Philosophy 338A
Philosophy of Law
2017
Note Fourteen

PROBABILITY

1. As is well known, the criminal proof standard is not a probabilistic standard. In civil law the proof standard is lower, made so by the fact that even high probability does not remove all reasonable doubt. It is doubtful whether this supposed difference of proof-strength is as routinely instantiated in routine practice as widely supposed. (We'll come back to this in later chapters.)

2. There are two recognized standards of probable proof in civil law.

    - proof on the balance of probabilities.

    - proof on the preponderance of evidence.

    Of course, "balance" here means a scale which measures weight. If the evidence for the plaintiff's claim outweighs the evidence against the opposite claim, she wins. If not, she loses. If the evidence of both parties are *in* balance, she loses. (So "balance" there means "equally weighted")

    It is often said that the winning weight need not be large. This usually taken to mean that if the evidence in relation to each claim is represented by a real number in the unit interval (0, 1), victory goes to the plaintiff if her evidence in relation to her claim outweighs its support of the other one by as little as 0.01. Intuitively, this is absurd. There are two things wrong with it. One is that the proof-criterion is absurdly undemanding and easy to fulfill. The other is that it rests on a mischaracterization of the evidence. Proof, however low its standard, is fashioned on the same evidence, namely, *all* the evidence presented at trial. So what's really wanted here is some device for measuring the weight of the evidence in relation to the plaintiff's plea for damages and the weight of that same evidence in relation to the respondent's claim that no damages are owed. I'll develop the point in the section to follow.

3. If proof on the balance of probabilities is supplied by evidence having *a* greater weight in relation to one claim than it has in relation to the other one, proof on the preponderance of evidence requires that the weight of the evidence *dominantly* favours the one position over the other. One way of quantifying this is to assign real numbers as weight-measures and define preponderance as follows:

    - take the weight of the total evidence supporting damages to be the value of the *conditional probability* of the proposition "Damages are owed" on the evidence presented.

    - take the weight of the evidence for the proposition "Damages are not owed" to be the value of its *conditional probability* on the evidence presented at trial.

Then

- When we compare the conditional probabilities of each of the contending claims, evidence is preponderant just in case the value of the associated conditional probability is greater than the value of the other one by a factor *n*, where *n* equals or exceeds, say, 0.8.

However, it is open to question whether real numbers are the best way of measuring the strength of evidence in legal contests. One of the reasons is that in any adversarial proceeding it is practically certain that the totality of the trial's evidence will be inconsistent. But when the real-number assignments obey the rules of the probability calculus, inconsistency gums up the works that calculate conditional probabilities.

4. Another claim that is often made is that considerations of probability have no operational role to play in criminal law. This is seriously mistaken.

- as we see in chapter 14 at pages 164-165, not even the criminal proof standard excludes considerations of probability. While guilt must be proved beyond a reasonable doubt, it is not required that each element of the case be proved beyond a reasonable doubt. Here high (enough) probability will do. Consider, for example, that in our law a charge of murder often succeeds even in the absence of a corpse. This creates a lot of confusion in the mind of the general public. We've all heard of the *corpus delicti* ("body of the crime") requirement, which is usually understood as demanding the body of the man whom Spike is accused of killing. But *corpus delicti* actually means the "body of evidence" of whatever crime we're talking about. In a recent Alberta case, a man was convicted of first-degree murder on strong but circumstantial evidence that he had hidden the bodies of his victims after he killed them.

  What the criminal standard requires is that all the evidence taken together establish the accused's guilt beyond a reasonable doubt, and leaves open that some pieces of that unified evidence prove an element of the case on the balance of probabilities (of strong enough force).

- It is not required of eye-witnesses that their sensory experiences prove beyond a reasonable doubt that what they believe to be true be so beyond a reasonable doubt. As we've seen, eyewitness evidence, not matter how truthfully given, is often mistaken.

  Opinion evidence is also subject to no such standard. When an expert witness testifies that in his considered professional opinion based on the factors he's examined that so-and-so (say the proposition that the accused is mentally fit to be tried), it is not required that his reasons for that belief prove it true beyond a reasonable doubt.

- The same applies to the beliefs that jurors form on the basis of what they've seen and heard at trial (and later in the jury room). Indeed what the judge admonishes them to do makes the point indisputable. In arriving at their verdict on the basis of all they've seen and heard, jurors are told to use their common sense and to draw upon their experience of life. Concerning which there is no denying that in reasoning in the way in which we

ordinarily reason about life's myriad questions, it is rare that our beliefs will be true beyond a reasonable doubt.

This turns out to be exceedingly important. There is little doubt that judges accede to the tacit access thesis, not only in the matter of understanding undefined terms but also more generally in the matter of knowing what to do in determining whether the term has been instantiated in various cases. If "guilty beyond a reasonable doubt" is undefinable but can be understood implicitly, the same holds true for our knowing what it takes for us to determine that in the case before us. Why is this important? It is important because it's beginning to look as if we'll have difficulty in specifying those points in a criminal proceeding at which something is delivered beyond a reasonable doubt. Call this the trial's *probativity points.* Could it be that when none of the information furnished at those points is beyond a reasonable doubt, nevertheless when the information from all the probativity points is taken together, proof beyond a reasonable doubt is secured? If so, the key property of the whole would have no occurrence in any of its parts. As a logician would say, the property of the whole completely fails to divide with respect to its parts.

All that this means is that neither composition nor division has anything to do with how nonconclusive parts generate a conclusive whole. It is not to say that they don't, but it leaves the logic of those situations in a state of obscurity. Here is a point to take advance note of. It is possible that logico-epistemically impeccable criminal convictions have nothing to do with proof, despite all the talk of it in our courts. We'll come back to this in later chapters.

5. *The tacit and the implicit*

In one of our classes just before reading week, one of you (sorry, I can't quite remember whom) asked whether "tacit" and "implicit" are one another's synonyms. Since time was closing in, I responded rather categorically in the negative. I said what I thought "tacit" meant before time ran out for a coherent explanation of "implicit". I apologize for that seeming abruptness. So here goes:

- Implicity and tacity are properties of understanding, belief and judgement, and also knowledge. For expositional ease, call the states we're in when we understand, believe, judge or know something in these ways a state of mind or an SM.

- When an SM is tacit, it is not linguistically formulable. It cannot be put into words.

- When an SM is implicit, it is also tacit. It is also a state that lacks a wholly conceptualized presence in thought. It is insufficiently structured to be an even unspoken propositionally organized thought.

On the face of it, this is alarming. In fact, it harbours a huge savings in the cognitive economies of humanity. Its frequency among us provides a large adaptive advantage. Examples are legion. How many times has something like this happened to you? You're in a situation and at a certain point begin to feel that something's not right, that there is danger lurking about. You feel this instinctively. If your instinct is right in this case, you can't put your apprehension into words and can't even give it a propositionally organized thought in your mind. But under

present assumptions, there is something that you know implicitly. You know that you're at some significant risk of danger.

As our discussion of hidden bias reminds us, it is perfectly possible and not infrequent that our instincts lead to error (and sometimes worse). So believing instinctively that you could really be in harm's way doesn't guarantee that you know you are, even implicitly. Even so, it is on empirical grounds alone assured that

- If our instinctive apprehensions weren't right with a notable frequency, the species *homo sapiens* could not have achieved an evolutionary footing in the first place.

By the way, the tacit access thesis of page 165 would better have been called the *implicit and tacit access thesis.*