



AALS

AALS Evidence Section Newsletter

Fall / Winter 2011

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Message from the Chair

I hope everyone is enjoying, or soon about to enjoy, a winter break. I am writing with two updates on the AALS annual meeting in January.

First, the Evidence Section's panel—"Theorizing Standards of Proof"—will take place on Saturday, January 7, 2012, from 10:30 am – 12:15 pm (Virginia Suite A, Lobby Level, Washington Marriott Wardman Park Hotel).

Speakers on the panel will include:

- Ronald J. Allen, Northwestern University School of Law
- Larry Laudan, National Autonomous University of Mexico, Institute for Philosophical Investigations
- Karen Petroski, Saint Louis University School of Law
- Alex Stein, Yeshiva University, Benjamin N. Cardozo School of Law

Below is the panel description from the AALS program:

This panel will explore recent theoretical work on standards of proof and related issues pertaining to sufficiency of evidence, including burdens of proof and evidentiary presumptions. Evidence law, scholarship, and courses focus to a large extent on issues regarding the admissibility, exclusion, and interpretation of individual items of evidence. Relatively less attention is given to issues relating to the sufficiency of evidence as a whole in proving contested issues at trial. These macro-level proof issues, however, are at least as important for carrying out the various goals underlying the law of evidence. Moreover, these proof issues not only structure and govern outcomes at trial; they also underlie various procedural issues controlling whether cases proceed—or ought to proceed—to trial in the first place (e.g., summary judgment in civil cases and motions to dismiss in criminal cases) and whether verdicts will—or ought to be—upheld or overturned (e.g., judgment as a matter of law in civil cases and challenges to sufficiency of the evidence in criminal cases). The panel will explore issues pertaining to these macro-level proof issues.

Second, the joint luncheon for the Criminal Justice and Evidence sections, which originally was scheduled for Saturday, has unfortunately been cancelled. After scheduling the panel and the luncheon, AALS added an event, free to conference registrants, with United States Supreme Court Justice Stephen Breyer (see “A Conversation with Justice Stephen G. Breyer” in the AALS program) at the same time as the joint luncheon. The luncheon was cancelled because of concerns of low attendance and to accommodate members from the two sections who wish to attend the added event.

I’m looking forward to seeing you in Washington, D.C. in January.

Sincerely,

Michael S. Pardo

University of Alabama School of Law

What’s the Weight of an Advisory Committee Note in the Restyled Federal Rules of Evidence?

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With the recent wholesale revision of the Federal Rules of Evidence, an interesting question has arisen concerning the interpretation of the amended rules. Specifically, how should courts treat the standard Advisory Committee Note following each amended rule? That standard language provides:

The language of Rule [insert rule number] has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Amendments Approved by the Judicial Conference, September 2010, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09-Appendix-D.pdf>.

This issue was recently debated by the Honorable Harris L. Hartz, United States Court of Appeals for the Tenth Circuit and member of the Standing Committee on Rules of Practice and Procedure during the restyling project, and the Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota and member of the Advisory Committee on Evidence Rules during the restyling project. The two discussed opposing viewpoints on how courts should weigh the Advisory Committee Note when they spoke on a panel at the

Symposium on the Restyled Federal Rules of Evidence at the College of William and Mary Marshall-Wythe School of Law preceding the Advisory Committee's Fall Meeting this past October.

Judge Hartz initiated the discussion by suggesting that the Advisory Committee Note may be interpreted as counteracting the effect of an amendment made pursuant to the restyling. Harris L. Hartz, Remarks at the Symposium on the Restyled Rules of Evidence (Oct. 28, 2011), in *Symposium on the Restyled Rules of Evidence*, 53 WM. & MARY L. REV. 1, 81-88 (forthcoming Mar. 2012). He spoke specifically of a situation where a trial court may find an ambiguity in the restyled rules or where a trial court may find that a restyled rule states a proposition differently than the judge had come to understand the proposition under the prior rules. He noted that the judge would necessarily look to the legislative history of the rule for clarification, but that the application of the legislative history concerning the restyled rules would be different from the application of the legislative history concerning amendments made independent of the restyling project. This unique application of legislative history results from the fact that, unlike other amendments, amendments associated with the restyling project were intended to effect no change of substance to the law of evidence. *Id.* "The court must assume that the rule means the same as it did before restyling." *Id.* at 83. For example, if a court were to determine that an application of the amended phrase "an opposing party's statement" is a substantive change from the original phrase "admission by party-opponent," the court may disregard the amended language because the Advisory Committee Note provides that no substantive change was intended.

Judge Ericksen responded that a court applying the amended rules should apply the rules as written, even if it finds a substantive change. Joan N. Ericksen, Remarks at the Symposium on the Restyled Rules of Evidence (Oct. 28, 2011), in *Symposium on the Restyled Rules of Evidence*, 53 WM. & MARY L. REV. 1, 89-94 (forthcoming Mar. 2012). In her view, a restyled rule "says what it says" and cannot be altered by the Advisory Committee Note. *Id.* at 90. To allow the Advisory Committee Note to alter the meaning of the text of the amended rule itself would be to give an unfair advantage to those privy to an understanding of the rule's application prior to the restyling project.

Instead, according to Judge Ericksen, it is up to the Advisory Committee to track the restyled rules, identify any unintended changes noted by the courts, and further amend the rule to negate the unintended substantive change. However, Judge Ericksen herself notes that unintended substantive changes to the rules under the restyling will be difficult for the Advisory Committee to identify for several reasons. *Id.* at 91-2. First, many evidentiary rulings are never appealed. Second, of those that are appealed, many are discounted as harmless error without ever getting to the heart of the matter. *Id.* So, many subtle substantive changes to the rules, however unintended by the Advisory Committee, may be effected at the trial level.

Moreover, the attorneys and the court will presumably all reference the restyled rules as amended in trials after December 1, 2011. *Id.* at 92-3. It is unlikely that any of the players involved in an argument over an evidentiary issue would rely

on an argument under the older version of the rules. So, while the attorneys may argue and the court may agree that the restyled rule was meant to effect no substantive change, it is highly unlikely that the court would disregard the language of the amended rule sitting in front of her in a current version of the Federal Rules of Evidence. *Id.* Again, the subtle substantive change to the rules will go unchecked.

There is no way to predict how this situation will play out. Judge Ericksen's practical prediction that a trial court can do no more than pay lip service to the Advisory Committee Note in the moment is well-taken. Likely also is her prediction that few rulings effecting a substantive change will be appealed and fewer still will survive the classification as harmless error. *Id.* at 91-2. For these reasons, the Advisory Committee on Evidence Rules will have a difficult time tracking the enforcement of such substantive changes and, thus, the Committee will have few opportunities to further amend a restyled rule to eliminate any unintended substantive change.

For those rulings giving effect to a substantive change which are appealed and heard on the merits, however, it seems that the appellate courts, with the advantage of time for greater consideration of the issue, will reverse these decisions of trial courts applying a substantive change. Courts should give great weight to Advisory Committee Notes in interpreting federal rules. *Vergis v. Grand Victoria Casino & Resort*, 199 F.R.D. 216, 218 (S.D. Ohio 2000) (“[T]he opinions, from all federal courts, which rely on the Advisory Committee Notes in issuing definitive interpretations of the various federal procedural and evidentiary rules are too numerous to cite. It is sufficient to say here, without exaggeration, that Advisory Committee Notes are nearly universally accorded great weight in interpreting federal rules.”). If the Advisory Committee Note in question here should be disregarded, what was the purpose of repeating it after each and every restyled rule? The Advisory Committee took great pains to avoid making a substantive change and, where such changes were overlooked, they should be corrected, even if only a handful are ever brought to light beyond the trial within which they are raised.

The “Conjunction Problem”: Its Cause and Cure

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Much evidence scholarship “has been driven by efforts to domesticate” various “proof paradoxes” arising out probability theory, and one of the foremost is the “the conjunction problem.” Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 Mich. St. L. Rev. 893, 894-95, 897 (2003). In basic probability theory, the “multiplication rule for conjunction” holds that the probability of co-occurrence of two or more events is based on multiplying the probability of each. In particular, if occurrences A and

B are mutually independent, then the probability of both A and B occurring together equals the probability of A and the probability of B each occurring separately: $\Pr(A \& B) = \Pr(A) \cdot \Pr(B)$. The “conjunction problem” or “conjunction paradox,” as framed by evidence scholars, goes like this: Suppose in a plaintiff’s civil case consists of two elements – say, defendant’s negligence and plaintiff’s damages – and he proves each to a 0.6 probability. The probability that both elements are true is 0.6×0.6 or 0.36. If the jury focuses on the probabilities of the separate elements without multiplying them, the plaintiff wins even though the overall probability of his claim is less than 0.5. If the jury instead focuses on the overall probability (.36), the plaintiff loses even though he has met the burden of persuasion under the jury instruction to prove each element by a preponderance of the evidence (0.6). Either way, there is a “problem”: a seemingly irreconcilable tension between the need to find component “essential elements” probably true and the ability to prove the probable truth of the overall liability narrative.

Evidence scholars have come to doubt whether it is possible ever to “dispose[] of the conjunction paradox as a formal matter.” Allen & Jehl, at 929. Instead, some have offered various theoretical workarounds, the most elaborate being Cohen’s attempt to create an alternative theory of probability, and the most pragmatic being Allen’s “relative plausibility” theory of adjudicative decisionmaking. See L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* (1977); Ronald J. Allen, *The Nature of Juridical Proof*, 13 *Cardozo L. Rev.* 373 (1992). Given the weight of scholarly authority acknowledging and accepting the existence of a “conjunction problem,” it is with some trepidation that I say: *there is no conjunction problem*.

Consider Zeno’s paradox of motion: motion is impossible, because to get from point A to point B, one must first traverse half the distance; and to get to that halfway point, one must first traverse half that distance; etcetera, ad nauseum until one cannot move at all. Zeno’s paradox is not a “problem” in the sense that it has never actually prevented anyone from moving. Yet as a paradox, it is apparently insoluble because it is well-constructed: it is free from obvious illogic and false premises. Zeno’s paradox successfully exploits gaps and limitations, not in the physical world itself (hence, motion is possible despite the paradox), but in our conceptual schemes for describing that world – in this case, language (the ambiguous meaning of “*must* traverse”), fractions (all numerical measures can be subdivided), and infinity (there is no theoretically smallest or largest unit, so the process of subdividing has no limit).

The conjunction paradox is a lot like Zeno’s – except that it is not well-constructed and therefore fails as a paradox. Like Zeno’s, it exploits ambiguous language (the jury “*must* find each element”), fractions (all claims are subdivided into several “elements”), and infinity (there is no theoretical limit to the number of facts that might have to be proven to meet the burden of persuasion in a given case). But the conjunction paradox is built on two readily identified false premises.

Before exploring these false premises, it is worth considering how scholars have grossly *understated* the conjunction “problem.” If the multiplication rule presents

a logical problem to fact-finders who must find a multiplicity of factual propositions to be probably true, why are those factual propositions limited to the “essential elements” of a claim? The “essential elements” are a fairly arbitrary – and small – set of facts that “must” be proven probably true for a claimant to meet his burden of persuasion. But the claimant will have presented a fairly complex story of guilt or liability consisting of many factual details supported by numerous “items” of evidence. For the claimant to meet his burden of persuasion, the jury will have to find many (not necessarily all) of these fact propositions to be probably true. The probabilities thus subject to multiplication (according to the logic of the conjunction paradox) will be those of dozens of facts that are a necessary part of the narrative.

This suggests that the conjunction “problem” is far worse than is conventionally supposed. Linguistically and logically, any factual proposition can be subdivided into numerous sub-propositions. “Traffic caused me to arrive late to the airport” could be a single factual proposition or two: “I arrived at the airport” and “traffic made me late.” But of course it could be many more than two: “I got in my car, my car was in the driveway, I started my car, it was 11:00 a.m., I wanted pick up my wife at the airport, she expected me to meet her before her baggage arrived, her flight was due in at noon, I got on Interstate 90, there was heavy traffic” etc., etc. I’ve just turned one proposition into 10 and haven’t even gotten near the airport yet. Probability theory tells us that a probability can be assigned to each of these 10-plus propositions, and must be multiplied to calculate the probability of “traffic caused me to arrive late to the airport.” In theory, any proposition can be subdivided into an infinite number of sub-propositions. The conjunction problem can be made into an analog of Zeno’s paradox of motion: no claim can ever be logically proven unless each component fact (of which there are an infinite number) is proven to a virtual certainty.

This apparent difficulty points to the first false premise in the conjunction problem. As conventionally presented, the conjunction problem is based on applying the multiplication rule for mutually independent events. If plaintiff’s claim C consists of essential elements X, Y and Z, then $\Pr(C) = \Pr(X \& Y \& Z) = \Pr(X) \cdot \Pr(Y) \cdot \Pr(Z)$. Why evidence scholars persist in using this formula has always puzzled me. Whatever might be said for the existence of independent events in the real world – perhaps two successive tosses of a fair coin are independent – the facts that constitute litigated claims are *never* independent events. (Several theorists note this issue but then gloss over it.) Allen, for example, says that elements of a cause of action “will *generally* not be independent, but that simply makes the mathematics slightly more complicated without affecting the analysis.” Allen, *Juridical Proof*, at 374 n. 4. (emphasis added.) Essential elements are “essential” to a single claim, and are thus interdependent by definition. Moreover, if the trial judge and the attorneys have done their jobs, then all the evidence presented to the factfinder is relevant, and irrelevant matter has been excluded. Since relevant evidence by definition has a tendency to change the probability of a fact of consequence, that means – by definition – that no “events” (evidenced factual propositions) at a trial are independent. According to fundamental probability theory, events A and B are independent if $P(A|B) = P(A)$. MARK L. BERENSON, ET AL., *BASIC BUSINESS STATISTICS: CONCEPTS AND APPLICATIONS* 157 (2009). But if B is relevant, then

$P(A|B) > P(A)$, by definition.

Therefore, we are talking about interdependent events, not independent events, meaning that the conventional presentation of the conjunction problem is wrong. To be sure, there is a multiplication rule for dependent events as well: $P(A \& B) = P(A|B) \cdot P(B)$. *Id.* at 158. The probability of two dependent or interrelated events A and B equals the “conditional” probability of A *given* B (i.e., assuming B is true) times the (independent or unconditional) probability of B. To the extent that a multiplication rule should be applied to essential elements of a claim, it has to be the multiplication rule for interdependent events.

A correct statement of the conjunction problem requires us to think about how to construct a set of propositions to be multiplied in light of the essential elements of the case. It also requires us to consider how certain factual propositions that are (arbitrarily) subdivided into “essential elements” may be highly correlated. Under the erroneous presentation of the conjunction problem, “duty, breach, causation and damages” are four independent events whose probability must be multiplied to produce a finding of negligence by a preponderance of the evidence. But breach and duty are hardly independent: a duty of care may exist independently of a particular breach, but a breach cannot exist without a duty: “breach” is shorthand for “breach of a duty of care.” So the probability of duty *given* breach is very close to 1.0.

Fortunately for our legal system, this error on the part of evidence theorists – treating elements of a claim as mutually independent facts subject to the multiplication rule for independent events – is not replicated in jury instructions. Here is the second false premise underlying the paradox: conjunction problematizers have misconstrued jury instructions. To be sure, jury instructions direct jurors to find each of several elements by the requisite burden of persuasion, but no jury instruction in the country says that those elements must be treated as mutually independent. Since those elements are by definition mutually *dependent*, the probability of each element is conditioned on the others. If a civil claim has essential elements A, B and C, then the overall probability of the plaintiff’s case is formulated various ways, all of them quite complex. For example: $\Pr(A \& B \& C) = \Pr(A|B \& C) \cdot \Pr(B \& C) = \Pr(A|B \& C) \cdot \Pr(B|C) \cdot \Pr(C)$. Do jury instructions really ask the jury to determine these conditional probabilities, let alone multiply them? That seems to be asking a lot – even evidence scholars shy away from formulating that exercise.

I suggest that jury instructions are asking for a different analytical operation, which might be called an “entailment check.” The “each element” instruction asks the jury to examine salient facts for compliance with the doctrine of entailment (also known as the doctrine of logical consequence). Inductive logic maintains that any proposition – any assertion of fact – can be subdivided into component propositions, and each one assigned a probability. The overall proposition is said to “entail” the components and cannot be more probable than any of the entailed components. If fact B entails fact A, the probability of B is less than or equal to the probability of A. IAN HACKING, *AN INTRODUCTION TO PROBABILITY AND INDUCTIVE LOGIC* 60 (2001). The fact assertion “he arrived at the airport on time” entails “he arrived at the airport,” and thus the probability

that “he arrived at the airport on time” cannot be greater than the probability that “he arrived at the airport (at all).” By requiring “essential elements,” the substantive law tells us that a case-specific story of guilt or liability must entail case-specific versions of certain generic facts – e.g., breach of a duty of care. By requiring that each element be proven by a preponderance of the evidence, the jury is instructed to check to make sure that each required fact is present at a level of certainty that meets the burden of persuasion. If any required fact falls below that level then, under the doctrine of entailment, the entire story of guilt or liability falls below that level – since the entire story cannot be more probable than its least probable entailed fact.

There are two important ways in which our expectation of jury decisionmaking conforms to such an “entailment check” rather than a multiplication exercise. First, the subdivision of a single story of guilt or liability into component facts is arbitrary and unstable: the same story can be characterized as one fact or several. But the probability of the overall case cannot – either intuitively or logically – depend on the happenstance of how much our language allows us to chop up the facts in this way.

Second, the jury instructions do not – and should not – ask jurors to assign definite probabilities to any specific element. Jury instructions set probabilistic *floors*: each essential element must be *at least* 0.5 probable in a civil case. This alleviates what would be the untenable burden on jurors to come up with precise conditional probabilities. But if we do not expect jurors to assign definite probabilities to the individual elements – and I maintain that we do not – then there can be no requirement of multiplication, at least not with the precision assumed by “the conjunction problem.” Probability theory tells us that, indeed, in a civil case with numerous elements, most of those conditional probabilities will necessarily be quite high in a case where the plaintiff meets his burden of persuasion. But that is hardly surprising given the high degree of correlation of such mutually dependent facts. Theoretical calculation never posed a problem until evidence theorists made it one.

Conference Announcement

You are invited to take part in the conference **QJustice 2012, the Third International Conference on Proportionality, Quantitative Justice, and Fairness**.

Topics: (i) inference and causality; (ii) consequentialism; and (iii) distributive Justice.

Venue & Dates: Lisbon, Portugal; May 22-24, 2012.

Institutional Sponsors: Carl von Linde Academy, Technical University of Munich; Institute of Penal Law & Criminal Sciences, University of Lisbon Law Faculty; Portuguese Association for Law Theory, Philosophy of Law and Social Philosophy, Lisbon; Benjamin N. Cardozo School of Law, Yeshiva University,

New York.

Conference Organizers: Rainhard Z. Bengez, TU Munich, Germany; Lothar Philipps, LMU – Munich University, Germany; Maria Fernanda Palma, FDUL – IDPCC, Portugal; Augusto Silva Dias, FDUL – IDPCC, Portugal; Paulo de Sousa Mendes, FDUL – IDPCC, Portugal; David Duarte, FDUL – Institute of Juridical and Political Sciences (ICJP), Portugal; Rui Soares Pereira, FDUL – IDPCC, Portugal; José de Sousa e Brito, New University of Lisbon, Portugal; José Manuel Aroso Linhares, University of Coimbra Law Faculty, Portugal; Giovanni Sartor, European University Institute, Law Department, Florence, Italy; Peter Tillers, Cardozo School of Law, Yeshiva University, USA; Joseph Gastwirth, George Washington University, USA; Scott Brewer, Harvard Law School, Harvard University, USA; Vern Walker, Hofstra University Law School, USA

Conference papers will be published, some of them in a special issue of Law, Probability and Risk, <http://lpr.oxfordjournals.org/>

If you would like to participate in the conference, please e-mail Rainhard ("Zvi") Bengez at bengez@cvi-a.tum.de, Peter Tillers at peter@tillers.net, or any of the conference organizers listed above.

QJustice 12 is part of a series of conferences organized by Rainhard Bengez, under the umbrella of the network "Quantitative Justice and Fairness." See <http://www.quantius.org/>

Book Announcements

Learning Evidence

Deborah Jones Merritt and **Ric Simmons**, both professors at The Ohio State University's Moritz College of Law, have published the second edition of "Learning Evidence" with West Publishing. The book adopts a novel pedagogical approach, teaching through exposition, rule text, and examples rather than appellate opinions. The second edition fully integrates the restyled Federal Rules of Evidence. Merritt and Simmons have also developed a comprehensive website, merrittevidence.com, that is open to all evidence professors (not just adopters). On the site, professors will find a host of teaching materials. Professors may also share their own teaching materials on the site, within a secure community that is not open to students or the public.

Evidence

Wolters Kluwer will be publishing a new edition of the **Mueller & Kirkpatrick** hornbook *Evidence* (5th ed. Aspen 2012) in February. This edition will incorporate the new restyled Federal Rules of Evidence.

Evidence: Text, Problems and Cases

The fifth edition of **Ronald J. Allen, Richard B. Kuhns, Eleanor Swift, David S. Schwartz & Michael S. Pardo**, *Evidence: Text, Problems, and Cases* (Aspen, Wolters Kluwer) was published in November 2011. Professor Pardo joined the book as a new co-author. The Fifth Edition incorporates the restyled Federal Rules of Evidence, has substantial new materials on the Confrontation Clause, and includes several new problems.

Stories About Science in Law: Literary and Historical Images of Acquired Expertise

David S. Caudill, Villanova University School of Law, USA

Presenting examples of how literary accounts can provide a supplement to our understanding of science in law, this book challenges the view that law and science are completely different. It focuses on stories which explore the relationship between law and science, especially cultural images of science that prevail in legal contexts. Contrasting with other studies of the transfer and construction of expertise in legal settings, this book considers the intersection of three interdisciplinary projects: law and science, law and literature, and literature and science. Looking at the appropriation of scientific expertise into law from these perspectives, this book presents an original introduction into how we can gain insight into the use of science in the courtroom and in policy and regulatory settings through literary sources.

Forensic Identification Expertise

Paul Giannelli is now a Distinguished University Professor at Case Western Reserve University and he wrote a chapter on forensic identification Expertise with Ed Imwinkelried and Joseph Peterson for the third edition of the FEDERAL JUDICIAL CENTER/NATIONAL RESEARCH COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, which was recently published.

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.

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