Book of abstracts

Evidence in Law and Ethics 2019
4th-5th April, Kraków

KEYNOTE SPEAKERS

Christian Dahlman (Lund University)
Naked Statistical Evidence and the Futility of Lawful Conduct

Day 1, 10:10-11:10

The problem of 'naked statistical evidence' is one of the most debated issues in evidence theory, captured by three famous examples: the Gatecrasher Case (Cohen 1977), the Prison Riot Case (Nesson 1979) and the Blue Bus Case (Thomson 1986). Most evidence scholars agree that it is deeply problematic to base a verdict on naked statistical evidence, but they disagree on why it is so, pointing to different characteristics of naked statistical evidence as the root of the problem, for example insufficient Keynesian weight (Posner 1999), insensitivity to the truth (Enoch, Spectre & Fisher 2012) and disregard for individual autonomy (Wasserman 1991; Pundik 2008). In my presentation, I will discuss the merits of different solutions to the problem of naked statistical evidence, and argue for the solution that verdicts based on naked statistical evidence fail to provide incentives. Such verdicts make lawful behaviour futile. The incentives-solution is based on a Benthamite view of the justification of legal verdicts. According to Jeremy Bentham, a verdict that punishes the defendant for an act is only justified if it produces an incentive for people in the same situation to abstain from such acts in the future (Bentham 1781).

Martin Smith (University of Edinburgh)
Accuracy, proof and the right against wrongful conviction

Day 2, 10:10-11:10

If people have a right not to be convicted of crimes that they did not commit, what follows about the standards of proof that should be applied in criminal trials? In this paper I argue that, while a right against wrongful conviction does not determine a unique criminal standard of proof, it does impose a certain formal constraint that any standard must satisfy. I argue that the conventional interpretation of the criminal standard of proof, in terms of a high probability threshold, violates this constraint, and proceed to outline an alternative interpretation that is able to meet it.

DAY 1

11:30-13:00 – Session I

Amit Pundik (Tel Aviv University)
Predictive Evidence and Unpredictable Freedom

When determining in criminal proceedings whether an individual performed a certain culpable action, predictive evidence is often ignored. Most apparently, and with only few exceptions, base-rates are excluded. Using such evidence in court also seems intuitively inappropriate. For example, using the high rate of crimes involving illegal firearms in a certain neighbourhood to support the conviction of an individual resident in a crime involving an illegal firearm (henceforth, the "crime-rates scenario") seems highly objectionable. The objection to base-rates is not only aimed at the sufficiency of such evidence (on the grounds that "crime-rates are insufficient on their own to prove that the individual is guilty"). The objection also requires that such evidence should not be used at all in determining the individual's guilt: that crime-rates should be inadmissible in criminal proceedings. The hostility of criminal fact-finding toward predictive evidence is also apparent in the deeply-rooted suspicion of bad character and previous convictions.

I seek to propose an account which is admittedly both counterintuitive and demanding in its metaphysical commitments, yet successfully provides a unifying justification for why different types of predictive evidence should not be admitted in criminal fact-finding. I would suggest that the fact-finding practices used to determine

culpability in criminal proceedings implicitly adhere to the view that culpable conduct requires free will that is necessarily unpredictable. While theorists of free will disagree on when an action can be considered free, they tend to agree that it is possible to predict a free action, at least to some degree of confidence. Contrary to this dominant view, in this paper I suggest that criminal fact-finding adheres to a theory of free will that includes a necessary condition of unpredictability, according to which free actions cannot have either subjective or objective probabilities. This condition means that an accurate assessment of what an agent is likely to do freely is not merely epistemically unfeasible but metaphysically impossible. It is not only the lack of sufficient information that prevents an accurate prediction of how an agent will act freely: free actions cannot be predicted because their probability does not exist. While I tend to think that, if free will exists, it is necessarily unpredictable, I do not pursue this claim here. Nor do I claim that the unpredictability condition is formally or consciously adopted by any existing legislation or judgment. I only argue that this condition is able to provide the sought-after justification for excluding predictive evidence.

Maciej Dybowski, Weronika Dzięgielewska and Wojciech Rzepiński (Uniwersytet Adama Mickiewicza w Poznaniu)

Reclaiming Evidence - On Exchanging Reasons in Legal Practice

The authors defend the thesis that the process of evidence-finding is ultimately rooted in the broader practices of providing reasons. The framework for the pragmatist account of evidence is set by the theses set out by practice theorists (Rouse, 2006). It is therefore assumed that evidence can only be understood in the broader inferential context in which a belief or action may attain the content in the way required for it to be epistemically significant. To stand as potential evidence, it must therefore be able to play a distinctive role in reasoning by serving as a reason for further beliefs (or actions), hence as a premise from which they can be inferred (Sellars/Brandom). What is more, the distinctiveness of the practice of reason-giving (its normativity) is constituted by interactions among the participants of the practice and their mutual accountability (Rouse, 2007).
The authors believe that these considerations can be transferred to the grounds of legal practice, albeit with certain reservations. Evidence in law can thus be understood in the inferential context of distinctly legal reasoning taking place within interactive exchange of reasons among participants of the legal practice. The significant thread of the legal practice is that it is generally based on norms as licenses for legal reasoning, whilst evidence in law is inferentially conceived of as that bit of knowledge which plays a role in coming to practical legal conclusions. However, the above account of evidence in legal practice does not seem to fully explain the conditions of the legal practice itself, as it reduces legal evidence-finding to legal rules. To use the metaphor of law as a game, the above-mentioned standard approach does not concern the game itself, but rather exclusively the rules of the game. This objection refers to the claim that a pragmatist account of normativity (legal normativity included) should involve both the issue (what the practice is about) and the stake (the difference it would make to resolve the issue in one way rather than another).
In line with this claim, the authors assert that there are significant distinctive features of the game of law that enable a reinterpretation of the concept of evidence in a way that does not reduce evidence-finding to a set of legal rules. Among these features are asymmetry between participants, the interactive exchange of reasons and limited game exit options.
These features amount to the fact that a legal game essentially involves “change of subject” (Black, 1964). This perspective prompts a twofold account of evidence that points to the fact that evidence functioning as a premise in legal reasoning stands for its issue, while evidence viewed from the perspective of a conclusion of such reasoning involves the stake, because it enables the “change of subject” at stake, through the practice of significant reason-giving.

Piotr Bystranowski, Bartosz Janik, Maciej Próchnicki (Jagiellonian University)
Certainty and punishment. An empirical study on the dimensions of evidence

One of the most fundamental assumptions of the criminal law system, in both common and civil law varieties, is the claim that the decision-making process in a criminal trial should be divided into two stages: the decision concerning the guilt and, provided the defendant has been found guilty, the decision on the severity of punishment. The first decision is dichotomous and the second is not, the latter should be proportional to legally relevant factors such as the wrongfulness of the act and blameworthiness of the defendant.
Two important features of the criminal trial are associated with this binary character of the decision on guilt. First, the defendant is found guilty (and, thus, can be subject to punishment) if the evidence collected against her has met the evidentiary threshold (which, in criminal law, has traditionally been the "beyond a reasonable doubt" standard) and is acquitted otherwise. It means, inter alia, that a defendant whose guilt has been proved to a high degree of certainty but not beyond reasonable doubt should be acquitted. Second, once the defendant's guilt has been established, the degree of certainty attributed to (and any other considerations regarding) the evidence collected against her should not influence in any way the decision with respect to the punishment, which should be based solely on the legally relevant factors. But is this desideratum likely to be satisfied in practice?
This study aims at checking three ways in which the quality of evidence collected against the defendant might influence the severity of punishment (provided the defendant is found guilty). First, we hypothesize that the strength of evidence will influence the sentencing process (if weaker evidence sufficed to convict the defendant, its relative weakness will be still discounted in the severity of punishment, contrary to what the law stipulates). Second, we hypothesize that if only circumstantial evidence (as opposed to direct evidence of possibly the same objective strength) can be presented against the defendant, this will not only lead to a lower chance of conviction (as suggested by the existing empirical literature) but also to a more lenient sentence, given conviction. Our third and final hypothesis deals with a situation in which evidence collected against the defendant is considered too weak to secure conviction of the putative act, thus making the prosecutor charge the defendant with a proxy crime--an offence not fully capturing the wrongfulness/harmfulness of the putative act but easier to prove. Following the existing theoretical literature, we expect that charging the defendant with a proxy crime will result in more lenient punishment, when compared with a situation in which she were charged with the primary offence (given the same strength of evidence).
Our hypotheses are tested by means of a series of simple vignette experiments, in which the strength and type of evidence as well as type of offence the defendant is charged with (primary v. proxy) are manipulated. Subjects are asked to deliver the decision on guilt (followed by questions checking their level of certainty) and, given conviction, the decision on the severity of punishment. The dependence between independent variable and the severity of punishment (both absolute and expected), as mediated by the level of certainty, is used to verify the hypotheses.

14:30-16:30 – Session II

Marcin Romanowicz (University of Warsaw)
Forensic Neuropsychology: Are We There Finally?

Forensic Neuropsychology is a rapidly evolving subspecialty of clinical neuropsychology that applies neuropsychological principles and practices to matters that pertain to legal decision-making. In 2003, Jim Hom put in the title of his article such question: "Forensic Neuropsychology: are we there yet?". This question should be revisited: are we there finally? Has the methodology of neuropsychology developed the standard of evidence that can be used as forensic argument in legal proceedings? What neuropsychological methods may be useful in applying the law? These are the basic questions that will be raised in the paper.

Julia Wesołowska (Jagiellonian University)
The theory of mind of Law: the interpretation of scientific evidence in the courtroom

The developments in brain sciences have seen courtrooms welcoming – some gladly, and some with resentment – a new kind of evidence: brain scans and expert scientific opinions. Using images and results obtained through methods such as EEG or fMRI as evidence is an increasingly popular practice among American courts - from 2006 to 2009, the number of cases in which these methods were applied having doubled. What is more, the weight of such methods of proof is increasingly significant, often becoming the basis for the decision of the jury and the judge. These methods are used in cases of serious and violent crimes whose perpetrators face the death penalty or life imprisonment. This practice, dubbed neurolaw, has many implications for the theory and practice of law as well as

raising broader social and philosophical issues. In this presentation I mean to examine precisely how legal decisionmakers ground their reasoning in scientific evidence.
The moment of interpreting scientific evidence in the courtroom creates tension: extracting fully meaningful and complex conclusions from neurobiological data requires knowledge of brain and mind sciences alike, while most if not all judges and juries are not trained to possess such skills. These jurors, not privy to specialized neuroscientific knowledge, are forced to translate their impressions into law using ad hoc theories of mind, created in confrontation with scientific evidence they are presented with. Furthermore, aside from knowledge, one's beliefs about free will, accountability and the mind-brain problem come into light: the verdict is filtered through these opinions. The presentation looks into judicial statements and, where possible, the opinions of jurors in iconic neurolaw cases in the United States, with Graham v. Florida 560 U.S. 48 (2010) and Grady Nelson v. Florida, in order to answer the questions such as: how do lawyers infer the mental from the physical; how does the language in courtroom oscillate between hard science and socially entangled law; can the language of neuroscience and the language of law converge and reinforce each other's meanings; finally, how do theories of morality and free will interplay in this complex dependency; and many others. It aims to discover how lawyers build bridges between the unknown ground and well-mapped legal territory, using their background knowledge and intuitions as to what is right.

Felix Bräuer and Kevin Baum (Universität des Saarlandes)

Trusting Artificial Experts

We rely on human experts for information. However, not all the experts we rely on are human. We increasingly depend on artificial intelligent systems ("artificial experts"). Algorithms recommend movies on Netflix and books on Amazon. But the influence of artificial experts doesn't stop here. Judges rely on algorithms to decide whether to grant parole (Corbett-Davies et al. 2017). And doctors employ algorithms to determine whether a patient should be taken off life-support (Song et al. 2018) or receive palliative care (Avati et al. 2017). This raises the following question: Under which conditions is it epistemically rational to trust artificial experts (Lepri et al. 2017)? In response we are going to argue for two things: (1) It can be rational to trust artificial experts in a predictive but not in an affective sense of "trust". (2) The reasons we need to have access to in order to be rational in predictively trusting artificial experts depend on the practical risks connected to receiving false information. Affective trust, roughly, means trusting a person (Faulkner 2007, 2011). We shall consider two accounts as to why affective trust can be (prima facie) rational: (i) the speaker, in telling the hearer something, intends to invite the hearer's trust. This invitation, and the hearer's understanding of this invitation, makes it rational for the hearer to trust the speaker (e.g. Hinchman 2005, 2014; Moran 2006; McMyler 2007, 2011, 2013); (ii) the hearer signals trust in the speaker by asking her for information. This display of trust moves the speaker to answer in a trustworthy fashion, thus making the hearer's trust rational (Faulkner 2007, 2011).
Both accounts explain the rationality of affective trust in virtue of an interpersonal relationship between the speaker and the hearer. However, such a relationship can't be established between us and artificial experts. Algorithms can't intend to invite our trust. Moreover, they don't have the capacity to recognize our needs and to behave in a trustworthy way in response. Hence, we can't be rational in affectively trusting artificial experts. However, it can be rational to predictively trust artificial experts. That is, it can be rational to believe that they will behave in a certain way – to give us true information (Faulkner 2007, 2011). Unlike affective trust, predictive trust can be rational due to background information we possess about our source of information. And it is plausible to assume that we have access to relevant background information here – for example, about an algorithm's track record. Hence, we can be rational in predictively trusting artificial experts.
This brings us to (2). Consider two of the examples from the beginning. Broad background information seems enough to trust the Amazon algorithm's recommendation – e.g. I liked its previous recommendations. However, more is needed for a doctor to be rational in following the recommendation to take a patient off life-support (Freedman 2015; Bräuer 2018). She needs access to the basis of the algorithm's recommendation, so that she can weigh this information against the reasons she possesses independently.

DAY 2

11:30-13:00 – Session III

Carla Bagnoli (University of Modena)
Burden of proof and burden of persuasion. The testimonial responsibilities of Independent observers

This paper argues that the epistemology of testimony would profit from a careful articulation of the distinction and relations between the burden of proof and the burden of persuasion, from within a systematic account of normative responsibilities.
The distinction between the burdens is often drawn in terms of a philosophical dichotomy, which separates objective and universally accessible evidence from the emotional modes of psychological manipulation. This dichotomy is taken to task in the first part of the paper. The argument revolves around the case of independent observers, e.g. in the observation election programs. Independent observers have the right to access all relevant information regarding elections and the duty to report and denounce misconduct. Their testimonial responsibilities are both epistemic and ethical. Emotions are regarded as sources of bias and distortion of judgment, according to a model of objectivity which belongs in the tradition of the Impartial Spectator. Yet the accuracy of observation often rests on discerning judgment and apt emotion. Thus, if not blinding, lack of emotional responsiveness is likely to undermine the observer's capacities for perspicuous observation. If so, then, independent observers should be required to cultivate an appropriate sensibility rather than asked to be unemotional and dispassionate as an Impartial Spectator would be. The conclusion of the argument is that an untenable philosophical dichotomy between the evidential and emotional aspects of the observers' stance underpins a misleading characterization of the independent observer as someone whose independence rests on lack of emotional reactions.
In the second part of the paper, it is argued that the same philosophical dichotomy leads to a mischaracterization of the contrast between the burden of proof vs. the burden of persuasion. On this proposal, there is an objective distinction between the burden of proof and the burden of persuasion, but it does not rest on the dichotomy between evidence and emotion. Rather, there are standards of correctness that govern the discharging of both these burdens. The distinction is articulated in terms of respect and mutual recognition of persons as having equal normative (epistemic and ethical) status. This is a normative articulation, which allows for redefining the 'independence' of observers in terms of their capacity to produce reasons that all others having equal normative status could share. Such reasons might have different normative weight in relation to different audiences, and it is a matter of rational argumentation and debate to establish the ethical and political legitimacy of such variability.
Finally, the third part of the paper argues that this normative model is particularly promising in the context of transitional justice, where the economy of credibility is systematically distorted by massive and normalized wrongdoing and normative uncertainty. In transitional societies, normalization and a diffuse lack of sensitivity to systematic institutional wrongdoing make particularly hard for the independent observer to collect evidence and meet the standard of proof. In such circumstances, an experienced observer, endowed with a refined ethical sensibility, is likely to find and provide more perspicuous observations and thus actively contribute to sustain the transitions toward justice.

Eva Schmidt (University of Zurich) & Andreas Sesing (Saarland University)
Bare Statistical Evidence and the Legitimacy of Software-Based Judicial Decisions

Based on actual court rulings, legal epistemologists hold that bare statistical evidence – evidence to the effect that a certain state of affairs is likely to obtain – cannot meet the standard of proof for conviction in criminal cases. For bare statistical evidence lacks an appropriate connection to the defendant's committing the crime; it is not individualized. This has interesting implications for algorithms used in criminal cases, since algorithms can do no more than determine probabilities, i.e. provide bare statistical evidence. But then the evi-dence that algorithms can provide cannot meet the standard of proof for criminal conviction. This arguably severely limits the use of algorithms in the criminal justice system. We discuss the issue by focusing on two use cases, one involving algorithms that calculate recidivism probabilities, the other DNA matching systems used in 'cold hit' cases.

Marvin Backes (University of St Andrews)
There is No Epistemic Mileage in Legal Cases

There is an obvious connection between epistemology and the law: both are, in some way, concerned with the truth. But what does this connection between epistemology and the law look like? For a long time, legal theorists and philosophers have drawn on insights from epistemology to help answer legal questions. One prominent example is the question of when a body of evidence is sufficient for conviction. While the legal standard of proof has traditionally been interpreted probabilistically, a number of people have pointed out that this probabilistic story is unsatisfactory – after all, we are generally reluctant to find a defendant guilty in cases where the only evidence against them is purely statistical; even if the statistical evidence is very strong and easily meets the legal probability threshold (e.g. 0.5 in civil cases). Hence, a number of philosophers and legal scholars have set out to modify and improve the current legal standard of proof. In doing so, they have often appealed to insights from epistemology. For instance, Thomson (1986) has argued that there needs to be a causal connection between the body of evidence and the proposition that the defendant is guilty; Enoch, Spectre, and Fisher (2012) and Enoch and Fisher (2015) have argued that the evidence needs to be sensitive to the proposition that the defendant is guilty; and Smith (2018) recently argued that the evidence needs to normically support the proposition that the defendant is guilty. Importantly then, these projects have used insights from epistemology to shed light on, and help answer, legal questions - let's call this the epistemic to legal direction of exchange. Over the years these projects have led to interesting interdisciplinary cooperation and I think we should be generally sympathetic towards the epistemic to legal direction of exchange.

More recently however, a number of philosophers have turned the above connection between epistemology and the law around and used reflections on statistical evidence in the law to draw epistemic conclusions about what we can justifiably believe (e.g. Smith 2010, 2016; Buchak 2013; Staffel 2016, and Littlejohn forthcoming). Specifically, they have used legal doctrines and our judgments about legal cases (e.g. Gatecrasher case and the Blue-Bus Company case) to argue against probabilistic accounts of epistemic justification – i.e. accounts that explain justification in terms of high probability. In short, they have attempted to use legal considerations to shed light on, and help answer, epistemic questions - let's call this the legal to epistemic direction of exchange.

The primary aim of this paper is to defend a probabilistic picture of justification against the most prominent arguments from legal cases – The Conviction Argument and The Comparative Probabilities Argument - and to provide some general reasons for being suspicious about arguments that follow the legal to epistemic direction. Finally, I provide a brief sketch of how we should understand the connection between epistemology and the law.

14:30-16:00 – Session IV

Marcin Waligora (Jagiellonian University Medical College)
How evidence shape research ethics. A case of pediatric oncology

Research with children must satisfy strict ethical standards and offer an appropriate balance of risk and benefits for participants. Pediatric research may be approved by the ethics committee when it **offer**s **the prospect of direct benefit**s **for participants and/or low risk. This is a broad, international consensus and well-established standard of research ethics.**

Recent scientific evidence illustrates that there are types of pediatric research which do not necessarily offer a direct benefit for participants: Phase 1 clinical trials in pediatric oncology: Approximately 1 in 10 children experiences a **surrogate objective response (i.e., tumor shrinkage), which will not necessarily translate into real-life benefits such as survival rate or quality of life. At the same time**, the **risk of participat**ing **in these trials remains high: a child participating in such studies experiences a mean of 1.32 severe and/or life-threatening drug-associated adverse events, and 1 in 50 participants experiences fatal drug-associated adverse events.**

In light of new evidence, there are two main options for stakeholders: to stop Phase 1 trials in pediatric oncology and to satisfy the existing **ethical standard**s **or to reframe** the **ethics framework to include new data. Stopping all trials would limit access to safe drugs in pediatric oncology. This option seems wrong and unrealistic. It is more likely that new data would influence the ethics framework for pediatric trials. I will elaborate more on this option in my presentation.**

Tomasz Herok (Lancaster University)

If intuitions are used as evidence in ethics, why are so many of its claims counter-intuitive? The case of "after-birth abortion"

What counts as evidence in ethics? According to the prevailing metaphilosophical dogma "philosophical intuitions provide data to be explained by our philosophical theories, evidence that may be adduced in arguments for their truth, and reasons that may be appealed to for believing them to be true" (Alexander 2012). Variations of this claim have been endorsed by many (Bealer 1996, Kornblith 1998, Pust 2000, Sosa 2009, Chudnoff 2013). However many philosophical theories do not seem to fare very well in terms of accounting for intuitions, nor do they seem meant to do so. Consider the following conclusions that have been reached by academic philosophers in the last couple of decades: it is always immoral to procreate (Benatar 2006), nothing can be moral or immoral (Mackie 1977), there is a moral obligation to give away nearly all of one's income to charity (Singer 1972), there are no valid moral principles (Dancy 2004), there is no obligation to obey any law of one's polity (Simmons 1976), nobody is ever morally responsible for anything (Pereboom 2001), children should have the same rights as adults (Cohen 1982), there is no moral difference between killing and letting die (Rachels 1975).
If intuitions "provide data to be explained by theories", how are those conclusions possible? I think there are five fairly plausible answers to this question. First, one can argue that only intuitions of people with expertise in a particular area of philosophy count as evidence (Kauppinen 2007, Ludwig 2007, Devitt 2011), and those people do not find the relevant claims counter-intuitive. Secondly, that there are two kinds of moral philosophy and only one of them treats intuitions as evidence (Brandt 1979, Unger 1996, McMahan 2013). Thirdly, that philosophers have to sacrifice some intuitions in the process of seeking reflective equilibrium (Daniels 1996). Fourthly, that philosophers only rely on intuitions when they engage in conceptual analysis (Goldman & Pust 1998), otherwise they are free to dismiss them. And finally, that philosophers do not use intuitions as evidence at all (Williamson 2007, Cappelen 2012, Deutsch 2015).
To determine which one is correct we have no choice but to examine arguments in favour of counter-intuitive claims case by case. Here I want to focus on the claim that it is morally permissible to kill newborns, recently put forward by Giubilini and Minerva (2012). I argue that while it might be tempting to interpret their argument as reflective equilibrium seeking, upon closer inspection it turns out intuitions do not play an evidentiary role in the argument.

Tomasz Żuradzki (Jagiellonian University)

Reporting Incidental Findings under Uncertainty

TBA