



AALS Evidence Section Newsletter

Winter 2010

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Message from the Chair

Dear Section Members,

Hope that you are enjoying your holiday season and that your grading is done.

I thought I would highlight a few items from the upcoming Annual Meeting in San Francisco, as well as talk broadly about some of the Evidence Section / evidence community activities that I would personally like to work on moving forward.

This year's AALS program features the following principal events, all of which are on Saturday, January 8th.

- EVIDENCE SECTION PANEL, 10:30am-12:15pm. *The Future of Statistics and the Law*, featuring Jay Koehler (Northwestern), Erica Beecher-Monas (Wayne State), and Mike Pardo (Alabama).
- EVIDENCE SECTION BUSINESS MEETING, immediately following the panel. The business meeting will consist of elections for a new Chair-Elect and Secretary, as well as a vote on by-law amendments required by the AALS national organization regarding honorary awards.
- SECTION LUNCHEON (jointly held with the Section on Criminal Justice), 12:15-1:30pm.

Looking forward, I would like to develop two scholarly-oriented ideas for the Section in the near future. The first is an annual paper competition for junior scholars. A number of sections, including Criminal Justice, conduct these competitions in advance of the Annual Meeting and have the winners make brief presentations of their work at the luncheon. To my mind, such a competition would foster greater interest in our field among junior scholars, and create a venue for showcasing our newer colleagues. Mike Pardo and I have discussed this possibility, and assuming the logistics are feasible, I hope to spearhead an

effort along these lines for next year.

The second idea aims at promoting our sense of community throughout the year, building on the work of the Evidence listserv. As I am sure many of you will agree, one of the most useful exercises in developing one's scholarship is the ability to workshop and receive comments on a working paper. Yet, workshop audiences rarely include more than one or two evidence specialists. Moreover, our other conventional venues – the Annual Meeting and various conferences – necessarily have limited scope. Wouldn't it be useful if we could have an evidence workshop, say, every two weeks?

A traditional workshop would of course be infeasible because of economic and time constraints, but technology offers other pathways. For example, what if we could develop a simple way to (video) record a speaker's presentation, post it on a secure website, and allow participants to download it? Then, we could all watch the presentation when convenient (while eating lunch at our desks, commuting on the train, etc.), and post discussion questions in response. We could even have pre-designated discussants, who could post video responses.

At this point, both of these ideas are just that – ideas. But over the next several years, I hope to make them a reality, at least on a trial basis. If any of you have thoughts or would like to help in their implementation, please let me know.

* * *

I have very much enjoyed the opportunity to serve as your Chair over the last year, and I look forward to seeing each of you in San Francisco.

My best wishes for the new year, and safe travels.



Ed Cheng
Vanderbilt Law School

Symposium Announcement

Second International Conference on Proportionality and Justice - Quantitative Aspects of Justice and Fairness

The Second International Conference on Proportionality and Justice – Quantitative Aspects of Justice and Fairness will be held at the European University Institute in Florence, February 25-26, 2011. Roughly one-third of the program will be devoted to proportionality in relation to evidence and evidential inference. Your papers and participation are invited. See the conference web site at <http://qajf.wordpress.com/>

Symposium Announcement

AI & Evidential Inference

There will be a one-day workshop on AI & Evidential Inference in conjunction with ICAIL 2011: The Thirteenth International Conference on Artificial Intelligence and Law, University of Pittsburgh, Pennsylvania, June 10, 2011. The invited panelists are Ronald Allen, Rainhard Bengez, Floris Bex, Scott Brewer, Craig Callen, James Franklin, David Hamer, Bruce Hay, Joseph Laronge, Michael Pardo, Federico Picinale, Henry Prakken, D. Michael Risinger, Giovanni Sartor, Peter Tillers, Bart Verheij, Douglas Walton, and Nanning Zhang. The workshop will examine computational methods and evidential inference in legal settings such as pretrial investigation and trials. Two foci of discussion will be (i) stories, narrative, or rhetoric, and evidential argument; and (ii) burdens of proof. Panelists will also be free to consider other topics, including, for example, (iii) evidential inference and statistical methods, and (iv) cognitive science, psychology, and inference.

See <http://www.law.pitt.edu/events/2011/06/icail-2011-the-thirteenth-international-conference-on-artificial-intelligence-and-law>.

Symposium Announcement

Trial Evidence

The Practicing Law Institute Trial Evidence program will be held on April 6, 2011 in New York City. The program chair is Professor Martin Schwartz (Touro Law Center) and faculty include: Prof Deborah Jones Merritt (The Ohio State University Moritz College of Law); The Honorable Reena Raggi (U.S. Court of Appeals for the Second Circuit); and The Honorable William Young (U.S. District Court, D. Mass.). More information is available at: <http://www.pli.edu/Content.aspx?dsNav=Ny:True,Ro:0,N:4294961984-164&fromsearch=false&ID=98200>

A Few New Interesting Cases

Expert Testimony in an Arson Case

On Nov. 15th, 2010, The Honorable Nancy Gertner issued an opinion in *United States v. Hebshie*, ___F.Supp.2d___, 2010 WL 4422040 (D.Mass.), granting the petitioners' Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2255, based on ineffective assistance of counsel. Hebshie was indicted for arson and consistently maintained his innocence throughout the trial and appeal. In the §2255 proceeding, his argument focused on counsel's ineffectiveness handling the scientific evidence. The expert evidence in question was: (1) "cause and origin" forensic evidence concerning how the fire started; (2) testimony from the handler of an accelerant detection canine; and (3) laboratory analysis of accelerant. The court held that counsel's failure to challenge all three types of testimony was error and that there was a "reasonable probability" that she would have excluded or limited all the expert testimony. The opinion provides an in-depth analysis of the shortcomings of the expert testimony. John Lentini (a contributor to *Modern Scientific Evidence*) testified as an arson expert in the §2255 hearing and Jane Moriarty testified about counsel's failure to challenge the expert testimony.

fMRI Evidence of Lie Detection

Two trial courts have excluded fMRI evidence of lie detection: *Wilson v. Corestaff Services, L.P.*, 900 N.Y.S.2d 639 (2010) and *United States v. Semrau*, No. 01-100074 MI/P (Report and Recommendation of Magistrate Judge Pham, dated May 31, 2010, available at <http://lawneuro.typepad.com/files/semrau.pdf>). In both cases, the parties sought to introduce the testimony of Steven Laken, Ph.D., CEO of Cephos Corp., a for-profit fMRI lie detection company. In each case, the proponent sought to introduce expert testimony that a witness responded truthfully to questions asked during an fMRI scan.

Both courts excluded the evidence; one with an evidentiary hearing (*Semrau*) and the other without. *Wilson*, in line with many cases, found that expert evidence about credibility should be treated “skeptically,” and decided that expert testimony about credibility was unnecessary, since it was within the “ken” of the jury. *Wilson* also held that the testimony did not meet the *Frye* standard of general acceptance, simply stating that the “scientific literature raises serious issues about the lack of acceptance of the fMRI test in the scientific community to show a person's past mental state or to gauge credibility.” 900 N.Y.S.2d at 642.

Semrau is a fairly detailed opinion (actually, a Report and Recommendation orally adopted by the U.S. District Court Judge at trial) and more in-depth than *Wilson*, addressing questions of reliability, problems with expert testimony on credibility, and the likelihood of unfair prejudice substantially outweighing probative value. The Court, using the *Daubert* factors as a guidepost, held the evidence was not sufficiently reliable to be admitted, focusing on the lack of ecological validity (i.e., lack of “real world”) related to error rate for the evidence; the lack of controls (the scans were repeated three times); and the lack of agreement among scientists that about the reliability of the procedure to determine credibility in the real world. The court also expressed concern about permitting expert testimony on credibility, and determined that the probative evidence was substantially outweighed by the danger of unfair prejudice.

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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