PROBABILITY AND THE LAW

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HANDOUT #9 – MARCH 7, 2014

1. SHONUBI: THE KNOWN AND THE UNKNOWN

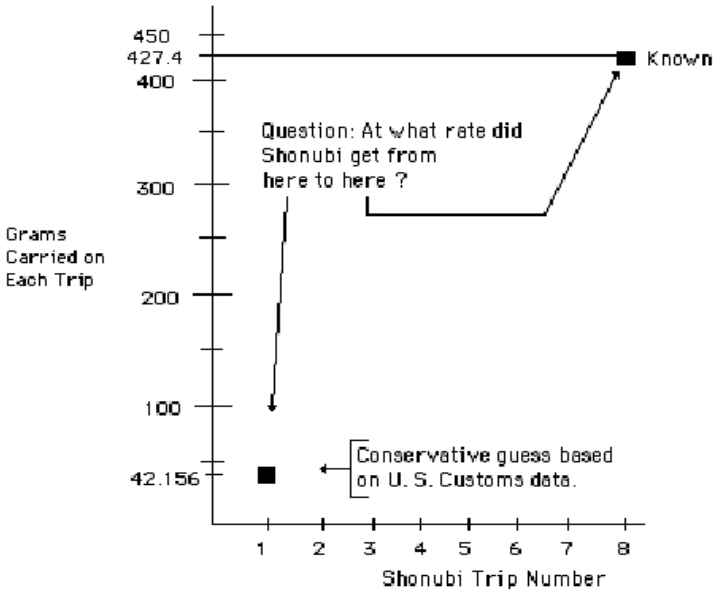
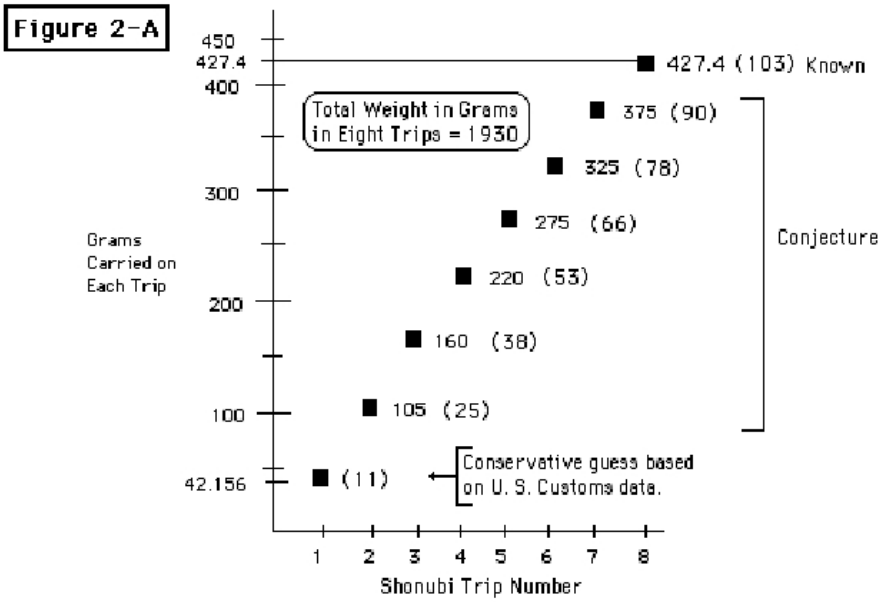


Figure 1: Boundary Conditions



2. SHONUBI: THE COURT OF APPEALS

> The "specific evidence" we required to prove a relevant conduct ... must be evidence that points specifically to a drug quantity for which the defendant is responsible. By mentioning "drug records" and "admissions" as examples of specific evidence we thought it reasonably clear that we were referring to the defendant – his admissions and records of his drug transactions. And by "live testimony" we were referring to testimony about his drug transactions. Judge Weinstein apparently misunderstood our prior opinion to equate "specific" evidence with "direct" evidence, a consequence that, as he pointed out, Shonubi III, 895 F. Supp. at 478, would preclude all use of circumstantial evidence. However, our identification of drug records as one example of "specific evidence" should have dispelled that misunderstanding since such records are a form of circumstantial evidence.

3. SHONUBI: THE DISTRICT COURT, JUDGE WEINSTEIN

> The capstone provisions of the Federal Rules of Evidence are Rules 401 and 402. Rule 401 defines relevant evidence as generally as possible in terms of whether a trier would find in it any tendency to affect evaluation of the operative facts. It reads: Rule 401. DEF. OF "RELEVANT EVIDENCE" Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> The new vaguely defined classification of "specific evidence" relied upon by the court of appeals in Shonubi II and IV is not only unauthorized by controlling case law and the Federal Rules of Evidence, it runs counter to our modern theory of forensic evidence. The unique Second Circuit rule represents a retrogressive step towards the practice relied upon from the Middle Ages to the late Nineteenth Century, which often limited the use and weight of evidence by category of evidence and type of case.

4. SHONUBI: COLYVAN ET AL. [NOT DISCUSSED IN CLASS]

> So, for example, let us suppose that 99 per cent of people from a certain reference class cheat on their taxes. Does this mean that we are justified in charging and sentencing someone in this class with tax evasion, without further evidence? No, of course not; we require more evidence than simply their membership in the reference class in question. It is important to note that we require further evidence not because we wish to raise the probability from 0.99 to something higher (after all a probability of 0.99 seems a good candidate for beyond reasonable doubt). Rather, we require further evidence because the reference-class evidence is not specific to the individual in question. (p. 172)
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> First, we note that no matter how you cash out the phrase "specific evidence," there is an obvious candidate for such evidence in the Shonubi case: Shonubi's previous behavior. (p. 175)
>
> Now if we accept inference to the best explanation, we have another kind of evidence that might have been employed in the Shonubi case to support the prosecution's claims about the total quantity of drugs imported by Shonubi. This evidence might consist of economic considerations such as the minimum quantity of heroin needed to cover the costs involved in the smuggling operation. (p. 176)