ESSAY

TRUTH, REASON, JUSTICE, AND EVIDENCE LAW

Talia Fisher†

This Essay addresses the most fundamental jurisprudential question underlying the institution of evidence law: it explores the justifications for subjecting legal fact-finding to the regulation of evidence rules. This issue has been at the center of evidence law scholarship since the days of Bentham's Rationale of Judicial Evidence, which advocated a naturalistic approach to legal fact-finding and launched an attack against exclusionary rules. Bentham's approach came to be known as "Free Proof" and its followers included well-known evidence law scholars, such as Wigmore, Thayer and Cross. To this day, free proof remains both a normative ideal and a practical reality, enjoying support in both academic and judicial circles. American trial judges routinely deviate from rules of evidence, when they sit without a jury, and evidence doctrine is continuously gravitating away from rules of admissibility. Against the background of the gradual vanishing of the institution of evidence law from American courtrooms, this Essay will make the case for the regulation of legal fact-finding and against free proof. In so doing it will also unravel the different theoretical perspectives through which the institution of evidence law is viewed and provide a mapping of current evidence law scholarship.

INTRODUCTION

Evidence law is a hallmark of the Anglo-American tradition.[1] It is also a relatively recent phenomenon in this

† Anny and Paul Yanowicz Professor of Human Rights, Tel Aviv University Faculty of Law and visiting fellow at Harvard Law School's Program on Behavioral Economics and Public Policy (2023). I'd like to dedicate this essay to the memory of the beloved Yonatan (Shafik) Richter, who was killed in a Hammas terror attack against a nature party on Oct. 7th, 2023. Shafik, an only son and father of two, volunteered at the party on behalf of the "Good People" organization. Indeed, he was one of the best people there are. May his memory be blessed. In writing this essay I enjoyed the academic support of Prof. Oren Bar Gill from Harvard Law school, for which I'm deeply indebted.

1 *See* Mirjan Damaska, *Free Proof and Its Detractors*, 43 AM. J. COMPAR. L.

legal landscape: the law of evidence emerged as a distinct legal field and as a unitary body of law only in the 18th century.[2] Soon after, it became the subject of debate. In his influential book, *Rationale of Judicial Evidence*, Jeremy Bentham launched an attack against exclusionary rules and against the regulation of legal fact-finding through rules of evidence, arguing that "[evidence law is] incompetent on every occasion to the discovery of truth, so incompetent therefore . . . to the purposes of justice."[3] Bentham advocated a naturalistic approach to legal fact-finding, one that mirrors the way in which people tend to reach conclusions about factual matters in their daily lives. His "Natural Method" was premised upon assessment of *all* relevant evidence by way of resort to life experience and practical wisdom.[4] Bentham's approach came to be known as "Free Proof" and its followers included well-known evidence law scholars, such as Wigmore, Thayer and Cross.[5] To this day, free proof remains both a normative ideal and a practical reality, with an "increasing academic and judicial momentum" in its favor.[6] American trial judges routinely deviate from rules of evidence when they sit without a jury.[7] The legal doctrine itself is continuously gravitating away from rules of admissibility, leaving behind only idiosyncratic exceptions to free proof.[8] This Essay is dedicated to a normative evaluation of these trends and to a mapping of the jurisprudential underpinnings of the institution of evidence law. Against the background of the gradual vanishing of the institution of evidence law from American courtrooms, it

343, 348 (1995); *See also* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 829 (1985).

2 Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 168 (2006).

3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 8 (Garland Pub. 1978) (1872).

4 *See* JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALIZATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 30 (2012).

5 ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 108 (2005). In 1972, during a stormy debate regarding the reform of evidence law in criminal trials, Cross is claimed to have remarked that he was working for the day when evidence law was totally abolished. *See* WILLIAM TWINING, RETHINKING EVIDENCE 1 (2006); *see also* RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE 24 (1992).

6 Schauer, *supra* note 2, at 202.

7 *Id.* at 165.

8 Ofer Malcai & Ronit Levin-Shnur, *When Procedure Takes Priority: A Theoretical Evaluation of the Contemporary Trends in Criminal Procedure and Evidence Law*, 30 CAN. J.L. & JURIS. 187, 189 (2017); Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J. L. & JURIS. 279, 285 (1996); PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 700 (2010).

will present the case against free proof, or more precisely, the various *sets* of arguments which can be formulated against the free proof ideal.

By systematically surveying the justifications underlying the legal institution of evidence law, this Essay will reveal the different theoretical lenses through which the institution of evidence law is viewed in the literature. In other words, alongside a discussion of the normative standards, by which free proof can be assessed, the Essay will provide a broad view of evidence law scholarship. This may be particularly important, as many jurists mistakenly believe evidence law to be a technical, dry, and value-neutral enterprise, premised upon weak theoretical foundations. Nothing can be farther from the truth: the theory of evidence law is rich and multifaceted. It is premised on a variety of fields of knowledge, ranging from economics to psychology.[9] Precisely because of the complexity and variety within the jurisprudence of evidence law, there is a need for a methodical mapping of this kind and for the translation of theoretical underpinnings into the framework of legal theory and real-world policy.[10] This Essay is a step in this direction and will proceed as follows.

Part I will begin with what has been termed the "Traditional"[11] approach to evidence law, which revolves around the epistemic function of trial and the institutions of evidence. Part II will juxtapose the traditional approach with the first generation of the economic approach to evidence law, centered around the Cost Minimization Model and aimed at *optimal* accuracy rather than *maximal* accuracy of legal fact-finding. The discussion will then turn to the second generation of economic analysis of evidence law and shift from the role of evidence law in securing *efficient administration of*

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9 The focus of this Essay is the theory of evidence law and the regulation of judicial fact-finding, rather than the theory of the process of proof more generally. For further discussion of the latter and its intersection with evidence law, see Richard D. Friedman, *"E" is for Eclectic: Multiple Perspectives on Evidence*, 87 VA. L. REV. 2029, 2038 (2001); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 46 B. C. L. REV. 949, 1017 (2006); Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 553 (2013).

10 According to Pardo, the practical significance of evidence law theory stems not only from the role of trials in the vindication of substantive rights, but also extends beyond the courtroom: "The evidentiary rules and standards also determine important issues such as who gets to trial in the first place, which verdicts will be allowed to stand, and which convictions will be overturned." Pardo, *supra* note 9, at 554.

11 Stein, *supra* note 5, at xi.

truth and justice (ex post) to the role of evidence law in creating incentives for *efficient primary behavior* (ex ante). Part III will challenge the rationality assumption, underlying both generations of economic analysis of evidence law. It will survey the behavioral approach to evidence law, rooted in the psychological literature, and focused on securing rational and reason-based judicial fact-finding. Part IV will desert the consequentialist perspective, underlying the institution of evidence law, in favor of deontological considerations of fairness and due process. The final section will summarize and conclude the discussion.

To accentuate the differences between the abovementioned theoretical approaches to evidence law, the arguments will be illustrated using an identical and concrete example—that of the character evidence rule, which proscribes (under Federal Rule of Evidence 404) the use of evidence of past misconduct, of disposition towards misconduct, or of a reputation for misconduct during the conviction phase of the criminal trial.[12] This rule will serve as a litmus test for each of the theoretical approaches to evidence law: after the general contours of each of the evidence law theories will be surveyed, the discussion will turn to exemplify the manner in which they unfold in the specific context of bad character evidence, allowing for a comparative outlook regarding their differential treatment of evidence law more generally.[13]

I
THE TRADITIONAL APPROACH TO EVIDENCE LAW: THE SEARCH FOR TRUTH

The starting point for any theory of evidence law is the search for truth and fact-finding accuracy.[14] In the words of Michael Pardo, "whatever its other features, the *nature* of evidence theory includes this epistemological core."[15] This is a recurring theme in evidence law scholarship and among nearly

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12 For further discussion of the character rule, see Morris K. Udall, *Character Proof in the Law of Evidence—a Summary*,18 U. CIN. L. REV. 283 (1949); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

13 In England and Wales, the character evidence rule underwent fundamental reform, reflecting yet another instance of the shift toward free proof in the Anglo-American world. *See* Criminal Justice Act of 2003, c.44 § 101 (Eng.).

14 Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 567.

15 Pardo, *supra* note 9.

all evidence law theorists ("from Gilbert to Cross"[16]). There may not be complete consensus among them on how important it is that courts unravel the truth, as compared to other social goals.[17] Nor may there be full agreement as to the appropriate allocation of the risk of error between the litigating parties.[18] But it is unequivocally agreed upon, that whatever the functions of the law, whatever good it can achieve in the world, its ability to do so depends on truth revelation and fact-finding accuracy at trial.[19] Unraveling of the truth is essential for vindication of the rights, duties, and obligations emanating from substantive law.[20] And parties seem entitled to courts using procedures that will render mistakes that infringe on their rights sufficiently improbable.[21] The rectitude of factual decision-making is thus viewed as the pivotal task of the adjudicative process[22] and thereby of the underlying institutions of evidence law.[23] And while the search for truth and accuracy serves as the reference point for *every* theory of evidence law out there, it applies, *all the more forcefully*, with respect to the traditional approach to evidence law.[24] This

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16 William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 272 (1984); Dale A. Nance, *The Best Evidence Principle*, 72 IOWA L. REV. 227, 232–33, 236 (1988).

17 Twining, *supra* note 16, at 272; Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 311 (1994).

18 *See* George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L. J. 880, 888 (1968).

19 Funk v. United States, 290 U.S. 371, 381 (1933). According to Twining, "the pursuit of truth in adjudication must at times give way to other values and purposes, such as the preservation of state security or of family confidences; disagreements may arise as to what priority to give to rectitude of decision as a social value and to the nature and scope of certain competing values . . . [b]ut the end of the enterprise is clear: the establishment of truth." Twining, *supra* note 16.

20 Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 L. & PHIL. 321, 321–22 (2005). Not all legal disputes are over factual matters. But, even when the facts are not in dispute, they are an integral part of the justification of the court's ruling. *See* HOCK LAI HO, A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH 2 (2008).

21 Other considerations, too, may be relevant to determining the right procedures. *See* Robert G. Bone, *The Role of the Judge in the Twenty-First Century: Securing the Normative Foundations of Litigation Reform*, 86 BOS. U. L. REV. 1155, 1162 (2008).

22 Dale A. Nance, *The Best Evidence Principle*, 72 IOWA L. REV. 227, 232 (1988) ("The reasonably accurate determination of disputed factual issues is . . . the pivotal task to be performed at trial."); Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 250 (1990) ("Verdict accuracy is one of the principal goals of the trial process.").

23 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 1019 (1983).

24 *Id.*

approach essentially reduces evidence law to "nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth."[25]

The centrality of the epistemic function of trial serves as a common ground both for those who endorse evidence law, under the traditional justification, as well as for those free proof theorists, who wish to abolish it.[26] The point of departure, between the two stances to evidence law, is set in conflicting *empirical* presumptions: according to proponents of the free proof model, opening the courthouse doors to a wider variety of evidence can be expected to improve the court's truth-finding capacity. This is based on the empirical assumption that "more evidence" amounts to "a greater degree of truth." In contrast, according to the traditional approach to evidence law, more evidence will not necessarily result in greater fact-finding accuracy. This is due, in part, to disparities in access to information, resources, and power, as well as to the impact of the framing and presentation of evidence on the manner in which facts are determined.[27] The fundamental assumption of the traditional approach to evidence law is that the way to determine the truth is not necessarily by bringing all relevant information and available evidence before the court, but rather by screening out problematic information and evidence that bear a significant and systematic potential for inaccuracy. The traditional approach thus justifies the exclusion of certain types of evidence and the regulation of the legal fact-finding process by evidence rules based on their contribution to accuracy. Of course, evidence law (like law more generally) operates in a categorical manner and is thereby susceptible to problems of over-inclusion and under-inclusion when it comes to its application to particular cases. But, here too, the problems associated with over and under inclusion do not necessarily render the evidentiary category, in its entirety, undesirable.

How does all this translate to the example of bad-character evidence? The traditional approach would justify the exclusion of evidence of character on the grounds that its probative value is outweighed by its prejudicial effect, and based on its negative contribution to the overall level of accuracy in

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25 *Thompson v. R.* Thompson v. R., [1918] AC 221, 226.

26 STEIN, *supra* note 5, at 115.

27 Gary Edmond & Andrew Roberts, *Procedural Fairness, the Criminal Trial and Forensic Science and Medicine*, 33 SYD. L. REV. 359, 365 (2011).

criminal trials.[28] Two types of empirical claims can (and often are) made in this regard. One challenges the predictive value of past behavior.[29] Another addresses the prejudicial potential entailed in this type of evidence and the tendency for over-valuation of the probative weight of recidivism by judges and jurors.[30] Both types of arguments are analytically related to the traditional justification for evidentiary laws, in that their roots are set in the negative value (in terms of accuracy) associated with the admission of evidence of character.[31] Both can be subjected to criticism—whether in the form of support for the predictive value of character in the psychological

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28 Mike Redmayne, *The Structure of Evidence Law*, 26 OXFORD J. LEGAL STUD. 805, 806 (2006).

29 Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 351 (1979); HUGH HARTSHORNE & MARK A. MAY, STUDIES IN DECEIT 4 (1928).

30 HO, *supra* note 20, at 289 ("Evidence of previous misconduct is . . . potentially prejudicial. This is taken to mean that the evidence is capable of leading the fact-finder away from the correct factual conclusion. Where the prejudicial effect of the evidence outweighs its probative force, admitting the evidence is more likely to obstruct than aid the discovery of truth. In such a case, it is justifiable to exclude the evidence for that is the course of action most conducive to the desired outcome."). For a broader discussion of reasons for the over-valuing of evidentiary information, particularly in the context of juries, see RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS, AND CASES 216 (2nd ed., 1982). For a wide-ranging survey of positions in this controversy, see Mike Redmayne, *The Relevance of Bad Character*, 61 CAMBRIDGE L. J. 684, 688 (2002).

31 Of course, both grounds can be subjected to critique. There are those who assign a probative value to information regarding previous behavior and present psychological and empirical sources for the tendency toward recidivism. Others attack the assumptions regarding the over-valuing of evidence by professional judges and even jurors. *See* Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 506, 533 (1991) ("[C]urrent psychological literature strongly supports the commonsense intuition that people act predictably according to their characters[.] . . . [T]he notion that jurors overvalue the probativeness of character or make errors because of their inability to make accurate assessments of character gains little reinforcement from contemporary work in the social sciences."). Finally, there are those who criticize the normative conclusion that supporters of the bad-character rule derive from the tendency to over-value evidence and argue that the remedy for over-valuing evidence should be a requirement for additional evidence, as opposed to the general disqualification of the evidence. *See* ADRIAN A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 213 (1989). In any case, the normative debate over the desirability of this rule is beyond the scope of this Essay. The purpose of the discussion is not to address the question of whether or not the bad-character rule is a good thing, normatively speaking, but rather to highlight the contours that characterize the justifications that can be offered for this rule from different theoretical perspectives, assuming that it is normatively desirable. This is a comparative process that aims to demonstrate the differences between the normative justifications. The bad-character rule is being used here for illustrative purposes only and has no independent significance in this context.

literature[32] or in the form of rejection of the empirical basis for over-valuation.[33] Other criticisms are levelled against the remedy itself: namely, rejection of the mechanism of excluding bad character evidence in favor of utilizing sufficiency requirements, aimed at the introduction of additional supporting evidence.[34] I will not delve into these issues, as the debate over the normative desirability of the evidence of character rule is beyond the scope of this Essay. The purpose of addressing the example of bad character is not to determine whether or not such evidence ought to be admitted during the conviction phase of trial and under what circumstances. Rather, the thought experiment conducted here assumes that the evidence character rule is indeed justified. What is of interest is the *typology of the justification itself*—its essential characteristics and relation to other types of justification, underlying alternative approaches to evidence law, which will be addressed in what follows. Resorting to the example of the evidence of character rule is a comparative step, taken in order to accentuate structural differences between types of justification, without bearing independent significance with respect to the debate over exclusion of such evidence from the conviction phase of trial.

To recap the discussion hereto, under the traditional approach, evidence law and the regulation of legal fact-finding, by rules of evidence, are justified because they promote truth seeking capacities and enhance the overall rate of accuracy in the judicial system. They are warranted in situations in which free proof fails in this respect, that is, in situations in which the inclusion of particular types of evidence can be expected to lead to a higher incidence of error in the system. From this point of view, the justification for the evidence of character rule would be rooted in the fact that its prejudicial potential outweighs its probative potential, and in the negative impact, in terms of accuracy, of evidence of past misconduct during the conviction phase of trial.[35]

II
The Economic Approach to Evidentiary Law: Efficient Administration of Truth

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32 *See* Davies, *supra* note 31.

33 *Id.* ("[T]he notion that jurors overvalue the probativeness of character or make errors because of their inability to make accurate assessments of character gains little reinforcement from contemporary work in the social sciences.").

34 ADRIAN A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 213 (1989).

35 Redmayne, *supra* note 28.

The traditional approach places exclusive focus on the epistemic functions of trial and evidence law, failing to account for the associated social costs.[36] But, evidence is an economic good, and fact-finding accuracy carries a price tag.[37] For example, expert testimony or the processing of DNA evidence cost money. Other types of evidence involve non-monetary costs, such as privacy infringements or the pain and suffering endured during cross examination.[38] These monetary and non-monetary costs, associated with truth revelation, raise the question of how much to invest in the enterprise of judicial accuracy and who should bear the price.[39] This is where the economic analysis of evidence law, with its insistence on the *efficient* administration of truth, enters the scene. The economic approach differs from the traditional approach in that it is sensitive to the variety of costs involved in the introduction of evidence and the unraveling of the truth.[40] According to the economic approach, the role of evidence law is not limited to the pursuit of truth and does not aim at *maximal* accuracy, but rather extends to the *efficient* administration of truth and strives for an *optimal* level of accuracy in legal fact-finding.

Before delving further into the economic approach to evidence law, a few words about the history of this intellectual movement are in order:[41] Utility considerations have been central to legal fact-finding at least since the days of Jeremy Bentham, the founding father of both utilitarianism and evidence law theory. A direct line can be drawn from

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36 Within the parameters of the traditional approach, one can find partial treatment of such questions, but this is restricted to specific contexts, such as privileges.

37 *See generally* Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L. J. 690 (2012).

38 Dale A. Nance, *The Best Evidence Principle,* 73 IOWA L. REV. 227, 241 n.67 (1988) ("The costs of *evaluation* should not be ignored, though it may be difficult to place a monetary value upon them. Aside from the more obvious and measurable court costs, there is the important expenditure of the cognitive resources of the trier of fact. We are coming to understand how the limitations upon such normal human resources result in decision strategies that seek to optimize the allocation of the trier's mental energies.").

39 STEIN, *supra* note 5, 107–08.

40 The understanding that there are costs that society should not pay for eliciting evidence is not limited to the economic approach, of course. There are deontological reasons to object to the use of torture, for instance. These issues will be addressed in subsequent parts of the discussion.

41 *See* Talia Fisher & Alex Stein, *Evidentiary Law*, inTHE ECONOMIC APPROACH TO LAW 1103 (2012).

Bentham's "Principle of Utility" to the economic analysis,[42] so it seems only natural that the realms of evidence law and judicial fact-finding would harbor this type of reasoning. However, when legal scholarship began to incorporate economic analysis, evidence law and the practice of judicial fact-finding remained very much out of the picture.[43] While a few essays devoted to the economic analysis of legal fact-finding were published in the early 1980s,[44] the writing remained very sporadic and quite limited in scope.[45] Economic analysis of law has, by and large, ignored the field of evidence law for nearly four decades.[46] It was only at the turn of the 20th century that Richard Posner, one of the pioneers of the economic approach to law, published his first comprehensive paper in the field of evidence law,[47] decades after the emergence of similar enterprises in other areas of the law. The lack of scholarship is particularly notable in light of substantial developments in economic analysis of closely related fields of law, such as civil procedure.

One reason why evidence law and judicial fact-finding have proven particularly resistant to economic analysis is rooted in the subject matter of courtroom drama, which often deals with issues and stakes that strike many as non-quantifiable and antithetical to cost-benefit reasoning.[48] Notions of efficiency,

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42 Don Bradford Hardin, Jr., *Why Cost-Benefit Analysis? A Question (And Some Answers) About the Legal Academy*, 59 ALA. L. REV. 1135, 1141 (2008).

43 Symposium: *The Economics of Evidentiary Law: Cost-Benefit Analysis, Unintended Consequences, And Evidentiary Policy: A Critique and A Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*,19 CARDOZO L. REV. 1585, 1588 (1998). *See also* Ron A. Shapira, *The Economics of Evidentiary Law: Economic Analysis of the Law of Evidence: A Caveat*, 19 CARDOZO L. REV. 1607, 1607 (1998); Richard D. Friedman, *The Economics of Evidentiary Law: Economic Analysis of Evidentiary Law: An Underused Tool, an Underplowed Field*, 19 CARDOZO L. REV. 1531, 1531 (1998).

44 *See generally* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309 (1981); Thomas Gibbons & Allan C. Hutchison, *The Practice and Theory of Evidence Law – A Note*, 2 INT'L REV. L. & ECON. 119 (1982). For more recent essays, see Myrna S. Raeder, *The Economics of Evidentiary Law: Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 CARDOZO L. REV. 1585, 1585 (1998).

45 Friedman, *supra* note 43, at 1531; Raeder, *supra* note 44, at 1585.

46 *See* Shapira, *supra* note 43, at 1607; Friedman, *supra* note 43, at 1531.

47 Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999). For a well-known critique of the cost-minimization model and Posner's economic analysis of evidentiary law see generally Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619 (2001).

48 Symposium: *The Economics of Evidentiary Law*, supra note 43, at 1588.

rationality, minimization of cost, and maximization of benefit may seem foreign to the legal realm, commonly associated with questions of moral culpability, fairness, justice, and retribution. The benefits of enhanced precision in the administration of justice or the costs entailed with privacy infringements are often deemed as irreducible to monetary metrics.[49] Evidence law has more to do with fairness and less to do with efficiency.[50]

Another reason for the initial rejection of economic analysis in the context of legal fact-finding was rooted in the tendency to view information and evidence as an exogeneous windfall, either present or non-present after the legal occurrence under debate, and thereby insensitive to costs, incentives and other economic forces. If this were, indeed, the case, the economic approach would seem to have very little to contribute to the analysis of evidence law and judicial fact-finding. But, as stated previously, such a depiction of the nature of evidence and judicial fact-finding is distorted, as the existence of evidence and the finding of truth are a function of the investment of monetary and non-monetary resources by the litigating parties and society at large. The field of evidence law thus raises a host of efficiency and distribution questions, which merit economic analysis. The economic approach to evidence law, which will be addressed in the following sections, emerged against this background. In the spirit of economic analysis, more generally, it is also premised on the assumption of rational maximization of utility under conditions of scarcity by potential and actual agents operating in the adjudicative system and strives for efficiency. In addition to potential and actual agents, it also focuses on legal and evidentiary institutions. And, finally, like economic analysis of other areas of law, the economic approach to evidence law also has both descriptive and prescriptive dimensions. Unlike the economic analysis of other legal fields, the economic approach to evidence law reflects two distinct outlooks: the first generation of economic analysis of evidence law adopts an ex post perspective and focuses on the efficient administration of truth and justice in the judicial system. The second generation

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For a comprehensive account—both descriptive and normative—of why economic analysis and cost benefit analysis are ill-suited for the evidentiary realm, see generally Lempert, *supra* note 47.

49 Richard D. Friedman, *"E" is for Eclectic: Multiple Perspectives on Evidence*, 87 VA. L. REV. 2029, 2038 (2001).

50 Raeder, *supra* note 44, at 1585–86.

adopts an ex ante perspective and focuses on the efficiency of primary behavior (thereby bearing greater similarity to the economic theory of other areas of the law). I shall now turn to the first of the two.

A. Optimal Truth: The Cost-Minimization Model

In his 1999 essay, *An Economic Approach to the Law of Evidence,*[51] Posner suggested to model the introduction of evidence as a tradeoff between the costs of judicial error and the costs of error avoidance: According to Posner's cost minimization model, the optimal tradeoff is one which minimizes the overall sum of these two types of cost.[52] The costs of error avoidance include the total cost of accurate fact-finding within the framework of trial and pre-trial proceedings.[53] The costs of judicial errors include the legal rights and obligations that the judicial system fails to enforce. If false positives (legal rights erroneously granted to the undeserving) and false negatives (legal rights erroneously unenforced with respect to the deserving) are equally costly, a judicial decision-making processes aimed at minimizing the overall number of errors in the system can be expected to produce the lowest sum of error costs. This is often considered to be the case in civil trials where the costs of error in favor of the plaintiff are considered a-priori equal to the costs of error in favor of the defendant.[54] Accordingly, in the civil context, the standard of proof is set at the level of a preponderance of the evidence, which allocates the susceptibility to error equally between the parties and minimizes the overall sum of error (irrespective of its type).[55]

When one type of error is considered costlier than another, minimization of the overall costs of error depends upon allocating the risk of error in a manner, reflective of the disutility ratio between these two types of error. The

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51 Posner, *supra* note 47.

52 In the words of Alex Stein: "[a]djudicative fact-finding implicates two social costs: the cost of accuracy and the cost of errors. The cost of accuracy encompasses the legal system's expenditures on fact-finding procedures that reduce the incidence of error. The cost of errors originates from incorrect factual findings produced by the system . . . [t]he overarching goal of the law of evidence is to achieve the socially optimal tradeoff between these two costs." Alex Stein, *Inefficient Evidence,* 66 ALABAMA L. REV. 423, 430 (2015).

53 Stein, *supra* note 5, at 141.

54 Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27, 34 (1996).

55 *See* Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738, 803 (2012).

paradigmatic example for asymmetries in error costs refers to the criminal trial, where a discrepancy exists between type 1 mistakes of false convictions and type 2 mistakes of false acquittals.[56] As the Blackstone Ratio famously holds "better that ten guilty persons escape, than that one innocent suffer."[57] The beyond-a-reasonable-doubt standard of proof reflects this 10:1 disutility ratio and expresses a social preference for wrongful acquittal over wrongful conviction. It strikes a tradeoff between false convictions and false acquittals that is intended to minimize the overall *cost* of error, though not necessarily the overall *rate* or number of errors.[58]

In this respect, the cost minimization model can be presented as follows: where p denotes the probability of a fact-finding error, and S denotes the stakes of such an error, pS would then stand for the cost of the error (the probability of error weighted by the stakes) and the goal of evidentiary institutions would be to minimize: $C(x) = p(x)S + c(x)$.[59] Under the cost minimization model, the gathering of evidence should continue to the point where the last piece of evidence yields a reduction in costs of error, which is equal to the cost of obtaining it. The legal tools designed to allow realization of this goal include burdens of proof, presumptions of fact, standards of proof, and evidentiary and procedural rules.

Execution of the cost minimization model is contingent upon the ability to overcome motivational and informational failures. The motivational failures are rooted in the fact that the private and social costs and benefits of the unraveling of the truth at trial do not necessarily correspond. While they may often overlap, there are potential misalignments in the utility functions of the litigating parties and that of society at large. The information failures refer to the possession of private information by criminal defendants and civil litigants,

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56 *See* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 25 (1997).

57 WILLIAM BLACKSTONE, COMMENTARIES, at *352 (1769). Numerous variations exist, the main variation being the ratio of n guilty men who ought to be acquitted in order to spare one innocent man. *See* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997). *See also*, Alex Stein, *Constitutional Evidence Law,* 61 VAND. L. REV. 65, 80 (2008) ("Criminal convictions thus require a very high, although numerically unstated, probability of guilt.").

58 Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV 1197, 1207 (2007) ("[B]y decreasing the incidence of false positives (erroneous convictions of the factually innocent), [a 'reasonable doubt'] standard increases the incidence of false negatives (erroneous acquittals and non-prosecutions of the factually guilty.")).

59 Posner, *supra* note 47, at 1484.

concerning facts or issues that are of relevance to the factual outcome of trial. The prospect of asymmetrical information among the parties themselves, and between them and the court, paves way for opportunistic behavior, leading to potential deviations from the determination of truth.[60] The object of evidence law is to address and minimize the abovementioned motivational and informational failures, so as to allow for an accurate and cost-efficient fact-finding process, one that would align with the prescriptions of the cost minimization model. According to Stein, this goal is accommodated through four distinct sets of rules: (1) decision rules, which determine the burdens and standards of proof; (2) process rules, which determine evidence admissibility and define legitimate fact-finding methodologies; (3) credibility rules, which elicit credibility signals from litigants with private information and (4) the evidential damage doctrine, which allocates the risk of error to the cheapest risk avoider.[61]

Posner's cost minimization model can be qualified in another important manner: It focuses on the aggregate cost of error and error prevention, without addressing the manner in which such costs are divided among the litigating parties. Stein adds this important layer to the discussion, claiming that the goals of evidentiary institutions include appropriate allocation of the risks of error among the litigants in a manner which complies with, what he terms, "The Principle of Equality" and "The Equal-Best Principle". The principle of equality applies in civil proceedings and requires the equitable distribution of the risks of error among the litigating parties, assuming a priori equality among them. The equal-best principle applies to criminal trials and assigns the majority of the risks and costs of errors to the prosecution, assuming a high disutility ratio between the social costs of wrongful convictions and wrongful acquittals.[62] In other words, Stein's approach differs from the traditional approach not only because it takes into account the costs of preventing errors in the judicial system, but also in its recognition of inherent uncertainty and of the role that evidence law plays in the allocation of uncertainty and the risks of error among parties and in society.

How does all of this translate to the example of the evidence of character rule? What sort of justification would the

60 Stein, *supra* note 5, at 143.

61 *Id.*

62 *Id.*

cost minimization model apply with respect to this rule of evidence? Under the cost-minimization model, the justification for the evidence of character rule would not be restricted to circumstances in which admitting evidence of defendant's past misbehavior would contribute to overall inaccuracy (as is the case under the traditional approach). In addition to these situations, where bad character evidence bears more prejudicial potential than probative value, the cost-minimization model would *also* accommodate the evidence of character rule in circumstances in which information regarding past behavior of the defendant can be expected to *further* the system's overall accuracy, but in which the social costs entailed would be deemed too high. Put differently, the cost minimization model would also justify the evidence of character rule on grounds of inefficient administration of truth, even where the information concerning the defendant's past behavior carries probative weight and has a truth generating capacity in the overall class of cases. Such an assumption, regarding the inefficiency of resort to the defendant's past as a means for eliciting the truth, may stem from the broadening of the scope of factual dispute (above and beyond the actions for which the defendant was indicted) when past behavior is taken into account.

To recap: while the traditional approach aims at minimizing judicial error, and ignores the costs of error prevention, the cost-minimization model views evidence law as a mechanism for minimizing the aggregate costs of errors and error avoidance in the judicial system. It strives for cost efficiency of the system and for optimal levels of accuracy. Under the cost minimization model, evidence law enters the scene in situations in which free proof fails—that is, in situations in which the inclusion of particular evidence would lead to an overall decrease in accuracy (similarly to the traditional approach), *as well as situations in which such inclusion could contribute to overall accuracy but in a manner deemed too socially expensive* (whether in monetary or non-monetary terms). From the theoretical perspective of the cost-minimization model, the justification for the evidence of character rule—like that for evidentiary doctrine in general—is based on the assumption that excluding information regarding the negative past of a defendant from the determination of guilt will minimize the aggregate cost of error and error prevention for the system as a whole.

As mentioned above, Posner's cost minimization model is

a manifestation of the 'first generation' of economic analysis of evidence law, which is focused on the cost efficiency of the judicial system. This approach highlights the costs and benefits associated with proving the facts of the case ex post. It emphasizes the backward-looking role of adjudicative fact-finding in the uncovering of (mostly) *past* events. In recent years we are witnessing a shift to a competing view in the economic analysis of evidence law—one which challenges the automatic resort to fact-finding accuracy, and which stresses the instrumental role played by truth at trial in the furthering of ultimate social objectives, most notably deterrence. According to this latter, "second generation" approach, the benefit of truth revelation is a function of how individuals can be expected to react to greater fact-finding precision in their choice of primary behavior. The economic analysis of evidence law has thereby evolved to incorporate the role of the adjudicative process not only in the unraveling of the *past* but also, more importantly, in the shaping of the *future.* It emphasizes the effects of evidentiary institutions on the cost benefit analysis of potential perpetrators and on the formation of incentives to engage in particular activities, and views *efficiency* in terms relating to primary behavior of agents (rather than the adjudicative system). It is not focused solely on the role of evidence law and accurate fact-finding in determining whether the defendant was, indeed, involved in the alleged offense, or which of the parties failed to comply with the terms of the contract. Rather, it emphasizes the manner in which evidence rules at trial, in the event of a legal dispute erupting, would impact the decision to engage in the criminal act or to breach the terms of the contract in the first place.

B. Optimal Deterrence: The Primary-Behavior Model

According to the Primary Behavior Approach, legal institutions, generally, and evidentiary institutions, particularly, ought to be evaluated and understood as being also (perhaps primarily) about supplying good incentives for behavior of agents outside the courtroom: in the marketplace, in the street and on the highway. While accurate fact-finding is an appropriate goal of the judicial process, it ought to be viewed in instrumental terms, as a means for the furthering of deterrence.[63] Accordingly, the Primary Behavior Approach uses the tools of economic analysis to evaluate and design judicial

63 *See* Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738, 742 (2012).

fact-finding and evidentiary institutions in light of their capacities for shaping desirable primary behavior.

The starting point for the Primary Behavior Approach is rooted in the application of cost benefit analysis and rational choice theory to the decision-making process of potential perpetrators. The underlying assumption is that individuals act as rational maximizers of their utilities, and choose to engage in activities, including socially harmful ones, when their benefit from doing so exceeds the associated costs. The imposition of criminal sanctions or civil liability and remedies is intended to enhance the expected cost of engaging in socially harmful activities in a manner that is reflective of the social harm involved. This forces rational maximizers of their utilities to internalize the social costs of their activities into their cost-benefit calculus, and ensures resort to potentially harmful behavior only when the social benefits outweigh the social costs involved. The path to such internalization goes through the courtroom, of course, as accurate judicial fact-finding is a prerequisite for the creation of a causal connection between an agent's behavior and its legal outcome. Quite intuitively, in order to promote the goal of optimal deterrence legal sanctions are to be imposed upon the factually guilty, and vice versa. Accurate fact-finding, in other words, can be viewed as a proxy for optimizing deterrence and for inducing socially desirable primary behavior.[64] The consolidation of ex post error avoidance and ex ante deterrence considerations can explain Posner's cost minimization model's emphasis on the former. However, as is the case with proxies more generally, the two objectives don't always align.[65] Rectitude of fact-finding, while typically conducive to deterrence, does not always further this goal. Inherent tensions may arise in certain circumstances between accurate fact-finding and deterrence objectives. Such is the case, claims Sanchirico, in the realm of bad character evidence.[66]

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64 "Perhaps there are some moderate deviations, occasional exceptions, and limitations, but nevertheless the applicable notion of truth might typically provide a workable guide or at least a sensible starting point." Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?,* 67 STAN. L. REV. 1304, 1304 (2015).

65 For instance, according to Kaplow enhanced ex post accuracy as to how much the plaintiff's future earnings are diminished by an auto accident injury may be wasteful, because it cannot be predicted ex ante and therefore cannot impact deterrence. For further discussion of accuracy versus consequences, see generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994).

66 Chris W. Sanchirico, *Character Evidence and the Object of Trial*, 101

According to Sanchirico, the evidence of character rule is incompatible with the idea that trial and evidence law are primarily geared toward fact-finding accuracy.[67] Rather, he suggests that the reluctance to use bad character evidence is rooted in its adverse effect in terms of ex ante incentives, and reflects an understanding of evidence law as facilitating the guidance of socially desirable behavior. This is so because at the point most relevant for incentives—when an agent is deliberating whether to break the law—her character and relevant character evidence are already a given. The character evidence that may be admitted against her does not depend on her current decision of how to proceed and whether to engage in the subsequent offense. This is the source of the incentive problem. For ideally, in order to generate the efficient incentives here, we would want the agent to know that the likelihood of her being (charged, and convicted, and) punished strongly depends on whether or not she decides to break the law here and now. The weaker the dependence, the less weighty the incentive supplied by the law not to engage in this specific criminal behavior.[68] Admitting character evidence at the conviction stage of trial can thus be expected to lower the marginal cost of choosing to engage in the criminal activity and act counterproductively in terms of the setting of incentives. Given some plausible assumptions about the difference between the trial stage and the sentencing stage—such as which is more relevant for deterrence—perhaps this line of thought can begin to vindicate the mixed attitude towards character evidence across the two phases of the criminal trial. Of course, a lot may be going on with character evidence. And it needn't be a part of the claim that giving the right incentives to primary behavior is the only normative consideration governing judicial fact-finding, evidentiary institutions and the rules regarding character evidence. But even if other considerations apply, still Sanchirico has succeeded in drawing attention to another kind of consideration, one that it would be foolish for economic analysis of judicial fact-finding to ignore.[69]

So, while the traditional approach to evidence law focuses on the *most accurate* investigation of *past* events, and the cost

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COLUM. L. REV. 1227, 1229 (2001).

67 *Id.*

68 *See* David Enoch & Talia Fisher, *Sense and 'Sensitivity': Epistemic and Instrumental Approaches to Statistical Evidence*, 67 STAN. L. REV. 557 (2015).

69 *Id.*

minimization model focuses on the *cost-effective* investigation of *past* events, the primary behavior approach maintains that evidence law and judicial fact-finding are linked more closely to the *future* than to the past.[70] The primary behavior approach conceptualizes the costs and benefits of legal fact-finding in terms of incentives for disengagement in socially harmful behavior, and in this can be viewed as a distinct (second) generation of economic analysis of evidence law. Similarly, to other areas of economic analysis of law, the economic approach to evidence law, in all its forms, is also geared toward social welfare maximization and embedded in the normative criterion of efficiency. However, this normative setting assumes two different conceptualizations, reflective of two different outlooks of economic analysis on evidence law and legal fact-finding. The first, manifested in the cost minimization model, focuses on systemic efficiency and on the cost-effectiveness of fact-finding accuracy. It relates to the ex post investment of resources in exposition of the truth by the litigating parties and by society at large, viewing utility in terms of truth value. The second, manifested in the model of primary behavior, stresses the instrumental role of fact-finding precision. It formulates the costs and benefits, which ought to be taken into account in the utilitarian calculus, in ex ante deterrence terms. This latter ex ante, deterrence perspective more closely aligns with the point of view generally endorsed by the economic approach to law in all the other fields, such as economic analysis of criminal law, contract law or tort law.

Normative considerations aside, as a practical matter economic analysis is increasingly becoming a staple of policymakers' attempts to secure the efficiency of trial and judicial fact-finding and their capacity to fulfill their designated social functions.[71] In the landmark case of *Mathews v. Eldridge*, the United States Supreme Court held that the costs of providing evidentiary safeguards ought to be weighed against the benefits associated with fact-finding accuracy. But reliance on this type of reasoning has not gone unchallenged. One of the central critiques emanates from the behavioral (psychological) approach to evidence law, to which the discussion will now turn:

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70 Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 46 B. C. L. REV. 949, 1017 (2006).

71 *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see generally* Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice,* 4 CRIM. JUST. 265 (2000).

III
THE BEHAVIORAL APPROACH: RATIONAL FACT-FINDING

Previous sections addressed the economic approach to evidence law, premised on (and defined by) the presumption of rationality[72]—that is, the assumption that the choosing agent ("homo economicus") is a utility maximizer who exhibits a stable system of preferences and makes unbiased judgments under conditions of uncertainty.[73] Rationality has become the model of individual decision-making in the realm of law as well, and this also applies to the context of the economic analysis of evidence law (that is, when the actors, whose behavior evidence law aims to influence, are litigants or potential defendants, judges, jurors, prosecutors, defense attorneys or police officers).

But, alongside the development of economic analysis, generally, and economic analysis of evidence law, specifically, emerged an extensive body of psychological literature that challenged the empirical basis of the presumption of rationality.[74] This (mostly experimental) corpus revealed that

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72 In the words of Posner: "[E]conomics is the science of rational choice in a world – our world – in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions – what we shall call his "self-interest." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (6th ed. 2003). *See* also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 1 (2004).

73 GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976).

74 Psychological analysis has been tightly entwined with evidence law and theory for many years and for obvious reasons, as it provides insights regarding the perception and memory of eyewitnesses. According to Park and Saks, the shared history of psychology and evidentiary law is characterized by bursts of activity separated by extended "quiet" periods. *See* Park & Saks, *supra* note 70, at 957. One of the pioneers of the psychological analysis of evidence law is Hugo Münsterberg, a professor of applied psychology from Harvard University. His writing examined the judicial realm from a psychological perspective and addressed (among other things) problems of perception and the memory of witnesses in the context of false confessions, the examination of witnesses and hypnosis. *See generally* HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME (Doubleday, 1909). Münsterberg laid the foundation for a large portion of the insights later derived from the psychological analysis of evidence law. However, his work was interrupted by the significant reservations that John Wigmore had regarding his research. Wigmore sharply criticized Münsterberg and that critique was so chilling that Münsterberg decided not to pursue his study of this topic any further. *See* John H. Wigmore, *Professor Münsterberg and the Psychology of Testimony: Being a Report of the Case of Cokestone v. Münsterberg*, 3 U. ILL. L. REV. 399, 427 (1909), as cited in Park & Saks, *supra* note *70*, at 957. Later on, Wigmore tried to use his power to thwart the research of the law professor Robert Hutchins. In 1926, Hutchins gave a lecture and published an essay regarding the meeting point of psychology and evidence law. Wigmore contacted Hutchins and voiced his discontent regarding

decision makers fall prey to "cognitive illusions that produce systematic errors in judgment".[75] Psychologists, who study human judgment and choice, pointed to a discrepancy between rational choice theory and actual human behavior. This discrepancy emanates, inter alia, from what Herbert Simon referred to as the "Bounded Rationality."[76] According to Simon, human cognition is a limited resource.[77] In order to better utilize our cognitive capacities, people resort to mental shortcuts and rules of thumb (heuristics). The use of mental shortcuts can be thought of as a rational strategy under conditions of limited cognitive resources, one which aims to simultaneously minimize both the cost of error of judgement and the cost of error avoidance (namely, the cognitive resources utilized to prevent error).[78] In this respect, the phenomenon of bounded rationality can be thought of as a manifestation of the cost-minimization model to every day decision making. However, even if the resort to mental shortcuts is based on rational and adaptive behavior, as a general matter, the results of this process may represent a deviation from the model of perfect rationality, that is the cornerstone of economic analysis.[79] This is because while rules of thumb and mental shortcuts can be effective across the board, they may lead to systematic errors within particular subsets of cases. In those latter cases, the use of rules of

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work on that topic and even referred Hutchins to his earlier critique of Münsterberg. However, unlike Münsterberg, Hutchins was not discouraged by Wigmore's critique and continued his study of the psychological analysis of consciousness, examining the implications for the reliability of witnesses. Together with his colleague Donald Slesinger, Hutchins wrote an extensive series of essays concerning the psychological analysis of evidence law. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence – Memory*, 28 COLUM. L. REV. 432 (1928); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence – The Competency of Witnesses*, 37 YALE L. J. 1017 (1928); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence – Consciousness of Guilt*, 77 U. PA. L. REV. 725 (1929); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence – State of Mind to Prove an Act*, 38 YALE L. J. 283 (1929); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929). After these two researchers completed their work, interest in this area died out for a period, but, in recent years, there has been renewed interest in this topic.

75 Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 777 (2001).

76 *See* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 113 (1955).

77 Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998).

78 *Id.*

79 *Id.*

thumb will lead individuals to make irrational decisions and form judgements that are incongruent with those predicted by the rational-choice model. All in all, as Simon argued, despite the fact that resort to mental shortcuts and rules of thumb is an optimization strategy, in particular instances it may lead to deviations from the rational choice.[80]

Here, I would like to emphasize another important dimension of bounded rationality: deviation from the rational-choice model does not mean that the behavior of individuals is necessarily arbitrary or erratic. The opposite is true. Reliance on rules of thumb and cognitive shortcuts leads to deviation from rational behavior that is *systematic* in nature and, therefore, *predictable*. A significant breakthrough in the study of such systematic deviations was provided by the work of Nobel Prize Laureate, Daniel Kahneman, and his colleague Amos Tversky. In an extensive series of experiments, Kahneman and Tversky demonstrated a variety of replicable systematic human deviations from rational choice in decision making processes.[81] For example, they discussed the Availability Bias, according to which the mental availability (or ease of recalling information regarding a particular event) serves as an indication to the frequency and magnitude of the event under question. According to this heuristic, the subjective probability, attributed by people to car accidents, for instance, will temporarily increase after they have witnessed a car accident.[82] Kahneman and Tversky also identified an Anchoring Bias, according to which individuals tend to base their decisions on irrelevant reference points or 'anchors' when making decisions under conditions of uncertainty. Many more biases and heuristics have been identified, the most well-known of which include the Hindsight Bias, Judgmental Overconfidence, and Prospect Theory.[83]

The behavioral approach to law applies the psychological findings of Kahneman and Tversky (and their followers) to the

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80 Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060-66 (2000).

81 *See* Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 PSYCHOL. REV. 582–83 (1996).

82 Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, 3, 11 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

83 Hersh Shefrin & Meir Statman, *The Contributions of Daniel Kahneman and Amos Tversky*, 4 J. OF BEHAV. FIN. 54, 54 (2003).

legal realm.[84] It attempts to assess actual human behavior in the legal context, and to design rules and legal institutions that will produce efficient results based on the assumption of bounded rationality.[85] In the context of evidence law theory, it sheds light on the role of evidence law in minimizing the associated irrationality and error of judgment, especially in the courtroom setting and in the context of legal fact-finding. [86] Incorporating these failures into the policy-making models presents an opportunity for the development of evidentiary rules that will lead to rational outcomes under real-life conditions, as compared to the conditions imagined by unrealistic models of perfect rationality.

After exploring the behavioral approach and its intersection with evidence law, the discussion will now turn to the example of the evidence of character rule: One of the cognitive heuristics identified by Kahneman and Tversky is the Representativeness Bias, which refers to the tendency of decision makers, under conditions of uncertainty, to base their judgments as to the likelihood that a given event, individual, or case is a member of a certain category, on over-valuation of the similarity to the archetype of that category. The two found that when people are asked to make categorical judgments, regarding whether a particular individual or event "belongs" to a certain category, they tend to *over* rely on the degree to which that individual or event shares similar characteristics with (or is "representative" of) the particular category of events or individuals.[87] When making such judgments decisionmakers

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84 Jeffrey J. Rachlinski, *The Psychological Foundations of Behavioral Law and Economics*, 2011 U. ILL. L. REV. 1675, 1677.

85 For example, the behavioral model addresses the bias of over-optimism and the erosion of the deterrent effect of criminal punishment under conditions of a gap between the actual probability of punishment and the subjective estimation of that probability by over-optimistic agents.

86 One of the groundbreaking essays in this area is Guthrie, Rachlinski &Wistrich, *supra* note 75. Their study found that judges are just as susceptible to Anchoring Bias, Hindsight Bias and Judgmental Over-confidence as other decision-makers, including laypeople and experts in different fields. Compared to the rest of the population, the judges were slightly less susceptible to Framing Bias and to the Representativeness Bias. *See also* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 L. & CONTEMP. PROBS. 105, 106 (2004); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHIC. L. REV. 571, 571 (1998). Another excellent essay on this topic, which addresses the phenomenon of over-correction and describes that issue from an evidentiary perspective is Ehud Guttel, *Overcorrection*, 93 GEO. L. J. 241 (2004).

87 Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 32, 39 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

tend to attribute *too much* weight to the similarities, and *too little* weight to other, relevant statistical information. Specifically, decision-makers tend to discount the frequency with which the underlying category occurs, namely, to undervalue the base-rate.

Similar to other heuristics, the representativeness bias is useful and rooted in the efficient use of cognitive resources: Judging similarity is a relatively easy cognitive task, and, in many cases, the degree of similarity corresponds to the probability that the event in question belongs to the relevant category. At the same time, this rule of thumb can lead decision makers to make systematic errors in their probability estimations. This is due to factors that influence the probability that the event belongs to the relevant category (e.g., whether the defendant committed the act in question or whether he belongs to the group of guilty people), but do not affect the similarity of the act in question to the category (e.g., do not affect the similarity of the defendant to the guilty population), and vice versa. For example, the frequency of the category of relevant cases (i.e., the base rate; for example, the proportion of guilty individuals within the population) affects the probability of guilt in the case in question (e.g., the probability that the defendant is guilty), but does not affect the similarity of the defendant to the relevant category (e.g., does not affect how similar the defendant is to the population of guilty people).[88]

In their work, *Inside the Judicial Mind*, Guthrie Rachlinski and Wistrich evaluated the susceptibility of judges to the representativeness bias, when asked to make a judgment involving the rule of *res ipsa loqitur*. Of the 159 judges who responded to their questionnaire, only 40.9% reached the correct statistical conclusion. 66% of the judges who erred submitted answers that reflected the representativeness bias.[89] While judges fared slightly better than the general population, their level of exposure to the representativeness bias was still significant. These findings indicate that the representativeness bias and other heuristics cannot be ignored in the realm of judicial decision making—and here we return to the evidence of character rule.

The representativeness bias applies to the bad character setting, in light of the categorical nature of the determination

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88 *See* Gregory Mitchell, *Mapping Evidence Law*, 2003 MICH. ST. L. REV. 1065, 1069–71.

89 Guthrie, Rachlinski & Wistrich, *supra* note 75, at 781.

of guilt: Thus, in estimating the probability that a defendant is guilty (namely, that she "belongs" to the category of "guilty individuals" or "criminals") judges and jurors may base their judgments on the extent to which the defendant's characteristics and demeanor are representative of the category of criminals. Past bad behavior may appear as bearing resemblance to the archetype of the category of guilty individuals. The fear is that introducing such evidence to the judge and jurors, at the conviction phase of trial, would lead them to overestimate its probative value, and to not give enough weight to the base rate. Decisionmakers may assign excessive evidentiary weight to information regarding the negative past of the defendant, information that is anecdotal, but representative of the criminal population (bearing similarities to the image or prototype of the category of guilty individuals). This,[90] while disregarding the relevant base rate of criminal behavior in society.

With this we come full circle, to the starting point of the Essay—the traditional approach to evidence law and its justification of the bad-character rule. As mentioned above, according to the traditional approach, the bad-character rule is justified in light of its contribution to overall accuracy in the judicial system. As discussed in Part A, one aspect of this rule's contribution to the investigation of truth concerns the tendency of fact-finders to overestimate the probative value of bad character evidence. Such overvaluation is also found at the root of the behavioral justification for the bad-character rule. This similarity between the two approaches notwithstanding, it is important to note the fundamental differences between them: The overestimation of the probative value of bad-character evidence under the traditional approach stems from *ignorance*, such as from a lack of sufficient empirical data concerning recidivism. The overestimation underlying the behavioral approach is rooted in *irrationality* and in systematic defects in the analysis of empirical data. There is a qualitative distinction between lack of information (or ignorance) and irrationality. Overestimation due to deviation from rational decision making and from the representativeness bias will exist even when all relevant information is freely available and the court is presented with a complete empirical picture regarding the ramifications of recidivism.

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90 *Id.* at 784.

IV
THE DEONTOLOGICAL APPROACH: THE FAIR SEARCH FOR THE TRUTH

The discussion hereto addressed consequentialist approaches to evidence law, which justify this institution and the regulation of legal fact-finding in light of their instrumental role in pursuing desirable social ends (whether in the form of fact-finding accuracy, systemic cost efficiency, deterrence, or rationality of judgment). The consequentialist ethics can be criticized for failing to account for justifications for evidence law, which exist above and beyond social welfare, and for jeopardizing—or at the very least failing to comply with—the plurality of moral intuitions underlying the pursuit of truth at trial. They can be said to fail to account for the precedence of humanistic values like fairness, equality, human dignity, liberty, or privacy, over expediency in the administration of justice or the promotion of deterrence.[91] The discussion will now turn to the deontological theory of evidence law and to the rights-based justification for the regulation of legal fact-finding.

At the center of the deontological approach to evidence law stands the premise that judicial fact-finding, particularly when it results in the imposition of criminal punishment, must enjoy moral legitimacy, and that evidence law's ramifications for public welfare do not possess such legitimizing power.[92] Rectitude of fact-finding at trial bears intrinsic value, and ought not be evaluated exclusively in terms of possible contribution to trial and social outcomes. The level of accuracy at trial, to which the litigating parties are entitled, is a matter of individual right rather than social welfare.[93] Litigants possess rights which trump conflicting social interests, and which lie outside the utilitarian calculus.[94] These include

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91 Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553 (2002); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28 (1976).

92 Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 216 (2003) ("[I]nstitutions should produce morally correct decisions regardless of ultimate effects on society.").

93 *See* Ronald Dworkin, *Principle, Policy, Procedure*, *in* C.F.H. TAPPER (ED.), CRIME, PROOF, AND PUNISHMENT 194 (1981).

94 Joel Feinberg, *The Classic Debate*, *in* PHILOSOPHY OF LAW 727 (Joel Feinberg & Jules Coleman eds., 6th ed., 2000); Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 862

equality, fairness, due process, and procedural justice.[95] These and other rights and values trump countervailing social utilities. They cannot and ought not be placed on a utilitarian calculus with, nor counterbalanced by considerations of, cost-effectiveness or overall deterrence. The deontological justifications for evidence law are based, in other words, on ethical and moral philosophy that lie beyond the boundaries of utilitarianism.

And here let us briefly return to Bentham: More than his contribution to evidence law scholarship, Bentham is known for being the founding father of utilitarianism. His opposition to exclusionary rules and to the institution of evidence law, more generally, was based on utilitarian logic.[96] The counterclaims against free proof, surveyed in previous parts of this Essay, grew from the same normative root, that of utilitarianism. Like Bentham's theory, those justifications, too, were based on the goal of social welfare enhancement and on the striking of a balance between the social costs and benefits associated with the use of evidence law rules and institutions.

Deontological thinking rejects this utilitarian calculus and the systemic focus at its core. First, it rejects the focus on *aggregate* happiness or pleasure, and critiques utilitarianism's agnosticism to the *distribution* of benefits and costs (or pleasure and pain) among individuals within society. This disregard for individual pain and pleasure, so the claim goes, negates our uniqueness and humanity as human beings.[97] Another layer of the deontological critique of utilitarianism is geared against the *commensurability* between different types of pleasure and pain, and the monolithic scale of valuation that lies at the center of the utilitarian calculus's tradeoffs. The deontological approach promotes a pluralistic theory of value, according to which goods and attributes differ from one another not only by *how much* we value them, but also by *how*

(2002).

95 LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 59–60, 67–73 (1996).

96 PETER MURPHY (ED.), EVIDENCE, PROOF, AND FACTS: A BOOK OF RESOURCES 3 (2003).

97 Milton C. Regan Jr., *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073, 1079, citing Kant: 'As regards happiness, men do have different thoughts about it and each places it where he wants, and hence their wills cannot be brought under any common principle, nor consequently, under any external law compatible with the freedom of everyone.' Immanuel Kant, *On the Proverb: That May Be True in Theory, But Is of No Practical Use*, *in* PERPETUAL PEACE AND OTHER ESSAYS (T. Humphrey ed., 1983).

we value them.[98] Money, love, friendship, privacy, and compassion cannot be measured in the same manner, and cannot be placed on the same scale as the utilitarian calculus would demand. According to the deontological critique, the systemic outlook, presumption of commensurability and monolithic ranking of values, that are the foundation of the utilitarian approach, transform the individual into a tool in hands of others.[99] The deontological approach denies the ethical legitimacy of this instrumentalist view of individuals within society.

Criminal proceedings have always attracted the attention of deontological thinkers, as manifested in Immanuel Kant's theory of retribution. A principal element in Kantian thought is that the sole justification for punishment is the existence of guilt,[100] and that punishing in the absence of the highest humanly possible level of certainty as to guilt is morally illegitimate.[101] *"Punishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime."*[102] According to certain approaches to the concept of retribution, this refers to moral guilt;[103] whereas according to other approaches, it refers to legal guilt.[104] However, in all cases, the question of guilt ought

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98 *See also* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 118 (1993).

99 About which, Kant said: "For a man can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: His innate personality protects him from this, even though he can be condemned to lose his civil personality." IMMANUEL KANT, THE METAPHYSICS OF MORALS: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 140–41 (Mary Gregor trans., Cambridge Univ. Press, 1991).

100 *See generally* Anthony M. Quinton, *On Punishment*, 14 ANALYSIS 7 (1954) (discussing the ontological connection between punishment and a past offense, and arguing that punishment of the innocent is impossible because if the person is not guilty, then what is imposed upon him or her cannot be deemed punishment).

101 MICHAEL S. MOORE, THE MORAL WORTH OF RETRIBUTION, IN RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (1987) ("Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it."). *See also* R.A. DUFF, TRIALS AND PUNISHMENTS 4 (1986).

102 IMMANUEL KANT, THE METAPHYSICS OF MORALS: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 133, 140–41 (Mary Gregor trans., Cambridge Univ. Press 1991).

103 For further discussion of the distinction between "moralistic" and "legalistic" retributivism, see Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment* 96 NW. U.L. REV. 843, 881 (2002).

104 *Id.*

to be examined with the highest level of certainty humanly possible, that is, at the level of moral certainty.[105] Punishment in the absence of moral certainty causes moral damage that cannot be counter-balanced by other benefits, including deterrence (which we discussed in the context of utilitarian justifications). The function of evidence law, according to this approach, is to ensure that this examination is carried out according to the appropriate standard[106] and, in so doing, to ensure the moral legitimacy of the criminal proceedings and punishments meted out based upon them.

The deontological approach has also taken hold in the civil law sphere. It emphasizes the fairness of legal fact-finding, as opposed to its cost efficiency (as reflected by the cost-minimization model) or as opposed to its ability to advance external social interests, like deterrence (as manifested by the primary-behavior approach). As noted earlier in this Essay, according to the cost-minimization model, evidence law is geared toward minimization of the aggregate cost of error and error avoidance. The implicit underlying assumption is that these costs can be placed on a single metric, disregarding the fact that the costs of error prevention (whether monetary costs or nonmonetary costs, like infringement of privacy) are qualitatively different from the costs associated with judicial error (miscarriage of justice).[107] The deontological approach is opposed to the cost-minimization model's flattening and placement of all of these qualitatively variable costs (money, privacy infringement, and miscarriage of justice) on a single scale. In the absence of any common denominator among them they cannot balance each other out nor deducted from one another.[108] The same holds true with respect to the commensurability between the benefits and costs borne by the plaintiff to those borne by the defendant. The cost minimization model rests upon the implicit assumption, that

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105 The scope of this Essay precludes an extensive discussion of the complex issue of moral certainty. For our purposes the following definition of moral certainty will suffice: "the form of certainty that any person is capable of achieving from an understanding of the nature of things, applying reason and thought to the testimony of others, along with personal observation and experience." Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1170 (2003).

106 Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1184 (2003).

107 Clearly qualitative distinctions can also be drawn between different legal costs, for example, between monetary costs and infringement upon the privacy of witnesses.

108 Stein, *supra* note 5, at 215.

it is possible to compensate for the costs or pain of one party by enhancing the benefit or pleasure of the other party. Within the cost-minimization model, the time, the money and effort that litigants and taxpayers invest in the judicial process—in order to minimize the likelihood of error—are measured on the same scale and counterbalanced by the costs of errors for the other party and for society at large.[109] The deontological approach rejects the presumption of commensurability between these costs and benefits, as well as the agnostic stance of the cost minimization model as to the distribution of costs and benefits (both among the litigating parties themselves, and between them and society at large). This does not do justice to the uniqueness of the plaintiff and defendant as human beings.[110]

The deontological approach takes a similar critical view of the primary-behavior model. According to the deontological approach, the legitimacy of the judicial ruling in civil proceedings is conditioned upon exclusive focus on substantiating justice between the litigating parties. Exposure of either of the parties to the risk of judicial error, in pursuit of external social goals (such as deterrence or influencing the primary behavior of others), transforms those litigants into tools in the hands of others, and infringes upon their human dignity. The parties (and potential victims of injustice) are not faceless entities, which can be pitted against one another. They each have their own identity and the court must employ procedures that minimize the likelihood of factual errors that may infringe upon their rights.[111] The role of evidence law, according to the deontological approach, is to ensure that the legal fact-finding adheres to this standard.

To recap, the deontological critique of utilitarianism and its various approaches to evidence law is focused on the systemic outlook underlying the utilitarian calculus. Deontological thinking rejects the systemic perspective underlying utilitarianism, and places the individual at its centerfold. However, it is precisely the individualistic point-of-view that deontological thinking adopts, which make it less applicable to the realm of evidence law. There is room to argue that the arena of evidence law and legal fact- finding is predisposed to an aggregative outlook. The fact that deontological theory does not fully account for the general

109 *Id.* at 214.
110 Regan, s*upra* note 97.
111 *Id.*

systemic level turns it into a problematic standard for assessing evidentiary institutions:[112] Thus, in the criminal context, retributivist deontological theories are concurrently committed to two fundamental principles: punishing the guilty and not punishing the innocent. Due to the case-by-case focus of retributivist thought, these two mandates are construed in absolute terms, without addressing the question of possible tradeoff. Deviation from either one of these outcomes is considered a departure from the principles of Just Desert. Indeed, retributivism takes no stance with regard to the trade-off between wrongful convictions and wrongful acquittals across the general class of cases. It is in this sense a utopian theory, that effectively disregards the difficult day-to-day reality of unavoidable errors in legal fact-finding, where decreasing the incidence of wrongful convictions comes at the inevitable cost of increasing the overall rate of wrongful acquittals, and vice versa.[113]

In light of this lack of a systemic outlook and the absolutist conception of retributivist principles of justice, many contend that they cannot, in fact, justify any type of evidentiary regime. Reiman and Van den Haag, for example, assert that the retributivist theories cannot justify the beyond-a-reasonable-doubt threshold, as it is inconsistent with the retributivist commitment to punishing the guilty: "Should we try to convict fewer innocents and risk letting more of the guilty escape or try to convict more of the guilty and unavoidably, more of the innocents? Retributivism (although not necessarily retributivists) is mute on how high standards of proof ought to be."[114] Similarly, Michael Moore asserts that the retributivist approach no less justifies the relatively lower preponderance of evidence standard in the criminal sphere than it does the heightened beyond-a-reasonable-doubt standard. In his opinion, absent any a priori commitment to the appropriate systemic ratio between wrongful convictions and wrongful acquittals, "[t]he retributivist might adopt a principle of symmetry here—the guilty going unpunished is exactly the same magnitude of evil as the innocent being

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112 Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1203 (2007).

113 Luna, *supra* note 92, at 220.

114 Jeffrey Reiman & Ernest Van Den Haag, *On the Common Saying that It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Pro and Con*, 7 SOC. PHIL. & POL. 226, 242 (1990).

punished—and design his institutions accordingly."[115] In light of the inherent tension between the individual-level focus of deontological thought and the system-level function of evidentiary institutions, it is no surprise that the abundant literature concerning retributivism and deontological theory does not generally concern itself with evidence law and with the crafting of evidentiary rules and institutions.[116] In this respect, there is room to argue that deontological theory embodies pure ethics and cannot serve as an applicable normative foundation for the assessment of evidence law.[117]

If we were to reject this conclusion, however, and were willing to endorse deontological criteria as standards against which to evaluate the normative desirability of evidence rules and institutions, these could then be applied to the context of character evidence. The use of bad character evidence, for purpose of conviction, contradicts two fundamental deontological principles: The first is that a person ought not be convicted and punished for a crime that he or she was bound to commit.[118] The forging of a causal connection between one's past behavior and one's current alleged involvement in a criminal act bears a deterministic aspect. Such determinism is not congruent with defendant autonomy and free will to engage in the criminal activity, a pre-requisite for the legitimate imposition of punishment.[119] The second deontological principle, that appears to be violated by the use of bad-character evidence, is that a person ought not be convicted and punished *ad hominem*. Punishment is only justified when it is tied to a particular behavior, to the performance of a

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115 Moore, *supra* note 101, at 157.

116 Bierschbach & Stein, *supra* note 46, at 1203.

117 Douglas N. Husak, *Why Punish the Deserving?*, 26 NOÛS 447, 451 (1992) ("'Other things' are not equal because punishment is administered by the state rather than by god; therefore, it is inevitable that the practice of punishment will suffer from (at least) each of the following three deficiencies: It will be tremendously expensive, subject to grave error, and susceptible to enormous abuse. . . . "). As long as the advocates of retributivist theory do not completely reject criminal punishment, they allow for the possibility that innocent individuals may be punished. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632–33 (1992).

118 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY – ESSAYS IN THE PHILOSOPHY OF LAW 174 (1970).

119 For an analogous argument concerning statistical evidence, see generally David T. Wasserman, *The Morality of Statistical Proof and the Risk of Mistaken Liability*, 13 CARDOZO L. REV. 935 (1991); Amit Pundik, *Statistical Evidence and Individual Litigants: A Reconsideration of Wasserman's Argument from Autonomy*, 12 INT'L J. EVIDENCE & PROOF 303, 305 (2008).

criminal act;[120] punishing the defendant for *who he is* (as manifested by his character) rather than *for what he did* infringes upon his human dignity. The types of justifications for the character evidence rule that deontological theories would provide, aligning with their general outlook on legal and evidentiary institutions, are thus rooted in the protection of defendant (and litigant) rights and individuality.[121]

CONCLUSION

Against the background of free proof and the vanishing shadow of exclusionary rules, this Essay explored the central arguments supporting the institution of evidence law and the subjecting of legal fact-finding to the governance of evidentiary rules. Since each of the normative cases addressed hereto represents a distinct theoretical perspective on the institution of evidence law, the outline of the central justifications also provided an opportunity for the mapping of the theoretical scholarship in the field. It should be emphasized, though, that the different theoretical perspectives which were put forth, are not exhaustive. Nor are they mutually exclusive: Just as it is impossible to fully appreciate the institution of evidence law without accounting for the costs of inaccuracy and judicial error, so it is impossible to understand this legal institution without taking the costs of prevention of error into account. And just as it is necessary to think about the role of evidence law in minimizing the administration of truth ex post, so is it imperative to think about the effects of evidence rules on the incentives created ex ante. And just as evidentiary policy cannot be appropriately designed without considering judges' systematic deviations from rational decision -making, so it is impossible to devise appropriate evidentiary policy without considering issues of due process and effects on the moral legitimacy of judicial fact-finding and punishment. Making prescriptive claims in the context of evidence law requires a sensitivity to the plurality of underlying normative ends discussed above, and to the qualitatively distinct obstructions

120 HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE, 76–77 (1979).

121 Lea Brilmayer & Lewis Kornhauser, *Review: Quantitative Methods and Legal Decisions*, 46 U. CHI. L. REV. 116, 149 (1978). Both can be subject to the criticism that they blur epistemology and metaphysics: By taking something as a basis for forming belief and for determining engagement in an alleged crime, we are not expressing any belief that he or she has always been bound to do so. Nor are we impacting his or her ability to choose to act otherwise. Nor are we implying that he or she is anything less than a fully autonomous individual. We are just taking one thing as an indicator of another.

of justice and associated social costs that legal fact-finding entails. I hope that this Essay will contribute to such an understanding of evidence law and provide academics as well as policy makers with a metric for evaluating and designing evidentiary rules and institutions.