UVA LAW | Schauer board council 2022

FREDERICK SCHAUER: Welcome and delighted to talk. And I will be talking about evidence and talking about at least some of the themes and examples in a book I wrote that Elizabeth mentioned called *TheProof* that has been out for a few months now. So I've been teaching evidence on and off for about 45 years.

It was one of the things I taught early in my academic career, unlike what seems to go on these days, I became an academic right out of practice-- no fellowship, no PhD, no writing, no clerkship right out of practice. And therefore, it was natural that I would start teaching things that I knew a little bit about from practice. And since I'd been a trial lawyer in Boston for three years, evidence was one of the things that I started teaching.

Then I gave it up for some years to teach and write about the First Amendment constitutional law and interpretation and jurisprudence. And then about 20 years ago, 5 years or so before I came here, I started teaching and writing about evidence again. Now, I mention this because of two related events that say something about evidence and two related events about my return to evidence as a field.

One, shortly after returning to it, I mentioned to a friend-- a quite distinguished moral and legal philosopher-- and who earlier had been in my First Amendment class at the Harvard Law School, I mentioned to this philosopher lawyer friend that I was teaching evidence, whereupon she said, and this is a direct quote, "You are joking."

Related to that, then at about the same time, I had mentioned to the then-dean of the Harvard Law School, who now has another job, I had mentioned to the then-dean of the Harvard Law School that I wanted to teach evidence in that half of my appointment that was at the law school rather than at the Kennedy School I'd been teaching the First Amendment. I mentioned to her that I wanted to teach evidence, whereupon she said, really?

And then immediately, she got on the phone with the associate dean while I was sitting there before I could change my mind and said, Fred's in my office now. He said he wants to teach evidence. Let him teach it whenever he wants, wherever he wants, in whatever form he wants because we can't find any enough people to teach the subject.

So both of these reactions reflect the common academic view that evidence is largely about a bunch of silly rules that you need to learn in order to take the bar exam, that you need to learn for some aspects of practice, but not the kind of subject that would attract genuine, intellectual interest. After all, what kind of intellectual or academic would be interested in a subject that has the hearsay rule with depending on how you count somewhere between 29 and 35 exceptions?

So all of this reflects, as I said, what I think is a common view about the subject. But what changed my mind? So one, the subject was waking up. The subject was becoming deeper, the subject was becoming more intellectually and academically interesting in a number of ways. One, there was a considerable interest and it's still thriving.

In statistical evidence, the use of statistics and a bunch of related issues, depending on how much evidence you know or when you took an evidence course, this is the general issue that often goes under the heading of the blue bus problem, but there are related statistical issues that have attracted philosophers, statisticians, lawyers as well that created a fair amount of genuine interest. Indeed, a bunch of leading philosophy journals these days talk about statistical evidence.

Second, there was an increased interest in a range of issues about experts and expert testimony. Some of this came out of the Supreme Court's Daubert decision. Some of it came out of the increasing interest in a number of different technical areas in which expertise became important. And one of the things that followed from expertise becoming important was a range of difficult and controversial questions about who is an expert.

So when I teach all of this, I like to at least introduce the subject of expert testimony by talking about phrenology. Phrenology for those of you who don't consult a practicing phrenologist on a daily basis is the domain that was wildly popular in the 19th century, the domain in which phrenological experts claim to be able to determine your behavior, your personality, and a whole bunch of other things from the terrain of your skull.

One of the interesting and important things about phrenology is that at the time that phrenology was a big deal, you could get advanced degrees in phrenology. There were institutes of phrenology. There were phrenological journals. There were awards in phrenology. All sorts of trappings of academic respectability surrounded phrenology.

But despite the fact that all sorts of academic trappings, intellectual trappings, scholarly trappings, surrounded phrenology, and that it looked like an academic field, that didn't detract from the fact that it was as was subsequently discovered that phrenology was to use the appropriate technical term, crap, that is knowing the terrain of one's skull tells you nothing.

But what's interesting about it is that it illustrates the way in which it's hard to determine who is an expert in a field about which you know nothing. Judges face this problem, lawyers face this problem. How can you determine who the experts are in a field if it is a field that you yourself don't anything about?

So all of these issues were part of what became discussed with some frequency starting a few years ago. And the third thing I'll mention here in terms of the rebirth of evidence as an academic and scholarly field, as well as a field of great practical importance was increasing interest related to the area of expertise in forensics.

Serious thinking about forensics, serious thinking about those forensic techniques that were widely accepted, but turned out to have never been tested, turned out to be less reliable than we might think. So there was a great deal of interest in evaluating forensics, re-evaluating forensics, looking at those forms of forensic evidence that include things like bite marks and tire marks and blood spatter patterns, and so on and so on and so on. Some of which were reliable, and some of which were not.

All of which generated important government reports and academic inquiry and so on. So but the other thing that explains my re-interest in evidence as a field was an interest in the way in which evidence as a field, evidence as a subject was increasingly relevant outside the legal system. That's what the book is all about.

How can we think about evidence outside the legal system, and maybe use a little bit of what the legal system does and thinks about evidence to inform our thinking outside the legal system about evidence? Obviously, questions of evidence have been front-page news at least since November of 2020. And a related series of questions, who said what to whom on January the 6th, 2021?

All of these issues with some frequency are now talked about as evidentiary problems. But there's a lot more than just the kinds of evidentiary problems that have recently become front-page news. So let me just give a few examples. One familiar to a number of you in the room, question of evidence was Thomas Jefferson, the father of Sally Hemings children.

And one of the interesting things about this issue is that not only does the Thomas Jefferson Foundation at Monticello say, yes to that question, but their answer to that question in their elaborate report about the question and about evidence makes explicit reference to Bayesian statistics, explicit reference to the way in which one can do a statistical analysis or at least think in statistical terms and think in Bayesian incremental terms about how to think about the evidence for and against this proposition.

This is entirely an evidentiary question and it's entirely a factual evidentiary question. It's not an evaluative evidentiary question. It's not a question as a question of fact that involves issues of disputed morality or disputed politics, although they obviously affect the factual inquiry, but basically, it is a purely factual inquiry of use of evidence to try to come up with an answer about something to which we cannot be sure.

So similarly, think about, again, a current evidentiary question, do vaccines work? And not only do vaccines work in the context of COVID but earlier, do vaccines work in the context of measles, the flu, and various other things? Once again, many people would say that we know that vaccines work, and some people would say that we know that vaccines don't work because they purport to rely on experts. But then the question is, who are the experts and how do we who the experts are?

Increasingly in an area in which everybody claims to be an expert, the Actress Gwyneth Paltrow claims to be a lifestyle expert. I don't what a lifestyle expert is. I've got a lifestyle. I'm pretty happy with my lifestyle. And I don't why I would want to consult an expert in lifestyles, but still we have lifestyle experts, we have experts on all sorts of other things and it still presents the same kind of problem who are the experts and how do we who the experts are.

One of the examples-- one series of examples I talk about in the book are examples about art authentication-- so evidentiary problems. So art authentication, not art evaluation. Not the question of whether Rembrandt was a better or worse painter than Picasso, or whether Rembrandt's are worth more or less than Picasso's, but strict authentication questions.

So one of the ones that's talked about now is who painted a painting called *Salvator Mundi.* It's commonly attributed to Leonardo da Vinci, but, of course, we can't ask him whether he painted it or not-- he's dead. And with a lot of other similar issues of art authentication, often the best evidence is unavailable. Even if we assume that asking him would be conclusive-- which it might not be-- but even if we assume that it would be conclusive, it would be hard to ask him.

So there are disputes now that involve relying on potentially contested and actually contested expert judgments that rely on historical inquiry, that rely on scientific examination of paints, of brushstrokes, and all of these. So let me talk briefly about another art example. In 1936 or 1937, a man named Han Meegeren, Dutch, painted a painting called *Christ at Emmaus.*

And *Christ at Emmaus* was claimed to be a Vermeer. Vermeer didn't paint very many paintings, so this appeared to be a discovery of a previously unknown Vermeer. Van Meegeren claimed that it was a Vermeer. Most museums agreed that this was a long lost Vermeer. Most of the Vermeer experts agreed that this was a long lost Vermeer.

And perhaps most importantly, the most famous and most rapacious art collector of the late-1930s, Hermann Goring, believed that it was a genuine Vermeer and eventually acquired it. I'll put scare quotes around the acquire, but he eventually acquired it. Fast forward to 1946, the war is over, at least some of the art that the Nazis had stolen was repatriated.

And at that point, we learned for the first time that *Christ at Emmaus* was an absolute total no doubt about it forgery. And the way we learned that it was an absolute total no doubt about it forgery was van Meegeren confessed-- and he confessed for a very good reason. He was charged in a Dutch court with having sold or given away an important part of the Dutch patrimony. That was a bad thing to do in the late-1930s through mid-1940s. He was charged with being a traitor.

He wisely made the judgment that it is better to be charged as a forger than charged as a trader. So at that point, he confessed and was sentenced to a short prison term and actually died before serving out the sentence. But all of these are questions of evidence. So let me just finish by a couple of lessons that come out of this and many other examples.

What can we learn from the law of evidence about evidentiary questions in everyday life? One, perhaps the most important question of any evidentiary question is compared to what. So it turns out that compared to what is a big and important question, one of the issues that I talk about in the book and one of the issues that I've been a little bit involved in by being part of a scientific project on this is lie detection.

Lie detection interests me not only because-- not only in the context of traditional polygraphs, but more recent forms of lie detection technology, which include things like periorbital thermography, electroencephalography. I'm always very proud of myself when I can pronounce these things to a larger audience. And most recently, functional magnetic resonance imaging brain scans.

So it turns out that there's a fair amount of skepticism not only about these modern techniques, but there's been skepticism all along in the legal system about lie detection, about polygraphs, despite the fact that there's remarkably less skepticism in the intelligence community and remarkably less skepticism among some large number of employers.

But it turns out that if we don't use lie detection technology at least for some legal purposes, what's the fallback proposition? At least if we're talking about trials, the fallback proposition is as it is commonly said the jury is the lie detector in the courtroom. And although lie detection technology from the 1920s when it was first invented to now is far from perfect, it's a lot better than ordinary people.

And there is some important research, most of it done by a former UVA psychology professor named Bella DePaulo. DePaulo and her colleagues have tested people's ability to determine whether other people are lying. And it turns out that most people-- even well-trained people-- are scarcely better than random at distinguishing liars from truth tellers. They rely on folk wisdom about whether people look at you and things of this variety all to determine whether people are lying or telling the truth and it's a lot worse than lie detection.

So compared to what? Second larger lesson that I hope comes out of the book and the like is weak evidence is still evidence. So we've all heard the phrase, there's only circumstantial evidence for something. People who say that there's only circumstantial evidence for something usually are lawyers for guilty defendants. But we hear similar kinds of things, there's no concrete evidence. There's no conclusive evidence. There's no direct evidence.

In all of these contexts, people who are using these qualifiers implicitly are saying, yes, there's some evidence, but I want you to believe that it's not enough. But again, whether it is enough or not depends on what we are going to do with it. How much evidence and how strong the evidence has to be is a function of what turns on it.

We know and we should know that we don't put people in jail unless there is proof beyond a reasonable doubt of some proposition, but do you require proof beyond a reasonable doubt if you have at least some information that your babysitter or your scout leader is a child molester? Under those circumstances, you might want a lot less than proof beyond the reasonable doubt. So how much evidence you want depends in large part on what turns on it.

So an indeed, and I'll finish with this one example, one of the big issues now that goes back and forth depending on the administration, one of the big issues is what's the burden of proof in university disciplinary proceedings for students charged-- especially students charged with various forms of sexual misconduct?

So for a while during the Obama administration, the Department of Education issuing guidelines under Title IX said that it was permissible to have a preponderance of the evidence standard. Then in the Trump administration, the Department of Education said that if universities wanted instead to have a standard of clear and convincing evidence or even proof beyond the reasonable doubt, they could do so.

And it turns out that this issue was largely an issue that's the modern embodiment of the famous phrase from Blackstone, "It is better that 10 guilty people go free than that 1 innocent be punished." So then the question is when we are talking about students charged with sexual misconduct on a university campus, what are the consequences of a mistake?

Those who would want a very high burden of proof say that being found guilty in a university disciplinary proceeding is so close to being found guilty in a court. That we should have the same standard of proof. That this is so consequential for your future life that it should be, once again, beyond the reasonable doubt.

On the other side, often advocates on the other side, in particular, victim's advocates, have said when somebody is wrongfully acquitted, that person remains in our community. And because they remain in our community, the consequences of a wrongful acquittal are much more serious than they are in the criminal justice system.

Right now, all of this is being played out in court on technical issues of administrative law and which agency has the power to do what, but it's, once again, an example of the way that issues of evidence are all around us. I could go on but I won't. There are many other examples. I certainly wouldn't mind if you read the book. But better, I think is just to think about evidentiary issues that are all around us in public policy and even more in the decisions we make every day. Thank you.

[APPLAUSE]