EVIDENCE, STANDARDS, AND INSTITUTIONS

I. ABSTRACT

Evidence law has traditionally been perceived as a dry and highly technical field. Not surprisingly, it was thought to belong almost exclusively to the professional interest of practitioners. This course will show that nothing could be further from the truth (an especially problematic situation for a field that has seeking truth as one of its main goals). We will see how evidence law is in fact filled with philosophically interesting topics, important doctrinal puzzles, and innovative policy proposals left largely unexplored by most practitioners. Throughout this course, we will pay constant attention to how different institutional arrangements influence legal fact-finding and to the related, yet different, difficulties that the use of probabilities imposes on legal decision-making, inside and outside of adjudicative settings. Specific topics to be discussed include the many functions of legal fact-finding, standards of proof, statistical evidence, expert testimonies, presumptions, and racial profiling. We will draw on carefully edited cases, specific rules of evidence, and excerpts from recent legal and multidisciplinary scholarship. The assigned material shows that the discussions we will have are not merely of academic interest; significant practical implications turn on these discussions. Participants are expected to come out of the course with a view of evidence law as an interesting, lively, and accessible field.

There are no pre-requisites for this course. Students should come prepared for each session. Readings will be short and heavily edited. Students are expected to write a reaction (not a research) paper of 5-10 pages as their evaluation.

II. OVERVIEW

Session 1: The Many Functions of Legal Fact-Finding
Session 2: Standards of Proof, Probabilities, and Explanations
Session 3: Naked Statistical Evidence
Session 4: Expert Evidence
Session 5: Racial Profiling

III. DESCRIPTION OF SESSIONS AND READINGS

Session 1: The Many Functions of Legal Fact-Finding

It is commonly thought that the function of legal fact-finding is first and foremost an
epistemic function of “getting the facts right.” However, after one begins the study of evidence, one quickly notices that the epistemic function of fact-finding cannot be the whole story. Most evidence law courses at American law schools spend most of the syllabus discussing a large number of exclusionary rules (e.g. relevance, hearsay, character evidence, privileges), most of which actually make it more difficult for fact-finders to determine the truth.

The epistemic goal of legal fact-finding is traditionally compared to other countervailing social considerations, such as the desire to mitigate existing prejudices. *Old Chief* is a good illustration. In that case, the Supreme Court held that, under FRE 403, evidence otherwise relevant is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

In this session, we will discuss one uncommon account of the functions of legal fact-finding. Nesson (1985) controversially argues that the need to promote public acceptance of verdicts better explains many evidentiary rules and other aspects of trials than an epistemic goal. Public acceptance is important because it improves compliance. In order to achieve this latter goal, courts should send a message that those who violate the law will be sanctioned, not merely that they will be sanctioned only if the violation is proven by due process. The former message encourages compliance, whereas the latter invites people to act according only to what they think can be proven against them. What are the explanatory and the normative values of this account? Should courts be concerned with compliance? Should the appearance of justice be more important than actual justice?

A discussion about the functions of legal institutes would be incomplete if left isolated from a discussion about their cultural and institutional underpinning. To that end, this session will also explore some of the ways in which different legal cultures and institutional designs affect legal fact-finding. Damaška (1997) sheds light on three distinctive features of the Anglo-American evidentiary system by comparing it with Continental systems, namely the task-division between the judge and the lay jury, the temporal concentration of trial proceedings, and the prominent role of the parties in fact-finding. We will examine the specific ways these features influence how evidence is gathered and presented in American courts. We will also ask to what extent these features explain differences in Anglo-American and Continental evidentiary regulation, such as the different sensitivities to the possibility of misuse of evidence. These discussions are of great practical importance. Whenever arguing for changes in procedural contexts, we should inquire whether certain evidentiary doctrines and practices might lose their raison d’être. These insights will follow us in the next sessions.
Assigned Readings:
- Old Chief v. United States, 519 U.S. 172 (1997)
- Mirjan Damascha, Evidence Law Adrift (1997) (excerpts)

Suggested Readings:
- Federal Rules of Evidence 102, 104, 401, 402, 403, 404, 501, 502, 801, 802, and 803

Session 2: Standards of Proof, Probabilities, and Explanations

Exactly how to understand the different standards of proof has been the object of much controversy in evidence scholarship and practice. Mainstream evidence scholarship claims standards of proof should be understood as probability thresholds ranging from 0 to 1. “Preponderance of the evidence” would then mean “proven by a probability higher than 0.5.” In recent decades, scholarship and judicial opinions have raised a series of objections to this view, as illustrated by the critical reactions following the misuse of probabilistic reasoning by a California court in People v. Collins.

Building on this criticism, Laudan (2006) shows us through references to judicial opinions, evidence treaties, and jury instructions how the legal profession has failed to produce an intelligible and coherent account of standards of proof. The book also discusses the kinds of considerations that should go into doctrinal formulations that allow standards to serve their dual functions of decision-making thresholds and mechanisms for distributing errors. In this session, we will discuss the functions of standards of proof and how to translate them into intelligible and coherent doctrinal formulations. This will allow us to anchor the discussion from the previous session regarding the influence of institutional arrangements on how legal fact-finding fulfills its functions into one important doctrinal puzzle. Following the previous discussion, we will also address some of the differences between an evidentiary system that relies on standards of proof and one that relies on free evaluation of evidence, such as the Continental European and the Brazilian legal system.

Pardo and Allen (2008) propose that legal fact-finding should involve a determination of best explanation of the admitted evidence, rather than a determination of whether each element is proven to a specific probability. Fact-finders should instead infer, from the fact that a given hypothesis best explains the admitted evidence, to the truth of that hypothesis. Their proposal allegedly not only provides a better description of jurors’ reasoning, but also avoids problems associated with the probabilistic model, such as the so-called proof paradoxes. We will discuss whether the appeal to explanations is a good alternative account of standards. We will also discuss
how pressing the objections to probabilistic interpretations of standards really are. This discussion will be important in later sessions when we address other issues related to the use of probability in legal decision-making.

**Assigned Reading:**
- People v. Collins, 438 P. 2d 33 (68 Cal. 2d 319 1968)
- LARRY LAUDAN, TRUTH, ERROR, AND THE CRIMINAL LAW (2006), chapters 2 e 3

**Suggested Readings:**
- Gustavo Ribeiro, *Can There be a Burden of the Best Explanation?*, Unpublished manuscript (2014)

**Session 3: Naked Statistical Evidence**

In this session we will discuss another example of contested use probability in legal fact-finding. In many cases, individualized evidence is hard to obtain. Legal decision-makers are sometimes left only with evidence pertaining to a class of people or objects. Reliance on this type of evidence for imposition of legal liability has generated a lot of anxiety amid the legal profession. Yet it is strange that the same courts that agree that the plaintiff is required only to prove her case by a probability higher than 0.5 also argue that statistical evidence that would do so is by itself not sufficient for a verdict for the defendant. That was what happened in *Smith v. Rapid Transit*, when the court found that the fact that the “mathematical chances” favored the proposition that the defendant caused the accident was not enough for a verdict for the plaintiff.

Schauer (2003) places the controversy involving naked statistical evidence (*i.e.* statistical evidence that is not case specific) in a larger problem about the use of generalities in decision-making. The problem becomes especially acute in legal settings given the all-or-nothing manner in which modern legal systems operate. For instance, courts usually have to find either for the plaintiff or the defendant. Splitting the differences is seldom an available alternative. Schauer also questions the assumption that there is any significant difference between statistical and many other types of evidence commonly thought of as individualized and commonly relied upon by courts with little fuss (*e.g.* witnesses’ eyesight and DNA evidence). We will address the question of whether there are any real differences between statistical and individualistic evidence or if it is merely a matter of presentation. Even if this
difference is real, should it matter for the purposes of the legal system?

We will also discuss the answer Enoch et al. (2012) offers to this very last question. They make use of the epistemic notion of sensitivity (roughly a form of constraint on beliefs: if the proposition believed were false, one would not have believed it) to explain our discomfort with statistical evidence. We will discuss what exactly the concept of sensitivity involves and whether it can help us to address the alleged problematic nature of naked statistical evidence for the legal system.

Assigned Readings:
- FRED SCHAUER, PROFILE, PROBABILITIES, AND STEREOTYPES (2003), chapter 3

Suggested Readings:
- Judith Jarvis Thomson, Liability and Individualized Evidence, 49 LAW AND CONTEMPORARY PROBLEMS (1986)

Session 4: Expert Evidence

Scientists are seen as authorities at the disposal of law to settle controversies. At the same time, the legal profession has been frustrated about the use of expert evidence in adjudication. Something has gone awry when instead of resolving disputes, science has fomented further disagreement. The blame for such frustrations is usually laid on the scientific illiteracy of legal decision-makers, on the perceived charlatanism or partisanship of experts, or on unfitness of legal practice to handle scientific evidence. These accusations have set the tone for institutional reforms. The 1993 Supreme Court decision in Daubert is perhaps the most important example. The issue in Daubert was how to state criteria according to which judges can properly assess expert evidence and perform their role of “gatekeepers,” keeping “junk science” outside courts.

Haack (2003) tracks the efforts of the legal system to deal with scientific testimony. This struggle takes place between two extremes: an exaggerated deference towards science, on the one hand, and an exaggerated suspicion of science, on the other. One challenge for legal reform is to break free from these extremes. We will address questions such as: what expectations should we have towards science’s capacity to solve legal conflicts? What should be the judges’ role be with regard to expert evidence? What kind of evidentiary institutional safeguards against “bad science” can we design?
In a world in which expert evidence is ubiquitous in high profile cases, and in which there is a highly lucrative market for those experts, it is not surprising that conflicting expert testimonies have become an important issue for the legal profession. Brewer (1998) addresses the pitfalls of traditional legal answers to this problem. Consider the resort to credentials. In a scenario with widespread credentials, judges do not have the capacity to evaluate seemingly equivalent credentials while giving good, independent reasons for it. Is a Ph.D. from Harvard better than a Ph.D. from Yale? Brewer’s proposal is that we have a legal decision-maker who has both the legal authority and the appropriate expertise to make justified decisions in the face of conflicting experts testimonies. An antitrust judge trained in economics is a good example. We will discuss Brewer’s arguments against traditional legal answers to the problem of conflicting experts and his proposed solution. As in previous discussions, attention to the consequences of different institutional arrangements will be important.

Assigned Readings:
- Susan Haack, Defending Science Within Reason: Between Scientism and Cynicism (2003), chapters 1 and 9

Suggested Readings:
- Federal Rules of Evidence 701, 702, 703, 704, 705, and 706

Session 5: Racial Profiling

Recent events in American society have brought race biases and broader social justice topics back into American law school classrooms. These events have also highlighted how difficulties with statistical evidence and generalizations are not restricted to adjudicative settings. Drawing on this momentum, this closing session will discuss the topic of racial profiling. That is, the use of an individual’s race or ethnicity as a key factor in deciding whether to engage in enforcement. Defenders of some form of racial profiling point to a supposedly significant correlation between membership in certain racial groups and the tendency to commit certain crimes. They then argue that that police can fight crime and secure law enforcement more efficiently and effectively if they stop, search, or investigate members of such groups differentially. Critics argue that such practices impose special, unjustified burdens on historically oppressed minorities and violate citizens’ constitutional
rights, even if the supposed correlation between racial groups and certain crimes and the benefits of the increase in law enforcement are in fact true. These were some of the arguments considered in Floyd v. City of New York, a class action case questioning the constitutionality of NYPD’s “Stop-and-Frisk” practices.

This session will discuss whether racial profiling is an efficient and effective instrument of law enforcement. Even if it is, is it consistent with a citizen’s constitutional rights? Should the answers to these questions change whether we are considering NYPD’s “Stop-and-Frisk,” Arizona immigration policy’s “Show Me Your Papers,” or TSA’s “Random Screening”?

Relying on distinction between the use of race as an information-carrier for investigative purposes, police abuse, and a “disproportionate” use of race in profiling, Risse and Zeckhauser (2004) controversially argue that some forms of racial profiling under certain conditions are neither unfair nor violate any moral rights. Lever (2005) provides a direct reply, arguing, first, that the harms of racial profiling are in fact much larger expected, and, second, that even if this were not the case, background racism in a society makes the negative consequences associated with racial profiling hard to accept.

Assigned Readings:
- Floyd v. City of New York, 959 F. Supp. 2d 540 (2013) (skim, don’t sweat the details)

Suggested Readings:
- Terry v. Ohio, 392 U.S. 1 (1968)
- United States v. Brignoni-Ponce, 422 U.S. 873 (1975)