PROBLEMS & PROJECTS

IN THE THEORY (AND PRACTICE) OF EVIDENCE LAW

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Francis Bacon wrote in 1625

"As for the philosophers, they make imaginary laws for imaginary commonwealths; and their discourses are as the stars, which give little light because they are so high"

while “as for the lawyers, they write according to the states were they live, what is received law, and not what ought to be law”

but here

- I'll try to avoid *both* Scylla *and* Charybdis
- & show how philosophy, specifically epistemology
- can shed light on real-life legal issues

“epistemology”???

- “if you want to empty the room at a cocktail party, say ‘epistemology’”---Jonathan Rauch, 1993
- yes, it’s ugly; but it’s a useful word, and a useful field
- so please don’t leave!

epistemology is the field to which it falls

- to articulate what evidence is, and how it’s structured
- what makes evidence stronger or weaker
- & whether and to what degree a claim is warranted by evidence

& is potentially useful to law

- because accurate fact-finding
- is necessary for substantive justice
- [even if you have just laws, and just administration of those laws, if you get the facts wrong, justice may not be served]

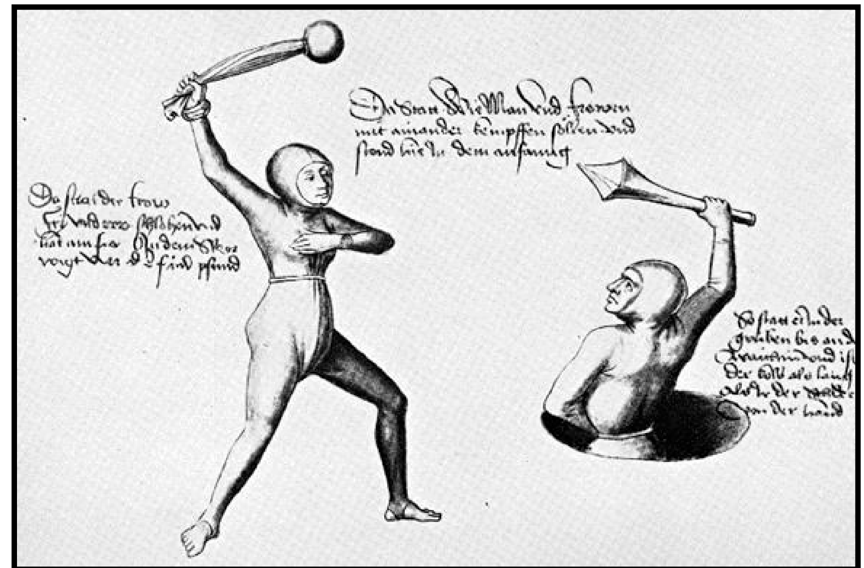
1. Epistemological Issues in the Law

trial by oath

older proof-practices (trial by oath, ordeal, or combat) depended on theological presuppositions

by ordeal (above)

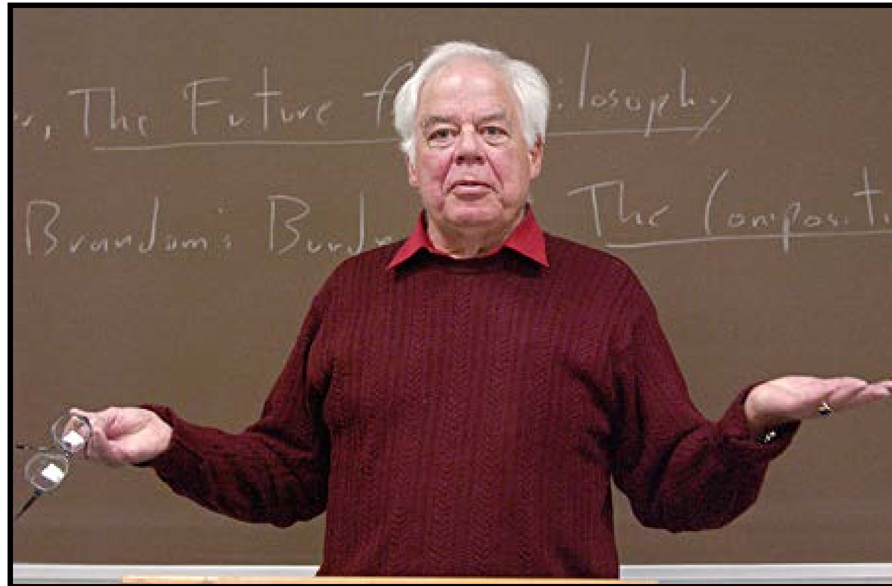
by combat (below)



modern proof practices

- rely instead on presentation of testimony (& documents, physical evidence, etc.)
- these practices depend on **epistemological** presuppositions
- about the relation of quality of evidence to the likely truth of claims at issue

had Richard Rorty been right



that standards of evidence are *pure convention*, with no connection to truth

then what we optimistically call

“the **justice** system”
could only be a
cruel kind of judicial
theater

so the law is up to its neck in epistemology

- i.e., in questions such as:
- are degrees of proof best construed as probabilities, as degrees of belief, or degrees of warrant?
- can combined evidence ever reach a higher degree of proof than its components? When?

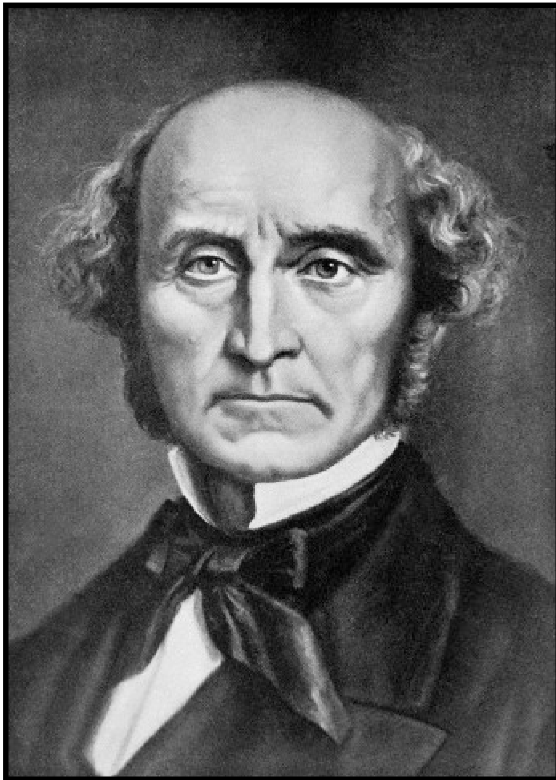
&

- how are we to distinguish genuine experts from charlatans?
- is an adversarial process a good way to arrive at factually sound verdicts?
- do exclusionary rules help or hinder?

2. Characterizing Legal Epistemology

- the *word* "epistemology" is relatively recent (mid-nineteenth century)
- but the *subject* goes back at least to Plato
- what I mean by legal epistemology: epistemology *relevant to legal concerns*

as J. S. Mill wrote in 1843



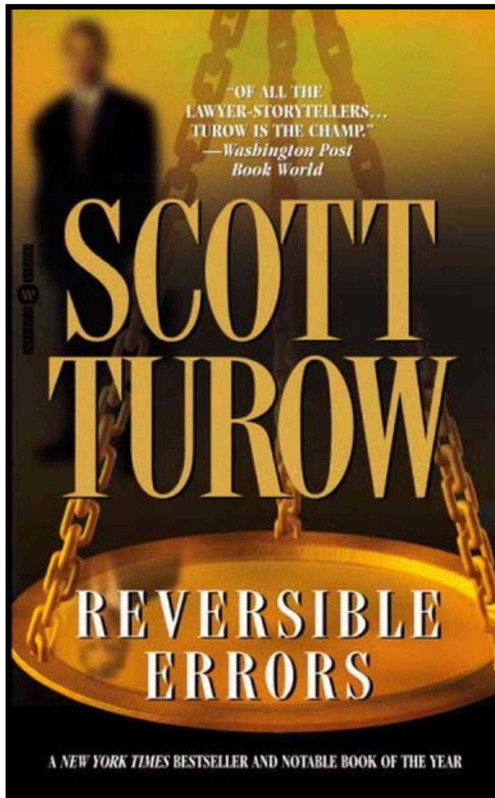
“the business of the magistrate, of the military commander, of the navigator, of the agriculturalist is to judge of evidence and act accordingly” ---indeed; which is why epistemology focused on evidence & its evaluation is most relevant

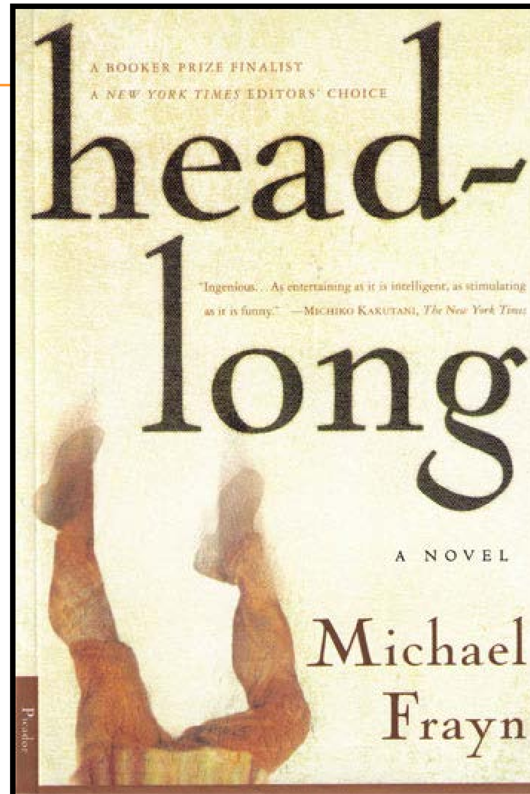
just to be clear

- I refer not to epistemology-the-professional-specialty
- but to any ideas about evidence and its evaluation useful to law
- wherever it is found

including, e.g. in work by

- lawyers, judges, legal scholars (Wigmore, Learned Hand)
- scientists (Bridgman, Clifford)
- novelists (Turow, Frayn, even Arthur Hailey)


"OF ALL THE
LAWYER-STORYTELLERS…
TUROW IS THE CHAMP."
—Washington Post
Book World
SCOTT
TUROW
REVERSIBLE
ERRORS
A NEW YORK TIMES BESTSELLER AND NOTABLE BOOK OF THE YEAR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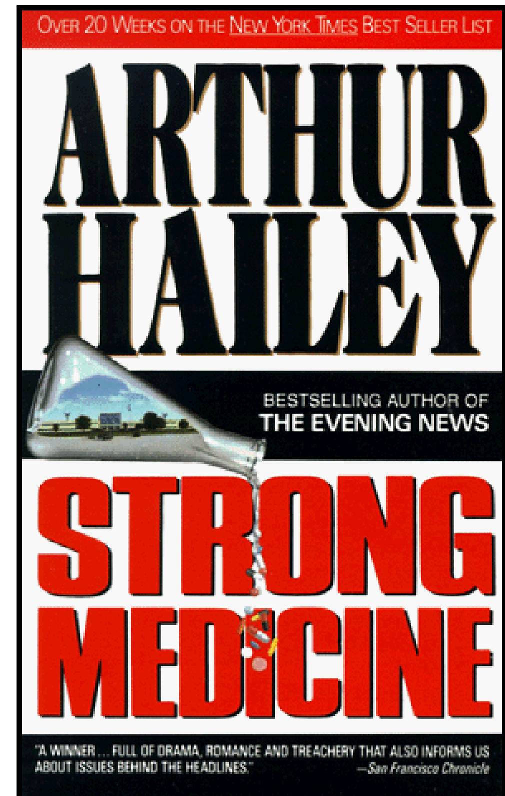
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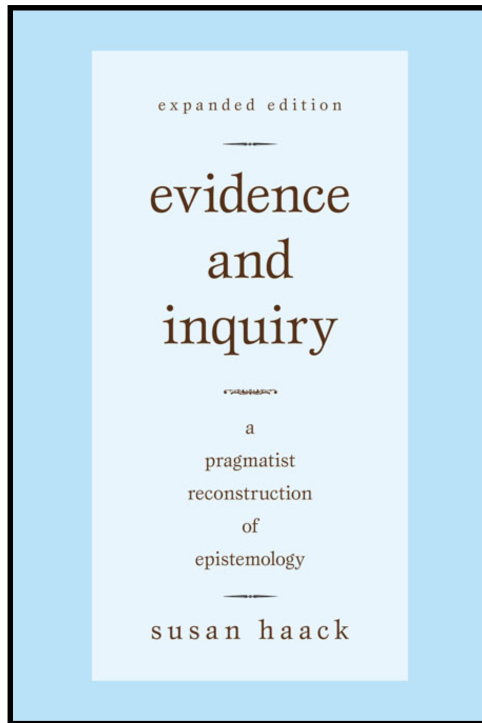
—San Francisco Chronicle

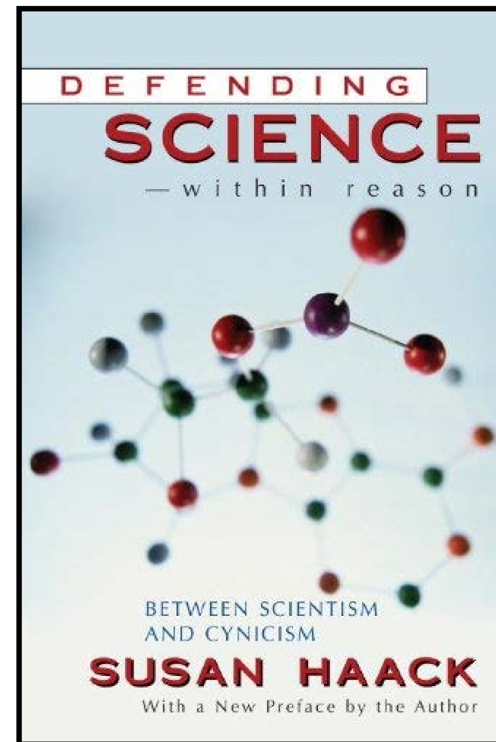
pitfalls to avoid

- confusing the epistemologically ideal with the best that's practicable
- confusing policy-oriented with epistemological elements in the rationale for or criticisms of evidentiary rules
- conceptual slippage (different legal & philosophical meanings of same term, e.g., evidence, reliability, causation, knowledge)

3. Some Legally-Relevant Ideas



1993/2009



2003/2007

(i) inquiry and pseudo-inquiry

- inquiry aims to discover the true answer to some question
- pseudo-inquiry aims to make a case for the truth of some proposition determined in advance
- “advocacy research” is pseudo-inquiry

(ii) evidence and warrant

- how warranted a claim is depends on how good the evidence with respect to that claim is
- evidence may be stronger or weaker, & a claim more or less warranted

the structure of warrant is *foundherentist*

- (I promise, this is the only technical slide!)
- unlike coherentism, but like some forms of foundationalism, allows a role for experience
- unlike foundationalism, but like coherentism, allows pervasive mutual support

& my account of the structure and quality of evidence

is informed by an analogy with a crossword puzzle

briefly

warrant of a claim

- how **supportive** the evidence is
- how **secure** the reasons are, independent of this claim
- how **comprehensive** the evidence is

reasonableness of entry

- how well it fits the clue/other entries
- how reasonable intersecting entries are, independent of this one
- how much of the crossword is done

still briefly and roughly

- how well E supports C depends on how well E and C fit together in an explanatory account---**explanatory integration**
- evidence may be **positive**, **negative**, or **neutral** (= irrelevant) with respect to C

fairly obviously

- a claim is more warranted the more independently secure the positive reasons are

- but the less warranted the more independently secure the negative reasons are

&

- evidential quality depends on facts about the world
- in particular, relevance isn’t formal, but material—it depends on facts (as the Federal Rules of Evidence acknowledge)

& (by 2003) my approach

- combined individual and social elements
- including a preliminary understanding of what's involved in relying on others' testimony

4. Applied to Evidentiary Issues

- what are degrees and standards of proof?
- *not* simply degrees of fact-finders' belief
- *not* simply mathematical probabilities, but
- *degrees of warrant* of a claim by evidence

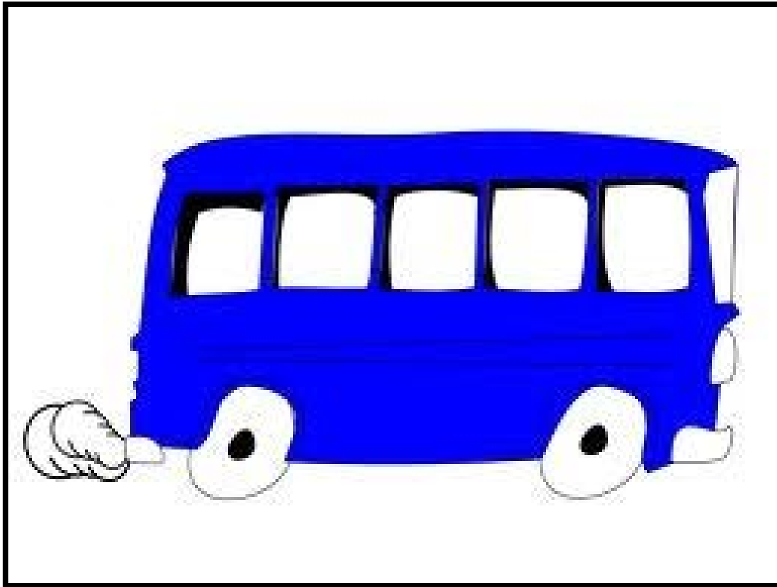
degrees of warrant aren't probabilities

- there may be no linear ordering of degrees of warrant
- in the absence of evidence neither p nor not p may be warranted at all
- warrant of [p and q] may be greater than warrant of either

however

- this doesn’t mean that statistical evidence can’t be very helpful, only that, for example
- we can’t equate prob. that a DNA match is random with prob. that defendant is guilty
- or proof by preponderance with RR>2

I can make sense of



origin of the “blue bus” problem

cases like Smith v. Rapid Transport (Mass. 1945), where the court ruled that statistical evidence alone was insufficient

& find a middle way

- between the “fact-based” (usually Bayesian)
- & “story based” approaches (requiring shifting of burden of proof)
- which have dominated the “New Evidence Scholarship”

& suggest what's right and what's wrong

- in Judge Kozinski's (*Daubert* 1995) idea that litigation-driven science is suspect
- in C. S. Peirce's critique of adversarialism as a bad way to get the truth
- & Bentham's critique of exclusionary rules

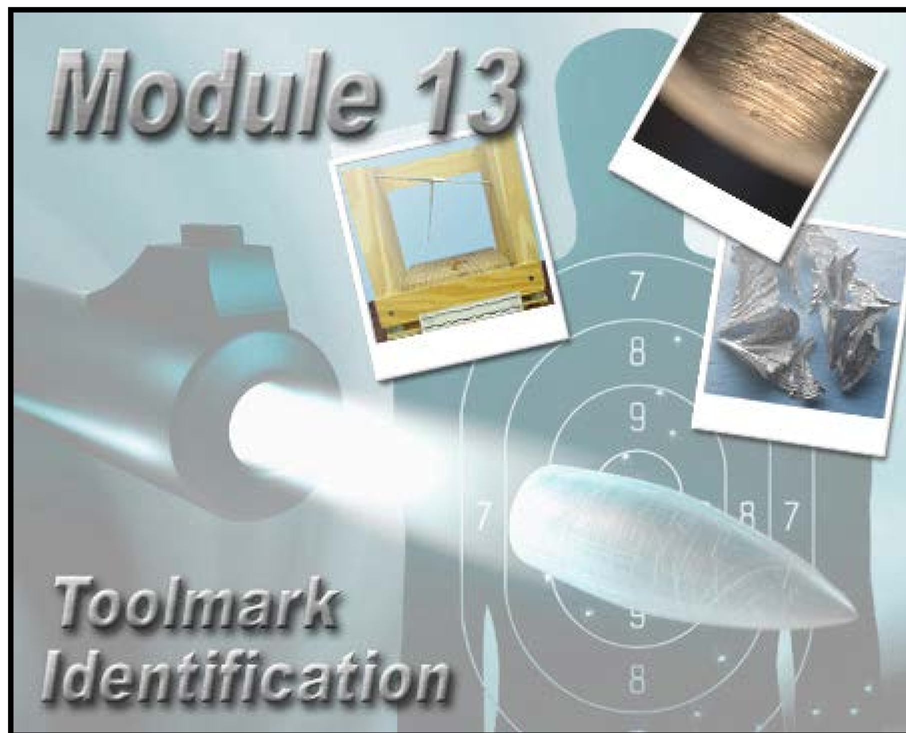
5. Looking Forward to New Projects

- about testimonial evidence
- about expert testimony
- about the misleading and the unreliable
- about “weight of evidence methodology”

& about “International *Daubert*”

- the U.S. S.Ct.’s ruling in *Daubert* (1993)
- has had an influence in other common-law jurisdictions (Canada, England and Wales)
- & in civil-law countries (Italy, Mexico, Colombia)

…there's plenty of other work, too

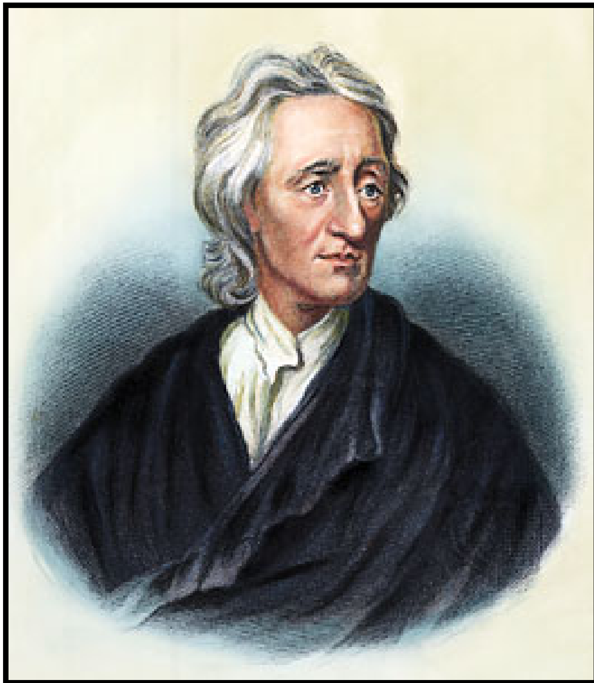


e.g. about physical evidence

& about

whether, or when, a group of people is likely better at assessing evidence than an individual

P. S.: as John Locke said long ago



"those who readily and sincerely follow reason, but have not a full view … have a pretty traffic with known correspondents in some little creek, but will not venture into the great ocean of knowledge"

so I see

- a **two-way process**:
- epistemology can be useful to law
- but also law to epistemology (esp. today, when epistemology is cliquish and hermetic)

thank you … merci!