



AALS Evidence Section Newsletter

Winter 2017-18

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Message from the Chair – Andrew Jurs

Hello to All!

As this year draws to a close, the Evidence Section has several exciting events to share with Section members. In early January (January 3 – 6, 2018), the 112th AALS Annual Meeting will convene in San Diego. The evidence section panel this year has been scheduled for Saturday, January 6 from 10:30 am to 12:15 pm in the Pacific Ballroom (Salon 17). I designed this panel to consider, after 25 years have passed since the landmark *Daubert v. Merrell Dow Pharmaceuticals* case, what might be the next great challenges in the field of scientific reliability. The complete panel description is as follows:

In *Daubert v. Merrell Dow Pharmaceuticals*, the U.S. Supreme Court instructed federal judges to screen expert testimony for reliability prior to admission. The court intended this gatekeeping to enhance the reliability of scientific testimony and ensure a consistent level of rigor between the courtroom and the laboratory. As *Daubert* approaches its silver anniversary, this panel will consider some of the next great issues in scientific reliability in both civil and criminal trials. By highlighting cutting-edge reliability concerns of our time, the panel will reflect on whether the great promise of *Daubert*—to deliver reliable science in the courtroom—has been met, and if not, what changes to the current legal approach to scientific gatekeeping may be in order.

Panelists will cover a variety of subject matter areas, including new models for forensic testing, the jury effect of expert testimony, judicial gatekeeping

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and the admissibility/sufficiency issue, and standards for appellate review. The panel includes the following speakers:

- Sandra Guerra Thompson, University of Houston Law Center
- William C. Thompson, UC Irvine, Department of Criminology
- Joseph Sanders, University of Houston Law Center (Call for Papers)
- David L. Faigman, UC Hastings College of the Law

Immediately following the Evidence Section meeting, we will be joining the Criminal Justice Section for the annual joint luncheon, from 12:15 to 1:30 PM in the Presidio Room. For those wishing to attend, please remember that AALS requires separate registration for this event.

During the joint luncheon, the Executive Committee is delighted to be able to honor Roger C. Park with the John Henry Wigmore Award for Lifetime Achievement in the Areas of the Law of Evidence and the Process of Proof. Professors Aviva Orenstein of the University of Indiana School of Law and Richard Friedman of the University of Michigan Law School will present the award to Roger at the luncheon. Congratulations to Roger!

I look forward to seeing everyone in San Diego, and wish you all the best for a productive and enjoyable 2018!

Best regards,

Andrew W. Jurs
Drake University Law School

AALS Panel on American Style Litigation

The AALS Litigation Section will be sponsoring a panel entitled "American Style Litigation: A Force for Good or Ill" at the 2017 Annual Meeting. The panel will be on Friday, January 5 from 10:30 AM to 12:15 PM.

Is litigation good for anything other than stirring up animosities? Did we take a wrong turn in our history down an adversarial path we could have avoided? What is the purpose of allowing people to sue after all – to resolve disputes? Force information? Engage in public debate through the courts?

Or is any function other than dispute resolution an illegitimate use of court power? Does the adversarial system promote or impede justice? We will answer these questions through discussion of two new books about litigation in the United States: Amalia Kessler's *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877* (Yale 2017) and Alexandra Lahav's *In Praise of Litigation* (Oxford 2017). John Fabian Witt described Kessler's book as a "powerful reinterpretation of our legal past"; Pamela Karlan called Lahav's book a "tour de force." The panel will investigate both the long history of America's love/hate relationship with adversarial litigation and what hope there is for the future. The panel will feature Lahav and Kessler, Judge McKeown (9th Cir.), Lester Brickman, and Steve Yeazell.

Conferences and Calls for Papers

United States

Request for Citations to your Evidence Articles: Kenneth Graham (UCLA) is compiling a collection of citations to published articles on Evidence. He would appreciate it if members could send him a list of their publications so he does not miss any. Please send them to cageyjd@twc.com and put "evidence citations" in the subject line.

ASU-Arkfeld 7th Annual eDiscovery and Digital Evidence Conference and Call for Papers, "Gaining An Edge: Law, Technology, and Analytics"

March 6-8, 2018 <http://events.asucollegeoflaw.com/ediscovery/> Sandra Day O'Connor College of Law, Phoenix, AZ

This innovative conference focuses on the practical and cutting-edge issues affecting electronic information, information governance, and data analytics. Leading jurists, attorneys, and legal and technological professionals will explore a wide array of eDiscovery issues, examining established precedent and projected new challenges, current and emerging technologies, and everything in between. All of our attendees, whether new to the world of eDiscovery or hoping to increase their existing eDiscovery expertise, will find knowledge, new ideas, and valuable

networking opportunities at the ASU-Arkfeld eDiscovery and Digital Evidence Conference!

2018 California High Tech and Digital Evidence Symposium, March 20-23, 2018; Monterey, CA

https://registrations.cdaa.org/CCFMTC/CCFMTC/Event_Display.aspx?EventKey=DES181303&WebsiteKey=02aa5f3f-3749-4c92-91da-67bfb6af2407

This seminar will include the High Tech Industry Panel and breakout sessions for investigators. It will also feature speakers on ransomware and the vulnerability of public infrastructure. There will be classes for the most advanced digital investigator, as well as for the new prosecutor wanting to understand digital evidence cases.

Call for Papers - From the Crime Scene to the Courtroom: The Future of Forensic Science Reform <http://www.law.uga.edu/calling-all-papers/node/730> **Event Date:** 07/1/18; **Abstracts due:** 12/22/17; **Papers Due:** January 22, 2018; **Organization:** Georgia State University Law Review

The Georgia State University Law Review invites legal scholars, advocates, attorneys, judges, scientists, and other practitioners to submit pieces for its upcoming symposium issue on forensic science reform. The symposium issue will address the challenges and opportunities facing forensic science at this unique moment in time, including: avoiding and correcting wrongful convictions; minimizing human error; technological advances in forensic science; ethical conflicts; and the opportunity for states and localities to lead forensic science reform. Authors are invited to submit pieces on these and other related topics.

Call for Papers –Police brutality: Its Chilling Effect and Innovative Solutions, <http://digitalcommons.law.seattleu.edu/sjsj/> **Event date:** 04/06/18; **Proposal Submission Deadline:** 1/10/18; **Organization:** The Seattle Journal for Social Justice.

The Seattle Journal for Social Justice is excited to announce its symposium entitled “Police Brutality: Its Chilling Effect and Innovative Solutions” on Friday, April 6th, 2018. We will examine this crucial issue from contrasting perspectives. We hope to explore the challenges and fundamental changes needed to address this issue. The journal welcomes papers for presentation at this symposium and for potential publication in the *Seattle Journal for Social Justice*. We are pleased to announce Taylor Dolven, reporter for Vice News, will be our keynote speaker.

“Police Brutality” is a topic addressed throughout the country by a variety of constituencies. We are especially interested in papers and presentations from all academic disciplines, from practitioners, and people in the field and on the ground. This topic triggers questions about the application of law and justice as it applies to race, culture, gender, religion and socioeconomic status as they relate to policing and communities. The *Seattle Journal for Social Justice* hopes that this symposium will serve as a platform for researchers, practitioners, and community organizers to interrogate, to analyze, and to create new developments in this arena.

Areas of interest for this topic include, but are not limited to:

- Body Camera Efficacy
- Evidentiary Issues in Prosecuting Police Brutality
- De-escalation Training
- Officer Mental Health Care and Safety
- The “Blue” Race
- Community-Police Partnerships
- Weaponry Militarization
- Reframing Criminal Behavior as Public Health Policy
- FBI narrative of nonexistent “Black Identity Extremists”
- Protests Large and Small: take a knee, economic disruption, and Black Lives Matter

Please submit by email your presentation proposal, including the title, authors, and abstract, to sjsjcontent@seattleu.edu with the subject line: Symposium Proposal. After we receive and accept your proposal, the authoring guidelines will be e-mailed to you.

International Conferences and Calls for Papers

1. The ICLEDM 2018: 20th International Conference on Law, Evidence and Decision Making; April 12 - 13, 2018; Venice, Italy
<https://www.waset.org/conference/2018/04/venice/ICLEDM>

The ICLEDM 2018: 20th International Conference on Law, Evidence and Decision Making; aims to bring together leading academic scientists, researchers and research scholars to exchange and share their experiences and research results on all aspects of Law, Evidence and Decision Making. It also provides a premier interdisciplinary platform for researchers, practitioners and educators to present and discuss the most recent innovations, trends, and concerns as well as practical challenges encountered and solutions adopted in the fields of Law, Evidence and Decision Making.

2. ICLELFS 2018 : 20th International Conference on Law, Evidence Law and Forensic Sciences; Conference Dates: Apr. 19-20, 2018; Paris, France
<https://www.waset.org/conference/2018/04/paris/ICLELFS/home>

The ICLELFS 2018: 20th International Conference on Law, Evidence Law and Forensic Sciences aims to bring together leading academic scientists, researchers and research scholars to exchange and share their experiences and research results about all aspects of Law, Evidence Law and Forensic Sciences.

3. ICLE 2018: 20th International Conference on Law of Evidence; July 23 - 24, 2018; Rome, Italy
<https://www.waset.org/conference/2018/07/rome/ICLE>

The ICLE 2018: 20th International Conference on Law of Evidence aims to bring together leading academic scientists, researchers and

research scholars to exchange and share their experiences and research results on all aspects of Law of Evidence. It also provides a premier interdisciplinary platform for researchers, practitioners and educators to present and discuss the most recent innovations, trends, and concerns as well as practical challenges encountered and solutions adopted in the fields of Law of Evidence.

Members' Awards, Podcasts, Books, Law Review Articles, and Presentations

Roger C. Park (UC Hastings)

The 2018 John Henry Wigmore Award for Lifetime Achievement in the Areas of the Law of Evidence and the Process of Proof recipient is long-time section member Roger C. Park.

Professor Roger C. Park attended Harvard College and Harvard Law School, where he was Case Editor of the Harvard Law Review. Between college and law school, he completed military service, including a tour in Vietnam. After graduating from law school, Professor Park clerked for Chief Judge Bailey Aldrich of the First Circuit. He did trial and appellate work for three years with the small civil rights firm of Zalkind & Silverglate in Boston. He also taught as an adjunct in the Political Science Department at Wellesley College.

In 1973, Professor Park joined the faculty of the University of Minnesota Law School and taught there for twenty years, becoming its Fredrikson & Byron Professor of Law in 1990. He joined the UC Hastings faculty in 1995 after teaching as a visiting professor in 1994. Professor Park has been the James Edgar Hervey Distinguished Professor of Law since 1998. He has also taught as a visiting professor at Stanford Law School, University of Michigan, Boston University, and Boston College.

Professor Park is an author or coauthor of eight books, including the Park & Lininger "Witness" volume of *The New Wigmore*, first published in 2012. He has written numerous law review articles on evidence law, evidence scholarship, and the empirical study of evidence issues. He is the "content

provider” for 20 computer-aided lessons on law that are distributed by the Center for Computer-Aided Legal Instruction. In addition to Evidence and Trial Objections, he has taught or co-taught Civil Procedure, Scientific Method for Lawyers, Legislation, Social Science in Law, Criminal Law, Drug Crimes, and Legal Professions.

Please join us at the luncheon on **Saturday, January 6, 2018 from 12:15-1:30 pm** for the awards presentation.

Professors Bergman (UCLA) Friedland (Elon) and Benham (Texas Tech)

For the forthcoming 7th edition of *Evidence Law and Practice*, Steve Friedland (Elon) and Paul Bergman (UCLA) welcome Dustin Benham of Texas Tech as a new co-author. One highlight of the 7th edition is a new review chapter in which students analyze evidentiary issues in the context of transcripts of testimony. Most of the transcripts are excerpted from famous trials (e.g., the O.J. Simpson trial and the trial of Ethel and Julius Rosenberg, the “Atomic Spies”) and from courtroom films (e.g., *A Few Good Men* and *A Civil Action*). The authors created additional short transcripts to broaden the scope of the review. Another change from earlier editions is that the Character Evidence materials have been re-written, re-organized and updated. Most notably, the accessible and student-friendly organization traces the distinction between inadmissible character evidence offered for a propensity-conformity purpose and proof offered for other admissible purposes.

Professor Nicolas (University of Washington)

The fourth edition of Peter Nicolas' textbook, *Evidence: A Problem-Based and Comparative Approach* (Carolina Academic Press), will be released in January 2018. For more information about the new edition or to order an examination copy, visit <http://www.cup-press.com/books/isbn/9781531004033/Evidence-Fourth-Edition>

Professor Bellin (William and Mary)

Jeffrey Bellin's all-new Hearsay volume for the "Wright & Miller" Federal Practice & Procedure Treatise is now in print. It is styled Wright & Bellin, Federal Practice & Procedure, Volume 30B ("Hearsay").

Deborah Merritt (The Ohio State University)

The fourth edition of *Learning Evidence*, coauthored by Deborah Merritt and Ric Simmons, is available for spring-semester adoptions. In addition to its distinctive presentation of evidence principles, this edition includes seven online interactives. Students will play the role of a courtroom lawyer or judge in each interactive, raising or ruling on objections to testimony that they hear in real time. Five of the interactives focus on subsets of rules (such as character evidence or hearsay); the other two combine rules from all parts of the course. The interactives offer continuous feedback, as well as a printable transcript that students can use to review their work. Student testers have been enthusiastic and we hope to expand the project to include interactives simulating settlement discussions, office brainstorming sessions, and other contexts in which lawyers use the rules of evidence.

Professor Rothstein (Georgetown)

Paul F. Rothstein's paper, "Demystifying Burdens Of Proof And the Effect Of Rebuttable Evidentiary Presumptions In Civil And Criminal Trials," was recently listed on SSRN's Top Ten download list for: LSN: Evidence (Criminal Procedure) (Topic). For now, the 80 page article is only published on SSRN and the Georgetown Law Scholarly Commons. You may view the abstract and download it at: <https://ssrn.com/abstract=3050687>.

David Caudill (Villanova)

David Caudill & Mark Pressman recently published "Somniloquy as Evidence: The Recurring Appearance of Outdated 'Sleep Talk' Expertise," in volume 53 of the CRIM. LAW BULLETIN, (a Thomson Reuters journal). In

addition, David has had a number of presentations on evidence issues here and abroad, which are listed below:

(i) CLE presentation on the ethical and evidentiary issues raised by the use of consulting experts (who are not thereafter disclosed as testifying experts) at the 2017 annual meeting of the Pennsylvania Association of Criminal defense Lawyers (April 27, 2017), in Harrisburg, Pennsylvania

(ii) Invited lecture on U.S. standards of admissibility for scientific evidence, June 7, 2017, in the seminar series for the History, Philosophy, and Sociology of Science program at the University of Melbourne in Australia.

(iii) Gave a paper on the uses of social psychology by U.S. legal academics at the 2017 Congress of the International Academy of Law and Mental Health, July 12, 2017, in Prague, Czech Republic.

(iv) Gave a paper comparing the use of consulting experts in US and in Australian litigation, at the 11th annual Studies in Expertise & Experience workshop, held May 20-21, 2017, in Geneva, Switzerland.

(v) Gave a paper, on discredited forensic fire expertise offered by prosecutors in numerous recent arson trials, at the annual meeting of the Society for the Sociological Study of Science, on Sept. 1, 2017, in Boston.

(vi) Invited lecture on the history of arson expertise in U.S. criminal courts, presented to the Fire Safety Engineering Department of Edinburgh University, Scotland, on Sept. 12, 2017.

(vii) Gave a paper (by video) entitled "Toward a Sociology of Forensic Knowledge" at Seton Hall University Law School, on Oct. 27, 2017, at a 2-day symposium in Honor of the work of D. Michael Risinger: Experts, Inference and Innocence.

A Few Interesting Cases from The Past Year

by Professor Chris Chambers Goodman
Pepperdine University School of Law

The United States Supreme Court did not have many evidence cases on its docket in 2017, but two decisions may be of special interest to Evidence faculty. In *Buck v. Davis*, 137 S.Ct. 759, decided on February 22, 2017 (6-2), the defendant had been convicted of capital murder, sentenced to death, and appealed based on ineffective assistance of counsel. The opinion by Justice Roberts found that defense counsel's introduction of an expert witness report, which stated that race was one of several statistical factors that increased the probability of future dangerousness, was prejudicial, holding that "[n]o competent defense attorney would introduce such evidence about his [sic] own client." *Buck*, at 775. The Court recognized that the expert report and testimony "appealed to a powerful racial stereotype—that of black men as 'violence-prone,' [and] created something of a perfect storm," given that the jury was charged with predicting the likelihood of this black defendant engaging in violent acts in the future. The fact that the expert was court-appointed, and had conducted about 70 evaluations in other capital murder cases exacerbated the prejudice. The Court reasoned that "when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the transcript. Some toxins can be deadly in small doses." *Buck*, at 777.

Pena-Rodriguez v. Colorado, 137 S.Ct. 855, decided March 6, 2017 (5-3), held that the Sixth Amendment requires relaxing the "no-impeachment" rule to permit the trial court to consider evidence of a juror's "clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Pena-Rodriguez*, at 869. The Court explained that the statement itself, including its content, timing and reliability must "tend to show that racial animus was a significant factor motivating factor" in the decision to convict. *Id.* The defendant was tried for unlawful sexual conduct and harassment. The juror's statements were reported by other jurors as follows: "I think he did it because he's Mexican and Mexican men take whatever they want," "Nine times of ten Mexican men were guilty of

being aggressive towards women and young girls,” and that the alibi witness was not credible because he was “an illegal,” even though the witness testified that he was a legal resident. *Pena-Rodriguez*, at 862. The case was decided based on Colorado’s Rule 606(b), which is the same as Federal Rule of Evidence 606(b).

Joining the Evidence Listserv

To subscribe to the Evidence Listserv send an e-mail message to Distinguished Professor of Law and James Edgar Hervey Chair in Litigation **Roger Park** (Hastings) at parkr@uchastings.edu. Please include your faculty position and school.

AALS Section on Evidence (2017-2018)

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