2007

Revisiting 'Dreyfus': A More Complete Account of a Trial by Mathematics

David H. Kaye

Penn State Law

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works

Part of the Criminal Law Commons, Evidence Commons, and the Legal History Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.
Essay

Revisiting Dreyfus: A More Complete Account of a Trial by Mathematics

D.H. Kaye†

Courts have struggled with "probability evidence."¹ A few have tried to expel nearly all quantitative assessments of evidence.² Others have propounded complex and arbitrary rules of admissibility.³ Still others have uncritically, and perhaps un-

† Regents’ Professor, Arizona State University Sandra Day O’Connor College of Law, and Fellow, Center for the Study of Law, Science and Technology. J.D., Yale Law School; M.A., Harvard University; B.S., Massachusetts Institute of Technology. I am grateful to George Fisher, William Kruskal, Paul Meier, and Hans Zeisel for their comments on drafts of this paper, to Marcelle Chase for locating records of the Dreyfus proceedings, and to Fernando Téson for verifying the translations of certain documents. Copyright © 2007 D.H. Kaye. All rights reserved.

¹. By “probability evidence,” I mean quantitative expressions, derived with the aid of the mathematical theory of probability, of the chance that certain events will occur. Such evidence or argument rarely is relevant in itself, but is supposed to assist the judge or jury in evaluating the probative force of facts established by other testimony, such as an apparent match in handwriting characteristics, in blood types, in hair fibers, and so on. For surveys of leading cases of involving probability evidence and efforts to extract useful principles from them, see 1 MCCORMICK ON EVIDENCE § 209, at 904 (Kenneth S. Broun ed., 6th ed. 2006); D.H. Kaye, The Admissibility of “Probability Evidence” in Criminal Trials (pts. 1 & 2), 26 JURIMETRICS J. 343 (1986), 27 JURIMETRICS J. 160 (1987) [hereinafter Kaye, Probability Evidence]. A deeper analysis can be found in DAVID H. KAYE ET AL., THE NEW WIGMORE, A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 12.4 (2004) [hereinafter KAYE ET AL., THE NEW WIGMORE].

². See State v. Schwartz, 447 N.W.2d 422, 428–29 (Minn. 1989); State v. Kim, 398 N.W.2d 544, 548–49 (Minn. 1987); State v. Boyd, 331 N.W.2d 480, 482–83 (Minn. 1983); State v. Carlson, 267 N.W.2d 170, 175–76 (Minn. 1978). But see State v. Bloom, 516 N.W.2d 159, 167 (Minn. 1994) (creating an exception to the Minnesota rule prohibiting testimony regarding some probabilities for DNA evidence).

comprehendingly, accepted such assessments. This Essay examines one notorious case that has been said to fall in the last category, the Dreyfus case. In a brilliant and influential article published over thirty years ago, Professor Laurence Tribe presented the case as a prime example of the irresistible power of even grossly fallacious mathematical demonstrations to overwhelm a legal tribunal. Not long afterward, Justice Douglas reiterated this view of the extraordinary power of mathematical evidence to confound court and counsel. A distinguished national panel also described the Dreyfus case as showing "the ability of mathematical evidence to paralyze critical examination." And, as the Minnesota Supreme Court attempted for the sixth time to fashion reasonable rules for the admission of expert testimony about DNA evidence, one Justice insisted that


6. Hull v. United States, 404 U.S. 893, 895–96 n.3 (1971) (Douglas, J., dissenting from denial of certiorari). Oddly, Hull involved little or no quantified evidence. Justice Douglas would have reversed a smuggling conviction because the government lacked direct evidence that defendants—who were walking on a highway, close to two knapsacks of marijuana, and three-quarters of a mile from "possibly the hottest spot on the Mexican border for smuggling"—had crossed the border with the marijuana. Id. at 894. He reasoned that, because the agent's testimony about the "hot spot" was based on "anecdotal experiences in four prior investigations," it amounted to "statistical evidence" that "[c]ourts have been hesitant to admit... because of the ease with which it can be abused." Id. at 895–96.


8. See State v. Alt, 505 N.W.2d 72, 72 (Minn. 1993); State v. Johnson, 498 N.W.2d 10, 14 (Minn. 1993); State v. Jobe, 486 N.W.2d 407, 419–20 (Minn.
"the infamous Dreyfus case" proved that if "an erroneous statistical probability plays any significant role in the conviction of an innocent person, the error has not only destroyed the life of the innocent person but has in some sense dehumanized the community."9

The case in question is the court-martial of French Army Captain Alfred Dreyfus at the turn of the nineteenth century.10 It is a case of such injustice that it toppled a government. But despite its legend in the literature on legal statistics, Dreyfus is not a case of mathematics run amok, unchecked and uncomprehended. To the contrary, the defects in the mathematical proof were dramatically exposed, and this evidence did not lead Dreyfus's judges to condemn him. Accordingly, Dreyfus's contrived conviction, as intolerable as it was, does not militate against the admission of "probability evidence."

THE DREYFUS CASES: AN OVERVIEW

Dreyfus is not a single case, but rather a series of connected military, civil, and criminal proceedings.11 They began in 1894 with a court-martial that convicted Dreyfus of transmitting military secrets to Germany and sentenced him to life imprisonment on Devil's Island.12 The verdict, which was tainted by a secret dossier, fabricated evidence, and widespread anti-Semitism in the French army and populace, became an in-

---

9. State v. Bloom, 516 N.W.2d 159, 173 (Minn. 1994) (Coyne, J., dissenting). The majority of the court held that an expert may testify to the frequency of occurrence of a DNA profile when this frequency is computed according to a "conservative" procedure devised by a committee of the National Research Council. Id. at 160–61 (majority opinion) (citing COMM. ON DNA TECH. IN FORENSIC SCI., NAT’L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992)). Not long after that, a second committee wrote that this "ceiling" procedure was not necessary; in its view, more extreme probabilities could be justified scientifically. COMM. ON DNA FORENSIC SCIENCE: AN UPDATE, NAT’L RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 35 (1996).


ternational cause célèbre. As evidence of Dreyfus's innocence began to mount and as it became known that French military authorities had manufactured additional evidence to keep the case from being reopened, the French army and government were shaken. The discovery of one forgery, purporting to be a letter from an Italian military attaché, prompted the suicide of the colonel working in military intelligence who had prepared it and produced the resignations of the chief of the Army's General Staff and the Minister of War.

France's highest court, the Cour de Cassation, sitting en banc as a result of special legislation, vacated the judgment of the military court. After five years of brutal conditions on Devil's Island, Dreyfus returned to a second court-martial. At Rennes in 1899, this court again found Dreyfus guilty of treason. Issuing a compromise verdict referring to extenuating circumstances (and prompting Dreyfus to ask "Since when have there been 'extenuating circumstances' for treason?"), the court sentenced Dreyfus to another five years' confinement. The verdict was so poorly received that within two weeks the President of the Republic pardoned Dreyfus.

After further political upheavals and a War Office report finding that most of the evidence at Rennes either did not relate to Dreyfus or had been altered to make it appear that it did, the Cour de Cassation granted a petition for review. In 1906, declaring that no credible evidence of treason ever existed, the court annulled the verdict of the Rennes court-martial. Dreyfus, the man twice convicted of treason, returned to the army and was awarded the cross of the Legion of Honor.

---

13. Id. at 92–110.
15. Id. at 328–34.
16. Id. at 381–83.
17. Id. at 388–97.
18. Id. at 427.
20. BREDIN, supra note 10, at 433–34.
21. Id. at 456–65.
22. Martin, supra note 10, at 47 (arguing that this judgment of acquittal, as opposed to remanding the case to the army, was procedurally improper but politically expedient).
23. BREDIN, supra note 10, at 481–85.
BERTILLON'S ANALYSIS OF THE BORDEREAU

The document that initiated the 1894 prosecution was a letter, known as the bordereau.\textsuperscript{24} Retrieved from a wastepaper basket in the German embassy, the bordereau listed several relatively unimportant documents about French artillery and troops.\textsuperscript{25} French intelligence officers decided that Dreyfus was the culprit. (Why not? He was a Jew and an Alsatian.)\textsuperscript{26} They collected and contrived evidence to support this thesis and ignored or suppressed all contrary evidence.\textsuperscript{27} The resulting dossier was sufficient to convince the French government to convene the 1894 court-martial.\textsuperscript{28}

Handwriting experts contacted by the army and the Ministry of Justice studied the bordereau and reached conflicting conclusions.\textsuperscript{29} The most notorious analysis came from Alphonse Bertillon, the head of the Bureau of Identification in the Paris Police Department.\textsuperscript{30} Bertillon claimed that Dreyfus wrote the bordereau in a way that would make it look like a forgery of his own handwriting.\textsuperscript{31} Bertillon advanced this "self-forgery" theory at both of Dreyfus's military trials and also at the criminal libel trial of the novelist, Emile Zola, for his vitriolic public letter, J'accuse, which denounced the army for "one of the greatest iniquities of the century" in its handling of the Dreyfus case.\textsuperscript{32}

To Bertillon, the proof of "self-forgery" was scientific, incontestable and infallible—in a word, géométrique.\textsuperscript{33} According to the leading account in U.S. legal literature, this proof included computations of the probabilities of selected coincidences "between the lengths of certain words and letters in [the bordereau] and the lengths of certain words and letters in correspondence taken from Dreyfus'[s] home."\textsuperscript{34} Furthermore, from "[o]bscure lexicographical and graphological 'coincidences'..."

\begin{itemize}
\item \textsuperscript{24} Id. at 59–69.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. The actual author was a French officer named Esterhazy who was providing information to the German military attaché. Id. at 318.
\item \textsuperscript{28} Id. at 65–69.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Bertillon achieved fame as the inventor of a system of identifying individuals from various body measurements. See, e.g., HENRY T.F. RHODES, ALPHONSE BERTILLON: FATHER OF SCIENTIFIC DETECTION 88–95 (1968).
\item \textsuperscript{31} BREDIN, supra note 10, at 73–74.
\item \textsuperscript{32} See SNYDER, supra note 19, at 185–90.
\item \textsuperscript{33} BREDIN, supra note 10, at 74.
\item \textsuperscript{34} Tribe, supra note 5, at 1332.
\end{itemize}
within the document itself,” Bertillon divined that the letter contained coded information.\footnote{Id. at 1332–33; see also Mary W. Gray, \textit{Statistics and the Law: Intuitive Views of Evidence May Be Altered by Mathematical Analysis}, 56 \textit{Mathematics Mag.} 67, 68 (1983); Elmer B. Mode, \textit{Probability and Criminalistics}, 58 J. Am. Stat. Ass’n 628, 639 (1963). Gray and Mode rely on a 1928 account, E.R. Hedrick, \textit{The Reality of Mathematical Processes}, in \textit{The National Council of Teachers of Mathematics: The Third Yearbook} 35, 40–41 (1928), which notes the frequency of the letters of the French alphabet within the bordereau as contrasted with the proportions found in typical French prose as constituting the statistical evidence against Dreyfus. \textit{Id.} I found no references to such testimony in the documents collected in \textit{La Revision du Procès de Rennes} (1909). \textit{See also infra} note 42 and accompanying text.}

For example, [he] stressed the presence of four coincidences out of the [twenty-six] initial and final letters of the [thirteen] repeated polysyllabic words in the [bordereau]. He evaluated at .2 the probability of an isolated coincidence and calculated a probability of $(0.2)^4 = .0016$ that four such coincidences would occur in normal writing.\footnote{Tribe, \textit{supra} note 5, at 1333 n.8. Other writers are less clear on the details of Bertillon’s purported demonstration and decryption of the letter. \textit{See, e.g.}, \textit{Michael Burns, Dreyfus: A Family Affair} 138 (1991) (“Bertillon also maintained that clues to the traitor’s finances were embedded in the document’s lettering. Without explaining his method, he announced that Dreyfus had received the sum of five hundred thousand francs.”). A more recent account suggests that the calculation involving the twenty-six polysyllabic words did not relate to some code involving initial and final letters, as described by Professor Tribe, but rather to the positioning of the words on the paper: After having traced on the “bordereau” with five mm interval vertical lines, Bertillon showed that some pairs of polysyllabic words (among twenty-six) had the same relative position with respect to this grid. Making allusion to the theory of probability, Bertillon stated that these coincidences could not be attributed to a normal handwriting. . . . After his deposition, Bertillon gave an example of the probability calculation: if the individual probability for one coincidence is set to 0.2, then the probability of observing four coincidences is $(0.2)^4 = 0.0016$. \textit{F. Taroni et al., Forerunners of Bayesianism in Forensic Science}, 38 \textit{Jurimetrics J.} 183, 189 (1998) (discussing Déposition Bertillon (du 18 janvier, 2 février, 4 février et 6 février 1899), \textit{in} \textit{La Revision du Procès Dreyfus—Enquête de la Cour de Cassation} 482, 482–500 (P.V. Stock ed., 1899)); \textit{see also} Colin G.G. Aitken & Franco Taroni, \textit{Statistics and the Evaluation of Evidence for Forensic Scientists} 123 (2d ed. 2004).}

Likewise, to establish that the letters had been traced over the word intérêt as it appeared in a letter in Dreyfus’s brother’s handwriting, Bertillon “computed the ‘amazing’ frequency with which certain letters in the [bordereau] appeared over the same letters of the word chain constructed by repeating intérêt a number of times, once a variety of complex adjustments had been made.”\footnote{Tribe, \textit{supra} note 5, at 1333.}
THE IMPACT OF BERTILLON'S TESTIMONY

Bertillon's recondite analysis may have had some impact in the first court-martial before the defense had the opportunity to examine his work carefully. The principal exponent of this view is the novelist Armand Charpentier, who wrote that Dreyfus's counsel, two observers from the General Staff, and the prosecuting attorney "afterwards declared that they had not understood a word of Bertillon's demonstration."38 As for the judges, Charpentier merely states that "it may reasonably be supposed that [they] were equally mystified," and he remarks that in any event, "they . . . allowed themselves to be impressed by the scientific phraseology of the system."39

Since the 1894 proceedings were closed to the public and were not transcribed, Charpentier's attributions seem somewhat speculative. Moreover, most accounts of the court-martial identify a dramatic announcement by a high-ranking intelligence official that an "honorable person" informed him that Dreyfus was a traitor as the event that swayed the previously doubtful tribunal.40 Bertillon's performance is rarely depicted as being even remotely persuasive.41

39. Id. The British historian, Guy Chapman, provides a slightly different account:

[Bertillon's system] was complex and needed a lot of explanation with the aid of diagrams and blackboards. The court heard him through for an hour, stunned by his unintelligible verbosity. All they understood was that Bertillon believed that Dreyfus had forged the bordereau in a mixture of his own hand and those of his wife and brother.


40. E.g., BREDIN, supra note 10, at 94 (noting that this baseless testimony was "the stroke of the bludgeon that brought Dreyfus down" (translating ARMAND CHARPENTIER, LES COTÉS MYSTÉRIEUX DE L'AFFAIRE DREYFUS 70 (1930))).

41. See, e.g., BURNS, supra note 36, at 138 ("Looking on, the prisoner [Dreyfus] attached no importance to Bertillon's testimony; he considered it, as did most observers, 'the work of a madman.'" (translated from ALFRED DREYFUS, CINQ ANNÉES DE MA VIE 69 (F. Maspero 1982) (1901))); NICHOLAS HALASZ, CAPTAIN DREYFUS: THE STORY OF A MASS HYSTERIA 51 (1955) ("[T]he testimony was not hurting him . . . . Bertillon entangled the court in a highly 'scientific' explanation of why the dissimilarities between Dreyfus'[s] handwriting and the handwriting on the bordereau proved that Dreyfus had been disguising his handwriting. No one could follow it, and after a while everyone gave up trying."); MARTIN P. JOHNSON, THE DREYFUS AFFAIR: HONOUR AND POLITICS IN THE BELLE ÉPOQUE 27 (1999) ("Bertillon . . . apparently made a bad impression with the court.").
Although the actual impact of Bertillon's pseudo-science in the first court-martial is difficult to gauge, in all the subsequent proceedings, other experts exposed Bertillon's "proofs" as vacuous.\(^{42}\) In the Rennes court-martial, for example, a letter provided by the world-renowned mathematician, Henri Poincaré, identified "colossal errors" in Bertillon's analysis and flatly declared that no unprejudiced person with a scientific education could possibly find any merit in it.\(^{43}\) In a meticulous report prepared at the request of the Cour de Cassation, Poincaré and two other distinguished scholars showed that the supposedly improbable coincidences said to confirm Dreyfus's authorship of the bordereau were of the type and frequency to be expected when one searches for any and all coincidences.\(^{44}\) For instance, the relevant probability of the four coincidences in the initial and final letters of the thirteen polysyllabic words is not \(0.0016\). That figure is the probability of exactly four coincidences in four words. The probability of four or more out of thirteen is approximately \(0.7\), indicating that such "coincidences" are common.\(^{45}\)

Thus, the Dreyfus case is a clear example of an early abuse of probability theory, but it is not a compelling example of

\(^{42}\) Those who describe the expert testimony as directed to the relative frequencies of specific letters report that eminent mathematicians explained to the court that, while the precise distribution of letters in the allegedly coded message may have been unusual, some such departure from the average was not especially unlikely. Among the many possible proportions in which the letters might appear, any particular set of proportions—even the most likely—is individually improbable. To appreciate this point, consider tossing a balanced coin 100 times. The single most probable outcome is fifty heads and fifty tails, but its probability is less than ten percent. Thus, the mathematician Painlevé, who was to become Prime Minister of France, reputedly declared: "Give me the works of Racine and I will show you that he, too, by your foolish tests is a traitor, for the works of Racine, like the letters of Dreyfus, do not show the most probable distribution." Gray, supra note 35, at 68 (citing Hedrick, supra note 35, at 41); Mode, supra note 35, at 639 (citing Hedrick, supra note 35, at 41). Although it makes a good story, the account of Bertillon's claim of a coded message and Painlevé's eloquent dismissal of it could be apocryphal. The late statistician William Kruskal searched without success for an authoritative source of the quotation reported by Hedrick. A sample of his inquiries attempting to document this quotation is available from the author.

\(^{43}\) LA REVISION DU PROCES DE RENNES, REQUISITOIRE ECRIT DE M. LE PROCUREUR GENERAL BAUDOUIN 116–17 (1907).


\(^{45}\) Tribe, supra note 5, at 1333 n.8.
judges or jurors beguiled and bemused by mathematics into convicting an innocent person. The courts-martial and related proceedings were so imbued with anti-Semitism, political machinations, and outright perjury, forgery, and fabrications that the mathematical errors pale in significance. Bertillon's forensic forays were more often greeted with ridicule than respect. In the Zola trial, for instance, the reaction to Bertillon's testimony about the "infallible and transcendent method of graphology" was "laughter from the audience." At the Rennes court-martial, one witness, a skilled draftsman, showed that Bertillon's measurements of the spacing and positions of letters were inaccurate, and another expert

by applying Bertillon's argument to any page of writing taken up at random, succeeded in demonstrating geometrically and infallibly that that page was a forgery. To the accompaniment of the laughter of the whole court, he made use of a page of M. Bertillon's own report for his demonstration! Learned members of the Institute and professors at the Ecole des Chartes also gave evidence which completely destroyed Bertillon's deposition... It is not surprising, then, that most accounts do not identify the mathematical testimony as an important cause of the convictions.

46. Martin, supra note 10, at 45–46. Martin describes the Rennes trial as follows:

Brought back from his hellish prison stay, Dreyfus appeared a broken man and inspired little confidence. In contrast, the military officers who testified against him... were much more impressive. Because of the lax rules of evidence, they were permitted to make impassioned denunciations and to repeat hearsay, much of it long since discredited. Trained magistrates might have sorted through the maze of testimony, but the seven officers on the court-martial board were hardly that. The prosecution argued that Dreyfus's guilt was proved not by a single document or act but by a cat's cradle of evidence that resolved into a pattern indicating that he was a traitor. Unable to discredit every accusation and every document, the defense could not prevail against this nebulous case.

Id.


48. SNYDER, supra note 19, at 300. At the end of his testimony, "the unhappy Bertillon withdrew amid hoots of laughter..." BREedin, supra note 10, at 262.

49. KAYSER, supra note 47, at 346–47 ([A]ll [these experts] were agreed in declaring once again that the [b]ordereau was written by Esterhazy.); see also SNYDER, supra note 19, at 305 ("The experts had done an effective job in ridiculing Bertillon's evidence.").

50. See, e.g., BREdin, supra note 10; CHAPMAN, supra note 39. But see Tribe, supra note 5, at 1333–34 (citing CHARPENTIER, supra note 38, at 52–53, for the view that the 1899 Rennes court was "mystified" and "impressed by the
Flimsy accusations, supported only by vague character evidence, fabricated hearsay, forged documents, and pathological science, make the Dreyfus affair a fascinating chapter in legal history. But it is a poor example of the supposed power of mathematics to paralyze critical thought and to insulate itself from effective refutation. If anything, the Dreyfus cases demonstrate that forensic abuses of applied probability can be detected and corrected.

This reconstruction of the events in Dreyfus does not mean that probability evidence is innocuous and should be routinely admitted. A single set of proceedings, conducted under the glare of publicity in a highly politicized atmosphere, could hardly support so sweeping a claim. But neither can the Dreyfus cases be relied on for the proposition that "probability evidence" is too mystifying to be admissible. The apparent consensus in the legal literature that the convictions are paradigmatic of the paralysis of "critical examination" induced by "mathematical evidence" is, on balance, inconsistent with the historical record. Whether the dangers of such evidence are any greater than those of more conventional modes of proof remains an important question for the law of evidence, but the resolu-
tion of this issue should no longer be influenced by a dubious reconstruction of the past.