

FOUNDATIONS OF EVIDENCE LAW

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ALEX STEIN

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This book expounds a general perspective under which evidence rules allocate the risk of error under uncertainty, rather than facilitate the discovery of the truth. The initial development of this idea took place in my doctoral dissertation at University College London. I am profoundly grateful to William Twining for supervising this dissertation and for being an exemplary mentor. I wrote this book at the Benjamin N. Cardozo School of Law of Yeshiva University, where I have found a wonderful academic environment, thoroughly conducive to scholarly research and writing. For this I thank Dean David Rudenstine and the entire Cardozo community. I also thank my colleagues who participated in a faculty workshop in which I presented Chapter 3. Special thanks go to Paul Shupack, Stewart Sterk and Martin Stone for their individual comments and suggestions.

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Preface

A prestigious publishing house advises that a book proposal ‘should give an answer to what might be called the Passover question: How is this book different from all other books?’¹ My publisher does not profess such a crude instrumentalism. Nonetheless, this Preface attempts to answer the Passover question.

Foundations of Evidence Law is not a doctrinal treatise. Unlike many excellent treatises, it does not offer a descriptive account of a jurisdictional set of rules and principles that describe a particular law of evidence. This book tells readers about evidence laws generally. The account begins with identifying the core features of the Anglo-American systems of evidence. These features are the systems’ objectives and the mechanisms for attaining these objectives. The emerging big picture exhibits the foundations of evidence law. This picture also marks the point at which my account ceases to be descriptive and becomes normative.

This picture constitutes the book’s general framework for developing a normative theory of evidence law.² The book develops this theory within this framework. As an alternative to this endogenous theory, one may consider developing evidence law from scratch (‘exogenically’). Why hang the normative on the descriptive and risk the accusation that an ‘ought’ is derived from an ‘is’? Unlike other questions discussed in this book, the answer to this question is relatively uncontroversial. A set of incontrovertible foundational factors is a prerequisite for a meaningful normative discussion about evidence law. These factors include the legal system’s objectives and institutional set-up. Disagreement about these factors precludes any workable consensus about evidence law mechanisms.

In Anglo-American legal systems, impartial adjudication is foundational. Other foundational factors are rationality and the justification requirement

¹ See http://www.hup.harvard.edu/editors_page/author_resources/manu_submit.html.

² This normative inquiry does not consider the history of evidence rules and their projected future. Readers interested in these subjects should consult James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898); John H. Wigmore, *Evidence in Trials at Common Law* Vol. 1 (Tillers edn, 1983), § 8a; Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence* (1937) 4 U. Chi. L. Rev. 247; Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England* (1990) 75 Cornell L. Rev. 497 (these writings describe the development of the rules of evidence by the institution of jury trial, by the adversarial format of litigation, or by both); Mirjan R. Damaška, *Evidence Law Adrift* (1997) (predicting that disappearance of adversarial jury trials and the shift to a multistage litigation format will prompt abolition of existing evidence rules).

for adjudicative decisions. Foundational factors also include the problem of uncertainty and the risk of error in fact-finding. These factors identify the uncertainty problem as unavoidable and the risk of error as omnipresent. Allocation of the risk of error in adjudicative fact-finding is therefore a foundational factor as well. Fact-finders must apportion this risk between the parties in a rational, impartial, and justified way. In doing so, they need to consider what is at stake. Fact-finders need to account for the rights, duties, and liabilities that might be determined erroneously. Substantive laws that evidence law helps to administer turn into a foundational factor for any normative discussion about evidence law. These and other foundational factors determine the direction a normative analysis of evidence law must take. They also identify the limits for what such an analysis may offer.

This book offers a normative analysis of evidence law that is both new and comprehensive. My analysis focuses on fact-finding procedures and decisions in American and English courts. The analysis develops an innovative interdisciplinary theory of evidence law that uses epistemology, probability, economics, and political morality. Under this theory, the key function of evidence law is to apportion the risk of error in conditions of uncertainty, rather than facilitate the discovery of the truth. The book develops this theory in seven chapters. To properly understand this theory, readers need to read Chapters 1 through 5 in that order. Chapters 6 and 7 apply this theory to criminal and civil adjudication, respectively. These chapters can be read in any order.

Chapter 1 delineates the domain of evidence law by identifying rules and doctrines that are genuinely evidential, as opposed to evidence-related rules and doctrines that promote objectives extraneous to fact-finding. This discussion singles out three categories of genuinely evidential rules and doctrines: (1) rules and doctrines that minimize the risk of error by enhancing the accuracy of fact-finding; (2) rules and doctrines that reduce the costs that fact-finding procedures and decisions incur; and (3) rules and doctrines that apportion the risk of error between litigants. Chapter 1 also analyses the means-end relationship between evidence rules and the controlling substantive law.

Chapter 2 defines the characteristics of adjudicative fact-finding (labelled above as foundational factors). This discussion identifies and analyses two fundamental problems—uncertainty and justification. It underscores the importance of the best-evidence principle as an epistemic device for controlling evidence-selection. The discussion also identifies the epistemic criteria for determining the probabilities of the relevant factual scenarios on the evidence previously selected. These criteria are empirical. They include common sense, logic, and general experience.

Subsequently, Chapter 2 analyses the sceptical challenges to these criteria. Stemming from diverse disciplines—analytical philosophy and cognitive

science or behavioural law and economics—these challenges point to the impossibility of rational and justified fact-finding. Chapter 2 underscores the methodological and operational inadequacy of these challenges. Philosophical scepticism is not an option for practical reasoning, to which adjudicative fact-finding belongs. This theory is also methodologically inferior to the common sense view of the world. Cognitive science has succeeded in establishing that lay reasoners systematically miscalculate probabilities. Such findings, however, identify failures in cognitive performance, not in cognitive competence.

Chapter 3 analyses and resolves two epistemological paradoxes, *Lottery* and *Preface*, together with their legal derivatives, *Gatecrasher*, *Blue Bus*, *Two Witnesses*, and *Prisoners in the Yard*. This analysis identifies the fundamental function of evidence law as apportioning the risk of error under uncertainty. The traditional perception of evidence law as facilitating the discovery of the truth is set aside. Specifically, Chapter 3 develops the principle of maximal individualization that eliminates the paradoxes. This principle has a number of features that have different applications in civil and criminal adjudication. Chapter 3 identifies these features as distributed across two dimensions, epistemological and moral. Within the epistemological dimension, the maximal individualization principle contributes to fact-finding. Within the moral and political dimension, this principle apportion the risk of error. The principle assumes this second role after completing the first: morality takes up what the epistemology leaves off. Within this dimension, the maximal individualization principle competes with utilitarian allocations of the risk of error. The results of this competition, reported in Chapters 5, 6, and 7, are variable.

Chapter 4 considers the question ‘What is evidence law for?’ This chapter analyses the conventional evidence doctrine and criticizes it for insufficiently regulating adjudicative fact-finding. This discussion levels a general opposition to free evaluation of evidence or free proof. This idea is flawed, but, nonetheless, influential amongst practitioners, law reformers, and legal scholars. Its endorsement by law reformers is responsible for the ongoing abolition of evidentiary rules and for the flowering of discretion in fact-finding matters. The *Criminal Justice Act 2003* is the most radical manifestation of this development in Great Britain. Chapter 4 argues that evidence law should develop in exactly the opposite direction. Legal regulation of adjudicative fact-finding needs to be tightened up, not scaled down. Evidence law should regulate the risk of error in adjudicative fact-finding. This regulation ought to apply to two categories of decision: apportionment of the risk of error between the parties and the various trade-offs between the cost of fact-finding errors and the cost of fact-finding procedures that aim at avoiding those errors. There is no moral, political, or economic justification for authorizing individual adjudicators (such as trial judges) to allocate the risk of error as they deem fit.

The principal question of this book is ‘What evidence rules are desirable?’ I do not discuss the institutional question ‘Who should produce those rules: the legislator or common law judges?’. The common law model, within which judges make rules that the legislator can repeal and modify, has several advantages. The federal rules system, under which the judicial branch promulgates evidence rules subject to Congress’s overriding legislative authority, is probably the best common law model of evidence rules. But direct democratic legislation also has merits. The issue is beyond the book’s scope. The theory that Chapter 4 develops makes only one institutional point. Apportionment of the risk of error in fact-finding is a task that must not be left to individual adjudicators, such as trial judges.

Chapter 5 entertains an economic analysis of evidence law. This analysis makes an unqualified utilitarian assumption (subsequently softened in Chapters 6 and 7) that evidential rules and doctrines are geared towards cost-efficiency. Cost-efficiency requires adjudicators to minimize the aggregate cost of accuracy-enhancing procedures and fact-finding errors. Chapter 5 examines the evidential mechanisms to attain this goal. These mechanisms enhance cost-efficiency by eliminating the problem of private information and the misalignment between the private litigants’ incentives and the social good. These mechanisms include decision rules that determine the burdens and the standards of proof, as well as different process rules that determine what evidence is admissible and what fact-finding methodologies are allowed. Decision rules minimize the aggregate cost of accuracy and errors by skewing the risk of error in the desirable direction (by preferring false positives over false negatives, or vice versa). Process rules minimize the aggregate cost of accuracy and errors by applying a different technique. These rules attach fact-finding methodologies that are more meticulous and more expensive to adjudication in which the cost of error is relatively high. Adjudication in which the cost of error is relatively low is equipped with more rudimentary and correspondingly inexpensive fact-finding methodologies. Mechanisms geared towards cost-efficiency also include credibility rules. These special rules elicit credible signalling from litigants with private information through adjustment of penalties and rewards.

Chapters 6 and 7 shift from utility to fairness and, correspondingly, from economics to morality. They examine the apportionment of the risk of fact-finding error in criminal and civil adjudication, respectively. These chapters identify and analyse two fundamental precepts: the equality principle that controls the apportionment of the risk of error in civil litigation; and the ‘equal best’ standard that needs to be satisfied in every criminal case in order to convict the accused. These precepts derive from political morality. They also attach to the maximal individualization principle, developed in Chapter 3.

These precepts justify and explain many evidential rules and doctrines in the Anglo-American legal systems. Chapters 6 and 7 provide a principled exposition of these rules and doctrines. This exposition is more attractive than the conventional portrayal of evidence rules as scattered and isolated exceptions to free proof. This exposition offers new rationales to the hearsay doctrine, to the rule against character evidence, to the rules regulating the admission of expert testimony, and to the existing burdens and standards of proof.

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1

Groundwork

A. Preliminaries

This chapter identifies the domains of evidence law discussed throughout the book. The chapter draws a fundamental distinction between the fact-finding objectives of the law and objectives extraneous to fact-finding that the law promotes through rulings on evidence. This distinction calls for a differentiation between the various legal rules that regulate evidential matters: rules that promote objectives intrinsic to fact-finding are the only ones that classify as genuinely evidential; rules furthering other objectives and values are evidence-related, but situated outside the domains of evidence law.

Under this framework, rules classifying as evidential are those that promote the following objectives: (1) enhancement of accuracy in fact-finding or, in other words, minimization of the risk of error; (2) minimization of the expenses that fact-finding procedures and decisions incur; and (3) apportionment of the risk of error with the consequent risk of misdecision between the parties to litigation. A robustly utilitarian approach, for example, diagnoses in adjudicative fact-finding two types of social cost: the cost of error, the 'substantive cost', and the cost of error-minimizing procedures, the 'procedural cost'. This approach keys all its evidential rules to the minimization of the aggregate sum of both substantive and procedural costs.¹ This fundamental utilitarian precept relates to the first two of the three evidential objectives. Furthermore, a robust utilitarian approach also allocates the risk of error in a way that minimizes the total cost of error and error-avoidance. Under this approach, none of the litigants has a right to demand the reduction, let alone elimination, of private costs—substantive and procedural alike—irrespective of the social good. Such claims are only respected in a legal system that either abandons or qualifies its utilitarian urge. In such a system, evidence law may produce a different trade-off between fact-finding accuracy and its costs. This trade-off depends on the system's non-utilitarian objectives and values and on

¹ See Chapter 5 below.

their relative significance. The system allocates the risk of error in accordance with these objectives and values.

A non-utilitarian risk-allocating scheme may well crystallize into individual rights that override social welfare. Under the utilitarian approach, allocation of the risk of error is always instrumental to the trade-off that reduces the aggregate sum of error costs and error-avoidance expenses (the total sum of substantive and procedural costs). The rights-based legal systems overturn this relationship of means and ends. Under these systems, fact-finding expenditures are instrumental to the right apportionment of the risk of error, rather than vice versa. These systems rely on a non-utilitarian political morality that transforms into individual rights. These rights do not merely escape from utilitarian calculus. They actually trump utility.² Consequently, rights that litigants have with respect to risk-allocation are not measured against the substantive and procedural costs that they incur. Because the prevalent political morality favours these rights, it deems the costs that these rights incur money well-spent.

This tension between the individual and the social is one of the book's principal themes. At this introductory stage, the reader need only note that this tension attaches to each of the three evidential objectives. The reader also need not accept my depiction of these objectives (although my ultimate project is to prove that it is correct). At this juncture, it is enough to acknowledge that these objectives are plausible. Accuracy in fact-finding is a logical prerequisite to proper administration of the controlling substantive law. Accuracy, however, is costly: it consumes the efforts of litigants and their attorneys, as well as those of judges and juries. The extent to which risk of error can be reduced depends on both private and social investments in the fact-finding procedures. This observation derives from experience and is virtually undisputed. Consequently, fact-finding efforts and investments should be used with wisdom: regardless of what one thinks about utilitarianism in general, one ought to be reluctant to expend £100 on a dispute over £90. Because absolute certainties are presently unavailable—a proposition that both experience and philosophy of induction confirm—adjudicative fact-finding, as, indeed, any fact-finding, is bound to be conducted in conditions of uncertainty. It is bound to rest upon probabilities, not certainties, and therefore involves risk of error. The legal system must choose how to allocate this risk.

This risk may be imposed in its entirety upon one of the parties, say, upon the prosecution in criminal cases or upon claimants in civil litigation. Alternatively, the legal system may devise risk-sharing formulae that divide the

² See Ronald Dworkin, Rights as Trumps, in Jeremy Waldron (ed.), *Theories of Rights* (1984), p. 153.

risk of error between the adversaries. Finally, the system may allow this risk to fall where it happens to fall—a normatively questionable, but still possible, approach. There is no escape from deciding how to allocate the risk of error in adjudicative fact-finding.³

These fact-finding objectives are not the only objectives that *evidence-related* rules may promote. Evidence-related rules may also promote objectives altogether alien and even antithetical to fact-finding. Such rules do not really belong to evidence law. Their most recurrent feature is a motivation to set aside accuracy of fact-finding for the sake of other goals and values. For example, a legal rule that suppresses evidence in order to protect a person's privacy or to remedy its violation is a rule that belongs to the law of privacy rather than to evidence law. Evidential remedy supplementing a person's right to privacy is functionally equivalent to compensatory remedy that attaches to the same right. Both remedies rectify the same wrong and therefore belong to the same branch of the law: that of privacy. Affiliating the privacy's evidential remedy to the law of evidence is as appropriate as associating the compensatory remedy with the 'law of money'. Evidential sanctions and remedies that attach to non-evidential rights or promote goals unrelated to fact-finding are outliers. This chapter eliminates these outliers from my subsequent discussion.⁴ Separating intrinsically evidential rules from evidence-related outliers helps setting the focus for the entire book. *This book focuses on the rules, principles, and doctrines that forge the instrumental relationship between evidence and fact-finding.*

This instrumental-relationship criterion does not only have exclusionary implications, but also functions as a basis for expanding the body of rules, principles, and doctrines that integrate into the law of evidence. Under this criterion, any rule that facilitates fact-finding objectives qualifies as evidential. The rule's formal affiliation to another branch of the law (such as procedure, criminal law, contract law, torts, and so forth) is immaterial. My analysis determines the identity of a legal rule by its functioning and consequences, rather than by its formal placement on the doctrinal map. For example, criminal law often mitigates a murderer's liability and punishment by reducing the crime to manslaughter if the murderer acted under provocation. The typical

³ See Alex Stein, *The Refoundation of Evidence Law* (1996) 9 *Can. J. Law & Jurisp.* 279.

⁴ This definition of the book's agenda does not suggest that such outliers are unimportant. As demonstrated by Chris Sanchirico, primary activities taking place outside of courtrooms—accidents, for example—can be efficiently regulated by directly conditioning the relevant legal sanctions on the presence or absence of particular types of evidence. See Chris Sanchirico, *Games, Information and Evidence Production: With Application to English Legal History* (2000) 2 *Am. L. & Econ. Rev.* 342; Chris Sanchirico, *Relying on the Information of Interested—and Potentially Dishonest—Parties* (2001) 3 *Am. L. & Econ. Rev.* 320; Chris Sanchirico, *Evidence Tampering* (2004) 53 *Duke L. J.* 1215. Such direct-incentive mechanisms belong to the relevant branches of the substantive law: torts, contracts, criminal law, and so forth.

provocation doctrine has an objective limitation: it demands that the action or the event that provoked the homicide be capable of destabilizing a person of ordinary temper and mental make-up. From the substantive criminal law perspective that determines the perpetrator's culpability by his or her subjective mens rea, this requirement is problematic. If it is the perpetrator's state of mind that separates murder from manslaughter, then the law should be interested in whether the provocative act (or event) had destabilized the perpetrator subjectively, not in whether it also could have destabilized an average person. However, a purely subjective standard for provocation both involves substantial fact-finding expenditures and increases the risk of error. Because evidence about a person's subjective state of mind is easy to concoct and difficult to refute, many killers—justifiably or not—would seek refuge in the defence of provocation. This prediction is especially troubling in a system that allows criminal defendants to benefit from any reasonable doubt arising in connection with their guilt. To counterbalance this problem, the police and the prosecution must invest more efforts into their fact-finding missions. Because information about the defendant's state of mind is largely controlled by criminal suspects and defendants, these efforts might be more expensive than productive. The aggregate sum of error costs and error-avoidance expenses would, consequently, rise. The legal system, therefore, understandably avoids this deleterious consequence by setting an objective limitation to the provocation defence. This choice is situated in the domain of evidence law, not in the criminal law domain. It advances evidential objectives rather than the goals of substantive criminal law, such as deterrence, desert, and retribution.

A second example is the 'parol evidence' rule. Despite its evidential self-identification, this rule is commonly affiliated to contract law. Under this rule, testimony contrary to a written agreement is generally inadmissible: a party can only tender such testimony in conjunction with a document written or signed by his or her opponent. Similar to many other legal rules, this rule serves more than one purpose. It promotes certainty and the consequent reliability of contracts and shields contracting parties from the adverse testimony of false witnesses. The evidential purpose of this rule is puzzling. Is there empirical evidence to the effect that most (or many) witnesses testifying against written agreements commit perjury? Apparently, there is no such evidence. The contractual purpose of this rule is puzzling too. If there is no good reason to suspect most witnesses of lying, and if an oral exchange of promises (subject to the consideration requirement) can yield a binding contract, why not allow witnesses to contradict documented agreements? The most persuasive answer to these questions rests on conventions and customs. Arguably, because the parol evidence rule operated at common law for many years, people got used to it and predominantly follow its precepts in forming

their agreements. A proposition stating that a particular agreement deviating from these precepts and from the corresponding habituation was nonetheless formed becomes suspicious. If people customarily followed the rule's precepts, then most such propositions would likely be false, which—in civil trials—gives a good reason to dismiss them *ab initio*. But is there such a customary practice? Apparently, there is none, for if such a practice were prevalent, then, presumably, we would not have witnessed so many court-authorized departures from the parol evidence rule as we presently do.⁵

There is, however, a more straightforward rationale for the rule. The parol evidence rule has no ambition to reduce the incidence of fact-finding errors. Rather, it aims to reduce the procedural costs of error-avoidance. It achieves this by inducing contracting parties to document their undertakings comprehensively. The witness-disqualification penalty, a mechanism that markedly differs from the custom theory, effects this inducement.⁶ Under the custom theory, the parol evidence rule functions as a contractual default provision that emulates the typical contractual stipulation and thereby reduces the transaction costs that contracting parties would otherwise incur. Under my rationale, the rule functions as a penalty-default provision⁷ that induces contracting parties not to externalize the cost of their anticipated litigation.⁸ By using witness-disqualification as a sanction, the rule induces contracting parties to reduce the social cost of error-avoidance.⁹

A third example quarters in the area of torts. Under the 'nationwide practice' standard, adopted by a growing number of jurisdictions across the United States, compliance with the 'local medical practice' is generally not a defence against medical malpractice allegations.¹⁰ This doctrine requires

⁵ See Alan Schwartz and Joel Watson, *The Law and Economics of Costly Contracting* (2004) 20 *J. L. Econ. & Org.* 2, 23–4 (identifying the courts' tendency to broaden the scope of 'interpretive' contract disputes to permit extensive recourse to prior negotiations and other oral evidence—a phenomenon that increases the cost of enforcing contracts).

⁶ See Alex Stein, *An Essay on Uncertainty and Fact-Finding in Civil Litigation*, with Special Reference to Contract Cases (1998) 48 *U. Toronto L.J.* 299, 341–4.

⁷ This rationale derives from Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules* (1989) 99 *Yale L.J.* 87.

⁸ See Stein, above note 6. ⁹ *Ibid.*

¹⁰ See, e.g., *Shilkret v Annapolis Emergency Hospital Ass'n* 349 A.2d 245, 252 (Md. 1975) ('the traditional locality rules no longer fit the present-day medical malpractice case'); *District of Columbia v Wilson*, 721 A.2d 591 (D.C., 1998) (medical malpractice defendant's conduct measured by a national standard, rather than by a local one); *Sheeley v Memorial Hospital*, 710 A.2d 161 (R.I. 1998); *Gallucci v Humbryd*, 709 A.2d 1059, 1065 (R.I. 1998) (both rejecting the 'locality rule'); *Pemberton v Tallahassee Memorial Regional Medical Center, Inc.*, 66 F.Supp.2d 1247 (N.D. Fla., 1999) (rejecting the 'locality rule' while restricting the nationwide standard to board-certified physicians). See, however, *Fowler v Springer*, 2003 WL 1984771, Ark.App., Apr 30, 2003; *Perry v Magic Valley Reg. Med. Ctr.*, 995 P.2d 816, 821 (2000); *Shane v Blair*, 2003 WL 21467829 (Idaho 2003) (all recognizing and applying the 'locality rule'). Consider also *Estate of Bradford ex rel. Bradford v O'Connor Chiropractic Clinic*, 624 N.W.2d 245 (2000) (holding that, ordinarily, in the medical malpractice

physicians to align with the general nationwide standards that apply in their fields of medicine. No physician can claim in his or her defence that, being a member of some particular locale that practices different standards of medical care, he or she was entitled to deviate from the general nationwide standard. As one of the courts explained:

The modern physician bears little resemblance to his predecessors. As we have indicated at length, the medical schools of yesterday could not possibly compare with the accredited institutions of today, many of which are associated with teaching hospitals. But the contrast merely begins at that point in the medical career: vastly superior post-graduate training, the dynamic impact of modern communications and transportation, the proliferation of medical literature, frequent seminars and conferences on a variety of professional subjects, and the growing availability of modern clinical facilities are but some of the developments in the medical profession which combine to produce contemporary standards that are not only much higher than they were just a few short years ago, but also are national in scope.¹¹

By setting this standard of care, the doctrinal rejection of the local-practice defence ostensibly belongs to where it quarters, namely, to the law of torts.

This explanation is not altogether satisfactory. After all, the nationwide standard approach has failed to attract the courts and legislators of other jurisdictions. These jurisdictions prefer to use local medical practice as a decisive criterion for negligence, with the local standards being affected, but not dominated, by the general national standards.¹² ‘Local’ is not synonymous

context, the standard of care for *general practitioners* derives from practice standards in the local community, while the standard of care for *specialists* derives from the standards practised across the nation), as well as *Magee v Pittman*, 751 So.2d 731 (2000) (holding that, in a medical malpractice action, the ‘locality rule’ applies solely to non-specialists and requires that the degree of care to which the physician is to be held be based upon the standard of practice in a similar community or locale and under similar circumstances, whereas specialists are held to a national standard requiring the degree of care ordinarily practised by physicians within the involved medical specialty).

¹¹ *Shilkrut v Annapolis Emergency Hospital Ass’n* 349 A.2d 245, 252 (Md. 1975).

¹² See *Fowler, Perry and Shane*, note 10 above, as well as *Hollis v United States*, 2003 WL 689261 (2003) (reaffirming that, under Texas law, a physician’s duty is to align with the degree of prudence and skill exercised by physicians of similar training and experience in the same or similar community under the same or similar circumstances); *Sommer v Davis*, 317 F.3d 686 (2003) (under Tennessee law, the controlling medical care standard refers to the locality of the alleged malpractice); *Nestorowich v Ricotta*, 740 N.Y.S.2d 668, 671 (2002) (‘The prevailing standard of care governing the conduct of medical professionals has been a fixed part of our common law for more than a century (see generally *Pike v Honsinger*, 155 N.Y. 201, 49 N.E. 760 [1898]). The *Pike* standard demands that a doctor exercise “that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where [the doctor] practices”. Although malpractice jurisprudence has evolved to accommodate advances in medicine, the *Pike* standard remains the touchstone by which a doctor’s conduct is measured and serves as the beginning point of any medical malpractice analysis’); *Mercado v Leong*, 50 Cal.Rptr.2d 569, 574 (1996) (a physician’s duty is to possess the degree of learning and skill ordinarily possessed by physicians of good standing practising in the same locality); *Kerke v Menninger Clinic, Inc.*, 172 F.Supp.2d 1347 (D. Kan. 2001) (under Kansas law, a physician

of ‘parochial’. Unlike the past, when judges and juries had ‘to equitably account for real disparities in medical knowledge, as well as access to the latest technology, with the touchstone being the physician’s geographic location of practice’,¹³ the contemporary local-practice standard no longer exempts physicians from the duty to stay current.¹⁴ At the same time, it is perfectly appropriate (nowadays, also fashionable) for a court to take a pluralistic view of medical science under which two different treatments of a patient may both be legitimate. Framed as the ‘respectable minority’ defence or as the ‘schools of thought’ limitation of liability, this pluralistic approach is part and parcel of the contemporary medical malpractice doctrine.¹⁵

The American shift to the nationwide medical practice standard can, however, be justified on evidential grounds. The local-practice standard generates an anti-competitive environment for medical experts, the key witnesses in virtually every medical malpractice case. Under this standard, medical experts not sufficiently familiar with the local medical practice do not qualify as expert witnesses. The expert witness status thus exclusively attaches to the local professional insiders. Courts have shifted from the local to the nationwide standards in an attempt to address this problem. They held that the local-practice standard facilitates the ‘silence conspiracy’ amongst doctors. Typically, this conspiracy assumes the form of an implicit agreement that stipulates ‘You won’t testify against me, and I won’t testify against you’.¹⁶

To this plausible scenario one should add other monopolistic repercussions. Even if the limited circle of experts does not form an impenetrable ‘silence conspiracy’, it may still limit its output and raise prices. The anti-competitive environment that the local-practice standard creates enables experts to extract high fees for a low amount of work. Local physicians may also be tempted to form coalitions in order to subject rival physicians to predatory measures. Such measures may include ‘testimonial conspiracy’ that would expose rival physicians to false accusations of malpractice. These sombre scenarios gain plausibility from the physicians’ opportunity to conspire and to monitor the implementation of their conspiracies at a relatively low cost. The nationwide standard eliminates this opportunity by magnifying the pool of qualified

has a duty to use reasonable and ordinary care and diligence in the diagnosis and treatment of his or her patients, to use his or her best judgment, and to exercise that reasonable degree of learning, skill, and experience which is ordinarily possessed by other physicians in the same or similar locations under like circumstances).

¹³ Amy Jurevic Sokol and Christopher J. Molzen, *The Changing Standard of Care in Medicine* (2002) 23 *J. Legal Med.* 449, 474. ¹⁴ *Ibid.*, at 475–7.

¹⁵ See Tim Cramm, Arthur J. Hartz, and Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know* (2002) 37 *Wake Forest L. Rev.* 699, 704–6 (relating the ‘respectable minority’ defence to the local-practice standard).

¹⁶ See, e.g., *Sheeley v Memorial Hospital*, 710 A.2d 161 (R.I. 1998).

medical experts. Because the number of qualified medical experts becomes very large, and because these experts are dispersed, any form of expert conspiracy becomes prohibitively expensive (in terms of both transaction costs and the costs of monitoring holdouts). This competitive environment also impels medical experts to trade their services for competitive prices.

To sum up, the nationwide standard is preferable not because it has a clear substantive merit that elevates it over the local-practice standard in the domain of torts. Evidential reasons dictate the adoption of the nationwide practice standard. Both the need to minimize fact-finding errors and to reduce the error-avoidance expenses necessitate the adoption of this standard.

These examples are paradigmatic.¹⁷ It would be bizarre if any substantive law that requires enforcement through adjudication were crafted in isolation from fact-finding costs and other adjudicative expenses. A substantive law policy would never be sound if it were to ignore anticipated enforcement expenses that include the costs of both fact-finding errors and their avoidance. Mechanisms reducing these costs can therefore often be found in the substantive law. Failure to account for these evidential mechanisms due to their formal affiliation to specialized branches of the substantive law would produce a disintegrated and distorted understanding of the law of evidence.

Many rules formally affiliated to civil procedure are, in fact, evidential in nature. The rules that control pre-trial disclosure of evidential materials make this clear. These rules and their underlying principle of full disclosure promote accuracy of fact-finding.¹⁸ Similarly, a criminal procedure rule that exempts witness-rebuttal evidence from pre-trial disclosure¹⁹ is evidential, rather than procedural, in character. By preferring unanticipated rebuttal of one's testimony over advance disclosure of rebuttal materials, this rule functions both as an epistemologically driven truth-revealing device and as an economic inducement that reduces the witnesses' opportunity to lie and deters potential liars. Such rules promote cost-efficient pursuit of the truth.

Together with the prohibition of adverse inferences from silence, the right to silence (or the privilege against self-incrimination) is also best understood as

¹⁷ See, e.g., James A. Henderson Jr., *Process Constraints in Tort* (1982) 67 *Cornell L. Rev.* 901 (advancing the process-cost factor as a general limit to liability in torts); Fred C. Zacharias, *The Politics of Torts* (1986) 95 *Yale L.J.* 698 (exemplifying non-liability rules motivated by the need to reduce the costs of legal proceedings); and Douglas Lichtman, *Copyright as a Rule of Evidence* (2003) 52 *Duke L.J.* 683 (fixation and creativity criteria that determine works' eligibility for copyright protection are, in essence, evidential cost-savers).

¹⁸ See Adrian Zuckerman (2003) *Civil Procedure* pp. 462–6.

¹⁹ See, e.g., Federal Rule of Criminal Procedure 16(e) (2004) that limits disclosure of prosecution materials to evidence to be presented in-chief and to information material to the preparation of the defence; *United States v Windham*, 489 F.2d 1389, 1392 (5th Cir. 1974); *United States v Dicarlantonio*, 870 F.2d 1058, 1063 (6th Cir. 1989); *United States v Delia*, 944 F.2d 1010, 1018 (2nd Cir. 1991) (exempting rebuttal evidence from pre-trial disclosure requirements).

an evidential, rather than substantive or procedural, device. The law confers this right upon criminal defendants and suspects on grounds commonly perceived as extraneous to fact-finding. However, this understanding of the right is inadequate. The right to silence is best understood as allocating the risk of error in criminal trials in a way that reduces the number of erroneous convictions at the price of increasing the number of erroneous acquittals. The right to silence helps fact-finders to differentiate between factually innocent and factually guilty defendants.²⁰ This differentiation is achieved by an important anti-pooling effect of the right to silence. Absent a right, a criminal's self-interested response to questioning would impose externalities (in the form of wrongful convictions) upon innocent suspects and defendants who tell the truth but cannot corroborate their responses.²¹ Absent a right, criminals would make false exculpatory statements as long as they believe that their lies are unlikely to be exposed. Knowing criminals' incentives, fact-finders would rationally discount the probative value of uncorroborated exculpatory statements, at the expense of some unfortunate innocents who cannot corroborate their true exculpatory stories. By contrast, neither pooling nor the ensuing wrongful convictions would occur were a right available. As Bentham famously noted, innocents would still tell the truth,²² whereas criminals would separate from the innocents by rationally exercising the right to silence. Note that the right to silence would only operate in this way in legal systems that observe the 'proof beyond all reasonable doubt' requirement. In such systems, criminals would opt for silence because lies either in court or during police interrogation are amenable to refutation that might secure the defendant's conviction. Silence, on the other hand, can help a guilty defendant to obtain an acquittal based on a reasonable doubt. The right to silence, therefore, allocates the risk of error in criminal adjudication in a way that benefits *both* guilty and innocent defendants.

By referring to the fact-finding objectives in plural, I have already emphasized that adjudicative fact-finding has more than one intrinsic (as opposed to extraneous) objective. This underscoring is not a prelude to radical pluralism. As stated at the outset, the number of objectives that I have in mind is only three. To repeat: one of these objectives is accuracy in fact-finding or error-avoidance. Another objective is minimization of the costs that error-avoidance—as compared with the possible non-avoidance of errors—would involve. Thirdly, there is adequate or equitable apportionment of the risk of error, yet another intrinsic objective of evidence law. Adjudicators are not only required to determine the facts of the case as accurately and as cost-efficiently

²⁰ See Daniel J. Seidmann and Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege* (2000) 114 Harv. L. Rev. 430. ²¹ *Ibid.*

²² Jeremy Bentham, *A Treatise on Judicial Evidence* (Etienne Dumont, ed. 1825), p. 241.

as possible. They also need to consider the possibility of committing errors in fact-finding, which would require them to allocate the risk of error in a proper way.

Accuracy in fact-finding (also identified as error-avoidance, or ‘rectitude of decision’, in Bentham’s terms) is a straightforward understandable objective of the law. Getting the facts right is a prerequisite to proper determination of the litigated entitlements and liabilities. This objective even appears tautological. In ordinary language, fact-finding is ‘fact-finding’ only when it is accurate. If adjudicators determine the facts inaccurately, then what they determine is not ‘facts’. In adjudication, any factual determination that adjudicators make—erroneous and accurate alike—counts as a ‘fact’ for the purposes of their decision. Any such ‘fact’ shapes the determination of the litigated liability or entitlement. Because adjudicators may err in their factual findings, the lawmaker may decide to evaluate the different risks of error by their nature and skew those risks in the desirable direction. Materialization of the risk of error in adjudicative fact-finding may have different consequences that vary in their gravity. The gravity of these consequences depends on the nature of the justice denied. In particular, it depends on the value of the entitlement erroneously annihilated and on the cost of the liability erroneously imposed. Aware of these consequences, the lawmaker may decide to formulate preferences with respect to the allocation of the risk of error. Adjudicators would then have to implement these particular preferences.

As demonstrated in Chapters 4–7, this lawmaking strategy is ingrained in the Anglo-American systems of evidence. These chapters expound the origins of the risk of error in adjudicative fact-finding, demonstrate the inevitability and pervasiveness of this risk, and set forth different political morality reasons that determine its apportionment. The present chapter merely charts a map for the evidence law domains; it does not investigate the domains. Also this chapter does not go beyond common knowledge that certifies the presence of the risk of error in adjudicative fact-finding. Because adjudicative fact-finding involves risk of error (a diagnosis explained in Chapter 2), allocation of this risk is fact-finders’ intrinsic task.

The fashion in which fact-finders discharge this task may be discretionary or regulated. The law (common law or a statute) may allow fact-finders to allocate the risk of error as they deem fit. Alternatively, it may exercise control over risk-allocation by setting up rules that fact-finders would have to obey. My present discussion assumes that the regulatory strategy is a plausible course of lawmaking. This assumption is common knowledge amongst legal professionals and academics. Later in this book, I advance a stronger claim that justifies the regulatory strategy on its merits. I also make a number of more specific normative claims that identify the scope, the form, and the substance of this strategy. As stated, this chapter aims to categorize evidence-related rules as

either intrinsic or extraneous to fact-finding and as belonging or not belonging to evidence law. This categorization is analytic in character. It does not depend on the validity of the normative arguments that I subsequently invoke to justify the regulatory strategy.

My categorization of evidence-related rules as either intrinsic or extraneous to fact-finding makes no claims with regard to the rules' form. In pursuing its regulatory objectives, both intrinsic and extraneous to fact-finding, the lawmaker may lay down a detailed list of specific prescriptions that narrow the adjudicators' discretion. The existing jurisprudential vocabulary brands such particularized prescriptions as 'rules', to differentiate them from the general 'standards' and 'principles' that structure the adjudicators' discretion, but have no ambition to dictate individual decisions.²³ The lawmaker also may promote its objectives by formulating just a few general principles that merely identify the chosen objectives. Adjudicators would then be left free to decide about the means for attaining these objectives. Alternatively, the lawmaker may devise a more nuanced set of provisions that accommodates both principles and rules. The lawmaker's choice between these different forms of regulation may have far-reaching consequences.²⁴ Evidence law is no exception to this observation. In this chapter, however, all forms of legal regulation are often labelled generically as 'rules'. I distinguish between 'rules' on the one hand, and 'principles' or 'standards' on the other, only when necessary.

This chapter divides the realm of evidence law into two distinct domains, epistemological and moral. The epistemological domain of evidence law is governed by the broad 'best evidence' principle, explained in Chapter 2. Rules and principles allocating the risk of error belong to the moral domain of evidence law. Based upon moral and economic grounds, these rules and principles are analysed in Chapters 5, 6, and 7. The economic grounds for these rules and principles are utilitarian. Utilitarianism, of course, is a variant of political morality. This chapter therefore categorizes these rules and principles as situated in the domain of political morality.

Unlike other moral domains, the moral domain of evidence law has no deontological rules. As emphasized (and famously claimed by Bentham more than two hundred years ago²⁵), evidence law is invariably adjectival in nature. This instrumentalist explanation has no exceptions. There is no such thing as a

²³ For this distinction in general see Ronald Dworkin, *Taking Rights Seriously* (1977), pp. 22–31; Louis Kaplow, *Rules Versus Standards: An Economic Analysis* (1992) 42 *Duke L.J.* 557.

²⁴ See Duncan Kennedy, *Form and Substance in Private Law Adjudication* (1976) 89 *Harv. L. Rev.* 1685.

²⁵ See Jeremy Bentham, *The Principles of Judicial Procedure, 2 Works of Jeremy Bentham* (John Bowring ed., 1838–43), p. 6 ('of the adjective branch of law, the only defensible object . . . is the maximization of the execution and effect given to the substantive branch of the law'). For an illuminating discussion of Bentham's theory of procedure see Gerald Postema, *The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication* (1977) 11 *Ga. L. Rev.* 1393.

free-standing rule of evidence, unassociated with any of the law's three fact-finding objectives: minimization of fact-finding errors; reduction of the error-avoidance expenses; and, finally, apportionment of the risk of error. This chapter explains why.

This chapter also identifies the interplay between the rules and principles of the two evidence law domains. Rules and principles allocating the risk of error (on utilitarian or other moral grounds) supplement the workings of the best evidence principle. Adjudicators activate the risk-allocating rules and principles only after exhausting the application of the best evidence principle. Generally, when the epistemological reasons for fact-finding no longer apply, adjudicators allocate the risk of error by applying the rules and the principles from the moral domain of evidence law. *Morality picks up what the epistemology leaves off*. This motto summarizes the principal thesis of this entire book.

B. Between the Moral and the Epistemological

Amid the many complexities that pervade adjudicative fact-finding, one proposition stands out as clear. Fact-finding rules and procedures are crucial to the protection of substantive rights. Two factors explain substantive rights' dependence upon fact-finding rules and procedures. First, the accuracy of the court's decision is crucial to the vindication of any substantive right. Getting the facts right is a basic condition for accuracy. Second, because adjudicators carry out their fact-finding tasks in conditions of uncertainty, determination of facts always entails risk of error. Any decision that relates to fact-finding, including any ruling that admits or excludes evidence, allocates this risk. Vindication of substantive rights becomes crucially dependent on the allocation of the risk of error. A court's decision allocating this risk affirms the prospect of divesting the bearer of the risk of his or her substantive right. This prospect becomes real when the risk of error materializes and the court actually makes a wrong decision.

The first of these factors—the need that adjudicative findings of fact coincide, to the extent feasible, with the actual events that give rise to the relevant substantive entitlements and liabilities—is situated in the epistemological domain. The best-evidence principle²⁶ regulates this domain. Under this principle, adjudicators must seek reconstruction of the relevant events by forcing the production of the best evidence available, relying on that evidence alone, and following the epistemologically most effective truth-certifying procedures. Epistemological in character, the best evidence principle

²⁶ See generally Dale A. Nance, *The Best Evidence Principle* (1988) 73 Iowa L. Rev. 227.

promotes the accuracy of adjudicative findings of fact by demanding that adjudicators ground such findings on the most reliable sources of information and follow the most effective procedures for testing information for veracity. The truth-certifying criteria that this principle applies across the board are empirical validation, logic, and general experience.

The second factor—the effect that allocation of the risk of error exerts on fact-finding and on the underlying substantive rights—is situated in the moral and political domain. Reasons identifying the bearer of the risk of error and determining the extent to which she or he will carry this risk are moral and political in character. These reasons supplement the reconstruction of the litigated event. They apply in the moral domain, in which the question ‘Good or bad?’ replaces the epistemological inquiry into ‘What happened?’. This shift occurs when any question that arises in connection with the epistemological ‘What happened?’ becomes unanswerable. Adjudicators turn from the best evidence principle to the apportionment of the risk of error after exhausting their epistemic reasons for resolving the relevant evidential or factual issue. The unresolvable evidential or factual issue transforms into the question ‘Who should carry the risk of a potentially erroneous finding?’. Any criterion for identifying the bearer of this risk—or, alternatively, for dividing the risk between the parties—can acquire normative validity only on moral and political grounds (egalitarian, utilitarian, or other). The traditional grounds for devising such criteria are fairness and equality, on the one side, and utility, on the other. I expound these criteria in the pages ahead. Here, I identify the interplay between the epistemological and the moral in adjudicative fact-finding. Allocation of the risk of error is a moral decision that adjudicators have to make in order to settle factual issues that the epistemological best-evidence principle fails to resolve. Once again, morality picks up what the epistemology leaves off.

Moral considerations that inform risk-allocating decisions belong to the domain of politics. Risk-allocating decisions that adjudicators make determine the application of state power against individuals. Any such decision forms part of the court’s final verdict that directs the coercive law-enforcement mechanism, sponsored by the state, to operate against one of the parties. By delivering a verdict against the defendant, the court licenses the state to apply its law-enforcement power against the defendant. By delivering a verdict against the claimant, the court effectively orders the state not to use its law-enforcement power against the defendant and to protect the status quo, should that become necessary. Allocation of the risk of error, therefore, is a matter of political morality rather than morality in general.

There is, therefore, a special category of claims, moral and political in nature, with respect to evidential rights. Arguably, litigants ought to be given

rights against risks or, more precisely, rights against various impositions of the risk of error in adjudicative fact-finding.²⁷ This book broadly identifies such claims as ‘arguments from fairness’ to distinguish them from the different utilitarian theories that oppose the idea of rights against risks. Under these theories, risk of error is allocated in a way that augments social welfare. These theories seek augmentation of social welfare by mediating between two types of the risk of error that exist in adjudication: ‘false positive’, the risk of holding a non-liable defendant liable; and ‘false negative’, the risk of holding a liable defendant not liable. Because these two risks are both mutually exclusive and jointly exhaustive, they are amenable to interactive trade-offs. The lawmaker can devise rules that reduce one of these risks by increasing the other.

Theoretically, false positives can be totally eliminated by a rule prescribing that any factual uncertainty is resolved in favour of the defendant. Conversely, turning any factual uncertainty into a conclusive reason for rendering a finding in favour of the claimant, or the prosecution in a criminal case, completely eliminates false negatives. Both rules, of course, are unrealistic. Because some degree of uncertainty is present in every single case, an adoption of any of these rules would predetermine the outcomes of all trials, making adjudication unnecessary. Under any of these rules, the error rate in the legal system would also be unbearably high. The utilitarian theories therefore attempt to determine the extent to which a reduction of one of the two risks and the corresponding increase of the other are socially optimal. The optimality criterion that these theories commonly employ is social welfare. This criterion alludes to a comprehensive utilitarian calculus that accounts for the cost of fact-finding errors and error-avoidance expenses. Under this criterion, the legal system ought to minimize the total sum of these costs.²⁸ This criterion originates from Jeremy Bentham.²⁹

The utilitarian approach holds that, generally, the risk of fact-finding error and of the corresponding misdecision must be allocated in a way that maximizes the number of correct decisions in the long run of cases.³⁰ This allocation of

²⁷ See Stein above note 3; Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?* (1998) 17 *Law & Phil.* 19.

²⁸ See Richard A. Posner, *Economic Analysis of Law* (6th edn., 2003), p. 599 (stating that the objective of a procedural system, viewed economically, is to minimize the sum of two types of cost: the cost of erroneous judicial decisions and the cost of operating the procedural system that reduces the incidence of errors); Steven Shavell, *Foundations of Economic Analysis of Law* (2004), pp. 387–418 (identifying procedural mechanisms that reduce this sum).

²⁹ See Gerald J. Postema, *Bentham and the Common Law Tradition* (1986), pp. 344–7 (explaining Bentham’s utilitarian system of procedure as based upon provisions ‘for minimizing evil in each individual case’—with ‘evil’ representing the cost of decisional error and the cost of avoiding it).

³⁰ See A. Mitchell Polinsky and Steven Shavell, *The Economic Theory of Public Enforcement of Law* (2000) 38 *J. Econ. Lit.* 45, 60–2.

the risk generates the greatest possible space for the controlling substantive law. Under this approach, the largest possible number of factually liable defendants assume liability, while the largest possible number of factually non-liable defendants are found not liable.³¹ This approach consequently holds that preponderance-of-the-evidence generally functions as a decisive criterion for settling factual issues. This criterion demands that adjudicators base their decisions on factual scenarios that are more probable than not. By focusing on the amount rather than on substantive consequences of adjudicative errors, this criterion treats false positives and false negatives alike. Every error is treated as a fixed disutility unit (u). A party whose factual scenario has probability P should win the case whenever $Pu > (1 - P)u$, that is, whenever $P > 0.5$.³² When the competing scenarios are equally probable (that is, when $P = 0.5$), adjudicators should normally decide against the claimant. This rule of decision reduces both the enforcement costs and (by deterring unmeritorious lawsuits) the costs of litigation.³³

Under the accuracy-maximizing criterion, any evidence that pertains to a trial issue is generally admissible. This criterion recognizes only two distinct grounds for suppressing evidence. First, evidence may be suppressed on the grounds intrinsic to fact-finding when the best evidence principle so requires. Second, evidence may be suppressed on the grounds extraneous to fact-finding, with respect to which the accuracy-maximizing criterion has no say. Equitable apportionment of the risk of error, however, is not one of the grounds that can justify suppression of evidence under this criterion. This criterion deems false positives and false negatives equally harmful and leaves no room for skewing the risk of error in either direction. The legal system randomizes this risk by allowing it to eventuate in any individual case. Together with the $P > 0.5$ rule, this principle of broad evidential admissibility minimizes the general incidence of fact-finding errors.

Both Bentham and the contemporary utilitarian theory have accounted for the possible asymmetry between false positives and false negatives. Formally, when the average harms associated with false positives and false negatives equal, respectively, p and n , claimants are entitled to prevail upon any probability that surpasses the $p/(n + p)$ threshold. Conversely, when the probability of the defendant's case exceeds $n/(n + p)$, the defendant prevails.³⁴ If a

³¹ Ibid.

³² See Alex Stein, *Of Two Wrongs that Make a Right: Two Paradoxes of the Evidence Law and their Combined Economic Justification* (2001) 79 Texas L. Rev. 1199, 1205–6.

³³ See *ibid.*, at 1206 n. 13 and sources cited therein.

³⁴ See John Kaplan, *Decision Theory and the Fact-Finding Process* (1968) 20 Stan. L. Rev. 1065, 1071–5. Both here and throughout this book I assume that standards of proof determine the expected and, ultimately, the actual ratio of false positives vs. false negatives. This claim may appear straightforward, but it is not. See Michael L. DeKay, *The Difference Between Blackstone-like Error*

particular type of error—say, conviction of an innocent person—is considered to be more harmful than the opposite type of error (acquittal of the guilty), utilitarianism would then demand that adjudicators (together with the entire legal system) decrease the incidence of the more harmful error (p) at the price of increasing the incidence of the less harmful error (n). For example, if convicting an innocent defendant is considered to be one hundred times more harmful than acquitting a guilty criminal, the probability threshold for convictions would be 0.99(100/101). Accordingly, the minimal probability of innocence (a reasonable doubt) guaranteeing the defendant's acquittal would be 0.01(1/101).

Any such framework may also utilize evidence-suppressing rules that skew the risk of error in the chosen direction. For example, broad admission of prior-conviction evidence might excessively intensify the fact-finders' distrust of criminal defendants as witnesses. Suppression of such evidence, however, can also produce fact-finding errors. Unaware of the defendant's criminal past, the fact-finders may credit his or her testimony with greater credibility than it deserves. Both types of error would distort the ultimate probabilities of guilt and innocence. Because false positives and false negatives do not inflict similar harms, the distortions that are likely to occur do not cancel each other out. There is, therefore, a sound utilitarian reason for excluding evidence that reveals the defendant's criminal record. Similar rationales can be mounted against the admission of hearsay and some other evidence against criminal defendants. I discuss those rationales in Chapter 5. My point here is to underscore *the utilitarian linkage between evidence-suppressing rules and the asymmetry between false positives and false negatives as producers of harm*.

Fact-finding errors are not slanted by nature. Adjudicative decisions lower the risk of error on one side of the scales of justice by increasing the risk on the other side. The power to determine the criteria for apportioning the risk of error is legislative in character. In a democracy, this power should be vested in the elected, accountable, and removable legislator (subject to the legislator's approval, judge-made common law may also develop criteria for apportioning the risk of error). Apportionment of the risk of error is a moral and political decision with far-reaching consequences. Leaving it to individual judges and juries would therefore create a serious institutional problem (discussed in detail in Chapter 4). Why should unelected adjudicators be in charge of such decisions?

Ratios and Probabilistic Standards of Proof (1996) 21 Law & Soc. Inquiry 95 (arguing that, in criminal cases, this ratio also depends on the accuracy of the fact-finding system and on the number of guilty criminals brought to trial). As argued throughout this book, proper allocation of the risk of error is an objective set for the entire system of fact-finding, not just for the standards and burdens of proof. As for the selection of cases for trial, I assume it to be unbiased. My discussion postulates that lawsuits and criminal charges are filed on the basis of prima facie evidence that only guarantees a reasonable prospect (rather than virtual certainty) of success.

The domain of the best-evidence principle is markedly different. Logic and experience set the appropriate epistemic standards for resolving case-specific factual issues that arise in this domain. Democratic procedures and institutions that operate in the domain of politics cannot adequately resolve such issues.³⁵ At their very best, democratic mechanisms can only produce decisions classifying as politically correct, not findings that are factually accurate. This book claims that adjudicators should only be in charge of case-management (a task particularly appropriate for judges) and of whatever genuinely classifies as fact-finding (a task that both judges and juries can perform). Moral and political controversies over the apportionment of the risk of error ought to be resolved by the law (if not legislatively, then by common law). Resolution of some of these controversies merits constitutional protection.³⁶

Fairness arguments counter the utilitarian theories, offering a different ideology for allocating the risk of fact-finding error. This ideology embraces an ironclad conception of entitlements—one that treats a person's right as valuable in itself, rather than as an instrument that the person can use strictly for attainment of some general social goal. Branded 'rights as trumps',³⁷ this ideology rejects the vision of rights as regulatory devices that induce alignment of individual actions with social good. Under this non-instrumentalist conception of rights, a person's right serves both as an essential component of his or her well-being and as a manifestation of the person's intrinsic value, altogether immune from utilitarian calculus.³⁸ Based on this conception, fairness arguments hold that individuals deserve rights against impositions of the risk of error in adjudicative fact-finding and that social welfare must not override any such right. This theory provides for risks of error from which a person should be protected as an individual pursuer of his or her own well-being, irrespective of the social consequences of this protection. This theory thus exhibits a clash between utilitarianism and Kantian morality. Analysis of this clash is a job for ethical theories, and its normative resolution is an objective for meta-ethics. For obvious reasons, these issues are not part of this book's agenda. To the extent relevant to the allocation of the risk of error in adjudicative fact-finding, I take up these issues in Chapters 7 and 8.

Fairness arguments make an additional anti-utilitarian point, called 'a rule against recalculation'. Traditionally, this point is associated with the rule against retroactive lawmaking. But in my discussion the 'rule against recalculation' is conceptually a more accurate description. The rule against recalculation is a legal

³⁵ The claim that they can is adventive. I therefore acknowledge it without discussion.

³⁶ See Alex Stein, *Evidential Rules for Criminal Trials: Who Should be in Charge?*, in Sean Doran and John Jackson (eds.), *The Judicial Role in Criminal Proceedings* (2000), p. 127.

³⁷ See Dworkin, above note 2.

³⁸ See Joseph Raz, *Value, Respect, and Attachment* (2001), pp. 145–58.

prohibition that does not allow adjudicators to redo a legal trade-off that already worked to the individual's detriment. If an individual sustains the deprivation that the relevant legal trade-off originally imposed, the individual should then also recover the trade-off's original benefits. These benefits are to be left unmodified in the case of this particular individual. From the constitutional law perspective, the rule against recalculation constrains not only judges, but also the legislator.

The United States Supreme Court's decision *Carmell v Texas*³⁹ exemplifies this point in the area of evidential rights. In that case, the court examined the constitutionality of a Texas statute that repealed a corroboration arrangement for cases of rape and sexual assault. Under the old arrangement, a rape defendant could not be convicted upon his complainant's testimony if the latter was not corroborated by the complainant's prompt outcry or by evidence extraneous to the complainant.⁴⁰ The old statute exempted from this arrangement complainants below fourteen years of age. The new statute broadened this exemption by extending it to complainants below eighteen years of age. The statute provided that the jury can convict the defendant on the uncorroborated testimony of such a young complainant if it finds it credible beyond all reasonable doubt.⁴¹ Carmell's complainant belonged to this new category of corroboration-exempted complainants.

According to the indictment, however, Carmell raped this complainant on numerous occasions that predated the new statute. Carmell therefore claimed with regard to these crimes that the court was not authorized to treat his complainant as a corroboration-exempted witness. He further contended that the jury could not properly convict him of any of these crimes on the uncorroborated testimony of his complainant. According to Carmell, the new statute can only be applied prospectively and thus cannot extend to any alleged offence that predates it. Carmell grounded this argument on his constitutional immunity from retroactive legislation (the Ex Post Facto clause).⁴²

In response, the state of Texas contended that the application of its new statute to Carmell's old offences did not violate the retroactivity clause because the latter only protects substantive, as opposed to procedural, entitlements.⁴³ Because the new statute did not modify the offences with which Carmell was charged, there was no detracting from Carmell's substantive entitlements. The repealed corroboration requirement qualified as an evidential, rather than substantive, entitlement. This requirement and the ensuing right to acquittal in the absence of corroboration could only be activated at trial. Before trial, a person holds no evidential entitlements whatsoever. At trial, he or she captures

³⁹ *Carmell v Texas*, 529 U.S. 513 (2000) (hereinafter: '*Carmell*').

⁴⁰ See Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon 1983).

⁴¹ See *Carmell*, above note 39, at 518–19.

⁴² See U.S. Const., Art. I, § 10; *Carmell*, above note 39, at 521–2.

⁴³ See *Carmell*, above note 39, at 520–1; 537–9.

only those evidential entitlements that the law recognizes at that time. Changes in the law of evidence that preceded the defendant's trial therefore cannot be invalidated on retroactivity grounds.

The state's arguments have only attracted the dissenting Justices.⁴⁴ The *Carmell* court held that the repealed corroboration requirement qualified as a substantive entitlement because it determined the level of proof necessary for conviction.⁴⁵ In justifying this conclusion, the court distinguished between two types of evidential rules: rules that determine what evidence can be admitted, which the retroactivity clause does not protect, and the protected category of rules which fix the level of proof that incriminating evidence needs to reach in order to allow the jury to convict the defendant.⁴⁶ The dissenting Justices drew the same distinction, but reached the opposite conclusion. In their opinion, the corroboration requirement set a formal credibility condition for basing a defendant's conviction on the complainant's testimony.⁴⁷ The dissent explained that this requirement did not affect the criminal standard of proof, constitutionally protected by the Due Process clause.⁴⁸ As emphasized by the dissent, the fundamental demand that the prosecution proves its case against the accused beyond all reasonable doubt remained intact in *Carmell's* trial. As in other criminal cases, the jury were told that they can only convict *Carmell* if they believe the complainant beyond any reasonable doubt.⁴⁹

Both the dissent and the court's opinions are flawed. The prosecution's license to utilize particular evidence (such as uncorroborated testimony of rape complainants) in order to satisfy a demanding proof requirement and obtain conviction by such evidence alone is similar in every respect to the prosecution's license to obtain conviction by satisfying a less demanding proof requirement (such as the jurors' license to convict the defendant on the basis of the complainant's testimony alone). There is no principled difference between the legislative power to reduce the measuring stone on one side of the scales of justice and the legislative power to add weight to evidence that the prosecution can throw on the other side of the scales. The dissent's concurrence with the court's proposition that rules regulating evidential sufficiency classify as 'substantive' therefore ought to have produced an identical categorization of the rules that control the admission of evidence.

There is, however, a more fundamental issue that all the Justices seem to have overlooked. What makes evidential sufficiency rules 'substantive'? The court provided only a partial answer to this question by intimating that evidential sufficiency rules *attach* to the system of legal arrangements that determine crimes and punishments.⁵⁰ If so, what is the exact nature of this

⁴⁴ See *Carmell*, above note 39, at 553–75.

⁴⁶ See *Carmell*, above note 39, at 530.

⁴⁸ See *Carmell*, above note 39, at 560–1.

⁵⁰ See *Carmell*, above note 39, at 532–3.

⁴⁵ See *Carmell*, above note 39, at 529–53.

⁴⁷ See *Carmell*, above note 39, at 553.

⁴⁹ *Ibid.*

attachment? How are we to identify the normative forces that create it? The court left this issue open, and I now attempt to resolve it.

The attachment of evidential mechanisms to the rules that determine criminal offences is engendered by legal trade-offs. The most typical of these trade-offs is the overenforcement paradigm.⁵¹ To understand this paradigm, consider the special corroboration requirement that common law attaches to its overbroad prohibition of perjury.⁵² This requirement bars conviction for perjury solely on the testimony of a single witness. Any such testimony must be corroborated by additional testimony or other evidence.⁵³ In the absence of corroboration, the jury must acquit the defendant.⁵⁴ This requirement is special because it constitutes an exception to the general law, under which 'the touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact . . . are, with rare exceptions, free in the exercise of their honest judgment, to prefer the testimony of a single witness to that of many.'⁵⁵ Despite this general rule, the corroboration requirement for perjury prosecutions 'is deeply rooted in past centuries'⁵⁶ it applies in several jurisdictions across the United States⁵⁷ that follow English law.⁵⁸ In England, section 13 of the Perjury Act 1911 provided that⁵⁹

A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be

⁵¹ This discussion originates from Richard A. Bierschbach and Alex Stein, *Overenforcement* (2005) 93 Georgetown L.J. (forthcoming).

⁵² See *Weiler v United States*, 323 U.S. 606 (1945) (upholding the common law corroboration requirement for cases in which a single prosecution witness accuses the defendant of perjury); section 13 of the Perjury Act, 1911.

⁵³ See *Weiler*, 323 U.S. at 608.

⁵⁴ See *ibid.*; *United States v Chaplin*, 25 F.3d 1373, 1378 (7th Cir. 1994) (holding that 'although criticized by some, the two-witness rule remains viable in perjury prosecutions, at least in those perjury prosecutions brought under a statute in which the rule has not been expressly abrogated').

⁵⁵ See *Weiler*, 323 U.S. at 608.

⁵⁶ See *Weiler*, 323 U.S. at 608–9.

⁵⁷ See, e.g., *Weiler*, 323 U.S. at 610–11; *United States v Chaplin*, 25 F.3d 1373, 1376 (7th Cir. 1994); *Hammett v State*, 797 So.2d 258 (Miss. App. 2001); *People v Ellsworth*, 15 P.3d 1111 (Colo. App. 2000); *Watson v State*, 509 S.E.2d 87 (Ga. App. 1998); *Murphy v U.S.*, 670 A.2d 1361 (D.C. 1996); *State v Barker*, 851 P.2d 394, 396 (Kan. App. 1993) (each jurisdiction requires corroboration for a single witness whose testimony accuses the defendant of perjury). See in particular *Hammer v United States*, 271 U.S. 620, 626 (1926) ('The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal'). See also West's Ann. Cal. Penal Code § 123 ('No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant. . .'); McKinney's Penal Law (N.Y.) § 210.50 ('In any prosecution for perjury . . . or in any prosecution for making an apparently sworn false statement, or making a punishable false written statement, falsity of a statement may not be established by the uncorroborated testimony of a single witness').

⁵⁸ See, *Hammer v United States*, 271 U.S. 620 (1926); *Weiler v United States*, 323 U.S. 606, 610 n. 4 (1945). See also *Marvel v State*, 33 Del. 110, 113 (1925) (the corroboration rule represents a partial abandonment of the quantitative theory of evidence in favour of evidentiary credibility).

⁵⁹ This section codified the common law. See *Weiler v United States*, 323 U.S. 606, 610 n. 4 (1945).

punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

Courts interpret this provision as a stringent corroboration requirement,⁶⁰ while legal scholars criticize it.⁶¹

Finding a rationale for this requirement in a system that generally allows adjudicators to convict the defendant on the testimony of a single witness cannot be easy. If one witness's testimony that adjudicators find credible beyond all reasonable doubt is good enough for convicting the defendant in a murder trial, why should it not be enough in trials for perjury? One commonly offered answer is that the corroboration requirement for perjury prosecutions is necessary to avoid chilling prospective witnesses with the prospect of easy prosecution for perjury.⁶²

This rationale flows from the overenforcement paradigm. Under its common law definition, perjury is any false statement regarding a material matter that a witness makes knowingly and under oath in a judicial proceeding.⁶³ This definition contains three mutually related ambiguities. First, what counts as a 'statement'? Would it include, for example, a witness's demeanor when the witness uses it deliberately as a form of communication? Second, what classifies as 'false'? Would this description attach, for example, to untruthful testimony when the witness hesitantly—but still deliberately—signals the court that his testimony is not to be believed (along the lines of the famous 'Liar Paradox'⁶⁴)? Would reticent non-acknowledgement of the truth qualify as perjurious deceit?⁶⁵ Third, does any of these puzzles impact the determination of the defendant's mens rea?

⁶⁰ See, e.g., *Hamid and Hamid* (1973) 69 Crim. App. R. 324 (CA).

⁶¹ See Ian H. Dennis, *The Law of Evidence* (1999), p. 488 (arguing that the corroboration requirement 'no longer has a plausible justification and could be scrapped without loss'); Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004), p. 470 (writing that 'even if section 13 of the 1911 Act might originally have been justified as a bulwark against witness intimidation or manipulation, this rationalization no longer validates the continuing demand for corroboration').

⁶² See *Weiler*, 323 U.S. at 609 ('The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted'); Roberts and Zuckerman, above note 61, at p. 470. Roberts and Zuckerman, however, favour other methods of reducing this chilling effect. Conditioning prosecutions for perjury upon the approval of the Director of Public Prosecutions is one such method.

⁶³ Under Section 1 of the Perjury Act of 1911, 'If any person lawfully sworn as a witness . . . in a judicial proceeding wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to imprisonment for a term not exceeding seven years, or to a fine or to both such imprisonment and fine'. The federal definition of perjury in the United States, U.S.C.A. § 1621, is similarly broad.

⁶⁴ See R. M. Sainsbury, *Paradoxes* (2nd edn, 1995), pp. 111–17.

⁶⁵ Thomas Nagel argues that it would not because it flows from generally known conventions. See Thomas Nagel, *Concealment and Exposure* (1998) 27 *Phil. & Pub. Aff.* 3. See also Bernard A. O. Williams, *Truth and Truthfulness: An Essay in Genealogy* (2002), pp. 96–100 (acknowledging the validity of the distinction between lying and being reticent or even misleading).

These ambiguities in the definition of perjury are important because many witnesses testifying in courts would rather not be there. Testifying costs time and money and often generates considerable stress in the form of questions about vague, unsavoury, or personal events, circumstances and relationships. Witnesses facing these disincentives have much to lose and little to gain from telling the truth. Many of them nonetheless choose to testify because they fear punishment for contempt (and in some cases, moral reprobation as well). A witness thus often will deliver evasive testimony that obfuscates the truth without making any affirmative attempts to mislead the court. Indeed, his or her testimony might openly display reticence that does not induce the court to make a wrong factual finding. It says, in effect, 'I am forced to testify against my will, and am very uncomfortable doing so, so please don't place too much weight on what I'm saying'. Is this testimony perjury?

Courts generally interpret perjury broadly by resolving any ambiguities in the prosecution's favour. Any part of a witness's testimony amounts to perjury if it is untrue and material to the case. Falsity cannot be offset by the witness's self-acknowledged reticence or evasiveness or by any other signal that induces the court not to believe the witness.⁶⁶ The witness also need not harbour any specific intent to mislead the court. His or her awareness of the statement's untruthfulness would satisfy the mens rea requirement.⁶⁷ In short, witnesses must always tell 'the truth, the whole truth, and nothing but the truth', and any deliberate violation of this requirement qualifies as perjury.⁶⁸ The reason

⁶⁶ See, e.g., *Ostendorf v State*, 128 P. 143, 154 (Okla. Crim. App. 1912) (wilful suppression of part of the truth is equivalent to an affirmative statement of falsehood); *Flowers v State*, 163 P. 558 (Okla. Crim. App. 1917) (same); Alan Heinrich, Note: Clinton's Little White Lies: the Materiality Requirement for Perjury in Civil Discovery (1999) 32 Loy. L.A. L. Rev. 1303, 1311–16 (demonstrating that courts uniformly interpret the 'materiality' condition for perjury in very broad terms).

⁶⁷ *United States v Williams*, 874 F.2d 968, 980 (5th Cir. 1989) (explaining that for perjury purposes, absence of such a motive to deceive the court does not exonerate a witness who knowingly gives false testimony on one of the material issues); *United States v Lewis*, 876 F.Supp. 308, 312 (D. Mass. 1994) ('[P]erjury does not require proof that the defendant had the specific intent to impede justice'); cf. 18 U.S.C.S. § 1623(a) (2004) (in order to convict a defendant of making false statements to a grand jury or court, the prosecution only has to show knowledge by the defendant that the statement was false).

A few states reject this broad interpretation. See Tex. Penal Code Ann. § 37.02(a) (Vernon 2003) ('Perjury. A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning, he makes a false statement under oath . . .'); Mo. Ann. Stat. § 575.040 (West 1995) ('A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths'); Tenn. Code. Ann. § 39–16–702 (2004) ('Perjury. A person commits an offense who, with intent to deceive . . . makes a false statement, under oath . . .').

⁶⁸ See, e.g., Model Penal Code § 241.1 ('A person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath or equivalent affirmation . . . when the statement is material and he does not believe it to be true'); Jared S. Hosid (2002) Perjury, 39 Am. Crim. L. Rev. 895.

for this approach is simple. Broadly defining perjury in this way strengthens the incentives of all witnesses to tell the truth⁶⁹ and eases the prosecution's burden in cases in which witnesses have in fact lied.

But it also creates a problem: the definition of perjury becomes overbroad in that it condemns and punishes individuals who do not necessarily produce the mischief at which the criminal prohibition against perjury aims. This mischief is an erroneous verdict that false testimony actively induces.⁷⁰ Openly evasive testimony does not do this because everyone can see that the witness passively defies the request to assist the court in its pursuit of the truth. At its worst, such testimony amounts to contempt of court—conduct that is certainly reprehensible, but not as pernicious as perjury. Indeed, as many commentators have noted, evasive as opposed to affirmatively misleading testimony raises normatively difficult questions about the extent to which an individual's moral entitlement to privacy and non-exposure should limit his or her truth-telling obligations to society.⁷¹ From a moral (as opposed to formal legal) point of view, it is one thing actively to bring about an injustice, and it is quite another thing to withdraw one's testimonial assistance from a justice-making proceeding. On this view, only outright liars can properly be identified and condemned as perjurers.⁷²

Why not redefine perjury as demanded by this nuanced approach? The answer to this question points to the law's operational concerns. Narrowing down the prohibition to capture only outright liars but not evaders would make perjury prosecutions more difficult than they presently are. This would dilute the incentives for people who are contemplating lying in court not to do so. Adoption of the broad definition of perjury—one that pools liars with evaders—is the best that the lawmaker can do. The resulting overenforcement of the law is the law's operational necessity, and this evil can still be attenuated.

The common-law corroboration requirement attenuates this evil. By making perjury convictions more difficult to obtain and, consequently, less probable

⁶⁹ For economic analysis of these incentives see Robert Cooter and Winand Emons, *Truth-Bonding and other Truth-Revealing Mechanisms for Courts* (2004) 17 *Eur. J. Law & Econ.* 307.

⁷⁰ See, e.g., *Bronston v United States*, 409 U.S. 352, 362 (1973) (holding that literally true statements made under oath that are evasive or unresponsive must be resolved under further questioning by counsel, not by prosecution for perjury, and that such statements do not fall within the federal perjury statute, 28 U.S.C.S. § 1621 (2004)); see also *United States v Shotts*, 145 F.3d 1289, 1299 (11th Cir. 1998) ('[T]he prosecutor's purpose must be to obtain the truth. Perjury, of course, thwarts that proper purpose. It must not be the prosecutor's purpose, however, to *obtain* perjury, thus avoiding more precise questions which might rectify the apparent perjury').

⁷¹ Cf. Williams, above note 65, at 96–100.

⁷² See Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements* (2001) 53 *Hastings L.J.* 157, 168–73, 179–80 (distinguishing on moral grounds between lying and misleading; defending the 'literal falsity' approach to perjury; and arguing that defensive deception is excusable on self-preservation grounds).

ex ante, the law reduces the chilling effect that the overbroad definition of the crime exerts. Due to the corroboration requirement, many evasive—but still not affirmatively lying—witnesses would escape criminal liability. The effect of this mechanism is to require the prosecution to identify a particular falsity in the defendant’s testimony, to demonstrate that this falsity was material to the proceedings in which the defendant appeared as a witness, and to provide additional and independent proof to back up a witness who testifies about this falsity. It will be much harder for the prosecution to discharge this burden in criminal proceedings initiated against evasive as opposed to deliberately misleading witnesses.⁷³ This trade-off is imperfect, but it is better than the alternative.⁷⁴

With these observations in mind, I return to *Carmell*. The definition of sexual assault—the crime with which Carmell was charged⁷⁵—is not overbroad. Under this definition, the prosecution must prove beyond all reasonable doubt that the defendant made a sexual contact with the victim without her consent while he was aware of both the nature of his conduct and of the possibility that the victim may not be consenting to it. There was no trade-off relationship whatsoever between the corroboration requirement that Carmell wished to retain and the definition of the crime with which he was charged. The repealed corroboration requirement therefore did not attach to the Texas definitions of rape and sexual assault. Rather, it was attached to the alleged victims of these crimes on the questionable theory that doubted their trustworthiness. This requirement belonged to the era of indiscriminate group-based disbelief that the Anglo-American systems of criminal justice exhibited towards women complaining about rape and

⁷³ Some scholars claim that the prosecution’s burden is already too heavy, to the detriment of society. See, e.g., Glanville Williams, *The Proof of Guilt* (3rd edn., 1963), p. 68 (noting the difficulty of proving the guilty mind as affecting all prosecutions for perjury); Michael Stokes Paulsen, Review, *Dirty Harry and the Real Constitution* (1997) 64 U. Chi. L. Rev. 1457, 1488–9 (‘Oaths are taken less seriously today. . . fewer people believe in hell, and an oath is no longer thought to be effective because of extratemporal consequences for false swearing. The only real bite behind an oath is the specter of a perjury prosecution, and perjury is notoriously difficult to prove. . . Indeed, the ethos of today is that perjury is commonplace. . .’).

⁷⁴ For another similar example, consider Article III, Section 3(1) of the United States Constitution, which provides, ‘No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in Open Court.’ U.S. Const. art. I, § 3, cl. 1. This corroboration requirement offsets a definition of treason that is both overbroad and ambiguous: as stated by the same constitutional provision, ‘Treason against the United States shall consist . . . [inter alia] in adhering to their Enemies, giving them Aid and Comfort’. U.S. Const. art. I, § 3, cl. 1. See also 18 U.S.C.A. § 2381 (2004) (‘Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States’).

⁷⁵ See § 22.011 of the Texas Penal Code.

sexual assault.⁷⁶ This era ended, and hence the abolition of the corroboration requirement. Carmell had no vested interest in the continuation of this era because it did not subject him to any trade-off (such as overenforcement). *Carmell v Texas* was a wrong decision.

C. What Does and Does not Belong to Evidence Law?

Arguably, execution of the best evidence principle and allocation of the risk of error do not fully define evidence law. Evidence law operates in yet another domain that accommodates rules and doctrines unrelated to the best evidence principle and allocation of the risk of error. These rules and doctrines are driven by concerns altogether extraneous to fact-finding. They determine the outcomes of the clashes between fact-finding and other goals and values that the law upholds and promotes. Resolution of such clashes often results in suppressing fact-finding for the sake of other goals and values. Anglo-American legal systems prefer ignorance to fact-finding when the latter: entails revelation of state secrets or other confidential information;⁷⁷ infringes privacy;⁷⁸ disrupts marital harmony;⁷⁹ forces criminal defendants and suspects into the choice between contempt, perjury, and self-incrimination;⁸⁰ discourages potential producers of accidents from taking precautions that might signal an admission of fault;⁸¹ chills peer review and other critical evaluation of professionals;⁸² creates a disincentive for benevolent actions interpretable as acknowledgement of responsibility;⁸³ destabilizes contractual relationships by

⁷⁶ This unflattering portrayal derives from simple facts. Traditionally, the jury's power to convict the accused on the testimony of a single witness extended to virtually all crimes, except rape and sexual assault; the corroboration requirement never applied universally. See Roberts and Zuckerman, above note 61, at p. 475 (explaining that 'with the benefit of hindsight, it seems more likely that the complainant corroboration warning reflected sexist stereotyping of—predominantly, female—sexual assault complainants, rather than well-founded assessments of complainants' testimonial unreliability); Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault (2004) 84 B. U. L. Rev. 945, 977–86 (prompt-complaint, corroboration, and caution requirements in rape trials are predominantly misogynistic and do not deter shrewd liars).

⁷⁷ See McCormick, *On Evidence* Vol. 1 (4th edn., 1992), pp. 268–72.

⁷⁸ *Ibid.*, at p. 269. ⁷⁹ *Ibid.* ⁸⁰ *Ibid.*, at pp. 430–5.

⁸¹ See Federal Rule of Evidence 407; *Flaminio v Honda Motor Co.*, 733 F.2d 463 (7th Cir. 1984) (Posner, J.).

⁸² See, e.g., Alissa M. Bassler, Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege (2003) 39 Idaho L. Rev. 689.

⁸³ Consider Federal Rule of Evidence 409: 'Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.'

allowing testimony to substitute or undermine documented agreements;⁸⁴ inhibits settlement negotiations and plea-bargain discussions;⁸⁵ and these are just representative examples.

The exclusionary rule is another familiar example of such preferences. This rule suppresses confessions and other probative evidence that incriminates the defendant when the police obtain such evidence through violation of one of the defendant's fundamental rights.⁸⁶ These rights typically include a person's entitlements to physical integrity and to privacy, the right to remain silent, the right to counsel, and the more general entitlement against coercive interrogation. The exclusionary rule aims at promoting a number of socially important objectives, all extraneous to fact-finding. First and foremost, these objectives include provision of meaningful legal remedies to the persons wronged by the police,⁸⁷ as well as prevention of police misconduct through incentives that discourage the police from breaking the law.⁸⁸ Other objectives that the exclusionary rule promotes are the integrity of the criminal justice system and the acceptability of criminal verdicts. The exclusionary rule promotes these objectives by not allowing criminal convictions to rest upon illegally obtained evidence. The ideology animating this approach justifies the workings of the criminal justice machinery in so far as it enforces criminal law within the bounds of the legal. Legality cannot be reinstated through illegality.⁸⁹

Another mechanism that promotes objectives extraneous to fact-finding is mandatory inferences. This mechanism typically assumes the form of legal presumptions. An example is a legal rule that conclusively presumes any child below the age of seven to be incapable of committing felonies.⁹⁰ Phrased in evidential terms, this presumption is not truly evidential. It establishes a principle of substantive criminal law that exempts minors below the age of seven from criminal liability for felonies.⁹¹ This presumption relates to fact-finding only as a trumping device. It does not allow the prosecution to introduce evidence demonstrating that a particular child—who was below the age of seven at the time that he or she committed the alleged felony—perpetrated that offence. Another example is the 'birth within wedlock' presumption that

⁸⁴ See E. Allan Farnsworth, *Contracts* (3rd edn., 1999), pp. 363–7, 427–30 (discussing statutes of frauds, the parol evidence rule and their underlying rationales).

⁸⁵ See Federal Rules of Evidence 408 and 410 (evidence about settlement and plea-bargain negotiations generally inadmissible).

⁸⁶ See McCormick Vol. 1, above note 77, at pp. 673–8.

⁸⁷ *Ibid.*, at pp. 677–8. See also Andrew Ashworth, *Excluding Evidence as Protecting Rights* [1977] *Crim. L. Rev.* 723.

⁸⁸ See McCormick Vol. 1, above note 77, at pp. 674–5.

⁸⁹ *Ibid.*, at pp. 676–7. For a broader layout of the legitimacy rationale, as controlling criminal evidence in general, see Ian Dennis, *Reconstructing the Law of Criminal Evidence* [1989] *Current Legal Problems* 21.

⁹⁰ See McCormick, *On Evidence* Vol. 2 (4th edn., 1992), p. 451.

⁹¹ *Ibid.*

extends to a child born to a mother living with her husband. This presumption deems any such child to be the child of the marriage unless the husband or the wife comes forward with counter-proof.⁹² As Justice Scalia explained, this presumption is a substantive rule of family law that protects the stability of the family—and, more contestably, the well-being of the child—at the expense of accuracy in fact-finding.⁹³ Finally, consider the employment discrimination presumption that applies in the United States in Title VII ‘mixed-motive’ cases. In such cases, both legitimate and discriminatory motives explain the employer’s decision against the employee. Because the resulting indeterminacy makes it practically impossible for the employee to establish her or his employer’s discriminatory animus, the discrimination presumption tilts the scales in her or his favour in order to fulfil the egalitarian promise of Title VII.⁹⁴ Accuracy in adjudicative fact-finding is not an objective of this presumption. Indeed, when the discrimination and the non-discrimination scenarios are equally likely, there is no *evidential reason* for preferring the former scenario over the latter. There is, however, a non-evidential reason for according preference to the discrimination scenario. Deciding indeterminate cases in this way effectively promotes the egalitarian objectives of Title VII.

Such rules and doctrines do not belong to the law of evidence. Their design and operation are evidence-related, but their essence is not evidential. Their affiliation to evidence law exhibits contingent instrumentality, rather than immutable bond. Underlying any such rule and doctrine is the treatment of its evidence-related mechanism as (arguably) the best means for attaining the ends that are chosen to prevail over accuracy in fact-finding. As the foregoing examples reveal, these ends include protection of civil and other individual rights, sustainment of moral values and political virtues, and a general pursuit of social welfare. The strength of the instrumental linkage between any such end and the underlying evidence-related mechanism is always contingent upon the comparative advantage of that mechanism over other means for attaining the end. Thus, in settings in which suppression of evidence functions as an inducement of some socially beneficial conduct, say, safety improvement, the evidence-suppressing mechanism can be substituted with direct payoffs, both positive and negative.

This competition is inevitable. Virtually any objective that the legal system can accomplish through suppression of evidence can also be attained by introducing the appropriate downward or upward adjustment into the relevant penalty or remuneration. A stick and a carrot are two equally functional sides of the same economic coin. For example, a manufacturer’s decision not to

⁹² *Michael H. v Gerald D.*, 491 U.S. 110 (1989).

⁹³ *Ibid.*, at 119–21; 124–32.

⁹⁴ *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989).

improve the safety of its products may constitute a ground for raising the level of its compensation duty above and beyond the actual damages. A substantive law provision to this effect would create an incentive for manufacturers to improve the safety of their products. Under this regime, evidence demonstrating that the defendant-manufacturer introduced new safety measures after the occurrence of the litigated accident would not just be admissible. Manufacturers would be eager to generate and present it in courts.⁹⁵ There would no longer be a need to exclude such evidence—as the law presently does⁹⁶—in order not to discourage manufacturers from introducing safety improvements.

The existing evidential privilege that functions as a carrot can be replaced with a liability enhancement that would function as a stick. To be sure, such a replacement does not always work to the benefit of society. The heightened liability regime would force manufacturers to demand higher prices for their products. Consumers may ultimately succumb to this demand. In some cases, the new legal regime would drive manufacturers out of business, yet another effect that might ultimately prove detrimental to society. Furthermore, heightened liability induces more claimants to file lawsuits, which increases both the litigation expenses and the number of unmeritorious lawsuits. The issue consequently reduces to the choice between two types of legal mechanisms, of which one is evidence-related and the other (that of direct pay-offs) is not. Such choices often derive from utilitarianism. In other cases, a rights-based morality takes the lead. In the remaining cases, the lawmaker opts for pragmatic solutions accommodating both utility and individual rights.

The exclusionary rule qualifies my observation about the plausibility of both evidence-suppressing and direct-pay-off mechanisms. This rule suppresses evidence obtained by the police through violation of constitutional or other rights that belong to criminal defendants and suspects. In the domain over which this rule exercises control, liability enhancements (specifically, criminal and disciplinary penalties, as well as compensatory and punitive payments under the law of torts) can hardly compete with the suppression of evidence as an instrument for deterring the police (and other law-enforcement agencies). A liability enhancement that places police officers under the right level of deterrence should, *ex hypothesi*, dissuade them from breaking the law in furthering their investigations. In this scenario, police officers never obtain evidence using unconstitutional and other illegal means. The exclusionary rule, therefore, is instrumentally superior to the alternative methods of deterrence. This point is quite straightforward. In the right course of things—that is, under the scenario in which police officers are adequately deterred and do

⁹⁵ This mechanism aligns with Chris Sanchirico's direct-incentive approach. See note 4 above.

⁹⁶ See Federal Rule of Evidence 407.

not break the law—evidence that the exclusionary rule currently suppresses does not come into existence.⁹⁷ The loss of such evidence under the exclusionary rule is, therefore, illusory rather than real. This loss cannot properly be counted as the rule's social cost—a point that underscores the advantage of the exclusionary rule over its disciplinary, criminal, and tort alternatives. Because each of these alternatives requires a separate proceeding mechanism, its administration would also be costlier than that of the exclusionary rule.

This feature is not present in other rules that suppress probative evidence in order to attain objectives extraneous to fact-finding. The exclusionary rule and other evidence-suppressing rules to which my present discussion refers are, however, still similar in one crucial respect. None of those rules facilitates fact-finding or allocates the risk of error. None of them consequently qualifies as evidential.

Sometimes, the forces of supply and demand that set remuneration for a socially desirable activity can secure its endurance even in the absence of the evidence-suppressing rule. Candid peer review, for example, is not likely to shrink in the absence of peer-review privileges. Instead, professional reviewers whose opinions are essential will both demand and recover larger payments for their work. Their remuneration will compensate them not only for their professional efforts, but also for the potentially unpleasant revelation of their identities and opinions. The issue transforms into a comparison between two types of social cost: the cost that society bears by paying reviewers greater remuneration and the cost incurred by suppressing peer-review evidence and by reducing the accuracy of court verdicts. The same argument applies to the settlement negotiations privilege. To the extent that both parties to such negotiations are interested in the privilege, they can create it in a separate agreement. The general contract law, under which such agreements are enforceable,⁹⁸ needs only one fortification. The law should protect such 'off-the-record' agreements against the demands for disclosure that come from third parties.⁹⁹ Apart from this provision, there is no need for a special evidential privilege that extends to settlement negotiations. In this domain, unregulated market forces perform at least as well as the privilege.

A plausible response to this argument comes from the standard default-rule theory of contracts.¹⁰⁰ Under this theory, default rules by which the law

⁹⁷ See Richard A. Posner, *An Economic Approach to the Law of Evidence* (1999) 51 *Stan. L. Rev.* 1477, 1533.

⁹⁸ See John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System* (2001) 80 *Neb. L. Rev.* 159.

⁹⁹ As judicially provided in *Rush & Tompkins Ltd v GLC* [1988] 3 All ER 737 (HL).

¹⁰⁰ See Alan Schwartz, *Incomplete Contracts*, in *The New Palgrave Dictionary of Economics and the Law* Vol. 2 (Peter Newman ed., 1998), pp. 277, 279–80.

supplements private transactions reduce transaction costs. Because settlement negotiators are typically willing to enter into an 'off-the-record' agreement, the law eliminates the transaction costs that such agreements incur by introducing a general default rule in the form of a settlement negotiation privilege. This strategy, however, imposes transaction costs upon parties willing to negotiate their settlement without the privilege. The unprivileged-negotiations possibility might attract negotiators willing to base their negotiations upon credible signalling. The issue once again boils down to the choice between two social expenditures. The existing privilege would only be justified if settlement negotiators were typically to prefer an 'off-the-record' environment to that of credible signalling. However, if an unprivileged negotiation environment reflects the negotiators' typical preference, the law should then opt for a default rule that denies the privilege. This point underscores both the instrumental contingency of the settlement negotiations privilege and its affiliation to contract law. The privilege's domicile in the evidence law domain is merely formal. This formality must not obscure the understanding of the privilege.

Arguably, many evidential privileges escape this instrumental analysis. Among these privileges are the privilege against self-incrimination and several other privileges that protect secrecy and secure confidential communications between clients and professionals. The relationship between these privileges and fact-finding is that of a head-on collision. Under any such privilege, forced revelation of the information that the privilege protects is generally perceived as a harm in itself. This vision of direct as opposed to consequential harm leaves no room for incentive-based alternatives to the suppression of evidence. If forced revelation of some privileged information were just to distort the individuals' incentives for acting in some socially beneficial way, these alternatives would then have been firmly on the agenda. However, because revelation of such information constitutes a harm in itself, these alternatives have no scope for application.

For methodological reasons that will become apparent, I assume that such privileges are grounded in sound rationales. If so, the intrinsic nature of the revelational harm that such privileges avert expels them from the evidence law domain. To the extent that a revelational harm is intrinsic, its occurrence cannot plausibly depend on the setting within which it was inflicted. Such harm can be inflicted both with and without connection to adjudicative fact-finding. The rule averting this harm within the framework of adjudicative fact-finding (typically labelled as 'privilege') must, therefore, be understood as instantiating a more general set of rules that avert the same harm in other settings. This understanding would affiliate the rule to the privacy law, the attorney services law, the state secrets law, and so forth. This understanding would also help evidence law to function as *law of evidence*.

I conclude this section by registering my reservations about the normative validity of the intrinsic-revelational-harm rationale for the privileges. Consider a criminal case in which keeping evidence secret—say, on state security grounds—exposes the defendant to a serious risk of wrongful conviction. Why not consider wrongful conviction and its consequences as intrinsically harmful as well? Consider yet another criminal case in which honouring the defendant's self-incrimination privilege and setting him or her free would seriously dilute deterrence. More innocent victims than previously would consequently become exposed to and, inevitably, suffer from crime. Why not consider their entitlement to protection from crime as intrinsic, too? My point is simple. In law, balancing and trade-offs are unavoidable. This anti-deontological point brings me to the final section of this chapter.

D. Free-Standing Evidential Rights?

According to Tribe,

Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one. . . . For when the government acts in a way that singles out identifiable individuals—in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*.¹⁰¹

This view is held by other scholars, who apply it to additional procedural and evidential domains.¹⁰² Arguably, a criminal defendant's right to cross-examine prosecution witnesses and the consequent exclusion of hearsay statements should also be perceived as belonging to the family of participation rights that are valuable *per se*. Hearsay evidence is not inadmissible because of the risk of error that its admission would produce. It is inadmissible because forcing a person into a criminal trial without providing her or him a fair opportunity to confront adverse witnesses is devoid of political warrant. Findings made upon testimonial accounts untested by cross-examination may well be accurate. Their accuracy is not the issue. The issue is whether the community in which criminal trials are conducted without full participation of the accused is attractive in moral and political terms.¹⁰³

¹⁰¹ Laurence Tribe, *American Constitutional Law* (2nd edn., 1988), pp. 666–7.

¹⁰² Robert Summers, *Evaluating and Improving Legal Process—A Plea for 'Process Values'* (1974) 60 *Cornell L. Rev.* 1; Michael D. Bayles, *Principles for Legal Procedure* (1986) 5 *Law & Phil.* 33.

¹⁰³ See Stein, above note 3, at 292–3.

Based on this deontological theory, one may also justify the law's ban on incriminating inferences that emanate from the defendant's past crimes. By treating personality and action as causally interrelated, such inferences undermine the anti-deterministic postulate of free agency, epitomized by the famous precept 'Judge the act, not the actor'. Free agency indeed serves as a pillar of the liberal theory of criminal liability.¹⁰⁴ From this perspective, using the defendant's personality as incriminating evidence undermines his or her autonomy and degrades his or her individuality.¹⁰⁵

The idea of free-standing rights with respect to evidence and procedures is quite compelling. I am, however, sceptical about this idea for a number of reasons.¹⁰⁶ My first reason focuses on the costs of fact-finding procedures. These costs are far from negligible. In many cases, they might also be expended without producing any offsetting benefits. The resulting disutility might impel the lawmaker to consider a replacement for the costly procedure. To properly examine this possibility, the lawmaker has to conduct a cost-benefit analysis that compares the new procedure with the existing procedure. This analysis compares the new amount aggregating the cost of errors and error-avoidance expenses with the old amount. Based on this analysis, the lawmaker opts for the lowest possible amount. This analysis requires the lawmaker to evaluate the litigants' substantive entitlements.

The theory of free-standing procedural rights rejects such calculations on deontological grounds. This rejection, however, creates an insurmountable problem. Resources that society can expend on adjudication are always limited. There are not enough resources for employing the best fact-finding procedures in every legal dispute. Any procedural theory therefore needs to devise its criteria for allocating these resources one way or another. To coin a phrase: *there can be no free-standing procedural rights because procedural rights cannot stand for free.*

My second reason analogizes litigation to a zero-sum game. Court hearings and other procedures postpone the enforcement of the litigated substantive rights. Such postponements are obviously detrimental to the right-holders. Justice delayed is justice denied. A party's right to be heard ought to be understood as including the right to subject the opponent to a temporary deprivation of her or his substantive right.¹⁰⁷ This temporary deprivation is inevitable. This deprivation, however, could hardly be justified if the right to be heard were to be perceived as deontological. Assume, for the sake of

¹⁰⁴ See H. L. A. Hart, *Punishment and Responsibility* (1968), pp. 46–9.

¹⁰⁵ See Stein, above note 3, at 293.

¹⁰⁶ See Stein, above note 36, at 133–5.

¹⁰⁷ For an illuminating discussion of this problem see Adrian A. S. Zuckerman, *Quality and Economy in Civil Procedure—The Case for Commuting Correct Judgments for Timely Judgments* (1994) 14 *Oxford J.L. Stud.* 353.

argument, that the right to be heard is unrelated to the risk of error in fact-finding and is also completely divorced from the underlying substantive right. If so, why prefer the hearing interest of one party over the non-delayed-justice interest of his or her opponent? If a person whose rights are adjudicated without a hearing is treated, in Tribe's words, *as a thing* rather than as a person, then what about a person temporarily deprived of his or her rights by a hearing provided to his or her adversary?¹⁰⁸ Would that person be treated as a thing as well?

There is also a logical reason for being sceptical about free-standing procedural and evidential rights. Assume, counterfactually, that the epistemic fallibility problem does not exist and that fact-finders are infallible. Would there be a room in such a world for procedural and evidential rights that are valuable intrinsically, rather than instrumentally? This question merits a negative answer, unless, of course, one alludes to rituals or to an exotic recourse to procedural and evidential rights as an indispensable source of psychological satisfactions.¹⁰⁹ If so, the theory of free-standing rights in the domain of evidence and procedure would fail completely. The right to be heard, and, indeed, the entire package of trial participation rights, are rights that ultimately derive from epistemic fallibility, not from moral virtuousness.

¹⁰⁸ As suggested by Alexander, above note 27, the justification for procedures temporarily depriving a person of his or her substantive right can be found only in treating the substantive rights as *ab initio* qualified by procedurally necessitated delays. Together with other procedural requirements that derive from the societal preferences with regard to risks and resources, delays that society deems procedurally necessary would attach to many substantive rights, but certainly not to all of them.

¹⁰⁹ See, e.g., David P. Leonard, *The Use of Character to Prove Conduct* (1986–7) 58 U. Colorado L. Rev. 1 (offering a catharsis-based explanation for the right to adduce evidence highlighting one's character).