

## The History of Evidence



Spring 2018  
Thursday 5-7 PM  
Wasserstein 3011

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Office hours: Tuesdays 1-3 PM\*

### Rationale

*“The field of evidence is no other than the field of knowledge.”—Jeremy Bentham*

This course, offered at the Harvard Law School and jointly in the college to advanced undergraduates and graduate students, will examine and compare the rules and standards of evidence in law, history, science, and journalism. What counts as proof in these fields varies and has changed over time, often dramatically. Emphasis will be on the histories of Western Europe and the United States, from the middle ages to the present, with an eye toward understanding how ideas about evidence shape criminal law and with special attention to the rise of empiricism in the nineteenth century, the questioning of truth in the twentieth, and the consequences of the digital revolution in the twenty-first. Topics will include the histories of trial by ordeal, trial by jury, the footnote, case law, fact checking, expert testimony, the polygraph, statistics, DNA, anonymous sources, and big data.

\*I hold walking office hours. If I’m not in my office, I’m out for a walk with a student; please wait and I’ll be back. If the weather’s bad or if, for whatever reason, you’d rather not go for walk, we can meet in my office. If you want to meet but can’t make my office hours, please email me to schedule an appointment. Please email me only during regular business hours, M-F, 9-5.

## Requirements and Grading

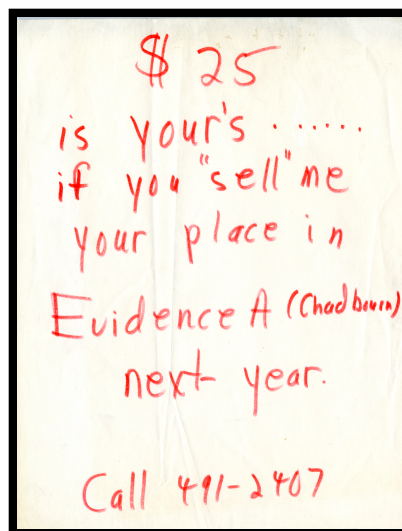
Your chief work for this course is preparation for, attendance at, and participation in seminar. That work accounts for thirty percent of your grade. Each student will also be required to make two 10-15 minute reports in class. These oral reports together account for forty percent of your grade (twenty percent each). I have listed possible subjects for these reports on the syllabus but you are welcome to propose a subject of your choosing. Two students will generally present each week although, depending on enrollment, there might be a few weeks where three students will need to present. You are strongly encouraged to coordinate your work in any given week with other students. Guidelines for this assignment will be discussed the first week of seminar, when you will also sign up for the week you will present. A final paper, due the first day of reading period, accounts for the remaining thirty percent of your grade. This paper will be a carefully argued 4000-word essay on a subject of your choice. A recommended approach is to write an essay on a topic we have discussed in class, using the supplemental reading as a foundation. You will need to submit a topic to me for approval before Spring Break. Guidelines for this assignment will be distributed in class. Law School students will receive grades of Honors, Pass, Low Pass, or Fail; FAS and GSAS students will receive letter grades.

### Policies

A course pack is available, free of charge, at the HLS Copy Center, in the basement of the Wasserstein Hall (WCC B018). You will need to show your Harvard ID to receive the course pack. Electronic devices are not allowed in class, except for student presentations. Please bring the course pack and your notes to seminar.

You are encouraged to collaborate with other students in preparing your oral reports. All written work, however, is individual. In documenting your sources, please use *The Bluebook: A Uniform System of Citation* if you are enrolled in the law school; if not, please use the *Chicago Manual of Style*.

The class is limited to twenty-two students. Auditors are not allowed.



*Undated note from a student, in the Papers of James Harmon Chadbourn, Harvard Law School Library, Historical and Special Collections.*

### Reference

Law students enrolled in this course will already have taken a course called Evidence. For non-law students who are curious about what that type of course covers, a good, single-volume textbook commonly used in the teaching of Evidence in American law

schools has been placed on reserve in Lamont. It is George Fisher, *Evidence* (New York: Foundations Press, 2002).

### Readings and Meetings

This is a long syllabus. Do not be daunted. Most of the reading listed here is supplemental—material you might want to read on topics in which you are particularly interested--rather than required, and material that might be useful to you if you choose to write your paper on this topic. The required readings are many but short, usually a total of 50-100 pages per week. Please read these pages carefully and entirely.

#### January 25                      What Is Evidence?

##### Reports:

There will be no reports this week.

##### Required:

Peter Murphy, Introduction, *Evidence, Proof, and Facts: A Book of Sources* (London: Oxford University Press, 2003), 1-22.

William Twining, "Evidence as a Multi-Disciplinary Subject," in *Rethinking Evidence: Exploratory Essays* (Cambridge: Cambridge University Press, 1990, 2006), 436-456.

Steven Shapin, *A Social History of Truth* (Chicago: University of Chicago Press, 1994), xxiii-xxxi.

##### Supplemental:

Jeremy Bentham, "On Evidence in General," *Rationale of Judicial Evidence* (1827), reprinted in *Evidence, Proof, and Facts*, 25-26.

Walter Lippmann, "News, Truth, and a Conclusion," in *Public Opinion* (New York: The Macmillan Company, 1922, 1950), 358-365.

David Schum, "What Is Evidence?" *Evidential Foundations of Probabilistic Reasoning* (1994), reprinted in *Evidence, Proof, and Facts*, 27-30.

Editors' Introduction, *Proof, Practice, and Persuasion Across the Disciplines*, ed. in James Chandler et al. (Chicago: University of Chicago Press, 1994), 1-8.

#### February 1                      Confession

##### Reports:

Paul Boyer and Stephen Nissenbaum, eds., *The Salem Witchcraft Papers* (New York: Da Capo, 1977).

Old Bailey Sessions Papers, 1670-1800, Harvard Law Library, Historical and Special Collections ([fully searchable at Old Bailey Online](#)).

Nat Turner, *The Confessions*, 1831 (and other slave conspiracy confessions as evidence). *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966).

The Central Park Five, 1989.

Karen J. Greenberg and Joshua L. Dratel, eds. *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005).

Required:

Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* (Chicago: I.R. Dee, 1999), 3-53.

John H. Langbein, *Torture and the Law of Proof* (Chicago: University of Chicago Press, 1977, 2006), 3-69.

Supplemental:

Paul R. Hyams, "Trial by Ordeal: The Key to Proof in the Early Common Law," in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, edited by Morris S. Arnold et al. (Chapel Hill: University of North Carolina Press, 1981).

Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986).

Jill Lepore, *New York Burning: Liberty, Slavery, and Conspiracy in Eighteenth-Century Manhattan* (New York: Knopf, 2005).

Jess Bravin, *The Terror Courts: Rough Justice at Guantanamo Bay* (New Haven: Yale University Press, 2013).

**February 8 The Fact**Reports:

The use of the word "fact" in Early American Imprints, Series I, 1639-1800.

The use of the word "fact" in the Papers of Benjamin Franklin, 1706-1790.

The history of fact-checking as a journalistic practice

*F for Fake* (1973), dir. Orson Welles.

Required:

Barbara J. Shapiro, "The Concept 'Fact': Legal Origins and Cultural Diffusion," *Albion* 26 (1994): 227-252.

Mary Poovey, *A History of the Modern Fact* (Chicago: University of Chicago Press, 1998), 1-16.

Supplemental:

Lorraine Daston, "Marvelous Facts and Miraculous Evidence in Early Modern Europe," in *Proof, Practice, and Persuasion Across the Disciplines*, 243-288.

John McPhee, "Checkpoints," in *Silk Parachute* (New York: Farrar, Strauss and Giroux, 2010), 165-195.

William Twining, "Taking Facts Seriously," in *Rethinking Evidence*, 14-34.

Barbara J. Shapiro, *A Culture of Fact* (Ithaca, NY: Cornell University Press, 2000).

Lorraine Daston, "Strange Facts, Plain Facts, and the Texture of Scientific Experience in the Enlightenment," in *Proof and Persuasion: Essays on Authority, Objectivity, and Evidence* ([Turnout]: Brepols, 1996), 42-59.

Anthony Grafton, *The Footnote: A Curious History* (Cambridge, MA: Harvard University Press, 1999).

Ann Blair, *Too Much to Know: Managing Scholarly Information Before the Modern Age* (New Haven, CT: Yale University Press, 2010).

## February 15 The Archive

### Reports:

Dying Speeches and Bloody Murders Collection, Harvard Law Library, Historical and Special Collections, searchable at [Dying Speeches collection](#).

Joseph Story Papers, Harvard Law Library, Historical and Special Collections.

Felix Frankfurter Papers, Harvard Law Library, Historical and Special Collections.

Pauli Murray Papers, Schlesinger Library, Radcliffe

Janet Malcolm, *In the Freud Archives* (New York: Knopf, 1983).

*Porn Archives*, edited by Tim Dean (Chapel Hill: Duke University Press, 2014).

The Internet Archive (archive.org)

### Required:

Natalie Zemon Davis, *Fiction in the Archives* (Stanford: Stanford University Press, 1987), 1-35.

Carlo Ginzburg, "Checking the Evidence: The Judge and the Historian," in *Proof, Practice, and Persuasion Across the Discipline*, 290-303.

Caroline Elkins, "Looking Beyond Mau Mau: Archiving Violence in the Era of Decolonization," *American Historical Review*, 120 (2015): 852–868.

### Supplemental:

Arlette Farge, *The Allure of the Archive*, translated by Thomas Scott-Railton (New Haven, CT: Yale University Press, 2013).

Allen Johnson, *The Historian and Historical Evidence* (New York: Charles Scribner's Sons, 1926, 1930), 1-23 ("The Sources of Information"), 24-49 ("The Basis of Historical Doubt"); 75-100 ("The Assessment of Evidence").

John Burrow, *A History of Histories* (New York: Random House, 2008).

H.B. George, *Historical Evidence* (Oxford: Clarendon Press, 1909), 9-28 ("What Is Evidence?").

Lisa Gitelman, *Paper Knowledge: Toward a Media History of Documents* (Durham, NC: Duke University Press, 2014).

## February 22 Investigation

### Reports:

Henry Fielding, *Examples of the Interposition of Providence in the Detection and Punishment of Murder* (London, 1752).

Edgar Allan Poe, "The Murders in the Rue Morgue," (1841).

Arthur Conan Doyle, *The Memoirs of Sherlock Holmes* (1894).

Records of the Wood Detective Agency, Harvard Law Library, Historical and Special Collections.

Sigmund Freud, "Dora: An Analysis of a Case of Hysteria," 1905.

Sarah Koenig, *Serial*, Season One, 2014.

*The Making of a Murder*, Season One, dir. Moira Demos and Laura Ricciardi, 2015.

Required:

Latif Nasser, "Oliver Sipple," Radiolab, 2017.

Janet Malcolm, *The Journalist and the Murderer* (New York: Knopf, 1990), 3-65.

Carlo Ginzburg, "Clues: Roots of an Evidential Paradigm," in *Clues, Myths, and the Historical Method* (Baltimore: Johns Hopkins, 1989), 96-125.

Supplemental:

Kate Summerscale, *The Suspicions of Mr. Whicher* (New York: Walker & Company, 2008).

Ronald R. Thomas, *Detective Fiction and the Rise of Forensic Science* (Cambridge: Cambridge University Press, 1999).

J. M. Beattie, *The First English Detectives: The Bow Street Runners and the Policing of London, 1750-1840* (Oxford: Oxford University Press, 2012).

Edmund Wilson, "Why Do People Read Detective Stories?" *The New Yorker*, October 14, 1944.

**March 1                      Surveillance**

Guest:                      Elizabeth Hinton, Assistant Professor of History and of African and African American Studies, Harvard University

Reports:

[\*The Tea Room\*](#), dir. William E. Jones, 1962/2007 (and the accompanying book, which is available on reserve at Langdell).

Latif Nasser, "Smile My Ass," Radiolab, 2015.

Errol Morris, dir., *The Thin Blue Line* (1988).

Periscope, Facebook Livestream, and Black Lives Matter

Required:

Elizabeth Hinton, *From the War on Poverty to the War on Crime* (Cambridge: Harvard University Press, 2016), ch. 2.

Anna Lvovsky, "Cruising in Plain View: Clandestine Surveillance and the Unique Insights of Antihomosexual Policing," *Journal of Urban History* (forthcoming 2018).

Jennifer Tucker, "Evidence of Camera Pictures," in Kelley Wilder and Gregg Mitman, eds. *Documenting the World: Film, Photography and the Scientific Record* (Chicago: University of Chicago Press, 2016).

Supplemental:

Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220.

David Sklansky, "'One Train May Hide Another': Katz, Stonewall, and the Secret Subtext of Criminal Procedure," *U.C. Davis Law Review* 41 (2008): 875-934.

Christian Delage, *Caught on Camera: Film in the Courtroom from the Nuremberg Trials to the Trials of the Khmer Rouge* (2013), esp. Ch. 5 ("Establishing Incredible Events by Means of Credible Evidence") and Ch. 6 ("Getting Film into the Courtroom").

Jonathan Finn, *Capturing the Criminal Image: From Mug Shot to Surveillance Society:*

## **March 8                      Testimony**

### Reports:

The use of the term “eye-witness” in America’s Historical Newspapers.

*U.S. v. Wade* 388 U.S. 218 (1967).

The McMartin Preschool Abuse Trials, 1987-1990

#MeToo, 2017-2018

### Required:

Hugo Munsterberg, *On the Witness Stand: Essays on Psychology and Crime* (New York: Doubleday, Page & Co., 1908), 3-12, 39-69.

George Fischer, “The Jury’s Rise as Lie Detector.” *Yale Law Journal* 107 (1997-1998): 602-624.

### Supplemental:

John Henry Wigmore, “Professor Muensterberg and the Psychology of Testimony,” *Illinois Law Review* 3 (1909): 399-445.

Matthew Wickman, *The Ruins of Experience: Scotland’s ‘Romantick’ Highlands and the Birth of the Modern Witness* (Philadelphia: University of Pennsylvania Press, 2007), 23-42.

Douglas Walton, *Witness Testimony Evidence: Argumentation, Artificial Intelligence, and Law* (Cambridge: Cambridge University Press, 2008).

## **SPRING BREAK**

## **March 22                      Expertise**

### Guest:

Caroline Elkins, Professor of History and of African and African American Studies and author of *Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya* (2005).

### Reports:

*Frye v. U.S.*, 293 F. 1013 ( D.C. Cir. 1923).

*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

*Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (2010).

Amicus briefs from scholars or scientists in any of your favorite cases

### Required:

Caroline Elkins, witness statement, 2012.

Caroline Elkins, Exhibit CE 1, 2012.

Caroline Elkins, Exhibit CE2, 2012.

### Supplemental:

Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge: Harvard University Press, 2004).

George Chauncey, “What Gay Studies Taught the Court: The Historians’ Amicus Brief in *Lawrence v. Texas* [539 U.S. 558 (2003)],” *GLQ* 10 (2004): 509-538.

## **March 29                      The Anonymous Source**

### Guest:

Ann Marie Lipinski, curator, the Nieman Foundation for Journalism, Harvard

### Reports:

*Ex parte Nugent*, 18 Fed. Cas. 471 (D.C. Cir. 1848).

*Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

*Branzburg v. Hayes*, 408 U.S. 665 (1972).

*Cohen v. Cowles Media*, 501 U.S. 663 (1991), including Elliot C. Rothenberg case files from *Cohen v. Cowles Media*, Harvard Law Library, Historical and Special Collections.

The James Risen case, 2014

Buzzfeed and the Russia dossier, 2017

Wikileaks, 2006-2018

### Required:

Walter A. Steigelman, “Newspaper Confidence Laws: Their Extent and Provisions,” *Journalism Quarterly* 20 (1943).

Stephen Bates, “The Reporter’s Privilege, Then and Now,” Shorenstein Center, Harvard Kennedy School of Government, Research Paper R-23, April 2000.

Perry Bacon, Jr., “[Which Anonymous Sources Are Worth Paying Attention To?](#)” *The Five-Thirty-Eight*, July 10, 2017.

[Anonymous Sources, The NPR Ethics Handbook](#)

Ronald Goldfarb, *In Confidence: When to Protect Secrecy and When to Require Disclosure* (New Haven, CT: Yale University Press, 2009), 177-202.

### Supplemental:

U.S. Congress, Senate, Committee on the Judiciary, *The Newsman’s Privilege* (Washington, DC: Government Printing Office, 1966).

Mark Bowden, “Lowering My Shield,” *Columbia Journalism Review* (July/August 2004).

Elliot C. Rothenberg, *The Taming of the Press: Cohen v. Cowles Media Company* (Westport, CT: Praeger, 1999).

Karl H. Schmid, “Journalist’s Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals’ Decisions from 1973 to 1999,” *American Criminal Law Review* 39 (2002): 1441-1500.

*In re Grand Jury Subpoena, Judith Miller* 397 F.3d 964 (D.C. Cir., cert. denied, 545 U.S. 1150 (2005)).

Dan Cohen, *Anonymous Source: At War Against the Media* (Minneapolis, MN: The Oliver Press, Inc., 2005).

Congressional Research Service, “Journalists’ Privilege: Overview of the Law and Legislation in the 109<sup>th</sup> and 110<sup>th</sup> Congresses,” September 28, 2007.

Norman Pearlstein, *Off the Record: The Press, the Government, and the War over Anonymous Sources* (New York: Farrar, Strauss and Giroux, 2007).

Stephen Bates, "Garland v. Torre and the Birth of Reporter's Privilege," 15 *Communication Law and Policy* 91(2010).

Jason M. Shepard, *Privileging the Press: Confidential Sources, Journalism Ethics and the First Amendment* (El Paso, TX: LBF Scholarly Publishing, 2011), 37-71.

Dean C. Smith, *A Theory of Shield Laws: Journalists, Their Sources, and Popular Constitutionalism* (El Paso, TX: LBF Scholarly Publishing, 2013), 1-48.

## **April 5                      DNA**

### Guest:

Jennifer Hochschild, Henry LaBarre Jayne Professor of Government at Harvard University

### Reports:

The Human Variome Project

The Global Alliance to Enable Responsible Sharing of Genomic and Clinical Data

The Innocence Project

Twenty-three and Me

FBI Combined DNA Index System

Verogen, Inc.

### Required:

Jennifer Hochschild, *Creating a New Racial Order* (2012), the chapter on genomics.

Sheila Jasanoff, "The Eye of Everyman: Witnessing DNA in the Simpson Trial," *Social Studies of Science* 28 (1998): 713-4.

Jennifer L. Doleac, "The Effects of DNA Databases on Crime," *American Economic Journal: Applied Economics* 9 (2017): 165-201.

Shoshana Magnet, *When Biometrics Fail: Gender, Race, and the Technology of Identity* (Durham: Duke University Press, 2011), ch. 1.

### Supplemental:

Timothy Caulfield et al, "Harm, Hype and Evidence," *Genome Medicine* 5 (2013).

Timothy Caulfield and Celeste Condit, "Science and the Sources of Hype," *Public Health Genomics* 15 (2012).

George J. Annas, "Genetic Privacy," in David Lazer, ed., *DNA and the Criminal Justice System: The Technology of Justice* (Cambridge, MA: MIT Press, 2004), 135-146.

Timothy Caulfield and Amy L. McGuire, "Policy Uncertainty, Sequencing, and Cell Lines," *G3* 3 (2013): 1205-1207.

John P.A. Ioannidis, "Genetics, Personalized Medicine, and Clinical Epidemiology," *Journal of Clinical Epidemiology* 63 (2010): 945-949.

Sarah Zhang, "[The Genomic Revolution Reaches the City Crime Lab](#)," *The Atlantic*, September 22, 2017.

## **April 12                      Data**

### Guest:

Cynthia Dwork, Gordon McKay Professor of Computer Science

### Reports:

The predictive uses of the U.S. Census, 1790-2010

R. G. Dun & Co. Credit Reports, 1841-1890, Baker Library, Harvard Business School  
*Olmsted v. U.S.* 277 U.S. 438 (1928).

President's Council of Advisors on Science and Technology, *Report to the President, Big Data and Privacy* (Washington, DC: Office of the President, 2014).

The use of predictive data analytics in child protection services

The use of predictive data analytics in credit reporting

The use of predictive data analytics in urban planning (e.g. Data-Smart City Solutions)

The use of predictive data analytics in suicide prevention

The debate over the 2020 U.S. Census

### Required:

Cynthia Dwork, "A Firm Foundation for Private Data Analysis," *Communications of the ACM* 54 (2011): 86-95.

Cynthia Dwork et al., "[Fairness through Awareness](#)," 2011 (the introduction only).

Jon Kleinberg et al., "[Human Decisions and Machine Predictions](#)," Working Paper 23180, National Bureau of Economic Research, February 2017.

Zachary C. Lipton, "[The Mythos of Model Interpretability](#)," 2016 *International Conference of Machine Learning Workshop on Human Interpretability in Machine Learning* (WHI 2016).

### Supplemental:

Michael Lynch, *The Internet of Us: Knowing More and Understanding Less in the Age of Big Data* (New York: Norton, 2016).

Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution that Will Transform How We Live, Work, and Think* (London: John Murray, 2013).

Jeffrey Needham, *Disruptive Possibilities: How Big Data Changes Everything* (Sebastopol, CA: O'Reilly Media, 2013).

Tim Harford, "Big Data: Are We Making a Big Mistake?" *Financial Times*, March 28, 2014.

Chris Anderson, "The End of Theory: The Data Deluge Makes the Scientific Method Obsolete," *Wired*, June 23, 2008.

U.S. House of Representatives, "Next Generation Computing and Big Data Analytics," One Hundred Thirteenth Congress, April 24, 2013.

David Lazer et al., "The Parable of Google Flu: Traps in Big Data Analysis," *Science*, March 14, 2014, pp. 1203-1205.

## **April 19                      After the Fact**

### Reports:

The use of the term "fake news" in *Proquest Historical Newspapers*

The Google Knowledge Vault

*The Colbert Report*, 2005-2014

The Internet Research Agency  
Online, automated end-to-end fact-checking algorithms

Required:

Simon Adler, "Breaking News," Radiolab, 2017.

Emily Bell and Taylor Owen, "[The Platform Press](#)," March 29, 2017.

Clay Shirky, "Truth Without Scarcity," in *The New Ethics of Journalism*, ed. Kelly McBride and Tom Rosenstiel (Los Angeles: Sage, 2014), 9-21.

Bruno Latour, "Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern," *Critical Inquiry* 30 (2004): 225-48.

Supplemental:

Jill Lepore, "After the Fact," *The New Yorker*, March 21, 2016.

Steve Myers, "Fact-Checking 2.0," in *The New Ethics of Journalism*, 61-75.

Amélie Yavchitz et al, "Misrepresentation of Randomized Controlled Trials in Press Releases and News Coverage: A Cohort Study," *PLOS Medicine* 9 (2012).

Lindsay Abrams, "How Medical News Becomes Ridiculous," *The Atlantic*, September 13, 2012.

**May 2            Final Papers Due**