The Justinian

Volume 1980
Issue 6 *November*

Article 1

1980

The Justinian

Follow this and additional works at: https://brooklynworks.brooklaw.edu/justinian

Recommended Citation
(1980) "The Justinian," *The Justinian*: Vol. 1980 : Iss. 6 , Article 1.
Available at: https://brooklynworks.brooklaw.edu/justinian/vol1980/iss6/1

This Article is brought to you for free and open access by the Special Collections at BrooklynWorks. It has been accepted for inclusion in The Justinian by an authorized editor of BrooklynWorks.

Justinian

VOL. XLI Wednesday, November 26, 1980 No. 3

SYMPOSIUM ON PROPOSED CODE A HUGE SUCCESS

By Stephen Bury

A Symposium on New York's Proposed Code of Evidence was held on Saturday, November 15, 1980, at Brooklyn Law School under the sponsorship of the Brooklyn Law Review. A panel, which was composed of several of the Code's draftsmen and three commentators, examined the effects which adoption of the Code will have upon the common-law rules of evidence now in use in the state. The program was well-attended by members of the local legal community, as well as by numerous BLS alumni and students.

After opening commentary by Brooklyn Prof. Richard T. Farrell, the program's moderator, the proposed changes to be made in the area of hearsay evidence under the Code were summarized by Jerome Prince, Dean Emeritus of the Law School and one of the Code's primary architects. Under ‡ 801 of the Code (hereafter designated NYCE), non-assertive conduct does not fall into the hearsay category. If a declarant's statement at a trial or hearing have been subject to cross-examination, statements inconsistent with a witness' testimony, consistent with testimony but offered as a rebuttal to a charge of recent fabrication, or used for purposes of identification are not hearsay. These are major changes in existing New York law.

—statements "describing or explaining an event or impression made while the declarant was perceiving the event or condition, or immediately thereafter"; this exception is new to New York law.

—"excited utterances" made while the witness was under the stress of an event or condition; this exception is currently known as a "spontaneous declaration".

—statements concerning the declarant's mental, physical, or emotional condition; these are currently admissible only when made to an attending physician.

—statements of medical history or past pain and suffering; these are presently inadmissible.

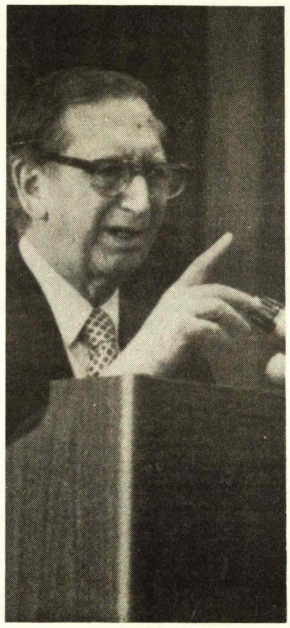
—statements which were recalled by a written or otherwise recorded means of refreshing declarant's memory.

—records of a business.

Statements made by an agent or employee within the scope of the agency relationship, or by a co-conspirator in the course of furthering a criminal conspiracy, also fall outside the limits of hearsay under the NYCE. Privity is rejected as a basis for admissibility under § 801.

These and other changes in existing law which have been proposed by NYCE were justified by Dean Prince in an earlier interview. "The direction of the Code is toward admissibility, with the theory being that evidence should not be excluded unless strong policy considerations warrant it," said Prince. The Dean went on to say that eventual passage of the Code into law is probable, as "the last public hearing thus far scheduled is in December. The plan is to introduce a finalized draft of the bill through the Law Revision Commission sometime in 1981, as an optimistic guess, but (the NYCE) would probably not go into effect until 1982. There are no constitutional objections, but certain groups will oppose changes." As an example of such opposition, Dean Prince cited the objections of surrogates to the proposed repeal of the Dead Man's Statute.

The next speaker, Prof. Peter J. O'Connor of Fordham University School of Law, continued the morning session of the Symposium by outlining the principal exceptions to the hearsay rule under the Code. Under NYCE § 803, the following statements are not excluded as hearsay, regardless of the witness' availability (as defined in § 804):



Former testimony of a witness will also be admissible if the Proposed Code is adopted. NYCE § 804 sets out grounds for a witness' unavailability, including privilege, refusal to testify, lapse of memory, death, illness, or absence from a given jurisdiction. Finally, dying declarations will be admissible in all cases (currently such statements are admissible only in homicide cases), so long as the declarant was making the statement under belief of impending death.

Prof. Travis H. D. Lewin of Syracuse University College of Law, one of the consultants to the Law Revision Commission on NYCE, closed the morning session by outlining the rules of evidence which will pertain to witnesses under NYCE. § 607 of the Code will permit impeachment of one's own witness, via reliance on the Federal rule set forth in *United States v. Morlang,* 531 F.2d 183 (4th Cir. 1975).

§ 608-609 of the Code will permit character testimony based on the witness' opinion, and impeachment of a witness by the introduction into evidence of his past criminal record. § 611 greatly broadens the permissible scope of cross-examination by permitting an attorney to examine any issue raised in the proceedings, rather than restricting the line of questioning to the "scope of direct examination" rule. In the event that a witness makes an inconsistent statement, an attorney may prove such inconsistency before permitting the witness to explain or deny such a statement. (The requirement that a witness be given a chance to explain inconsistencies must be met at some point, however.) NYCE § 613 codifies these expansions in the existing law.

Commentary throughout the morning session was provided by the Hon. Bernard S. Meyer, Associate Judge on the New York Court of Appeals, and Mr. Robert Pitler, the Chief of the Appeals Bureau of the New York County District Attorney's Office. Judge Meyer's observations were supportive of the changes to be effected by the Proposed Code, and offered the opinion that careful judicial scrutiny of the new rules would render them effective. On the other hand, Mr. Pitler raised some eyebrows in the audience with his sharp criticism of Code limitations to be imposed on the prosecution in criminal cases which would extend benefits to the defendant. He questioned the liberalization of existing rules of evidence, particularly via NYCE § 807, which bars identification of a criminal defendant through police sketches or photographs.

Asked later if his criticism of the Code had been too open or biting, Mr. Pitler stated, "I think you'll find a lot of defense lawyers objecting to the Code also." He questioned the sudden change in established rules of evidence, adding, "I think you'll find a lot of defense lawyers objecting to the Code also." He questioned the sudden change in established rules of evidence, adding, "My major objection is that there's no rush . . . This should not be rushed through without consulting others in the state." Pitler also indicated that the Manhattan D.A.'s office had recently formed an 18-member panel of trial lawyers to examine the NYCE, and that the panel's 140-page report would be submitted to the Law Revision Commission on November 19. While Mr. Pitler did not elaborate on the panel's findings, he seemed to indicate that there were major objections to the liberal trend suggested by the Proposed Code.

The afternoon session of the Symposium opened with a presentation by Prof. Michael Martin of Fordham University School of Law on the scope of privileges to be extended under th enew Code. He emphasized that the New York statutory enactments would provide greater uniformity with the current Federal Rules of Evidence, enabling a New York lawyer to employ basically the same rules in state courts as in Federal court.

The Code retains the privileges enumerated in the CPLR currently in effect. the husband/wife, attorney/client, medical professional/patient, and social worker/client relationships will continue to enjoy protection in the courts, as well as the privileges developed in case law (trade secrets, political vote, informant's identity, and government information outside the public domain.)

§ 501 of the NYCE specifically prohibits judicial extension of new privileges, but protects constitutional and other privileges developed by statute, and permits a court to extend privilege to a specific statement or document. This change removes establishment of privilege via precedent, from the courts and places the granting of privilege solely in the hands of legislators.

In order to protect a defendant's right of privacy, the Code authorizes the extension of privilege to relationships where the defendant believed the attorney or health care professional to be authorized to practice. In the same vein, the Code makes eavesdropper evidence inadmissible, unless such information was obtained within a marital relationship and was not protected by the interspousal privilege. The same rights of privacy are not accorded to corporate entities, however, nor to officers of public agencies.

Within the husband/wife privilege, however, there is nothing specific stated on the incompetency of one spouse to testify against the other. With this omission, the Code takes cognizance of the decision in *Trammel v. United States,* 100 S.Ct. 906 (1980), which limited the application of interspousal privileges. This is new to New York law, which previously accorded privilege to such testimony.

As to the issue of disclosure of an informant's identity, § 510 (b) (2) of the Code provides that a judge in camera should examine the informer's testimony to decide if such disclosure should be made. If the informer can give testimony on the merits of a case but is unavailable, the charges against a defendant in a criminal case are to be dropped. This alters the current New York law, to be found in *People v. Goggins,* 34 N.Y. 2d 163, 168-69, cert. denied 419 U.S. 1012 (1974).

Privilege may be waived by voluntary disclosure under NYCE § 512. An admission which was privileged is treated as a voluntary disclosure if made under cross-examination, per NYC § 513.

If a privilege is claimed, particularly to avoid self-incrimination, no inferences may be drawn from such a claim, per NYCE § 514. A jury must be so instructed. However, other witnesses are permitted to comment on such a claim, following the holding in *Marine Midland Bank v. Russo,* 50 N.Y. 2d 31, 42-43 (1980).

Prof. Thomas F. Shea of St. John's University School of Law presented the topic of circumstantial evidence under NYCE. Few changes have been made in the area of introducing character evidence into a criminal trial. However, evidence of a victim's violent character may be introduced to support a claim of self-denfense by the defendant, even if such a trait was not known to the defendant at the time of the alleged offense, per NYCE § 404. The same latitude is not extended to evidence of a victim's unchastity in rape cases; the existing law prohibiting evidence of past sexual conduct of the victim has been retained under the Code, § 412, with the already existing exception that a prior conviction for prostitution is admissible circumstantial evidence.

Unlike present law, the Code permits a witness' inferences drawn from observation of the habits of another. § 406 allows such inference to be drawn from several instances of the same behavior, or from the opinion of the witness himself. Habit is carefully distinguished from character trait; the former is admissible, whereas a statement on the latter is inadmissible.

Professor Margaret A. Berger, Brooklyn Law School and a visiting professor at Harvard University School of Law, provided commentary throughout the afternoon session. The Symposium was closed by a brief review of the best evidence rule under the Code, which was conducted by the Project Director for NYCE, Associate Dean Robert A. Barker of Albany Law School.

The future of the Proposed Code will soon rest with the Law Revision Commission and the State Legislature. Its passage appears likely, but there will no doubt be opposition from various sectors of the state's legal community. The Symposium outlined these areas of debate, and hopefully provided its audience with a sharper view of the changes which may soon occur in the field of evidence. As Dean Prince stated, "It's a very lively and important topic."

* * *

(The author wishes to thank Jerome Prince, Dean Emeritus of Brooklyn Law School, and Philip Levy.

Justinian

Published under the auspices of the Student Bar Association
BROOKLYN LAW SCHOOL
250 Joralemon Street, Brooklyn, NY 11201
Telephone: (212 625-2200)

Editor-in-Chief ..... Lisa Printz
Managing Editor ..... Stephen Bury
Production Editor ..... Debbie Henkin
News Editor ..... Martin Kleinman
Entertainment Editor ..... Barry J. Fisher
Advertising Manager ..... Julian Singer

STAFF
Jane Huseman, Steven Kaplan, Larry Kelly, Diane Namm, Larry Rogak, Steve Saltzman, Warren Shaw, Scott Shelkin, Judy Shouse, and Scott Taylor

Editorials express the opinion of the Editorial Board
Copyright 1980 by BLS Student Bar Association

LETTERS TO THE EDITOR

Should B.L.S. students receive credit for law related outside work done while attending law school?

Well, why not? Many law students hold clerk jobs, especially during their second and third years. Very often, clerking for a law firm means ten to twenty or more hours per week spent researching and writing memoranda, filing civil and criminal actions at Supreme Court, answering calendar calls, and even interviewing clients. Some students have the luxury of working by choice; for others, the money is an absolute necessity. But for almost all, the experiences gained are worthy of academic recognition.

Students who work in addition to having a full credit load have a tougher time than those taking clinical programs. First of all they must take one more course per semester than clinical students, because clinic students, obviously, substitute the clinic for a course whereas working students do their work in addition to a full course load.

Second, working students usually must work harder than clinical students because employers who pay students for their work expect and demand more than most outside agencies supervising law students. A clinic student is usually expected to learn, and complete assignments. But a working student usually has greater responsibility—his employer is primarily concerned with his practice, not with education; though it is considered a generous by-product of the student's employment.

Why not grant credit to those who work after school? Some say that there is no way of monitoring the work experience of the student, as in clinical programs; to see whether the work is *worth* any credit. But in actuality, this is not a problem. No employer is going to hire a student and not give him some work to do. No matter what one does in a law office, one will observe the practice of law. Even a student hired to operate a photostat machine for $3.50 an hour will get the opportunity to look at motion papers, trial briefs, memoranda, and other legal paperwork.

Additionally, whereas clinical students have been known to skimp on their hours thanks to occasional supervisory largesse, it would be indeed unusual to find an employer who would pay a student for hours he didn't work, and produce.

A work-study program which allows students one credit for every hours per week of work would be a vi lternative here. It would recognize th e best education is experience, and re d those who devote a significant numbe of hours outside the classroom to additional legal education.

Clerking for a law firm is a great experience. It provides the all important view of the practical application of law in the real world which is necessary to balance out the purely theoretical, academic side of legal education provided in the classroom. It is an experience whose value should be acknowledged with one to three credits per se-

https://brooklynworks.brooklaw.edu/justinian/vol1980/iss6/1

those students who are learning far more than those who do no outside work.

For those whose duties involve research and writing, a submission of writing samples could serve as an indication of the semester's work to be reviewed by a professor in charge of work-study. For those who do no writing on the job, an essay at the end of the semester detailing the experiences and observations of the student could show the professor the value of the student's work experience. Additionally, each employer could write a certification of the student's duties and hours worked per week.

Work-study is a system which has worked at many schools and is not only fair, but just. It is, quite simply, a system that gives credit where credit is due.

Sincerely,
Lawrence Rogak

This letter is to clarify the article on the Moot Court National Team which appeared in the last issue of the *Justinian*.

As the article correctly noted, the team was at a disadvantage this year because we received the competition problem several weeks late. However, the article omitted any mention of the other factors which create a severe disadvantage for the Brooklyn Law School team every year and which are the basis of the Honor Society's refusal to run the first year moot court program at BLS.

Unlike most other schools that participate in the competition, the Brooklyn Law School team does not receive a single academic credit or any form of prize, stipend or scholarship in recognition of the work involved in representing the school in a national competition. We believe that the work we have completed, which includes writing three briefs, winning the school competition, and completing ten rounds of oral argument deserves academic credit. Yet the faculty has rejected all credit proposals. Furthermore, while we certainly do extend our warm thanks to those faculty members who gave so generously of their time in judging our practice rounds, especially Professors Poser, Schenck, Kuklin, Hoffman, Walter and Herman, it should be noted that not a single faculty member attended either round of our argument at the Bar Association. Dean Glasser, however, did attend the evening round. We were dismayed by this lack of support.

Finally, we would like to add our thanks for the cheerful and extensive assistance provided to the team by all members of the Brooklyn Law School Library staff and by Ms. Zulma Bogan, key operator for the school's xerox facilities.

Sincerely,
Susan Sternberg
Elliot Schaktman
Carrie Teitcher

Ed. Note: On November 21, 1980 the faculty voted to grant academic credit to National Team members.

NOVEMBER BLUES

We can't help it. Here it is, the end of November and we feel as though we've hit the 20 mile marker, but those last 6½ or so miles are not even in sight. It's a strange gnawing inside; knowing that the end is coming, the long road until semester's close is drawing near; people are talking about Thanksgiving and going to Florida for a vacation. It's an unusual time for all of us; the jitters of first semester law school exams, the midway point in our law school careers, the home stretch before that last push toward graduation.

The B.L.S. calendar calls our next non-class days "winter recess." Funny, our memories of recess include yelling and laughing and a game with a huge bouncing red ball that touched every part of our lower leg when we kicked it. Somehow, this recess won't be much like those days in the old schoolyard.

November has traditionally been a very different month. The weather can't make up its' mind whether to rain or snow, and football season pretends to reach a phony dramatic climax of parades and marathon Thanksgiving broadcasts. This year, we vow *not* to excuse ourselves from the table after the cranberry sauce and at least wait until the turkey is served.

Siblings and friends are home from their respective academic and economic pursuits and the temptation to spend a lazy four days in front of the ball games, or running in the leaves with the dog, or carrousing until four every morning is overwhelming. Some of us will use any excuse to party — the advent of the Thanksgiving weekend is but a few days when classes don't get in the way of our lives.

For others this weekend means a bit of fresh air in the long months we've spent without a break. It's a chance to fortify ourselves with some good sleep, good food, and good company before the serious hibernation of studying begins.

For most of us, we hope it will be a time for a laughing meal with family and friends; a time to actually give thanks for love and health. . .and a chance to eat sitting down. Have a happy.

IS IT LIVE OR IS IT. . .

It is with great pleasure that we learn of the opportunity to type our final examinations. For those of us who are handicapped or simply write illegibly, this is a great boon, and still another step into the mechanized world. With due deference to those students who need to utilize the machine, and all seriousness aside, we turn our attention to another favorite mechanical device; one which has caused a certain amount of anxiety among professors—the tape recorder.

While we were in college, there were a weird few, who came to classes each day, armed with a pen and notebook, and their secret weapon, a Panasonic taperecorder and a handful of blank cassettes. These people took copious notes, and later, while we were out drinking beer, they were typing the transcripts of their tapes. We can't help but wonder how Rosemary Woods would have fared in college.

Here at BLS we find a handful of students who, for various reasons, tape their classes. We wonder how our professors feel by being immortalized (perhaps soon on celluloid!) It seems unlikely that they are unaware of the small black machines. Do they self-censor their lectures, or strive for a Las Vegas monologue?

We overherard a strange converstion in the cafeteria recently. In a discussion about his cassette collection a student was heard to say, "I'll trade you two Gilbrides for a Ronayne and a Habl." (Wonder how much a bootleg Leitner will be worth in a few years. . .)