) decides that he is clearly guilty. It's a frontal attack of the right to trial by jury. It's one

thing to exclude evidence because it's unduly prejudicial or has low probative value, or to serve some extrinsic policy. It's quite another to allow a judge (or court) to decide that a defendant is so clearly guilty that he doesn't get to present his defense.

The Supreme Court reversed in a unanimous opinion by Justice Alito, his first. The Court did not address the jury trial issue, although Holmes's attorneys did pick it up in their brief. That might be because the right to jury trial is not mentioned in the question on which cert was granted. More likely it was simply that the Court was not interested in doing more than necessary to knock out the South Carolina precedent. In any event, as one might expect from a unanimous decision, the opinion says relatively little.

The Court held that the exclusion of Holmes's evidence violated his right to present a defense:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

126 S. Ct. 1731, quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). That right is violated by

evidence rules that "infringe upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

*Id.*, quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

If you were hoping this case would define the contours of the right to "a meaningful opportunity to present a complete defense" – sorry. It didn't, unless you think you know what will be considered "arbitrary" and "disproportionate" next time around. But the court did endorse that right again, and it reaffirmed its commitment to the scattering of earlier cases that reversed state-court convictions for exclusion of defense evidence: *Washington v. Texas*, 388 U.S. 14 (1967) (testimony by accomplice); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (evidence of another person's guilt); *Crane v. Kentucky*, 476 U.S. 683 (1986) (circumstances of confession); *Rock v. Arkansas*, 483 U.S. 44, 58, 56 (1987) (hypnotically refreshed testimony by defendant).

*Holmes* could have been decided simply as an application of *Chambers*, except that the Court said in *Chambers* itself, and repeated in *Scheffer*, *supra*, 523 U.S. at 316, that the decision in *Chambers* was limited to "the facts and circumstances" of that case. If nothing else, *Holmes* may remove that unfortunate asterisk from the rule, however vague, if not from the *Chambers* opinion. In fact, *Holmes* was a stronger case for reversal than *Chambers* in two respects. First, *Chambers*' jury did hear a considerable amount of evidence about the other suspect; *Holmes*' jury heard none. Second, the exclusion in *Chambers* was based on rules of general application – Mississippi's hearsay rule, and its prohibition against impeachment by the party that called a witness – while the exclusion in

*Holmes* was based on a special rule for criminal defendants who are determined to be clearly guilty.

Which brings me back to the holding of the South Carolina Supreme Court. Judge Alito points out that in order to conclude, as the South Carolina Supreme Court did, that the evidence against *Holmes* is “overwhelming” a court must evaluate that evidence,

and where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

126 S. Ct. at 1734.

This is a peculiar statement. I would have said that the South Carolina Supreme Court *did* assess the reliability of the state's evidence and found it “overwhelming,” but I don't sit on the Supreme Court. More important, does Alito mean that it would have been *unconstitutional* for a state court to base the exclusion of critical defense evidence on a finding that has “traditionally been reserved for the trier of fact” (i.e., the jury) – to wit, a finding that the defendant is clearly guilty? That was the position of the evidence professors' amicus brief, and one could interpret the Court to agree, by implication. Or does Alito just mean that if state courts want to make this sort of decision they have to do it more explicitly than the South Carolina Supreme did here?

I think he means something in between. I think the intended message is something like this: “Everybody knows that this sort of decision is the core function of criminal juries. So please guys, don't make life hard for us by ignoring such a basic common law rule. If you do, we might have to spell out the constitutional limits on your power to exclude defense evidence, and you wouldn't want us to do that, now would you?”

---

## E-JOURNAL: INTERNATIONAL COMMENTARY ON EVIDENCE

**By Craig Callen (Michigan State) and John Jackson (Queen's University of Belfast)**

In the last two years, with the help of Berkeley Electronic Press, we have revived *International Commentary on Evidence*, an experimental peer-reviewed electronic journal on evidence law and theory. It is on the web at [www.bepress.com/ice](http://www.bepress.com/ice). Members of the Evidence Section have contributed their scholarly work and efforts as referees and editors to help get I.C.E. off the ground. Along with our colleague Sean Doran, we founded the journal to promote scholarly communication about the law of evidence without regard to political or academic boundaries. Each article addresses evidentiary issues of interest in more than one jurisdiction, and, frequently, in disciplines such as

economics, psychology, philosophy and history.

Volume 2, issue 1 focused on *Crawford v. Washington*, with an intriguing paper on *Crawford* from Dale Nance, as well as assessments of *Crawford* from scholars in the UK and Europe, concluding with Frank Herrmann's analysis of *Crawford*'s use of legal history. The next issue included commentaries on a new English evidence text, Paul Roberts and Adrian Zuckerman's *Criminal Evidence* (2004), including essays on hearsay, fact-finding and expert evidence. By the time this is published, I.C.E. should have published another issue. It includes (i) an article by Douglas Walton and Fabrizio Macagno on the use of tools of argument analysis from artificial intelligence to analyze the role of common knowledge in fact-finding, (ii) an essay by Lee Steusser on Canadian law regulating the evidence of experts on flaws in eyewitness testimony, (iii) the work of two Israeli scholars, Doron Menashe and Mutal Shamash, arguing that jurors' tendency to rely on narratives in fact-finding cuts against free proof, and (iv) responses to Menashe and Shamash from Robert Burns and Ronald Allen.

Authors are currently preparing manuscripts for the next issue. To mark the commencement of the first international criminal trials taking place at the International Criminal Court in The Hague, John and Sean have asked a number of experts in the field of international criminal law and evidence to write a short piece on the topic: Can a person facing charges for war crimes or crimes against humanity receive a fair trial on the evidence? The experts include judges and practitioners who have practiced in international criminal tribunals as well as academic experts in the field. We asked the authors to draw upon their own experiences, with reference to their own jurisdictions and to comparative and international examples where appropriate. This issue is scheduled for publication in the fall.

Other projects in preparation include a set of essays inspired by Julian Barnes' novel, *Arthur & George* on the influences of Conan Doyle (or Sherlock Holmes) on our analysis of fact-finding and evidence, Menashe and Shamash's response to commentators, a note or two on recent cases, and a jury study.

The journal welcomes submissions or proposals in any area of evidence law and theory (including inquiries about participation in our ongoing projects such as the war crimes issue and the Conan Doyle/Holmes essays). Electronic publication permits I.C.E. to publish peer-reviewed articles on current topics within weeks of submission. In addition, we hope that people will take more advantage of one of I.C.E.'s relatively unique features, which its electronic format makes possible. Readers who wish to publish responses to articles on I.C.E. can do so within weeks, with an opportunity for rejoinders from authors. The journal's electronic format thus, makes it not only a resource for those interested in the latest academic commentary on specific evidentiary issues, but also a platform for those who wish to engage in an exchange of views on these issues.

In addition, please let us know at [callen@law.msu.edu](mailto:callen@law.msu.edu) or [j.jackson@queens-belfast.ac.uk](mailto:j.jackson@queens-belfast.ac.uk) if you would be willing to serve as a referee. As the journal matures, we find we can always use more help.

---

## Evidence Listserv

To subscribe to the Evidence Listserv send an e-mail message to [listproc@chicagokent.kentlaw.edu](mailto:listproc@chicagokent.kentlaw.edu). The message must be sent in plain text format, not html or rich text. The message should have no subject line. In the body of the message include: “subscribe evid-fac-1 [your first name] [your last name]”. Make sure there is a single space between each word, and do not include the brackets. The Evidence Listserv is maintained by Roger Park (University of California, Hastings; [parkr@uchastings.edu](mailto:parkr@uchastings.edu))

---

## Evidence and Evidentiary Procedure Abstracts

Post and circulate your new work through the EVIDENCE AND EVIDENTIARY PROCEDURE archive and abstracting journal, part of the Social Science Research Network (SSRN). The EvPro archive currently contains 270 papers with 16,800 accumulated downloads. The e-mail abstracting journal, which announces newly posted papers, currently has about 300 subscribers. You can view the current EvPro archive at <http://www.ssrn.com/link/evidence-evidentiary-procedure.html>.

Evidence and Evidentiary Procedure Abstracts provides a forum for posting both completed works and works in progress on issues concerning the processing of information by the legal system. The journal’s scope encompasses the traditional concerns of Evidence scholarship, including hearsay evidence, character evidence, expert witnesses, and privileges. It extends as well to informational aspects of civil and criminal procedure, such as those arising from discovery, investigation, and interrogation. It also reaches forms of nonjudicial fact-finding, including regulatory auditing, legislative hearings, and any other process by which the state gathers information for use in the implementation of law and policy. The journal welcomes a broad range of methodological approaches.

### How to Subscribe

You can subscribe to EvPro by going to [www.ssrn.com](http://www.ssrn.com). You will need to enable cookies on your browser to use the link above. Help is available at 877-SSRNHelp (877.777.6435). Subscription is free for those at institutions that already have a site license with SSRN. This includes most law professors and many professors in other fields. A 6-month trial subscription is free to all.

### How to Post Papers and Acceptance Notices

To post a paper, go to [www.ssrn.com](http://www.ssrn.com) and click on “Submit” at the top of the page. The website will walk you through the process. The posting process is fairly simple the first time, and eventually becomes routine. In any event, help is again available at 877-SSRNHelp.

### How to Classify Previously Posted Papers under EvPro

Go to <http://hq.ssrn.com>. The website will walk you through the process. Help is again available at 877-SSRNHelp. Classifying your paper in Evidence and

Evidentiary Procedure does not remove your paper from other archives.

---

## Interdisciplinary Research Programme at University College London, 2004-7

*Evidence, Inference & Enquiry: Towards an Integrated Science of Evidence*

This programme aims to bring together researchers from a wide variety of academic disciplines to explore similarities and differences in their approaches to evidence. Participating disciplines include Statistics, Law, Economics, Psychology, Education, Medicine, Ancient History, and History and Philosophy of Science. The programme supports several projects addressing specialist disciplinary concerns, while attempting to weave these together into a single integrated whole by emphasising and developing common intellectual ground. The ultimate aim is to develop critical understandings of the nature and uses of evidence, and thereby advance decision-making and risk management across a wide variety of academic and practical activities.

Most activities are fully open to all interested parties. Full details of the programme, and of past and upcoming events, can be found online at <http://www.evidencescience.org> where it is also possible to sign up to an e-mail list for notifications and discussions.

---

## Conferences and Symposia

### **Graphic and Visual Representations of Evidence and Inference in Legal Settings**

January 28-29, 2007, Cardozo Law School, Yeshiva University, 55 Fifth Avenue (5th Ave. & 12th St.), New York (Manhattan), New York. The public is invited. There is no registration fee. (However, there will be a modest charge for any lunches or dinners that attendees elect to take at the site of the conference, Cardozo Law School.) This interdisciplinary conference brings together scholars and practitioners from such fields as law, philosophy, computer science, artificial intelligence, cognitive psychology, and linguistics who are interested in the graphic visualization of legal evidentiary inference and its support by software tools. The following issues will be addressed: Current and new graphical means to visualize factual inference and proof; Semantics of such graphical notations: what are the underlying theories of evidential reasoning? (jurisprudential, philosophical, psychological, rhetorical, logical, or mathematical); Which software tools for graphical representations of factual inference and proof are currently available or being developed?; What are the potential contexts for the use of such software and what are the potential benefits of such software? (crime investigation, litigation, trial, law teaching, etc.); To what extent can graphic representation of evidential arguments support the automatic evaluation of hypotheses?; How can current insights about human-computer interaction be exploited to increase the usefulness of such software? (e.g., how can visual complexity created by the size of the available mass of

evidence be managed?); Are empirical results available on usability and effects of use of charting methods (whether manual or digital) in legal or other contexts?; What are the practical constraints faced by crime investigators or legal professionals who want to use such software?

Conference officials: Peter Tillers (Cardozo Law School): Conference chair e-mail address: [peter@tillers.net](mailto:peter@tillers.net); Henry Prakken (Universiteit Utrecht / University of Groningen): Program chair e-mail address: [henry@cs.uu.nl](mailto:henry@cs.uu.nl); Thomas D. Cobb (University of Washington, Seattle): Deputy program chair e-mail address: [tomcobb@u.washington.edu](mailto:tomcobb@u.washington.edu).

Panelists: Thomas D. Cobb; Philip Dawid; Neal Feigenson; Branden Fitelson; Tim van Gelder; Thomas F. Gordon; John Josephson; Marc Lauritsen; Richard Lempert; Ronald P. Loui; John D. Lowrance; Jennifer Mnookin; Dale Nance; Andrew Palmer (unconfirmed); Priit Parmakson; John L. Pollock; Henry Prakken; Chris Reed; Burkhard Schafer; David Schum; Richard Sherwin; Samuel Solomon; Peter Tillers; William Twining; Bart Verheij; Vern Walker; Douglas Walton.

### **Rules of Evidence: FRE v. CEC**

On February 2-3, 2007, Southwestern Law School in Los Angeles will host a one and one-half day symposium--"Rules of Evidence: FRE v. CEC" -- comparing the provisions of the Federal Rules of Evidence to those of the California Evidence Code in recognition of the fact that the California Bar Exam will henceforth test on the CEC as well as the FRE.

Symposium topics will include hearsay, expert testimony, character/impeachment and relevancy and competence. Participants will include Mark Cammack, David Faigman, George Fisher, Fred Galves, Norman Garland, Victor Gold, Isabelle Gunning, Edward Imwinkelried, David Kaye, David Leonard, Tom Lyon, Miguel Mendez, David Miller, Roger Park, Myrna Raeder, Eileen Scallen, Eleanor Swift, and Gerald Uelman.

Papers from the symposium will be published as a special edition of the Southwestern Law Review. The symposium will be open to the public. Save the date. More details will follow.

---

## **Announcements**

A number of members responded to the invitation to submit announcements and descriptions of new articles and books:

### **Polelle on Dying Declarations post *Crawford***

Prof. Michael Polelle of John Marshall Law School in *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285 (Spring 2006) responds to Justice Scalia's dictum in *Crawford v. Washington*, 541 U.S. 36 (2004) that the hearsay exception of dying declarations may well survive the Sixth Amendment analysis of *Crawford* for unique historical reasons. Polelle

challenges the claim that this hearsay exception was historically the sole exception used against criminal defendants. He traces the flawed scholarship that spawned the claim. Without a credible basis for historical exceptionalism, or even convincing policy reasons to support them, dying declarations must succumb to the same bright-line constitutional logic of Crawford as any other hearsay exception.

Polelle also rejects the argument of those who agree dying declarations flunk the Crawford test but then allow them to be used anyway against criminal defendants because of hyperextended notions of either forfeiture or waiver. The article traces the inadequacy of these notions when attempts are made to base them either on the Federal Rules of Evidence or constitutional waiver doctrine. The article concludes with suggestions for reform that would salvage at least some dying declarations for use against criminal defendants.

### **Nicholas on Federal, Florida and Texas Evidence Rules**

Professor Peter Nicolas, of the University of Washington School of Law, is publishing two books with Aspen Publishers this summer, *FEDERAL AND FLORIDA EVIDENCE RULES* (ISBN 0-7355-6286-5) and *FEDERAL AND TEXAS EVIDENCE RULES* (ISBN 0-7355-6285-7). The books are designed to help both students and practitioners learn the differences between the federal rules of evidence and the rules of evidence in Florida and Texas, respectively.

The books are organized in the same order as are the federal rules of evidence. The full text of each federal rule of evidence is followed by its legislative history, which in turn is followed by the corresponding provision in the Florida or Texas rules of evidence and its legislative history. Following each federal and state rule pairing is detailed commentary explaining the similarities and differences between the federal rule and its state law counterpart, with citations to key federal and state case law.

The books are divided into eleven sections that correspond to the eleven articles of the federal rules of evidence. At the beginning of each section is a correlation table that makes it easy to find the corresponding provision in the state evidence code if you know the federal rule number, and vice versa.

The books can be assigned in class and used in conjunction with any evidence textbook to help students learn the differences between federal and state practice.

### **Davies on False Confession**

The N.Y.U. Review of Law & Social Change has published Sharon Davies' new article, *The Reality of False Confession—Lessons of the Central Park Jogger Case*. The cite is 30 NYU REV. OF LAW & SOCIAL CHANGE 209 (2006).

This article employs the revelations in the Central Park Jogger case to argue that a rethinking of proposals designed to curb the admission of false confessions in criminal prosecutions is warranted.

The article proposes a new gatekeeping role to reduce the corrupting impact of

false confessions on criminal prosecutions. As gatekeepers, trial judges asked to admit confession evidence alleged to be false would perform a role similar to that which federal trial judges presently perform when considering whether trial juries should be subject to the powerful influences of expert evidence. The proposal thus departs from the reforms suggested by criminal procedure scholars in the past in two important ways. First, it looks to evidentiary rather than constitutional norms as the legal bases justifying the reform. This approach, the article argues, dovetails with existing evidentiary rules, has historical support, and is consistent with the Supreme Court's current jurisprudential approach to reliability challenges. Second, the reform proposal is directed at the courtroom instead of the interrogation room. By avoiding making broad changes to standard interrogation practices which yield far more true confessions than false, courts will be able to provide prophylaxis not currently available in only those cases in which a confession is actually alleged to be false.

### **Rozelle promotion**

Susan D. Rozelle has been promoted to Associate Professor at Capital University Law School, and will be a Visiting Associate Professor at Seattle University Law School for the 2006-2007 year.

---

## Contributions to the Fall/Winter 2006 Newsletter

Please send contributions for the fall/winter 2006 newsletter to Chris Sanchirico (University of Pennsylvania; [csanchir@law.upenn.edu](mailto:csanchir@law.upenn.edu))