



AALS

AALS Evidence Section Newsletter

Fall / Winter 2008

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Send contributions for the Spring / Summer 2009 newsletter to:

Ed Cheng, Secretary
<edward.cheng@brooklaw.edu>

Message from the Chair

Dear Section Members,

I have three brief but important messages for you.

1. WIGMORE LIFETIME ACHIEVEMENT AWARD

First, I am delighted to announce that Margaret Berger has been awarded the Section's Wigmore Lifetime Achievement Award for 2009. We will be honoring Margaret and presenting the award at our Section luncheon at the AALS meeting in San Diego. The luncheon is from 12:15-1:30pm on January 9th. Thanks to the many section members who put forward a host of excellent nominations, and to the Officers and Executive Committee who considered the nominees and voted on the award.

2. ANNUAL CONFERENCE—January 6-10, 2009, San Diego, California

The annual AALS meeting is almost upon us. You can view the full program and register at www.aals.org/am2009/

Our section is sponsoring two events at the meeting: a Friday luncheon, as mentioned above, followed immediately by a Section panel.

EVIDENCE SECTION PANEL

Friday, January 9, 2009 at 1:30-3:15pm,

Evidentiary Foul Play: Deception, Destruction, and Just Deserts

Judges and practitioners report that evidentiary foul play is commonplace. Documents that should be produced in response to a discovery request are regularly shredded, altered, or suppressed. Witnesses frequently lie to investigators, deponents, and courts. Fact finders are routinely misled by the fabrication and destruction of evidence. Explicit academic analysis of evidentiary misbehavior, however, is relatively uncommon. Such considerations often do play a background role in the analysis of well studied rules, such as those concerning hearsay, the Confrontation right, and the privilege against self-incrimination. But the need remains for a well developed and well connected literature that directly and comprehensively explores the delineation,

discouragement, and punishment of evidentiary misdeeds. This Program is an attempt to aid in the development of such a literature. Papers will touch on a diverse array of topics, but all will be centered on the question: how and to what extent should the law discourage and punish evidentiary foul play?

Section elections and other section business will take place immediately after the program.

SECTION LUNCHEON
Friday, January 9, 2009 at 12:15-1:30pm

At our Section luncheon, which immediately precedes our Section panel, we will present the Wigmore Award to Margaret Berger. The luncheon will also be a great opportunity to chat with fellow Section members in a more casual atmosphere.

3. MIDYEAR CONFERENCE

Lastly, I am pleased to report that our midyear conference on “The Future of Evidence: How Science and Technology Are Changing Evidence Law” was a great success. Thanks again to Eleanor Swift and her program committee for putting together a terrific event.

Looking forward to seeing you all at the annual meeting.

Chris Sanchirico

University of Pennsylvania

Osborne and the Right to Post-Conviction DNA Testing

David H. Kaye
Arizona State University College of Law
kaye@alum.mit.edu

The Supreme Court will consider whether an individual convicted of a crime has a constitutional right to obtain a DNA sample that might exonerate him. The case that raises this issue has produced four appellate opinions so far. The one that the Supreme Court will review is *Osborne v. District Attorney's Office for Third Judicial District*, 521 F.3d 1118 (9th Cir. 2008).

The case began in 1994 with a vicious attack on a prostitute. The evidence that led to William Osborne’s conviction included semen from a condom that was analyzed with a relatively unrevealing form of DNA testing. While pursuing

other avenues of relief, Osborne filed an action in federal district court under a civil rights statute, 42 U.S.C. § 1983, to force state officials to give him the biological material for more modern DNA testing. Unlike most other states, Alaska has no statute specifically prescribing the conditions under which prisoners can obtain post-conviction DNA testing. After some twists and turns, the district court decided that Osborne had a “limited” due process right to the sample.

The Ninth Circuit affirmed, emphasizing that the crime-scene DNA sample had been introduced at trial as evidence against him, that more definitive testing now is available at no cost to the state, and that Osborne could use an exculpatory finding to obtain post-conviction relief. Although the state of Alaska contends that the Ninth Circuit “created from whole cloth” a new constitutional right, other courts have found that such a constitutional right exists. E.g., *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006); *McKithen v. Brown*, 565 F.Supp.2d 440 (E.D.N.Y. 2008).

Although Osborne has been pursuing state habeas corpus relief, he has yet to seek federal post-conviction relief. Given the many limitations of federal habeas corpus and the state court decisions to date, it may be that the only avenues that remain open to him are executive clemency and state or federal relief on the theory that a prisoner has a “freestanding” right to be released because he can show that, despite a fair trial unblemished by any prejudicial errors, he is actually innocent. In *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court recognized that such a right *might* exist, but the Court determined that even if it did, the proof of actual innocence in that case did not satisfy the “extraordinarily high ... threshold for any hypothetical freestanding innocence claim.” *Id.* at 555.

Although a new DNA finding excluding Osborne as the source of the crime-scene DNA would be powerful evidence of actual innocence, the Ninth Circuit conceded that it would not be “conclusive.” As in *House*, therefore, the Court conceivably could avoid resolving the “freestanding right” issue by characterizing the evidence here as falling short of the vague, “extraordinarily high” threshold. It also could avoid this question by finding a right of access to DNA evidence just because the evidence would provide support for a petition for a pardon—an issue that the Ninth Circuit chose not to consider. Finally, it could avoid all these issues by holding, as Alaska argued, that a federal court should not issue what is, in effect, a discovery order against the state outside of an actual post-conviction proceeding.

In contrast, unless the Court were to pin the right of access to new testing to executive clemency rather than a judicial proceeding, Osborne cannot prevail unless he establishes two things. First, the Court must agree that regardless of how fair Osborne’s trial may have been, he has a constitutional right to be released if he is factually innocent. Second, he must persuade the Justices that access to the DNA samples would be reasonably likely to produce sufficient evidence of his actual innocence.

In short, this complex case will produce new law about federal rights to DNA testing, but the opinion that emerges could be anything from a narrow,

procedural loss to a sweeping constitutional victory for Osborne, with plenty of permutations in the middle.

© 2008 D.H. Kaye. Thanks to Andrew Hessick for looking at a draft of this posting and to Ira Ellman, Carissa Hessick, and Carrie Sperling for listening to me blabber about some of the issues noted here.

General Announcement

On-Line Materials from the AALS Mid-Year Evidence Conference

Eleanor Swift
University of California, Berkeley (Boalt Hall)
eswift@law.berkeley.edu

Following our successful Evidence Conference from June 4-6 in Cleveland, conference presenters were asked to submit their materials (outlines and slides) for posting on the AALS Conference Website. These materials can be enormously helpful to Evidence Section members. Many presenters did respond, and these materials may be viewed at http://www.aals.org/events_2008evidenceprogram.php

Additional materials may still be posted. If you made a presentation, please send your outlines, slides etc. to Mary Cullen at MCULLEN@aals.org

Many thanks to all of you for making the Conference a memorable event!

Conference Announcement

Forensic Science for the 21st Century: The National Academy of Sciences Report and Beyond

David H. Kaye
Arizona State University College of Law
kaye@alum.mit.edu

The ASU Center for the Study of Law, Science, and Technology at the Sandra Day O'Connor College of Law will hold an international conference on April 3-4 in Tempe, Arizona, on the future of forensic science, with special attention to the highly anticipated report of the U.S. National Academy of Sciences on Identifying the Needs of the Forensic Sciences Community. Cosponsors are the National Judicial College and sections of the American Bar Association.

In addition to the usual suspects from legal academia (e.g., faculty at ASU, Berkeley, Harvard, Irvine, Michigan, Virginia, etc.), participants will include state and federal judges, the NAS committee chairmen, the president of the American Association of Forensic Sciences, directors of the FBI laboratory and the Innocence Project, and prosecutors, defense attorneys, forensic scientists, and criminalists. Papers will be published in the ABA-ASU journal, *Jurimetrics: The Journal of Law, Science, and Technology* and in the Oxford University Press journal, *Law, Probability & Risk*.

A conference website with more detailed information is being established. Questions also can be directed to the conference organizers: David Kaye, Jay Koehler, and Michael Saks.

Book Announcement

Federal Rules of Evidence Summary Trial Guide

William R. Eleazer

Stetson University College of Law

wreleazer@verizon.net

The 2009 Edition of the *Federal Rules of Evidence Summary Trial Guide* is now available from Elex Publishers, Inc. The guide sells for \$10.00 but law professors receive a 50% discount when ordering by e-mail. Full description and info for ordering, plus list of state evidence guides that are available, can be found at www.elexpublishers.com.

Book Announcement

Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska

Edited by

John Jackson, Queen's University Belfast

Maximo Langer, University of California, Los Angeles

Peter Tillers, Cardozo School of Law, Yeshiva University

Studies in International and Comparative Criminal Law - no. 3
Hart Publishing. October 2008. Pp. 372. \$115.00.

This book aims to honour the work of Professor Mirjan Damaška, Sterling Professor of Law at Yale Law School and a prominent authority for many years in the fields of comparative law, procedural law, evidence, international criminal law and continental legal history. Professor Damaška's work is renowned for providing new frameworks for understanding different legal traditions. To

celebrate the depth and richness of his work and discuss its implications for the future, the editors have brought together an impressive range of leading scholars from different jurisdictions in the fields of comparative and international law, evidence and legal theory. Using Professor Damaška's work as a backdrop, the essays make a substantial contribution to the development of comparative law, procedure and evidence. After an introduction by the editors and a tribute by Harold Koh, Dean of Yale Law School, the book is divided into three parts. The first part explores a number of insights from Professor Damaška's work in the fields of evidence, criminal law and legal theory. The second part considers contemporary trends in national and international criminal procedure, examining both the extent to which these are resulting in converging practices across national jurisdictions and the growing importance of international criminal law. The final part of the book assesses Professor Damaška's contribution to comparative law and the challenges faced by comparative law in the twenty first century.

Journal Issue Announcement

2008 AALS Evidence Section Program

D. Michael Risinger
Seton Hall Law School
risingmi@shu.edu

Volume 38 Number 3 of the *Seton Hall Law Review* features the 2008 Program of the AALS Section on Evidence. The issue contains the introduction to the Wigmore Awards to Judge Jack Weinstein and William Twining by Margaret Berger and Peter Tillers, as well as the addresses of the awardees. In addition, the issue also includes articles from the Section Panel entitled *Guilt vs. Guiltiness: Are the Right Rules for Trying Factual Innocence Inevitably the Wrong Rules for Trying Culpability?* Contributors include Michael Risinger (Seton Hall), Keith Findley (Wisconsin), Eleanor Swift (Berkeley), Christopher Slobogin (Florida), Ed Imwinkelried (UC Davis), and Susan Haack (Miami)

Journal Issue Announcement

Daubert, Innocence and the Future of Forensic Science

Tamara Piety
University of Tulsa College of Law
tamara-piety@utulsa.edu

Volume 43 Number 2 of the *Tulsa Law Review* (Winter 2007) features the program from the Tulsa conference on *Daubert, Innocence and the Future of Forensic Science*. The issue includes contributions from Erica Beecher-Monas (Wayne State), Simon Cole (UC Irvine), Michael Risinger (Seton Hall), Michael Saks (Arizona State), and an Introduction by Jane Campbell Moriarty (Akron)

Section Member News

- **Henry Noyes** (Chapman) has posted a draft article on SSRN entitled “Federal Rule of Evidence 502: Stirring The State Law of Privilege and Professional Responsibility with A Federal Stick” (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273325).

Professor Noyes identifies and discusses serious questions regarding the constitutional authority of Congress to enact Rule 502 and numerous practical and constitutional problems that may arise when applying the rule.

This work in progress was selected by the AALS Section on Litigation from a "Call for Papers" for presentation at the AALS Annual Meeting in San Diego. Professor Noyes will be presenting the paper at the Section on Litigation meeting from 8:30-10:15 a.m. on January 8, 2009. He welcomes your comments now and at the meeting.

Joining the Evidence Listserv

To subscribe to the Evidence Listserv send an e-mail message to **Roger Park** (Hastings) at parkr@uchastings.edu. Please include your faculty position and school.

SSRN's EVIDENCE AND EVIDENTIARY PROCEDURE ABSTRACTS

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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.

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AALS Section on Evidence (2008)

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Contributions to the Spring / Summer 2009 Newsletter

Please send contributions for the Fall/Winter 2008 newsletter to Ed Cheng at edward.cheng@brooklaw.edu.