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Article 1

Introductory Remarks

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SYMPOSIUM ON THE EMERGING ISSUES IN THE RULES OF EVIDENCE: FEDERAL AND NEW YORK

INTRODUCTORY REMARKS

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This volume of the *St. John's Journal of Legal Commentary* is a symposium on the law of evidence. At the turn of the 20th century, a student of Professor John Chipman Gray at Harvard Law School noted that Professor Gray warned his evidence class that "[n]o branch of law lends itself more easily to philosophical inquiries or subtlety of distinctions."[1] Since the Federal Rules of Evidence went into effect in 1975, they have proven a fertile ground for disagreement in philosophy and subtle distinction.[2] In the con-

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1 JOHN M. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 2 (1947).

2 Pursuant to Congress's delegation of power, the Supreme Court was empowered to establish rules of evidence in the federal courts that would take effect after Supreme Court approval. *See* 28 U.S.C. § 2072(a) (1988). On November 20, 1972, the Supreme Court approved the Federal Rules of Evidence and provided that the Rules become effective that July. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N.

tinuing spirit of philosophical inquiries and subtle distinctions, the Supreme Court in the last days of June 1993, decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] and *St. Mary's Honor Center v. Hicks.*[4]

Under *Daubert*, judges have the substantial role of "gatekeeper." The judge's role as gatekeeper in jury trials is to protect the jury from being sidetracked by unreliable, immaterial, or irrelevant evidence.

> The temptation to give utterance to faulty conclusions, to conclusions based on faulty premises, to conclusions which are merely intuitive, that inordinate desire to hear one's self talk which the Romans styled the "*Cacoethes loquendi*," all these had to be passed under censorial treatment before the tribunal could possibly mete out justice. The earliest judges must have been impressed with the stringent necessity of making a distinction in the mode of recounting past events between the gossip of neighbors, however interesting, and the solemn assertion under oath of events affecting the life and liberty of the subject.[5]

The aspiration of a law review should be to serve some purpose beyond a forum for publication, although at least one person has suggested that this is a "revolutionary proposal."[6] I am told that the editors of this volume have attempted to prepare a useful volume. Only time will demonstrate their success or failure.

The first three articles in this issue discuss the *Daubert* decision. Professor Edward Imwinkelried, whose views were cited in

7051-52. Nonetheless, Congress had some philosophical differences and thus suspended the Rules effective date until it had the chance to make its changes. *See* Pub. L. No. 93-12, 87 Stat. 9 (1973).

After revisions were made in the Senate and House, President Gerald Ford signed the "Conference Draft" on February 2, 1975, to take effect July 1, 1975, which would apply the Rules to all cases except those already filed where application "would not be feasible, or would work injustice . . . ." *See* Pub. L. No. 93-595, 88 Stat. 1926 (1975), *reprinted in* 1974 U.S.C.C.A.N. 2215. Still, philosophical differences and subtle distinctions are evident even in these early stages. For example, the House version of Rule 801(d)(1)(C) was compromised in committee for fear that "it would face extended discussion during the Senate debate." *See* H.R. REP. No. 355, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1092-93. However, by October of 1975, the Senate became convinced of the wisdom of the House version and the Rule was changed. *Id.*

[3] 113 S. Ct. 2786 (1993).

[4] 113 S. Ct. 2742 (1993).

[5] 1 BURREL W. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 2(1) (Horowitz rev. 1913).

[6] James C. Raymond, *Editing Law Reviews: Some Practical Suggestions and a Moderately Revolutionary Proposal*, 12 PEPP. L. REV. 371, 378 (1985).

the Court's decision, argues that had the Court ruled otherwise in *Daubert*, it would have distorted the balance among Articles II, VII, and VIII of the Rules. Next, Ronald Simon, signatory of an amicus brief in the case, deconstructs the decision and suggests the strategies and arguments litigants will now use to implement the Court's decision. Finally, Robert F. Magill, Jr., addresses the evolution of the Learned Treatise Exception in Rule 803(18), including its use in films and articles in industry publications. He concludes by examining what effect the *Daubert* decision may have on admissibility under this rule.

The next two articles discuss the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*. Mark Schuman thoroughly traces the Supreme Court's decisions from *McDonnell Douglas Corp. v. Green*[7] through *United States Postal Service Board of Governors v. Aikens*,[8] climaxing with the apparent contradictions in the Court's opinions. He shows the danger in abbreviating terms of art, such as "burden of proof" and "pretext for discrimination" to "burden" and "pretext." The former have one accepted meaning, the latter many. He proceeds to analyze *Hicks* and its practical effect on employment discrimination litigation, concluding with a thorough and controversial discussion of the political implications of the *Hicks* decision. The next article discusses the different approaches to limitations on damage awards in employment discrimination cases when after-acquired evidence is used to mitigate damages or to eliminate liability altogether. Robert A. Richardson argues that after-acquired evidence should not be used at all; alternatively, the employer should carry the burden of persuasion as to its effect on the mitigation of damages.

In the next article, Professor Victor Gold discusses how civil unrest and racial motivations taint jury verdicts. The author argues that, although a strong public policy of finality in jury verdicts is codified in Federal Rule of Evidence 606(b), an even stronger policy against corruption of the decision-making process is best served if an exception is made to allow a juror to testify to racial bias (and presumably civil unrest) in the decision-making process. In the final article, Professor James Fagan discusses the use of photographs in criminal trials in New York noting that the New

[7] 411 U.S. 792 (1973).
[8] 460 U.S. 711 (1983).

York Court of Appeals has reestablished a liberal standard of admissibility. He argues, however, that this standard violates the due process clause of the New York state constitution because it allows for the admission of photographs that prey on the inchoate fears of the jury, thereby depriving the defendant of a fair trial.

Student notes discuss the exclusionary rule in New York; the parent-child and reporter's privilege; the act of production and the Fifth Amendment; impeachment; and prior consistent statements. The student section of the issue concludes with a compendium of the New York law of evidence.

Unhappily, the efforts to establish codified rules of evidence in New York are indefinitely stalled. The lack of a code certainly complicates the task of collecting the New York Law of Evidence in one place. The authors have made a major start in the right direction.