

Syllabus

Logistics

The instructor for the course is Professor Ira Ellman. My office is Room 208 in the law school, Armstrong Hall. My normal office hours are Tuesdays from 1:30 to 2:30. If you need to speak with me and cannot come during this time period, please send me an email to set up an appointment for a different time. Ms. Keelah Williams will be assisting Professor Ellman, and her office is SCOB 242H and her office hours will be Mondays from 3 to 4 p.m. and by appointment. Her email is Keelah.Williams@asu.edu.

The reader for this class can be purchased from the duplicating office in the basement of the Law School (Armstrong Hall). It contains all the assignments listed here. Please be sure to pick up the reader in time to prepare for the first class.

There is no final examination in this class. The fourth and final essay is due on Friday, December 6, after the final class on Monday, December 2.

Substance

This is not a law class, but it is a class *about* law, and many of the readings will require at least a rudimentary familiarity with legal process. Some class members may have such knowledge already, but I will not assume that you do. To help fill this gap, please read pages 104-117 of Farnsworth, *Introduction to the Legal System of the United States* (3d ed), which is reprinted in the course reader. These thirteen pages provide a basic summary of how civil and criminal trials work. You may wish to read this before the first class, but in any event, be sure to read it before the second class. I do not plan on discussing this material directly in class, but I will take questions on it, and I urge you to ask questions about any aspect of legal process that you are not clear about.

For your information, the excerpts contained in the reader that are identified as coming from “M&W” are from Monahan and Walker, *Social Science in Law* (7th edition, 2010).

Introduction

Week One, August 26: Introduction

- I. Assignments
 - A. M&W pp 8-10: The classic “Brandeis Brief” in the *Muller* case
 - B. The 2000 Presidential Election: Could the law cope?

1. Background, on chads and butterflies, from LOWENSTEIN AND HASAN, ELECTION LAW (2d ed., 2001) 65-70
2. Gannett newspaper article on butterfly ballot court case
3. Henry E. Brady, Michael C. Herron, Walter R. Mebane, Jasjeet, Singh Sekhon, Kenneth W. Shotts, Jonathan Wand, *Law and Data: The Butterfly Ballot Episode*, Political Science & Politics, March 2001
4. Picture of the Butterfly Ballot

II. Questions

- A. The *Muller* case (the first reading) seems to rely on factual claims about the need to protect women in the workplace. What facts does the Court consider to have been shown? What evidence does it have for these facts? How would a social scientist evaluate this evidence?
- B. The second set of readings provide some general background on the famous ballot controversy in Florida in the election between Gore and the first Bush, and then focus on a particular aspect of that controversy, the Palm Beach County Butterfly Ballot.
 1. Note that there were two distinct controversies associated with this case. Most press attention at the time focused on the “chad” problem: courts had to decide whether to count ballots that voting machines had not counted because the “chads” were not fully dislodged from ballot. And if the vote could in principle be counted, how would those inspecting the ballots decide whether whether any particular ballot showed the voter meant to cast a vote, and if so, for whom? The other issue was whether the format of the “butterfly” ballot used in Palm Beach County misled some voters who intended to vote for Gore, so that they mistakenly marked their ballot as a vote for Buchanan. Compare these two legal issues (chads, and butterfly ballot). Think about the nature of each claim: how do you decide whether the claim is true, and what can the law do about the claim if it is true? In those respects, how are the claims the same, and how are they different?
 2. We will focus in class on the butterfly ballot issue. The article by Brady *et al* examines whether the claims that it caused confusion are true, and whether, if there was confusion, the confusion mattered (because of the number of votes it affected). I appreciate that for most and perhaps all of you, it will take effort to understand exactly what evidence this article presents on this question. This article is an excellent example of good social science work that answers a potential legal question of importance, and you should do your best to try to understand it. We will review it in class to make sure you do.
 3. Consider these two related questions about the butterfly ballot issue:
 1. Why was the evidence presented by the *Brady* analysis less effective in the legal dispute about the 2000 election, than was the evidence the court considered in *Muller*, about the issue there (restrictions on working conditions). Which evidence would a social scientist considered more persuasive?

2. Do social scientists and courts ask different questions? Exactly what does the Brady analysis prove about the effect of the Butterfly Ballot? Is this proof sufficient to provide a basis for a court granting a legal remedy? It appears it was not, but why? Is it because the question the law needs to answer is different than the question answered by the Brady analysis? Or is social science evidence on that question different than the evidence the law needs? Would a social scientist answer the ultimate question (who won the election?) differently than a court would?

No Class Monday September 1, Labor Day

FIRST ESSAY DUE TUESDAY, SEPTEMBER 2 AT 5 P.M.

Part I: Proof and Facts in Individual Cases

Preparation for Week Four: Before class on September 9, please complete a survey you will be directed to on Survey Monkey. You will receive an email with further instructions. (We will not discuss the survey until Week 4, but your completing it now will help us incorporate its results in the Week Four discussion.)

Week Two, September 9: The use of social science to establish facts at a trial: Trademarks

3. Assignment: M&W pp 104-108, 110-114, 116-120, 124-127.
4. Questions
 - a. These cases provide a window into how the law decides whether evidence will be considered in a case (is “admissible”) because it is relevant, probative, non-hearsay.
 - b. It is sometimes said that social science evidence is not useful for law because it tells you about groups, not about individuals, while cases are about individuals. Was that a problem in the Butterfly Ballot case? Should it be a problem in these trademark cases? Why does the law seem to treat them differently?
 - c. Consider the purpose of the social science evidence the courts consider in these cases. It is offered to prove facts. What is the role of the relevant facts in these cases, as compared to Muller—is there something basically different about the purpose for which the factual claims are offered in Muller, as compared to these trademark cases? Does that or could that account for differences in how the court treats the social science evidence?

Week Three, September 16: The use of social science to establish facts at a trial: Obscenity

5. Assignment:
 - a. M&W 142-167.
6. Questions: what is similar and what is different about the use of social science to prove facts in these obscenity cases, as compared to its use to prove facts in the trademark cases presented last week?
 - a. What is similar is that the court must make a legal decision that requires it to establish what the larger community understands or believes about something
 - i. do many people get confused about product brand?
 - ii. is this item beyond “contemporary community standard”?
 - b. But is there a difference also?
 - i. Compare the question the court must answer in the trademark cases to the questions in the obscenity cases, and consider whether there is the comparison suggests any difference in the role social evidence plays in these two kinds of cases.

Week Four, September 23: A Glimpse at the Psychology of Fact Assessment I

7. Assignments
 - a. Dan Kahan, *Culture, Cognition, and Consent*, 731-742, 756-761, 765-767, 773-777
8. Questions. Although this reading is about the legal standards applicable to rape, it provides an example of some more general basic points that you should think about as you read it
 - a. How are our perceptions of facts affected by our own predispositions?
 - b. How are our perceptions of facts affected by the judgments of those around us?
 - c. How do *factual* conclusions in legal proceedings necessarily implicate *values*?

SECOND ESSAY DUE FRIDAY, SEPTEMBER 27, AT 5 P.M.

Week Five, September 30: A Glimpse at the Psychology of Fact Assessment II: Group Decisionmaking--Does the size of the jury matter?

9. Assignment: M&W 272-289, 294-296.
10. Questions to consider for class discussion:
 - a. Does the Court understand the research on group decisionmaking that is offered to help it decide what the constitutional rule should be?
 - b. Think about the different factual questions juries were asked to decide in the kinds of cases we considered in weeks two, three, and four. Is a single standard of minimum jury size necessarily appropriate across all kinds of cases?
 - c. Does Kahan’s work on cultural cognition might tell us anything about the best rule the law might adopt with respect to jury size?

Week Six, October 7: Forensic “Science”: Can the Law Tell the Good from the Bad?

Assignments.

- a. Expert testimony generally: Federal Rule of Evidence 702, M&W pp. 52-53.
- b. Michael Saks and Jay Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 *Science* 891 (2005)
- c. Frontline video: Death by Fire (60 minutes)
- d. Those who are interested may wish to read a New Yorker article on the same case I will post on the course blackboard site.

14. Basic Points

- a. Scientists can be seen as experts who tell us what the facts are—but in that case, the law must be able to distinguish bad from good scientific methods
- b. History shows great difficulty with the law’s ability to do that.

NO CLASS OCTOBER 14 (FALL BREAK)

Week Seven, October 21: Scientific Evaluation of Everyday Evidence: Eyewitnesses

15. Assignments

- a. Scheck, Neufield and Dwyer, “*Actual Innocence*,” 46-77.
- b. Summary of scientific findings on eyewitness testimony taken from Oregon v. Lawson, 291 P.3d 673 (Ore. 2012)
- c. Perry v. New Hampshire, 132 S.Ct. 716 (2012)
- d. In class we will watch a 25 minute clip from “60 minutes”.

23. Basic Points:

- a. False Confessions and mistaken eyewitness identification account for the overwhelming majority of mistaken convictions
- b. Legal procedures, developed long before science tackled these questions, rely on common sense ideas of good proof that psychologists have long known are wrong.
- c. In recent years these mistaken convictions have been revealed by DNA evidence exonerating some of the falsely convicted.
- d. Psychologists can suggest some techniques for improving the accuracy of such evidence, or at least improving our evaluation of it.

Part II: Use of Scientific Facts in Forming Legal Policy

Week Eight, October 28: Judicial Use of Social Science Evidence

19. Assignment
 - a. M&W 417-421 (Predicting Violence)
 - b. M&W 188-191 (General background on “legislative facts”)
 - c. M&W 192-211 (Brown v. Board of Education)

20. Questions
 1. Did the court understand the social science evidence? Why?
 2. Did the social science evidence matter? Should it have mattered?
 3. Recall Week Five—did the court properly understand the social science evidence on jury size? Did that matter?
 - 4.

THIRD ESSAY DUE FRIDAY, NOVEMBER 1 AT 5 P.M.

Week Nine, November 4: Constitutional Facts II—Use of statistics

21. Assignments:
 - a. In death penalty cases, M&W 315-335 (Does the death penalty deter? Discriminate?)
 - b. In Profiling, M&W 443-460
 - c. The law’s (in)competence in statistics: *Chances Are*, by Steven Strogatz. NY Times Opinionator, April 25, 2010.

22. Basic Points
 - a. Constitutional adjudication often involves arguments over facts
 - i. The law struggles with statistical evidence of such facts, and the result often depends in large part which side has the burden of proof under the applicable legal rule.
 - ii. Statistics can inform us in different ways. E.g.,
 - (1) Does the death penalty deter? (Does it have the intended social effect?)
 - (2) Do we discriminate in administering it (Balduis study)
 - iii. Science cannot resolve the value question (is it morally correct to impose the death penalty as "just deserts" whether or not it deters)
 - iv.

NO CLASS NOVEMBER 11: VETERANS DAY

Week Ten, November 18:

Basing Legal Policies on Citizen Preferences: Can Social Science Tell Us What They Are? Or How They Are Formed?

23. Assignment
- a. Excerpts from Stalans and Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing*, Law and Human Behavior, 1990
 - b. Dan Kahan, *Coin Toss Reveals that 56% of Quarters Support NSA's Monitoring Policy*, posted on *cultural cognition blog*, 6/11/2013
 - c. Excerpts from Lord, Ross, and Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, Journal of Personality and Social Psychology 1979, Vol. 37, No. 11, 2098-2109
 - d. NOTE: We may also begin the Week 11 assignment during Week 10

Week Eleven, November 25:

More On the Effect of Knowledge and Education on Citizen Preferences About Legal Policies

25. Assignments
- a. Kahan et. al., *The polarizing impact of science literacy and numeracy on perceived climate changes risks*, Nature: Climate Change, Letter published on line 27 May 2012, <http://www.nature.com/doifinder/10.1038/nclimate1547>
 - b. Video: Nova, Intelligent Design on Trial
 - c. Kahan, *What does "disbelief" in evolution *mean*? What does "belief" in it *measure*?*, posted on *cultural cognition blog*, 6/19/2013

Week Twelve, December 2: Using Social Science to Make Laws More Effective

26. Assignments
- a. Richard Thaler and Cass Sunstein, *Nudge*, pp. 1-14, 55-60 (Ash and group effects), 62-69 (extend Ash to political and regulatory arena), 78-80 (plus Shel Silverstein poem Smart) (when markets don't protect the irrational).
 - b. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stanford L.Rev. 211 (1995). Pp. 214, 215, 216-218, 219-220, 222-224 (Summarizes some H&B findings—later parts consider applications)
 - c. Cialdini et. al., *Managing Social Norms for Persuasive Impact*, 1 Social Influence 3 (2006).

FOURTH ESSAY DUE FRIDAY, DECEMBER 6, AT 5 P.M.