

Proof: Uses of evidence in law, politics, and everything else. By Frederick Schauer. Cambridge, MA: Harvard University Press, 2022. 320 pp. \$29.95 hardcover.

Reviewed by Emily R. D. Murphy, Hastings College of the Law, University of California, San Francisco, California, USA

In a perfect world supplying us with the infinite attention of our students, I would make *Proof* one of a handful of books that all incoming law students should read. This much-needed book comes to the public and the legal profession at a time of collective disillusionment with the basic political and psychological processes by which we come to agree on facts. Determining and distinguishing facts is more important than ever. Embracing subtle and situation-specific distinctions is likely the only way out of our seemingly intractable and bitter disputes over the shape of society (Greene, 2021).

Proof is not just about evidence law per se. It is about how we know what we know, and then how we relate those questions of everyday epistemology to the difficult questions of fact determination in the courtroom. It approaches these topics with the only truly appropriate methods, which are also increasingly absent from the current political and cultural discourse: nuance and multi-dimensional methodology. Schauer masterfully lays out—in his typically enviable, punchy prose—how we know what we know in a way that every non-lawyer can access. He marries this version of everyday evidence to the legal doctrine, delivering essential lessons about both.

If those key lessons could be made core tenets of secondary education, or simply implanted directly into the brains of the electorate, we would all be better off. Schauer's treatment of them is a good, gentler alternative. None of these will be new to law and society kin, but they are beautifully delivered. The first of these is the is-ought distinction so often elided in “the discourse,” but particularly relevant in the context of a global pandemic. That is: facts are necessary but not sufficient for solving society's hard problems. “Following the science” does not actually inform us what to do as a matter of policy (or personal decisions), which must incorporate normative values. Pretending otherwise is an error, sometimes disingenuous, of less-than-rigorous thinking.

The second lesson is that, in a complex world of inherent uncertainty, context matters mightily to the evaluation of evidence. Problems of fact determination are inseparable from the meta-questions of “how,” “how much,” “compared to what,” and “for what purpose.” Socially relevant facts do not exist in a vacuum; this is, in part, what makes their determination so difficult. The final key lesson, delivered in the last but most important chapter of the book, is about the existence of what I propose to students is the single most powerful, and problematic, bit of cognitive wiring that we have: motivated reasoning. Schauer writes: “Understanding motivated reasoning is crucial for understanding when and how evidence matters in the world, and when and how it does not” (p. 228). Indeed, it could have been a productive frame for the entire book.

For all that is praiseworthy in the book, this would not be a proper review if I did not offer a “friendly amendment” related to that second key lesson about contextual fact determination. There Schauer over-emphasizes the idea that “compared to what” does just as much analytical work as “for what purpose.” I disagree with him on this bigger question within my own area of expertise: neuroscience as evidence, a topic about which Schauer has written previously (Schauer, 2010) and to which he devotes some attention in the book in the chapter on “Lies and Liars.”

I have no argument with the importance of the “for what purpose” assessment of evidence. Due to the deliberately uneven distribution of burdens of proof and compulsory process rights, a

criminal defendant offering a brain scan to introduce doubt about the relevant *mens rea* should probably be held to a less rigorous standard of reliability and validity than the prosecution offering the same type of scan to argue for guilt. But I do not think the “compared to what” analysis stands on exactly the same plane. Schauer has argued elsewhere that brain scans might not be very reliable, but if they are more reliable than the next best alternative—such as the polygraph or the statistical likelihood of your average layperson detecting mendacity in a stranger—they should be admitted (Schauer, 2010, p. 1213). He recapitulates this argument here: “The question to be asked about any form of lie detection, therefore, is not whether the method is perfect, and not whether it is highly accurate, but whether the method is better than lie detection through the use of all of the folk wisdom, urban legends, uninformed amateur psychology...” (p. 121). That is, we should compare alternative means of assessing a fact about the world and go with the one that is “better.”

But this version of “compared to what” only invites comparison of the actual rates of accuracy or reliability. It does not include how the evidence is actually weighted or valued, and whether that weight is in line with the actual accuracy or reliability. The full question should be: “compared to what, *and how understood?*” to try and account for the other side of the coin: valuation of the degree of proof, and its relationship to some empirical concept of veridical accuracy. This version of the question simply incorporates the balancing test that Rule 403 articulates.

Schauer recognizes this more complete analysis in his excellent treatment of character evidence. Character evidence is both more familiar and perhaps less empirically studied (in terms of evaluating base rates of both accuracy and misuse) than neuroscience-based lie detection, if only because the latter is a more precise and operationalized concept than “character” and “past acts.” Schauer writes: “[T]he legal system’s treatment of character and of past acts may reflect an important theme in the law of evidence—that more evidence is not necessarily better, and not even more relevant evidence, especially if juries or even judges will misuse or be misled by that evidence” (p. 211). This could, of course, also be true of a neuroscience-based lie detector: it may be “better” than observing demeanor, but are jurors capable of giving it the precise weight it deserves, and not more? This is an as-yet unanswered empirical question, but I think Schauer’s position on the “compared to what” issue has to account not just for (perhaps) observable difference in actual, veridical statistical accuracy of alternative methods of proving a fact, but also the actual weight it is given in the minds of a decision-maker, and whether that weight is truly warranted.

Overall, the book was also, for me, an essential and timely corrective to the frustrations of teaching American federal evidence law, which had come to feel more and more like a “grotesque structure” than a worthy example of American legal achievement (*Michelson v. United States*, 1948). To teach American evidence law is to become intimately familiar with the bizarre, internally incoherent edifice of “misshapen stone[s],” often seemingly divorced from evaluation and use of facts in real life (*Michelson v. United States*, 1948). And one of the frustrations of teaching core evidence doctrines is their distance from everyday psychological processes about what information to trust, value, and use. Schauer’s book squarely addresses these tensions and, while unable to resolve them, leaves the reader better able to see evidence, in all its forms, for what it is. *Proof* is fundamentally, for society, a book about clear thinking.

REFERENCES

- Greene, Jamal. 2021. *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart*. Boston: Houghton Mifflin Harcourt.
- Michelson v. United States*, 335 U.S. 469. 1948.
- Schauer, Frederick. 2010. “Can Bad Science Be Good Evidence: Neuroscience, Lie Detection, and Beyond.” *Cornell Law Review* 95: 1191–220.