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# **Can rules of criminal evidence be devised that would be uniform across jurisdictions?**

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## **ABSTRACT**

The thesis focuses on comparative criminal evidence law and sets out to explore whether it is possible to devise rules of criminal evidence that would suit different jurisdictions. This work should be treated as an exploratory project as it aims to find a suitable approach and then test it using three different rubrics of evidence law – evidence of prior convictions, hearsay evidence and standard of proof. Those rubrics in six different jurisdictions will be examined.

The thesis first discusses the mainstream dichotomous approach to comparative criminal procedure and evidence, concluding that the inquisitorial-adversarial distinction has by today lost much of its descriptive power and was never meant to be a normative model. Instead, the author finds that all Western style jurisdictions today are concerned with accurate fact-finding and in order to facilitate accurate fact-finding, should take into consideration the cognitive needs and abilities of fact-finders. Since for the most part human cognition is universally the same, this psychology-based approach can serve as a foundation for evaluating the evidentiary regulation – and unless some extra-epistemic factors prevail, should guide legislatures towards optimizing and unifying their evidentiary regulation.

Based on the recent studies in legal psychology, the author offers recommendations that would be workable in all sample jurisdictions. This is in part possible because empirical research tends to debunk often-held beliefs about professional judges being far superior fact-finders immune from the cognitive biases and emotional appeal usually attributed to jurors.



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Andreas Kangur



## **AUTHOR'S DECLARATION**

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Andreas Kangur

## INTRODUCTION

In this thesis I will demonstrate that the great diversity in evidence law in different jurisdictions is not inevitable – and that it is possible to develop rules of evidence that can be applied across jurisdictions. I will demonstrate this through the examination of three areas of evidence law – evidence of prior convictions, hearsay evidence and standard of proof – and six different jurisdictions. I will heavily draw on the relevant psychological research as my argument is that it is human psychology and the common instrumental goals that form the common fabric joining together diverse jurisdictions.

Arguments about law in different jurisdictions coming together or that evidence law should develop in better concordance with contemporary scientific research and psychological research in particular, have been made before. However, I am not aware of any attempts to develop universal rules of evidence based on insights from psychology. It is precisely the comparative (or even universal) nature of this project that makes it different from earlier studies.

### *Background*

My original question arose in the context of juxtaposing the two criminal rules of witness examination in Estonia. In felony criminal procedure, witness examination at trial consists of direct and cross-examination. Whereas direct examination is to be carried out by the party who has called the witness and, as a rule, should be done without resorting to leading questions, cross-examination is by the opposing party and leading questions are allowed. The judge, if he chooses, can question the witness once the parties are finished with their questioning. In contrast, a witness in a misdemeanour case is supposedly first asked to provide a free narrative account of the event or circumstances in question, and then examined by the parties, with no leading questions allowed. I say ‘supposedly’, because my own observations show that the free narrative is sometimes omitted.

The two different modes of witness examination are puzzling. Assuming that the purpose of the trial in both felony and misdemeanour cases is the same, why would witness examination be done differently? And since this is the case, are the two modes of witness examination equally fit for purpose? Then again, Estonia with its still fast-evolving legal system has frequently been an inspirational case study. Perhaps this is some special Estonian issue? I am not aware of such clear divergence within another single criminal

procedure jurisdiction (differences between civil and criminal procedure are fairly common and may arguably even be justified). However, any legal scholar taking interest in comparative criminal procedure knows that differences of this kind between jurisdictions are ubiquitous. There are hundreds of works detailing the differences in criminal procedure of various countries bearing evidence of the great diversity in this field.

But why the differences? Is a witness not a witness regardless of whether the trial happens in Germany or the United States or Italy or Australia? Or, for example, how is it that in the United States a defendant must be guilty beyond a reasonable doubt but in Germany, the judge's "inner conviction" would suffice? Questions of comparative criminal procedure like these become increasingly more acute as the world is becoming more interconnected. Take, for example, mutual assistance in criminal matters where courts in one jurisdiction will often have to request their counterparts in another jurisdiction to help them with collecting evidence or to turn over evidence already collected. What is the significance of the fact that, for example, a witness statement was taken by the police criminal investigator instead of in open court before a judge and through the process of direct- and cross-examination? Or, does the fact that the witness was cautioned instead of being sworn have any effect on the value of the statements given by the witness? And, what about mutual recognition of criminal court judgments? How can one jurisdiction recognize a verdict by another if the evidentiary basis for the judgment is markedly different? Then again, perhaps the differences are only cosmetic in that they have some symbolic meaning or are used to save court's time but have no effect upon the accuracy of the outcome? But what if I have misunderstood the goals and driving forces behind criminal evidence?

### ***Purpose of the study***

The study I have undertaken seeks to explore criminal evidence law from a comparative perspective but instead of detailing the differences or looking for their origins, its main thrust stems from the perception of the world shrinking. The question I attempt to answer is whether it is possible to devise a set of criminal evidence rules that could transcend the jurisdictional boundaries and be equally well suited for most, if not all, jurisdictions? I am not looking to discern common elements or provisions from the criminal evidence laws of different jurisdictions as they exist but rather seeking to answer this question *de lege ferenda* – for the law as it should be. The practical benefits of this inquiry would manifest themselves in not just the two instances I already mentioned – international assistance in criminal matters and mutual recognition of criminal judgments. If there was a set of

criminal evidence rules that is objectively better suited for its purpose, adopting them would mean a universal improvement in the quality of criminal justice all over.

### *Structure*

This thesis has four chapters. The first chapter is dedicated to foundational matters and the three subsequent chapters deal with substantive matters. I will first look at the concept of criminal evidence law and attempt to clarify what it is that I am talking about and how it relates to criminal procedure. Many jurisdictions view the law of evidence as a part of criminal procedure. My approach is to keep them separate and to take procedure in its narrower sense as a given – a product of political, cultural and historical influences. Choices about procedure are determined by what a country is willing and able to invest in their criminal justice system in terms of time, money and people. Next I will embark on the search for some common ground to serve as the basis for my unification attempt. This common ground I find not in the law but in the human factor – the one constant in all jurisdictions is that the law of evidence attempts to regulate the mental operations performed by human adjudicators. Whether it be by prescribing what information in what form the adjudicators may consider or by stipulating what conclusions the adjudication process should return based on particular information, the law of evidence, regardless of what fundamental human rights instrument is applicable or what political party is in power operates through directing the same instrument – the human mind. This in turn means that the law of evidence, if it is to work, must be grounded on relevant psychological research. This is a good starting point for my inquiry – but even if the instrument being used is the same, common rules cannot exist without their goal being something they share as well. After all, an axe could be used in a number of different ways depending on whether the goal is to chop up firewood or pound in a nail, for example. The purpose of criminal evidence law therefore becomes a crucial question - and a far more controversial one to answer than one might think. I will demonstrate that while there may be a number of different auxiliary objectives and secondary goals that may be different from jurisdiction to jurisdiction, there is one central goal underlying criminal evidence law in all jurisdictions – to ensure the accuracy of fact-finding so that the guilty are convicted and the innocent acquitted.

Having identified the cognitive operations of the fact-finders as the object of regulation, and factual accuracy as the main goal, I will proceed by examining the various ways evidence law works. This whole first chapter could be termed as "laying the foundation"

for the future discussion and part of this foundation is also a quick glance at the model jurisdictions. I have selected England and Wales, the United States, Estonia, Chile, Russia and Germany to serve as my sample jurisdictions.<sup>1</sup> There are several reasons behind this choice but the most important reason is to embrace the diversity of geographic locations, historical backgrounds, political systems – and the diverse choices in terms of procedural design and fact-finder profile. As we will see throughout this work, the jurisdictions I have chosen also present a great variety of combinations of evidentiary and procedural regimes. One should be mindful that this work does not purport to offer a comprehensive picture of any of these jurisdictions and due to the nature of this project can only touch upon the main principles.

With the necessary general groundwork in the first chapter, in each of the subsequent chapters I will take a closer look at one of the following three rubrics of evidence law: evidence of prior convictions, hearsay, and standard of proof. For each of these rubrics I will explore the approaches taken by our model jurisdictions and the relevant psychological research. Where possible, I will also offer specific suggestions for fashioning an improved regulation.

The results of this study are summarized in the final concluding part of this work at which point I will also offer my conclusion about the more general issue – is a pan-jurisdictionally applicable set of evidence rules even possible? The study may also yield some ancillary insights into the issues of procedural design more generally and those will be presented at the end as well.

### ***Limitations***

One word of caution is also in order. While my study and its recommendations are based on the assumption that the relevant psychological research can be generalized across populations (i.e. studies about, for example, memory conducted on Americans also hold true for Estonians, Germans or Chileans), this may not be universally true – and may mean that the recommendations must be qualified in some jurisdictions because of socio-cultural quirks. Similarly, some of the psychological research itself is less than conclusive and thus it may turn out (as it has in the past time and time again) that things are not as they seem.

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<sup>1</sup> All translations of foreign language sources are my own unless indicated otherwise.

## **CHAPTER 1. FACTS, EVIDENCE, PROOF AND COGNITION – SETTING THE STAGE FOR HUMAN PSYCHOLOGY-FOCUSED INQUIRY INTO THE LAW OF EVIDENCE**

### **What is evidence law and how is it distinct from the law of procedure?**

What criminal evidence law is and how it relates to criminal procedure law is not immediately obvious. Evidence, Ian Dennis explains, is information that provides grounds for belief that a particular fact or a set of facts is true.<sup>2</sup> Evidence law deals with questions about generation, collection, organization, presentation and evaluating information for the purpose of resolving disputes about past events in legal adjudication.<sup>3</sup> Whereas the law of evidence is possibly one of the most complex and technical subjects in an American law school, there is no such subject or even a distinct branch of law in many countries and questions of evidence law are considered to be inextricable parts of procedural law in, for example, Germany, Austria, Russia, Estonia, Italy or Chile, to name a few. English evidence law, Roberts and Zuckerman observe, can claim the status of a self-conscious discipline for barely more than a century dating back to either the mid-nineteenth century or the mid-eighteenth century if one defines the development of a self-conscious discipline through legal practice rather than legal scholarship.<sup>4</sup>

While the law of evidence deals with what essentially amounts to information processing, criminal procedure law either proscribes or prescribes real tangible actions by government agents and citizens in detecting crime and punishing criminals. The central issue is that of curbing individual rights and liberties in the process of crime-fighting: it is a balancing act the results of which are dictated by whether the jurisdiction places more value on crime control or ensuring due process, as Herbert Packer wrote of the two models of criminal process in 1964.<sup>5</sup>

Although the law of evidence is traditionally associated with court procedure, this association is due to courts being tasked with resolving factual disputes in criminal matters

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<sup>2</sup> Ian Dennis, *The Law of Evidence*, 4th Ed. (Sweet&Maxwell: London, 2010), 3.

<sup>3</sup> Paul Roberts & Adrian Zuckerman, *Criminal Evidence*, 2<sup>nd</sup> Ed. (OUP: Oxford, 2010), 2.

<sup>4</sup> Roberts & Zuckerman, note 3, at 2. See also John Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 36 Wayne L. Rev. 1149 (1990).

<sup>5</sup> Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev 1 (1964).

and not because information processing by other bodies or institutions could not possibly be regulated by evidence law. In fact, some scholars have pointed out that since full-blown criminal trials are becoming increasingly rare with different kinds of procedural diversions being the main mode of disposing of criminal cases, focusing on evidence law in the trial setting or even focusing evidence law itself on court procedure is a misplaced effort.<sup>6</sup> In spite of these objections, I will still remain faithful to the trial-centeredness of evidence law for two reasons. Firstly, it appears that trial, regardless of its precise role and significance in the procedural framework of a particular jurisdiction, is the one constant that features as the culminating event across all jurisdictions. Secondly, trial as the capstone event in criminal procedure leaves its imprint on the rest of the procedure and guides the procedural decisions of the various actors even if in the end it never happens. The police will collect evidence considering the conditions for admissibility at trial; the prosecutor will decide whether to prosecute based on what admissible evidence has been collected; and the defendant's choice whether to accept a procedural diversion such as a plea agreement is also at least in part based on what evidence would likely be admissible at trial. In spite of only some cases going to trial, all defendants have the right to have one and the potential of a trial shapes the procedure leading up to it.<sup>7</sup>

As a matter of doctrine, different jurisdictions may of course choose to look at the law of evidence as a component part of the law of procedure but for analytical purposes, I will keep them distinct so I can examine the nature of the relationship between procedure and the law of evidence in different jurisdictions. It seems clear from the outset that the two are interrelated and possibly interdependent in that choices about procedure will shape the law of evidence and *vice versa*. So when we delve into the comparative law of evidence, it often comes with procedure attached.

## **The feasibility of universal rules of evidence**

Proposing that rules of evidence could be devised in a way that they are equally suitable for many jurisdictions will immediately meet this counter: legal systems and traditions are much too different for this. Perhaps a “Continental” system could borrow from another or an “Anglo-American” system might benefit from the insights of another system within the

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<sup>6</sup> Roberts & Zuckerman, note 3, at 44.

<sup>7</sup> See further discussion in the English context in Roberts & Zuckerman, note 3, at 45.

same “tradition” but translations or transplants from across the “traditions” cannot work.<sup>8</sup> So goes the discourse when one accepts the dichotomous approach to comparative law of evidence and criminal procedure, as we will see in a bit. My journey to the land of comparative criminal procedure and evidence has a specific goal – not to find what separates the jurisdictions, systems and traditions, and makes them irreconcilably different but to find what unites them and acts as common ground – provided, of course, that there actually is some element that all systems can claim as their own. Nevertheless, the following will be limited to the realm of Western, more or less modern and rational criminal justice systems and scholarship. While an excursion to Islamic law or African tribal criminal justice would be fascinating, it would also far exceed the scope of this work.

### ***Traditional dichotomy and Mirjan Damaška's works***

Comparative criminal procedure law and evidence law inquiries often revolve around the idea of the great dichotomy of the adversarial model and the inquisitorial model of criminal procedure.<sup>9</sup> Or in geographical terms – there are Continental-European (civil law) and Anglo-American (common law) legal systems with corresponding stereotypical law of criminal procedure and evidence. As Peter Duff notes,<sup>10</sup> the classic exposition of the two systems is found in an article by Mirjan Damaška written in 1973.<sup>11</sup> Damaška in his introduction uses a term that most others do not – he writes about “evidentiary style”<sup>12</sup> that under his set of terms is associated with the legal system – civil law or common law. More specifically, he argues that the evidentiary styles are the product of three main confluencing procedural factors in any given legal system: whether the trial is preceded by an official investigation; whether the parties have the responsibility of presenting the evidence; and whether the fact-finding body is composed of laymen or (also) includes professional adjudicators. What exactly an evidentiary style is, remains undefined. The ‘style’ appears to mean a procedure-inspired (or in some cases, dictated) preference for certain kinds of evidence over others (such as written official documents over live

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<sup>8</sup> See, for example, Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants*, 45 Am. J. of Comp. L. 839 (1997), but see also Harry T. Edwards, *Comments on Mirjan Damaška's Of Evidentiary Transplants*, 45 Am. J. Comp. L. 853 (1997).

<sup>9</sup> John Jackson & Sarah Summers, *The Internationalisation of Criminal Evidence* (Cambridge University Press: Cambridge, 2012), 6.

<sup>10</sup> Peter Duff, *Changing Conceptions of the Scottish Criminal Trial: the Duty to Agree Uncontroversial Evidence* in Antony Duff et al., *The Trial on Trial. Volume 1* (Hart Publishing: Oxford, 2004), 30.

<sup>11</sup> Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973).

<sup>12</sup> Id., at 510.



testimony). As early as 1973, Damaška recognized that differences among jurisdictions even nominally belonging to the same legal system can be significant.

For Damaška, 'legal system' refers to the tradition and historical-cultural origin of the entire system of laws and legal institutions whereas the question about the 'model of criminal procedure' (adversarial-inquisitorial-accusatorial...) refers to the features of the system designed for detecting, adjudicating and punishing crime. While this kind of differentiation may seem just a theoretical nicety, Damaška's choice to keep the two separate is actually a wise one. It would be careless and superficial, as we will later see, to settle for the crude traditional associations between the legal system and procedural model. The associations especially today lack both prescriptive and descriptive power.

Peter Duff<sup>13</sup> has distilled Damaška's classic dichotomy down to six characteristic traits and this appears to be illustrative of how those who believe the dichotomous two-model approach is useful define the two models. According to him, the adversarial model carries with it the following implications:

1. the parties are partisan and have sole control over the presentation of their case;
2. there are complex and restrictive evidentiary rules;
3. the prosecution must prove their case without compelling the assistance of the defence;
4. the judge is a passive umpire with no prior knowledge of the case;
5. the outcome is determined by a single hearing held in public at which there is heavy emphasis on the oral presentation of evidence.

The non-adversarial<sup>14</sup> model, on the other hand, is characterized by the following features:

1. there is an official investigation to establish the truth;
2. the parties do not control the presentation of evidence;
3. there are few restrictive evidentiary rules;
4. the defence is expected to assist in the discovery of the truth;
5. the judge plays an active part in gathering and selection of evidence;
6. the outcome results from a cumulative administrative process which has built up a case file, a dossier, of largely written evidence.

Duff's comparison sheet is compiled from an instrumental point of view and looks directly at the outward expressions in procedure as do actually many others if not most who choose

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<sup>13</sup> Duff, note 10. See also, Roberts & Zuckerman, note 3, at 46.

<sup>14</sup> Duff uses this as the synonym for inquisitorial

to use the adversarial-inquisitorial dichotomy in their scholarship. Interestingly enough, it is none other than Damaška himself who in his later book<sup>15</sup> cautions comparativists against such a simplified approach. He observes that the two models only have their very core carved out with sufficient definition – while the adversarial model of procedure takes its impetus from a dispute and requires a (private) complaint to get under way, the inquisitorial model is based on an official investigation that can be launched even in the absence of a complaint. Beyond these core ideas, the clusters of other features imputed to the two models are constantly shifting and changing. Damaška cautions against portraying the particular models as two distinctive groups of static systems – one embracing the descendants of the common law and the other one stemming from the continental tradition. This “lowest common denominator”<sup>16</sup> approach is not viable as Damaška notes and we shall later see for ourselves: one cannot set up a model to which all systems of either pedigree would conform, not only because of the diversity in details but also because of the constant changes that are taking place.<sup>17</sup> Another point is brought up by Nijboer in his article about Dutch criminal evidence law:<sup>18</sup> the law on the books can be radically different from the law in action. In the Netherlands, for example, Nijboer writes, the current code of criminal procedure implies that a standard criminal case would culminate in a trial where most of the evidence is presented through live testimony. In practice, most of these provisions are usually dormant and the majority of cases are decided on the dossier.

In his “Faces of Justice and State Authority” Damaška himself used two different parameters to chart the main forces influencing the evolution of court procedure: the organization of authority and the disposition of government.<sup>19</sup> While held in high regard by other academics as a more nuanced way of organizing the “unruly data,”<sup>20</sup> in his later

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<sup>15</sup> Mirjan Damaška, *The Faces of Justice and State Authority* (Yale University Press: New Haven, CT, 1986), 4.

<sup>16</sup> Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L. J. 1, 7 (2004).

<sup>17</sup> Damaška, note 15, at 5. This is precisely why keeping legal system and procedural model strictly separate also at the level of definitions makes a lot of sense.

<sup>18</sup> J. F. Nijboer, *Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective*, 41 Am. J. of Comp. J. 299 (1993).

<sup>19</sup> Damaška, note 15, at 181.

<sup>20</sup> Ronald J. Allen & Georgia N. Alexakis, *Utility and Truth in the Scholarship of Mirjan Damaška*, in John Jackson et al., eds., *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Hart Publishing: Oxford, 2008), 332. According to Roberts, Damaška's approach has several methodological strengths as it bridges the justice system and the general political system, his two axes are better able to encapsulate the complexities of real legal processes than the unidimensional adversarial-inquisitorial dichotomy; the modular structure of his conceptual building blocks facilitates modeling of relatively unusual combinations of features; and he demonstrates that concepts are always ideologically loaded – all conceptualizations of legal process depend on the perspective of the observer. - Paul Roberts, *Faces of Justice Adrift? Damaška's Comparative Method and the Future of*

“Evidence law Adrift”<sup>21</sup> Damaška reverted to the unidimensional adversarial-inquisitorial dichotomy and his two-axes grid explained in “Faces of Justice and State Authority” never made it into the mainstream – possibly because it is more nuanced than an average criminal procedure textbook.

Although the dichotomous approach to criminal procedure and evidence law can probably still be considered the mainstream, now perhaps more than before one should pay attention to Damaška’s warnings that it lacks descriptive power with regard to particular systems and was never meant to be a normative tool. Roberts also points out that the conventional dichotomy’s main flaw is that it is often unclear whether it is meant to be normative or descriptive<sup>22</sup> but argues that as an analytical tool and a starting point for a more refined analysis, the dichotomous adversarial-inquisitorial scale is still useful even if not descriptive of any real legal order. Maximo Langer writes that the inquisitorial-adversarial dichotomy still serves the comparative law inquiry well as Weberian ideal-types highlighting the differences in the procedural and evidentiary framework of the two camps. The two models, he argues, represent a deeper culture that is responsible for distortions of and resistance to legal transplants from the other camp and that such transplants therefore should be more accurately referred to as legal translations.<sup>23</sup>

While some scholars still view this dichotomous thinking as useful, others take a more principled stand and argue that the dualist perspective on criminal procedure and evidence law has become increasingly unhelpful.<sup>24</sup> As Sklansky describes, the simple-looking approach by the comparativists has in some cases taken a fairly strange turn when judges have started dabbling in comparative law.<sup>25</sup> Painting with a broad brush across a whole continent full of different legal systems, some American judges apparently view

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*Common Law Evidence* in John Jackson *et al.*, eds., *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Hart Publishing: Oxford, 2008), 302.

<sup>21</sup> Mirjan Damaška, *Evidence Law Adrift* (Yale University Press: New Haven, CT, 1997), 3. Here Damaška examines Anglo-American evidentiary regulation with Continental European evidence law serving as a comparative reference point. His argument is that since the main pillars supporting the Anglo-American model have eroded over time, the Anglo-American system of evidence law is likely to undergo radical changes in the near future – one that has been critically received by some American scholars – see, for example, Richard D. Friedman, *anchors and Flotsam: Is Evidence Law 'Adrift'? Review of Evidence Law Adrift*, by M. R. Damaška, 107 Yale L. J. 1921 (1998). Notice that even in 2014, Damaška’s prediction has not realized.

<sup>22</sup> Roberts, note 20, at 298.

<sup>23</sup> These cultural differences are expressed in structures of interpretation and meaning, personal dispositions and procedural power balance. Langer, note 16, at 9. See also, Stewart Field, *Fair trials and procedural tradition in Europe*, 29 OJLS 365 (2009).

<sup>24</sup> Jackson & Summers, note 9, at 8.

<sup>25</sup> David A. Sklansky, *Anti-inquisitorialism*, 122 Harv. L. Rev. 1634 (2009).

“inquisitorialism” as something akin to the main evil in the realm of criminal procedure.<sup>26</sup> As Sklansky also aptly points out, it is far from clear what exactly is meant by “inquisitorialism” that must at all costs be resisted. Civil law tradition, he remarks, is not monolithic and does not serve well as a general-purpose contrast model.<sup>27</sup> Apparently in those judicial opinions, the originally descriptive models have somehow transmogrified into prescriptive ones. Dennis suggests that the goals of adjudication dictate the aims of the law of evidence.<sup>28</sup> It appears, however, that in some cases no such analytical approach can be identified and the new role of the two models is to concentrate on the perception of a standoff and differences rather than rational calculation.<sup>29</sup> The dichotomous approach in itself probably helps to fuel the seeking of contrast and opposition<sup>30</sup> – after all, its original aim was to explain why in different jurisdictions the same task – adjudication – is often subject to different regulation.

For our inquiry, the two (or four) model approach appears rather unhelpful – it is divisive and focuses on differences between jurisdictions, perhaps even driving them apart as an ideological tool in that those designing criminal justice systems limit their search for workable arrangements to their own end of the traditional dichotomy and refuse to look farther. The approach of this thesis is to do exactly the opposite – look past the limits and obstacles to see if they really exist or are but self-imposed and illusory. The dichotomy, however, does show us where those potentially prohibitive differences are that need to be tackled. We also should not underestimate the dichotomy’s influence in shaping the scholarly discourse: even though it may be unhelpful for our purposes, others still prefer to use this language and look at the world through the dichotomous prism. Therefore, the reader should expect seeing references to inquisitorial and adversarial models further down the road but keep in mind that my own approach is not relying on this.

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<sup>26</sup> One famous example of this is Justice Scalia’s majority opinion in *Crawford v. Washington*, 541 U.S. 36 (2004) where he explicitly cites European-style inquisitorial procedure as the principal evil against which the 6<sup>th</sup> Amendment’s confrontation clause is purportedly directed.

<sup>27</sup> Sklansky, note 25, at 1696.

<sup>28</sup> Dennis, note 2, at 28.

<sup>29</sup> For a description of most common misunderstandings and mutually skeptical attitudes, see Thomas Volkmann-Schluck, *Continental Criminal Procedures: True or Illusive Model?*, 9 Am. J. Crim. L. 1, 2 (1981).

<sup>30</sup> As Jackson notes, the “[o]pposing ideal types provide much stronger lenses for understanding the machinery of justice [...] they concentrate much more on the differences between those procedural traditions than on any similarities” – John Jackson, *Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries* in Jackson *et al.*, Eds., *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Hart Publishing: Offord, 2008), 222.

***What is driving the procedure? Looking for commonalities rather than building a stand-off: Jackson and Summers***

Sarah Summers in her “Fair Trials”<sup>31</sup> takes an approach that is explicitly contrary to that of Damaška's: instead of explaining why and where the criminal justice systems diverge, she set out to question the basis for this divergence and indeed, even question the existence of real differences among European criminal justice systems. Focusing on the inquisitorial/adversarial divide, she argues, creates several undesirable effects.<sup>32</sup> Her focus and inspiration is the European Court of Human Rights and the “ease with which the court has assumed the mantle of the regulator of European Procedural Rights in Criminal proceedings.” Recent work by Jackson and Summers<sup>33</sup> continues this endeavour and seeks to find the shared values and commonly accepted principles of criminal evidence law across various systems. Their hope is that if those values and principles can be discerned, one could recommend improvements while avoiding cries that foreign implants are being imposed upon native soil. It appears to be their focus on finding commonalities rather than lines of separation that prompts them to abandon the adversarial-inquisitorial dichotomy and turn their attention to two traditions that complement each other in contemporary evidence law in all Western legal systems: the rationalist tradition and the rights tradition.<sup>34</sup>

The rationalist model of adjudication was developed by Twining, but is ultimately based on utilitarian ideas. The main assertion of the theory is that the fundamental aim of adjudication is rectitude of decision-making. Rectitude is in turn achieved by the correct application of substantive law to the true facts of the dispute. The facts are determined through the accurate evaluation of relevant and reliable evidence by a competent and impartial adjudicator applying the specified burden and standard of proof.<sup>35</sup> It thus follows that achieving the rectitude of decision presupposes a pursuit of truth through reason.<sup>36</sup> And although far more popular in the English language evidence discourse than the German or French for example, Twining considered his model equally well applicable to both ends of the traditional dichotomy of continental and Anglo-American evidence law.

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<sup>31</sup> Sarah J. Summers, *Fair Trials. The European Criminal Procedural Traditions and the European Court of Human Rights* (Hart Publishing: Oxford, 2007), 16.

<sup>32</sup> See *Id.*, at 3-10.

<sup>33</sup> Jackson & Summers, note 9, at 13.

<sup>34</sup> *Id.*, at 14...19.

<sup>35</sup> Dennis, note 2, at 29, citing Twining, *Rethinking Evidence*, 2006.

<sup>36</sup> Twining's model is derived from Bentham's idea of Natural System of Procedure that shuns technical exclusionary rules or prescriptions on how to evaluate evidence. Instead, the law should educate and advise fact-finders in order to promote as accurate fact-finding as possible. According to the principle of utility, this freedom is to be circumscribed by concerns of unjustified costs including “preponderant vexation” and expense and delay caused by accepting certain types of evidence.

Jackson and Summers explain how rationalist theory has been able to expose faults in the fact-finding system in procedural arrangements on both sides of the English Channel: the English system had been taken captive by the parties and on the Continent, the Roman Canon system of legal proofs ran against the idea of rationality.<sup>37</sup> The rationalist theory carries with it an important notion that can be traced back to the empiricist philosophy of Locke, Hume and Bacon: that observation and memory supply the basic data for reasoning and that we can only go beyond the data collected through our senses by what is now called inductive generalization. This also means that present knowledge about the facts is possible but since it is all the product of the inductive reasoning process, we are actually dealing with probabilities rather than certainties.<sup>38</sup>

The rights tradition, Jackson and Summers argue, is the second major method for organizing the objectives of adjudication at work both in Anglo-American jurisdictions as well as in Continental Europe. Unlike the focus on general utility in the rationalist way of thinking, the rights model places the individual and his rights at the forefront. The rights tradition has its roots in the Enlightenment idea that an individual is not merely an object of state authority but the source and the reason of statehood and is thus to be treated accordingly. According to Dennis, there are two rights which are central to the debates on the law of evidence – the right of the accused not to be wrongfully convicted, and the right of any person to a fair hearing.<sup>39</sup> These two rights both entail a number of subordinate components – the building blocks that make up the right to a fair hearing, for example.<sup>40</sup> Moreover, unless the fairness of the hearing is considered just a non-functional decoration unrelated to the accuracy of the outcome, holding a fair hearing seems to be one of the instruments of guaranteeing the defendant's right not to be falsely convicted. The rights tradition is embodied in the American Bill of Rights as well as many more recent human rights documents such as the European Convention of Human Rights. The discussion about rights in criminal evidence law and criminal procedure in general usually revolves around the rights of the defendant – and for a good reason: the rights discourse emerged in earnest at a time when judicial torture in Continental Europe was common and English defendants had it only somewhat better.<sup>41</sup> Nevertheless, as Roberts aptly remarks, criminal process

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<sup>37</sup> Jackson & Summers, note 9, at 16.

<sup>38</sup> *Id.*, at 15.

<sup>39</sup> Dennis, note 2, at 36.

<sup>40</sup> The ECHR Article 6 explicitly lists several component rights such as right to impartial tribunal, right to adjudication within reasonable time, right to counsel, right to call witnesses, right to be confronted with witnesses against oneself, right to interpretation, right to public trial and public judgment, and right to be presumed innocent.

<sup>41</sup> Jackson & Summers, note 9, at 18.

with the sole purpose of respecting the rights of the individual accused is inconceivable as this would defy the whole instrumental purpose of the criminal process.<sup>42</sup> Individual rights cannot rise to the level where they completely block the operation of substantive criminal law in that the system is no longer able to collect and process information that would lead to apprehension and punishing of offenders. The rationalist tradition and the rights tradition are significant because, as Jackson and Summers show, they both are currently shaping criminal evidence law across the Continental/Anglo-American spectrum – they constitute a low-level commonality between different systems.

Depicting the rationalist and rights traditions as something mutually exclusive or offsetting would mean that one is again looking to find confrontation where there is none. The two have actually in common what amounts to the central feature of not only criminal evidence law but the entire criminal procedure: the goal to ensure accurate implementation of substantive criminal law. This can only be achieved through accurate fact-finding: the tool of choice of criminal law – punishment – should be meted out to those who chose law-breaking as their course of action and deserve to be punished.<sup>43</sup> The two vantage points - effectiveness (as represented in the rationalist model) and individual rights are but factors to consider and limitations to take notice of. Moreover, while it may be tempting to view the individual defendant's rights in criminal procedure as hindrances and obstacles getting in the way of truth-seeking, the rights may actually be instrumental in securing accurate fact-finding (e.g. the right to counsel or the right to challenge the prosecution's evidence are likely to favourably contribute to fact-finding accuracy regardless of whether the jurisdiction belongs to one end of the adversarial-inquisitorial scale or the other). While most of the rights discussion until very recently has been almost exclusively about the rights of the defendant, there are also other actors in the procedure now claiming their rights. Most prominent among them are probably crime victims<sup>44</sup> but similar issues about individual rights in criminal procedure have been raised on behalf of witnesses.<sup>45</sup> Accurate fact-finding is also salient in striking a balance between the often contradictory rights of these different stakeholders.

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<sup>42</sup> Paul Roberts, *Subjects, Objects and Values in Criminal Adjudication* in Antony Duff *et al.*, *The Trial on Trial* (2): *Judgment and Calling to Account* (Hart Publishing: Oxford, 2006), 37.

<sup>43</sup> Whether the justification for punishment is reformation, retribution or deterrence, punishing someone other than the person who committed the crime is not only non-functional but also morally indefensible.

<sup>44</sup> See Douglas Baloof, *The Third Model of Criminal Process: the Victim Participation Model*, 1999 Utah L. Rev. 289 (1999) or William Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative perspective on American Problems*, 32 Stan. J. Int'l L. 37 (1996).

<sup>45</sup> See Claire de Than, *Positive Obligations under the European Convention on Human Rights: Towards the Human Rights of Victims and Vulnerable Witnesses*, 67 J. Crim. L. 165 (2003).

Jackson and Summers' approach is certainly a step closer to finding a common ground for the law of criminal evidence in different jurisdictions. The international human rights treaties have effectively unified many aspects of criminal evidence law thereby creating a standard that, indeed, appears to successfully bridge the traditional dichotomous view on the legal systems. If one is to assume that the collective wisdom of the various human rights instruments and international tribunals represents the ideal of criminal evidence law then it is difficult to deny that Jackson and Summers' approach also entails a strong prescriptive/normative component.

There are, however, weighty arguments that temper my optimism. As a universally applicable framework that would not only provide descriptive but also normative content, the legal world is notoriously volatile. Human rights seem to be *en vogue* these days in the West and most jurisdictions have been eager to ratify international conventions and demonstrate their compliance with their provisions – or at least declare their support for the ideals enshrined therein. The principles themselves, however, are less than principled and while Summers correctly points to the European Court of Human Rights taking on the role of pan-European criminal evidence and procedure law regulator, the Court's jurisprudence is characterized by concessions and compromises rather than actual unifying force.<sup>46</sup> It also appears that Jackson and Summers have built their framework around the concept of universal defence rights. However, evidence law is not applicable to just the defence, nor can its purpose be just to defend individuals against the state. It thus appears that even though Jackson and Summers set out to combine the rationalist and rights tradition, the combination turned out a bit one-sided.

### ***Human psychology as the connecting element: Dan Simon***

There is a danger that we may miss an important point here: laws and rights in criminal procedure and evidence are not values by themselves. As we recall, evidence law is about ascertaining facts of the past based on available information. So the laws and rights must support this mission in order to have any real value. Alternatively, the question could be posed like this: can convicting a factually innocent person be moral, legitimate or purposeful? Or conversely, how can a system pride itself in setting factually guilty

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<sup>46</sup> See Jackson & Summers, note 9, at 366.



defendants free so they could commit more crimes?<sup>47</sup> Ultimately, this would be the result of the system not being able to get the facts right. When lawyers embark on the task of discussing, comparing or designing trial orders, philosophies of evidence evaluation, extent and substance of individual rights and meanings of truth, they often tend to lose sight that this is not a computer program or a machine they are devising or criticizing. Criminal process is “nothing else than a communicative act, which is set in place in order to answer the one question of the guilt of the accused,” as Safferling and Hoven point out.<sup>48</sup> Or as Dan Simon explains:

One of the most distinctive features of the criminal justice process is that it is operationalized predominantly through people: witnesses, detectives, prosecutors, suspects, defence attorneys, forensic examiners, judges, and jurors. These actors turn the wheels of the system through their mental operations: perceptions, memories, recognitions, assessments, inferences, judgments, and decisions—all tied in with emotions, affective states, motivations, role perceptions, and institutional commitments. As the process can perform no better than the mental performance of the people involved, it seems sensible to examine its workings from a psychological perspective.<sup>49</sup>

Just like law cannot force the sun to shine, it will not be able to legislate for human nature or cognitive needs and abilities. We may assume and hope that humans have perfect memory but when the law proceeds on this assumption and the assumption is empirically wrong (as, indeed, this one obviously is), our carefully balanced system may be more sub-optimal than we can accept. We may theorize about truth and proceed on the basis that, philosophically, truth is something objectively ascertainable and reality is something universally perceivable.<sup>50</sup> Yet, empirical evidence tending to show that the same exact event or object can be perceived and construed radically differently by different individuals should at least make us pause and think how to deal with this dissonance. Or, while scholars have spent years and countless pages describing the proper way of inferential

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<sup>47</sup> Perhaps, when the evidence against a guilty defendant has been fabricated by the state, the system should be proud of setting that defendant free? I would argue that this situation entails triple the shame: first, for failing to convict the offender for what he did, and then for convicting the defendant for something else that he did not do, and then, for fabricating evidence thus perverting the course of justice in three different instances. See also James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 Alb. L. Rev. 1629 (2013).

<sup>48</sup> Christoph Safferling & Elisa Hoven, *Foreword: Plea Bargaining in Germany after the Decision of the Federal Constitutional Court*, 15 German L. J. 3 (2014)

<sup>49</sup> Dan Simon, *Limited Diagnosticity of Criminal Trials*, 64 Vand. L. Rev. 143, 145 (2011).

<sup>50</sup> An explanation of various ways to conceptualize truth can be found in Susan Haack, *Truth, Truths, “Truth” and “Truths” in the Law*, 26 Harv. J. L. & Pub. Pol’y 17 (2003).

reasoning the fact-finders are supposed to undertake,<sup>51</sup> we will later see that empirically, the average fact-finder, be it a judge, juror, lay assessor or a mother trying to make sense of how her son parted company with his lunch money, will instead engage in unconscious heuristic reasoning and story construction. To address this, the legislation would have to either create the environment where fact-finders are forced to use methodical reasoning process or tailor the process so that the methodical deliberate reasoning is not needed. This is not to say that a system cannot make compromise at the expense of cognitively optimal fact-finding arrangement but in order for the compromise to be intelligent and informed, one must be aware of the implications of one's choices.

Dan Simon's focus on the human psychology of fact-finding as the basis for evidence law discussion is very attractive as human participants are indeed the common and arguably indispensable element across all jurisdictions. Moreover, unless the digital (r)evolution results in judges and lawyers being replaced by computers, human element is the one constant that remains even if the state order should change, a country should choose to leave the human rights convention or radically alter their criminal justice system. Simon himself focuses on the evidence law and the procedure in the United States but unlike the law and legal order, human cognitive needs and abilities are not limited by state borders. Until fairly recently, human cognition was commonly assumed to be universal. It is only over the past 10-20 years that psychology has developed an awareness for the existence of cross-cultural differences in cognition and reasoning. Whereas some qualities differ from culture to culture,<sup>52</sup> most are still shared by all humans. As an example pertinent to this thesis, members of more collectivist cultures naturally tend to pay less attention to individual details and think more in terms of the big picture and relationships between objects than those belonging to more individualistic cultures.<sup>53</sup> Still, as most findings of psychological science can be generalized universally it provides the common ground for analyzing the law of evidence in different jurisdictions. By asking what the human mind is capable of and under what conditions it can best do what it is expected in terms of information processing we create a function-driven normative approach that allows

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<sup>51</sup> See, for example of some of these systems, Terence Anderson & William Twining, *Analysis of Evidence: How to Do Things with Facts Based on Wigmore's Science of Judicial Proof* (NWU Press: Evanston, 1998), 105.

<sup>52</sup> See Ara Norenzayan & Steven J. Heine, *Psychological Universals: What Are They and How Can We Know?*, 131 Psych. Bull. 763 (2005).

<sup>53</sup> Richard E. Nisbett *et al.*, *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 Psych. Rev. 291 (2001) specifically exploring differences in tacit epistemology, attention and the nature of cognitive processes such as dialectical versus logical ones between East Asian and Western cultures. See also, Jennifer T. Stanley *et al.*, *Cultural differences in gaze and emotion recognition: Americans contrast more than Chinese*, 13 Emotion 36 (2013).

evaluation of criminal evidence law in different jurisdictions and can suggest improvements to the current system.

While we may look at the human mind as the tool that is used in this information processing exercise, we also need to identify the end goal against which then one may compare the results of one's analysis. For Dan Simon, this end goal is discovery of truth which to him means accurate fact determination.<sup>54</sup> Having identified accurate fact-determination as the objective, he proceeds to analyze several aspects of the United States evidence law and criminal procedure in light of what is known about the cognitive needs and abilities of the human actors in the criminal justice process. He then also makes several suggestions about how procedure and evidence law in the United States should be upgraded in order to better facilitate accurate fact-finding in criminal cases. Thus, to use Simon's approach to analyze the law of evidence in different jurisdictions, identifying the human mind as the common tool is not enough: there would also have to be a common objective. Whether there actually is a common objective is a question that will be more closely examined in the next section.

The human psychology-focused approach to procedure and evidence is by far not unprecedented. Park and others note that doctrinal evidence scholarship has in recent times decreased to make way for various types of interdisciplinary research.<sup>55</sup> Among these different branches, cooperation of law and psychology is arguably the most important one dating back to the early 20<sup>th</sup> century and the works of Hugo Münsterberg.<sup>56</sup> From then on it has seen both bursts of enthusiasm and times of disenchantment.<sup>57</sup> Dan Simon laments that procedure has for lawyers become a thing in itself and overshadows the drive for factual accuracy.<sup>58</sup> Due process and fundamental rights may, but do not necessarily work towards alleviating the problems with the accuracy of fact-finding. This concern is substantiated by the hundreds of wrongful convictions that have been exposed.<sup>59</sup> In his article Simon concedes that the current law of evidence “contains a considerable amount of

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<sup>54</sup> Dan Simon, *In Doubt. The Psychology of the Criminal Justice Process* (Harvard University Press: Cambridge, MA, 2012), 13.

<sup>55</sup> Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. Rev. 949, 952 (2006).

<sup>56</sup> His book 'On the Witness Stand' that was published in 1908 looked at different issues such as perception and memory of witnesses, confessions and hypnotism.

<sup>57</sup> Park & Saks, note 55, at 957.

<sup>58</sup> Dan Simon, note 125, at 204-205.

<sup>59</sup> See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press: Cambridge, MA, 2011) or Samuel R. Gross *et al.*, *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523 (2005). See also, Acker, note 47 for recent data on exonerations in the United States as well as discussion of the effects of wrongful convictions.

psychological intuitions” but argues that the law’s psychological sensibilities are often limited and inaccurate, and are frozen at the pre-experimental state of knowledge that prevailed at the time these common law rules were forged. “There is thus good reason to update the legal system with more reliable and nuanced knowledge of human behaviour.”<sup>60</sup> Simon himself examines jurors’ ability to accurately assess the probative value of witness statements and to deal with “non-evidential” factors such as courtroom persuasion tactics, emotional arousal, racial prejudices and the coherence effect.

Dan Simon is not alone in looking into the jury and its decision making process from the psychological point of view. The works of Pennington and Hastie, for example, have been groundbreaking in exploring the way jurors actually organize information in order to make sense of the trial evidence. Their story model<sup>61</sup> is not only widely accepted<sup>62</sup> but has also laid the groundwork for further research by others, including Simon himself.

At least as important are the works of Guthrie, Rachlinski and Wistrich – two professors and a federal judge who have conducted several experimental studies on judicial decision making and judges’ cognitive abilities. Their research quite clearly shows what often seems to be forgotten: judges are humans and not at all impervious to the many cognitive shortcomings commonly ascribed to lay decision makers.<sup>63</sup>

All these works tend to be confined to just one jurisdiction or to the Anglo-American world at best. However, similar concerns should animate the debate over the best procedural arrangements everywhere. Analyzing procedural arrangements or rules of evidence from the perspective of human psychology as opposed to abstract philosophical ideas could easily be the key to getting closer to the resolution of the lingering dispute over the comparative fitness for purpose of different procedural arrangements.

Before we can proceed with this, however, we must take a closer look at the other side of the equation: is accurate fact-finding really the goal that unites different jurisdictions?

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<sup>60</sup> Simon, note 125, at 149. See also Dan Simon, *More Problems with Criminal Trials: the Limited Effectiveness of Legal Mechanisms*, 75 Law & Contemp. Probs. 167 (2012).

<sup>61</sup> Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. Pers. Soc. Psych. 242 (1986).

<sup>62</sup> Lisa Kern Griffin, *Narrative, Truth and Trial*, 101 Geo. L.J. 281 (2013).

<sup>63</sup> See, for example, Chris Guthrie, Jeffrey Rachlinski, Andrew Wistrich, *Altering Attention in Adjudication*, 60 UCLA L. Rev. 1586 (2013); *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195 (2009 – with Sheri Lynn Johnson); *Can Judges ignore Inadmissible Evidence? The Difficulties of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251 (2005); *Blinking on the Bench: How Judges Decide Cases?*, 93 Cornell L. Rev. 1 (2007); *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001).

## The objective to be achieved by the law of criminal evidence

The view of the criminal procedure and criminal trials as primarily a truth-finding enterprise seems to enjoy a widespread support. Even a cursory look at literature reveals the importance of this objective regardless of whether a system is more interested in crime control or ensuring fundamental rights to its citizens; or whether it belongs to one legal tradition or another. Ashworth and Redmayne state that the 'purpose for having trials in the first place is to make accurate decisions.'<sup>64</sup> Findlay also posits that 'In criminal cases, fact-finding accuracy is the driving objective and preventing conviction of the innocent is a paramount concern.'<sup>65</sup> As Roberts writes about the English system, "the aspiration that judicial verdicts should conform as nearly as possible with the truth, not surprisingly, merits pride of place as the first principle of criminal evidence."<sup>66</sup> The United States Supreme Court in *Funk v. United States* wrote of the rules of evidence: "The fundamental basis upon which all rules of evidence must rest if they are to rest upon reason – is their adaptation to the successful development of the truth."<sup>67</sup> "Accuracy of fact-finding" or "ascertaining the truth" is held in similarly high regard in other systems.<sup>68</sup>

A careful observer has by now picked up on a possible ambiguity in terms that could prove significant: accurate fact-finding is often used interchangeably with 'ascertaining the truth' but what is truth and whether it necessarily entails accurate fact-finding is not clear. Duff and others make this point and also argue that the forum where evidence law operates – the criminal trial – actually also serves purposes other than accurate fact-finding.<sup>69</sup> Even though trials are sometimes viewed as purely instrumentalist (i.e. geared exclusively or mainly towards accurate fact-finding), the fact-finding function may not even represent their main objective and an accurate account of the past is itself a means, not the end.

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<sup>64</sup> Andrew Ashworth & Mike Redmayne, *The Criminal Process*, 3<sup>rd</sup> Ed. (OUP: Oxford, 2005), 299.

<sup>65</sup> Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 592 (2009).

<sup>66</sup> Roberts & Zuckerman, note 3, at 18.

<sup>67</sup> 290 U.S. 371, 381 (1933).

<sup>68</sup> For an overview of the German theories, see Peter Riess, *Über die Aufgaben des Strafverfahrens*, 2006 Juristische Rundschau 269, 270-71 (2006) or Michael Bohlander, *Basic Concepts of German Criminal Procedure*, 1 Durham L. Rev. 23(2011). For Estonia, see Eerik Kergandberg, *Üldmenetluse ja erimenetluste vaheline pingeline Eesti tänases kriminaalmenetlusõiguses ja kohtupraktikas*, Juridica 8 (2012), 579.

<sup>69</sup> Antony Duff *et al.*, *The Trial on Trial*, vol. 3: *Towards a Normative Theory of Criminal Trial* (Hart Publishing: Oxford, 2007), 91.

Truth, they argue, cannot be equated to an accurate record of the past events in question for it is much richer and has intrinsic significance rather than being just the necessary precondition to imposing criminal punishment.<sup>70</sup> Truth is not as much concerned with whether the defendant drove at 80 mph in a 30 mph zone but it is a statement by the fact-finder condemning the defendant for his criminal wrongdoing – and this inherently also includes a value judgment.<sup>71</sup> Still, the foundation for the verdict must be knowledge of the past events. Duff and his co-authors explain that this unhesitant knowledge must be gleaned from the evidence introduced at trial through the appropriate process. And of course it must be true knowledge, they continue – trial is not the place for 'pure procedural justice' where the justice of the outcome is contingent on the justice of the procedures employed. The trial aims at a verdict that is both true and justified by the adequate and legitimate evidence presented at the trial.<sup>72</sup> This mission statement apparently holds true regardless of how a system is positioned on Damaška's conflict-resolution-truth finding scale<sup>73</sup> and also provides further support for the hypothesis that accurate fact-finding is the one objective joining together all western style criminal justice systems where criminal law is in essence retributive. To wrap up this disambiguation attempt here, truth and accurate fact-determination may not be the same thing: truth emerging from the trial often has a normative component and its accuracy may be tempered by a variety of factors such as procedural rights afforded to the witnesses and the defendant (privileges, exclusionary rules etc), or time and resource restrictions.<sup>74</sup> So even when accurate in light of the evidence presented at trial and thus "true", the verdict may be less than accurate in the wider sense.

### ***Is there a reality to be ascertained? Realists and sceptics.***

However, regardless of how we declare our high aspirations towards factual accuracy, the relationship between reality and perception is not clear and even the concept of 'reality' is far from unambiguous. Broadly speaking, the divide in epistemology runs between realists and sceptics along the line of whether there exists objective and perceivable reality

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<sup>70</sup> Id., at 81.

<sup>71</sup> Id., at 83. The fact-finder always has a choice whether to convict or not even in the face of facts that satisfy the formal requirements for a conviction.

<sup>72</sup> Id., at 91.

<sup>73</sup> Id., at 69.

<sup>74</sup> There is also an argument that the purpose of trial and evidence law as its component is not so much to sort out the past but to shape future conduct through a system of privileges and restrictions on admissibility designed to protect and thereby promote certain relationships or conduct such as settlement in civil cases – see Chris W. Sanchirico, *Character Evidence and the Object of Trial*, 101 Colum. L. Rev. 1227 (2001).

independent of the observer (cognizer) or not. Depending on how reality and its relationship with perception and its reflection in language is conceptualized, fact-finding arrangements may have to be different as Jackson argued.<sup>75</sup>

The realists who apparently comprise much of the mainstream evidence scholarship<sup>76</sup> posit that there is objectively some real world "out there" and that humans can gain knowledge of this objectively existent world through their senses. The oldest and possibly the best known and grasped by people who are not digging too deep into questions of ontology and epistemology is the correspondence theory of truth. The theory maintains that truth is an accurate reflection of outside reality – a statement is said to be true when it conforms to the external reality. At the most basic level, this entails an assumption that there is some form of objectively existent matter that "is what it is" independent of the observer, their background, language or location,<sup>77</sup> and that knowledge of this reality can be objectively put into words. This knowledge should be obtained through inferential reasoning from one's own experiences. As Damaška explains, a more sophisticated version of the correspondence theory maintains that establishing the truth is to ascertain a match between a cognizer's statement and phenomena that can be either intrinsic to nature or socially constructed.<sup>78</sup> By offering this definition, he attempts to reconcile the correspondence theory with another prominent theory of truth – the social construction theory which asserts that there is no inherent relationship between words and external reality (but the external reality still exists and full knowledge of it is possible); the relationship and thus the world view is constructed within a societal framework. So, the same sensual perceptions may give rise to different versions of what it means in different societies as the meaning of language is a social construct. Damaška's argument is also that much of what the law deals with is not phenomena internal to nature but social constructs like the days of the week and, therefore, the question about constructing a faithful image of external natural reality may not be the all-important issue in legal context anyway.<sup>79</sup> Now, descending from the heights of the philosophy of science, for the purposes of adequate arrangements for judicial fact-finding, this simply means that the same sensation may be described by different words depending on the background of the witness and that in some instances this

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<sup>75</sup> John Jackson, *Theories of Truth Finding in Criminal Procedure: an Evolutionary Approach*, 10 Cardozo L. Rev. 475 (1988).

<sup>76</sup> Donald Nicolson, *Taking epistemology seriously: 'truth, reason and justice' revisited*, 17 Int'l J. Evidence & Proof 1, 3 (2013).

<sup>77</sup> Haack, note 50.

<sup>78</sup> Mirjan Damaška, *Truth in Adjudication*, 49 Hastings L. J. 289, 291 (1998).

<sup>79</sup> Id., at 292

is more than just a simple translation problem as demonstrated, for example, by the difficulties in translating into English the more than 50 words Eskimos have for snow.<sup>80</sup>

Scepticism has always been a part of philosophy and in terms of epistemology, as Nicolson explains, there are degrees of scepticism ranging from those radical post-modernists who argue that there is nothing "out there" to be known to the more moderate sceptics who doubt the completeness and accuracy of knowledge.<sup>81</sup> Sceptics argue that truth and knowledge are always partial and influenced by the background and abilities of the observer. While there may be something "out there" to be gleaned knowledge of, there are no absolute truths about it possible. Surely there may be social conventions, popular opinions or wide-ranging agreements about truth in any particular situation and about ways of gaining the knowledge sought. In fact, even some realists agree that true knowledge of the objective reality may be difficult to obtain. According to Jackson, many self-proclaimed sceptics upon closer examination actually turn out to be ontological realists who have become disillusioned about the ability of the current procedures to achieve truth.<sup>82</sup> The position that sets true sceptics apart from realists is that for a sceptic, true knowledge of objective reality is impossible.<sup>83</sup>

### ***Procedurally tempered compromises: consensus theory and procedural truth***

Weigend argues that while otherwise not making much sense, some features of criminal procedure are best explained through the consensus theory.<sup>84</sup> The consensus theory is based on the works by Jürgen Habermas who has claimed:

‘I can [correctly] ascribe a predicate to an object if and only if every person who could enter into a dialogue with me *would* ascribe the same predicate to the same object.... The condition of the truth of statements is the potential agreement of all others.’<sup>85</sup>

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<sup>80</sup> [http://www.washingtonpost.com/national/health-science/there-really-are-50-eskimo-words-for-snow/2013/01/14/e0e3f4e0-59a0-11e2-beee-6e38f5215402\\_story.html](http://www.washingtonpost.com/national/health-science/there-really-are-50-eskimo-words-for-snow/2013/01/14/e0e3f4e0-59a0-11e2-beee-6e38f5215402_story.html)

<sup>81</sup> Nicolson, note 76, at 6. Moore calls those who recognize that there is an independent reality but that the truth of it inherently dependent on human beliefs and conventions constructivists. See Michael Moore, *The Plain Truth about Legal Truth*, 26 Harv. J. L. & Pub. Pol'y 23, 28 (2003).

<sup>82</sup> Jackson, note 75, at 513.

<sup>83</sup> Nicolson, note 76, at 11.

<sup>84</sup> Thomas Weigend, *Should We Search for the Truth? And Who Should Do It?* 36 N.C.J. Int'l L. & Com. Reg. 389, 396 (2011).

<sup>85</sup> *Wahrheitstheorien*, in H. Fahrenbach (ed.), *Wirklichkeit und Reflexion: Festschrift für Walter Schulz* (Pfullingen, 1973), 219.



Whereas Weigend points to the explanatory value of the consensus theory, he is also critical of it. The theory on its face value purports to assume some objective reality, however, if so, it also entails some other assumptions that will make the consensus theory of truth at best shaky as demonstrated by Nicholas Rescher.<sup>86</sup> As Weigend illustrates, accepting that truth can be just a matter of consensus could mean, for example, that a murder conviction would not be based on “because he did it” but rather on “because the parties negotiated and found that punishing the defendant is the desirable outcome.”<sup>87</sup> Damaška, too, takes a critical view on the consensus theory: consensus among the parties of the criminal process cannot be a result of a fair discussion since the parties are not on an equal footing and have partisan incentives thereby distorting the possible truth-indicating power of consensus. Jung is not ready to scrap the consensus theory just yet: he points to types of court procedure where consensus theory seems to be in action and well accepted – plea-bargaining and German *Strafbefehl* are evidence that criminal procedure in some instances may actually already accept the notion of truth through consensus.<sup>88</sup> Similar is the significance of stipulations of fact in American courts.

It appears though that Damaška, Weigend and Jung all have adopted a restrictive understanding of how the consensus theory would pan out in the context of criminal procedure – why would it be sufficient to have only the parties agree to the truth of the defendant's guilt in a criminal matter where the criterion for truth in other matters was the potential agreement of every other person who could participate in the dialogue? Damaška, Weigend and Jung seem to think for some reason that persons other than the parties to the particular criminal case have no business in the dialogue. While criminal procedure may indeed limit the number of people who can actually engage in the dialogue, the dialogue about the truth value in the criminal judgment is by no means limited to the parties alone: the outcome of criminal procedure affects more people than just the parties (victim, parties' families, communities etc). In order to preserve its legitimacy, they too must share the consensus that the outcome of the proceedings is a true verdict. Still, asserting universal agreement as the criterion of truth is not useful for the purposes of criminal procedure as a standard against which to evaluate the end product if one adopts the realist perspective. It does, however, fit well with the more sceptical outlook. Even Damaška himself recognizes that the degree of objectivity necessarily varies. The facts to be “found”

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<sup>86</sup> Nicholas Rescher, *Pluralism: Against the Demand for Consensus* (OUP: Oxford, 1995), ch 3.

<sup>87</sup> Thomas Weigend, *Is the Criminal Process about Truth?: A German Perspective*, 26 Harv. J. L. & Pub. Pol'y 157, 169 (2003).

<sup>88</sup> Heike Jung, *Plea Bargaining and its Repercussions on the Theory of Criminal Procedure*, 5 Eur. J. Crime Crim. L. & Crim. Just. 112 (1997).

are not of the same type and their character can be quite different. Some facts to be found are exclusively of the past, others exist at the time of the proceedings and yet others would come to be in the future; some are about what happened, others are expected to answer the “why?”; some are devoid of value judgments, others are loaded. The question of whether a person is dead, Damaška observes, is much less contingent upon the prevailing social views than whether his behaviour at the time of his death would be considered provocative or life-threatening.<sup>89</sup>

Admitting that there is no objective truth does not necessarily mean that all arguments and statements have equal value or that there is no way to evaluate competing statements.<sup>90</sup> Rather than seeing truth in terms of correspondence to reality as the scientific method and correspondence theory of truth would, Jackson argues that although no one individual can claim a direct link to the 'Recording Angel',<sup>91</sup> truth as the goal should not be abandoned and the legal process should embrace a new dialectical method. Instead of looking for infallible correspondence to reality, the objective should be coherence that is achieved through a dialogue between interested parties. While there is no guarantee that the result actually is the truth, reaching agreement between as many involved and interested parties is as good as we can get, Jackson argues.<sup>92</sup> Steps in the right direction in Jackson's view are mutual disclosure of evidence and allowing the parties and the judge an opportunity to pose questions and be heard. Nicolson argues that while for a sceptic, complete true knowledge is impossible, truth should be viewed as an aspiration – involving the best possible description or explanation we can muster and a commitment to remain as assiduous and honest in our inquiries and communications as we possibly can.<sup>93</sup>

So how do these theories of truth map onto the criminal procedure and evidence law? As Hock Lai Ho correctly remarks, one must distinguish the internal and external perspective regarding the issue of truth and its relationship to the criminal process, evidence law or trial.<sup>94</sup> The external vantage point is that of a system engineer – someone looking at the fact-finding machinery from the outside and evaluating whether the system as it stands supports a particular goal. The internal perspective is that of a fact-finder in the system and is concerned with how a fact-finder would conceptualize their task in that system.

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<sup>89</sup> Damaška, note 78, at 300.

<sup>90</sup> This is essentially the gloomy future Damaška fears would threaten us if we were to give in to the skeptics and abandon the correspondence theory – see Damaška, note 78.

<sup>91</sup> Jackson, note 75, at 526.

<sup>92</sup> Id., at 526.

<sup>93</sup> Nicolson, note 76, at 41.

<sup>94</sup> Hock Lai Ho, *A Philosophy of Evidence Law* (OUP: Oxford, 2008), 46.

Although presumably no judge would argue against the importance of truth as the main goal of trials, Ho cites both judges and legal scholars who explicitly claim that the purpose and task of a court is not to find the truth but to do something else (resolve a dispute, do justice between the parties, etc).<sup>95</sup> His examples of judicial dicta, however, are all concerning civil cases and not likely to be equally accepted in criminal cases – there is hardly a judge who could, with a straight face, argue that it is a legitimate and acceptable use of state power to impose criminal punishments on someone who has done nothing to deserve it even if it resolves the dispute or helps save resources.

The points of view of system engineers are divergent, mostly all systems receive scholarly criticism for being somehow sub-optimal for ascertaining the truth. It is often at this juncture that the good old adversarial-inquisitorial dichotomy gets whipped out again, sometimes to the detriment of the analysis. Points of criticism include party dominance, excessive use of plea bargaining, constrained time-frame and exclusionary rules of evidence.<sup>96</sup> But also the diametrically opposite system features get their share of criticism. A judge cannot be an impartial adjudicator while being a zealous investigator, the argument goes. The prosecutor has a direct line to the court *via* the investigative file or dossier<sup>97</sup> which is handed to the court well before the trial if one is held.<sup>98</sup> This has the effect of making the procedure bureaucratically cumbersome and slanted in favour of the prosecution. The defendant is objectified and is stripped of opportunities to mount an effective defence. The judge-dominated procedure also has an inglorious inquisitorial history that its proponents are reminded of.<sup>99</sup> The end result, Weigend remarks, is equally dissatisfying in both systems: “a half-truth based on what the defendant and more or less interested third parties are willing to disclose.”<sup>100</sup>

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<sup>95</sup> Id., at 53.

<sup>96</sup> See Weigend, note 87. Weigend also attacks the jury for being not suitable for truth-finding but probably the reason for the entire system being made unsuitable for truth-finding.

<sup>97</sup> For discussion of the effect dossier may have on the decision making process, see Craig R. Callen, *Cognitive Strategies and Models of Fact-Finding* in John Jackson *et al.*, eds., *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Hart Publishing: Oxford, 2008), 170-173. See also, Daniel T. Gilbert, *How Mental Systems Believe*, 46 Am. Psychol. 107 (1991).

<sup>98</sup> For example, see Claudio Pavlic Feliz, *Criminal Procedure Reform: A New Form of Criminal Justice for Chile*, 80 U. Cin. L. Rev. 1363 (2012).

<sup>99</sup> See, for example, Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C.J. Int'l L. & Com. Reg. 387 (2010), or C. Ronald Huff & Martin Killias, eds., *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Temple University Press: Philadelphia, 2008), or Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for Truth*, 56 N.Y. L. Sch. L. Rev. 911 (2011-12).

<sup>100</sup> Weigend, note 96, at 161. Weigend also proposes a hybrid model that would cure this situation in Weigend, note 84. Weigend also makes use of the mainstream dichotomy of adversarial and inquisitorial models.

In his view, ascertaining the whole truth in a criminal matter is an unattainable goal and the desired end result should be called “procedural truth” - while certainly driven by the desire to get as close to the truth, the endeavour is tempered by the needs of a legal process, most notably the fact that finding the truth is not the end goal in itself but means towards resolving the conflict.<sup>101</sup> This notion imposes limits on the time, methods and other resources available to the judicial inquiry. Conceptualized this way, Weigend argues, even plea-bargaining and other consensual forms of justice make sense as long as there is a visible honest effort put forth to introduce facts on which the decision maker can base a defensible verdict.<sup>102</sup>

***Conclusion: moderately sceptical about truth but certainly committed to finding it***

Apparently while no criminal justice system can afford to flat-out deny the existence of objective external reality and the need to ascertain it (thus also endorsing realist ontology), they also need to recognize that their capability of doing so is limited. Where opinions differ is the benchmark of success that depends on the theory of truth. Correspondence theory is very attractive because it assumes that there is the possibility that humans are able to gain objective detached knowledge of the outside reality – and thus verify whether truth has been ascertained or not. Here I will have to go with the moderate sceptics. Like Nicolson argued, even if there is objective reality, full and infallible knowledge of this objective reality cannot be achieved, especially within the constraints of criminal procedure regardless of the jurisdiction. Furthermore, while the rationalist theory might seem to support the notion of unfettered freedom of proof, Dennis explains that there are at least four considerations that justify limiting the evidence available to decision-makers: the need to avoid unnecessary cost and delay, the need to ensure procedural fairness, the need to avoid errors and quite possibly the need to pursue other competing values such as the security of the state or the protection of family relationships.<sup>103</sup> In addition, one must also account for the imperfections of human fact-finders. In any event, there is no independent way of verifying whether the ultimate truth has been found or not. This does not mean that

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<sup>101</sup> Weigend, note 96, at 169. Note here that Weigend is not only writing with adversarial process in mind but explicitly includes inquisitorial systems under the same umbrella. They, too, he observes, recognize limits on fact-finding and are not structured like a historic or scientific inquiry which would probably allow to get closer to the “whole truth”.

<sup>102</sup> Id., at 173. This is admittedly based on Luhmann’s idea of legitimation through procedure. See Niklas Luhmann, *Legitimation Durch Verfahren* (3rd Ed., Darmstadt 1978).

<sup>103</sup> Dennis, note 28, at 33.

one should not set high aspirations and attempt to create a legal framework that would, as much as possible, help the pursuit of truth along (i.e. be conducive to accurate fact-finding). Whether a system claims to be able to find the “objective reality” or admits to settling to a close approximation is actually irrelevant as no system would deny the importance of the aspiration of accurate fact-finding. This together with the human psychology factor or “cognitively optimal fact-finding arrangements” as Damaška puts it<sup>104</sup> serves as the bridge between the criminal evidence law of different jurisdictions. In other words, there is a universally pertinent question of how to make procedure more conducive to accurate fact-finding given the cognitive needs and abilities of the persons involved. While there are certainly limitations encroaching upon this goal of accurate fact-finding that cause jurisdictions to use sub-optimal arrangements, they do not void the goal itself.

## **Selection of topics for the study**

This work will examine the rules of evidence and procedure from the point of view of what psychology now knows about fact-finders and their abilities. In order to examine the rules of procedure and evidence from the cognitive perspective, we can liken the exercise of the criminal trial to information processing much like psychologists use information processing terms to model cognitive operations. Fact-finding in adjudication is, after all, a cognitive operation that the rules of evidence purport to regulate: evidence is received by the fact-finder (information input), evaluated (processed) and then a verdict is rendered (output). We can see how the rules of procedure and evidence relate to this scheme if we view accurate fact-finding as the desired end product. Damaška is right when he argues that the kind of fact-finder used must be considered in designing the rules of evidence and procedure – much like the specifications of a computer will ultimately set limits to the type of software it can run, the modes of data entry available (camera, accelerometer and microphone or just perforated cards and keyboard), or the peripherals that can be connected to it (black and white screen or a 3D printer). So now our main question is this:

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<sup>104</sup> Mirjan Damaška, *Epistemology and Legal Regulation of Proof*, 2 L.P. & R. 117 (2003). Damaška himself hints at the need to take advantage of the advances in cognitive science to design more optimal procedure but also cautions that a successful procedure cannot be compiled by „shopping at a boutique“ for the best elements in different systems. Criminal procedure systems, he argues, are complex phenomena influenced by different socio-political, historical and cultural factors and would-be reformers should proceed with extreme caution. His point is dead-on with regard to any legal reform or legal evolution in general. We will proceed cautiously.

how to make the chosen “machinery of justice”<sup>105</sup> work so that accurate fact-finding is possible. The rules of evidence can provide for two types of controls – input controls and reasoning controls on the fact-finding process.<sup>106</sup>

### ***Input controls***

Input controls often take the form of exclusionary rules like this one:

*The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.*<sup>107</sup>

The rule is animated by the concern that fact-finders are not able to adequately assess the probative value of information presented them it and will reach an erroneous conclusion by according it too much weight. Incidentally, this rule also advances other goals not necessarily related to the concerns of accurate fact-finding – it empowers the judge to exercise his discretion in pursuit of judicial economy by filtering out information that could not rationally help fact-finding but would waste judicial resources.<sup>108</sup>

Input controls can also be imposed on the format of evidence. For example, law can prescribe that court-appointed expert must prepare a written report that contains specific information to ensure the reliability of information by eliminating data loss through fading memory or careless recording. In conjunction with another rule that makes such reports by default admissible without the expert’s personal appearance, costs and time needed for trials would be reduced.

Some input controls are procedural and prescribe specific actions that a procedural actor must take in order to ensure the reliability of information, such as the requirement that witnesses must be excluded from the courtroom so they cannot hear other witnesses testify.<sup>109</sup> Depending on the role of pretrial investigation and the information gathered in its course, procedural controls may have to be imposed at an earlier stage than the trial itself. This is especially pertinent to those procedural designs where the results of the pretrial investigation carry over into the court procedure by means of reading out pretrial

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<sup>105</sup> Note 104.

<sup>106</sup> Diamond and Vidmar call the two types of controls “blindfold” and “admonition” - Shari S. Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 Va. L. Rev. 1857, 1863 (2001). However, the notion input control as discussed here is far more comprehensive than mere blindfolding.

<sup>107</sup> FRE 403.

<sup>108</sup> See Advisory Committee notes on Rule 403 of the FRE.

<sup>109</sup> FRE 615.

investigation reports from the case file or by simply incorporating these reports into the trial record by reference. In these cases, controlling the “how” at trial stage is far less important than controlling the original compilation process.

Input controls can also take the shape of rules mandating that information regarding a particular subject be presented to the fact-finders. For example, Section 226(4) of the Estonian Code of Criminal Procedure requires that the court be provided with the printout of the defendant’s criminal record in all cases where charges are filed with the district court. This type of control embodies the idea that certain information is inherently probative and must therefore be made available to the fact-finder regardless.

### ***Reasoning controls***

Reasoning controls aim to direct or guide fact-finders in drawing conclusions from the evidence. They, too, can take many different shapes and have a differing degree of specificity. As Nijboer explained about Dutch trials,<sup>110</sup> the black letter of the law and the law in practice can be very different. While in some jurisdictions the official dogma denies that there even is such a discipline as the law of evidence, let alone constraints on the process of evidence evaluation, fairly specific instructions on how to evaluate evidence can be found in case law of higher courts.

When it comes to making sense of the evidence, all contemporary Western criminal justice systems profess the principle of “free proof” – and have slightly different understandings of the concept.<sup>111</sup> According to Alex Stein, this principle can be traced back to Jeremy Bentham and in its current doctrinal form holds that subject to certain limitations, law should not control the inferences that judges draw from the evidence about legally relevant facts. The validity of these inferences is a matter of evidential relevancy and weight, as determined by common sense, logic and general experience.<sup>112</sup> The limitations would include policies regarding allocation of the risk of error (burdens and standards of proof), overriding objectives such as the protection of state secrets, free standing process values or provisions incentivizing certain conduct (such as having written contracts). These

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<sup>110</sup> See note 18.

<sup>111</sup> See William Twining, *Freedom of Proof and the Reform of Criminal Evidence*, 31 Israel L. Rev. 439 (1997), or Mirjan Damaška, *Free Proof and Its Detractors*, 43 Am. J. Comp. L. 343 (1995).

<sup>112</sup> Alex Stein, *Against 'Free Proof'*, 31 Israel L. Rev. 575 (1997).

limitations are non-inferential and non-epistemic.<sup>113</sup> To this day one of the main features of the jury system is the jury's freedom to evaluate evidence independently and in private without having to give reasons for its verdicts or being subjected to appellate scrutiny and this is sometimes regarded as the highest manifestation of the free proof principle.<sup>114</sup>

On the European continent the principle of free proof emerged as a reaction to the Roman-Canon system of legal proofs that was criticized for its rigidity.<sup>115</sup> In 19th century French and German law, evidence was categorized into “full proof” and “half proof”. Where full proof of guilt (testimony by two eyewitnesses or a confession) had been presented, the judge had no choice but to convict.<sup>116</sup> Where full proof was not available, the existing evidence had to be augmented with a confession sometimes obtained by torture.<sup>117</sup> One can still spot occasional examples of similar reasoning controls in contemporary times: an example of this was Article 459 of the Chilean Code of Criminal Procedure in force as recently as in 2000: “The sworn testimony of two competent witnesses who have personally perceived the matter about which they testify and can give sufficient reasons for their knowledge is considered sufficient proof of fact unless the testimony is contradicted by an equally qualified witness.” Or, Article 462 that stated “A witness will be presumed to have been drunk if he has been convicted of drunkenness at least three times during the last five years.”

Removing the “evidentiary chains” paved the road to introducing lay juries to the continental courts but those were soon replaced by mixed tribunals consisting of professional judges with lay assessors in many jurisdictions. Freedom of proof, it was then emphasized, did not amount to a license to abandon the canons of rational inference or accepted maxims of experience.

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<sup>113</sup> The assumption, as Stein points out, is twofold: that judges have the competence of rational evidence-based reasoning based on the facts; and that evidential weight can be determined by the judges without resorting to value-preference. Stein's argument is that fact-determination is not free of value judgments as the judicial inquiry is inevitably limited but the limits are not there because evidence runs out but due to a strategic choice.

<sup>114</sup> John Jackson, *Making Juries Accountable*, 50 Am. J. Comp. L. 477 (2002). Note that this freedom is not unlimited – juries are sometimes given instructions to restrict their use of a particular piece of information to a specific purpose and not for the others – see, for example FRE 105: “If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”

<sup>115</sup> Although as Damaška argues, this criticism was grossly exaggerated and the judges had enough flexibility even under the Roman-Canon system of proofs to avoid convicting anyone they did not feel was guilty. Damaška, note 111, at 344.

<sup>116</sup> Jackson & Summers, note 9, at 60.

<sup>117</sup> Torture was abolished at the end of the eighteenth-beginning of the nineteenth century: in France 1788, in Prussia 1740 and in Spain 1820. Volkmann-Schluck, note 29, at 2.



Though widely accepted as the cornerstone of the rationalist tradition, freedom of proof has not escaped challenges. For example, commonsensical rationalist reasoning may not be enough to make sense of the scientific evidence anymore. Thus, the argument goes, the evidentiary process must either start paying more attention to educating fact-finders so they are able to understand the science, or defer more fact-finding to the scientists.<sup>118</sup> Similarly the principle of free proof is under attack from the constitutional (rights) perspective. While the principle maintains that the fact-finder should be entitled to give any weight they feel is warranted to any evidence they get their hands on, from a constitutional perspective, some evidence may have to be excluded in order to protect the rights enshrined in the constitutional instruments.<sup>119</sup>

Instrumentally, reasoning controls come into play once the fact-finders have been availed to evidentiary information and start working out a verdict. Roman Canon system's rules were excellent examples of direct reasoning controls where the law expressly dictated how evidence is to be assessed. Direct reasoning controls can also take the shape of presumptions, burdens and standards of proof. As the three are closely related and will be covered in more detail in the chapter devoted specifically to the standard of proof, I will not discuss them here.

There are also indirect reasoning controls – provisions in procedural law that do not dictate what inferences can or should be drawn from a given configuration of evidence but prescribe the questions asked and the form in which the decision must be rendered. Even though these rules do not directly relate to the epistemic foundations of the decision, they structure the deliberation process by either prescribing questions that must be answered<sup>120</sup> or demanding that the fact-finder deliver a reasoned written judgment<sup>121</sup> or both.

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<sup>118</sup> Ronald Allen & Joseph Miller, *The Common Law Theory of Experts: Deference or Education*, 87 Nw.U.L.Rev. 1131 (1993).

<sup>119</sup> Jackson & Summers, note 9, at 54. As Jackson and Summers note, the constitutional concerns generally do not mandate „exclusionary rules of the common law kind“ – but some evidence may have to be set aside to ensure the legitimacy of the verdict.

<sup>120</sup> An example of this would be the verdict forms used in Spain as described in Stephen Thaman, *Should Criminal Juries Give Reasons For Their Verdicts?: The Spanish Experience and The Implications of The European Court of Human Rights Decision in Taxquet v. Belgium*, 86 Chi.-Kent L. Rev. 613 (2011).

<sup>121</sup> See, for example, German Code of Criminal Procedure (StPO) Section 267 that specifies minimum requirements for a written judgment.

### *Making the controls work: the three topics examined in this thesis*

Whether to use professional judges, lay jurors or a mix of lawyers and non-lawyers as fact-finders is a question primarily of choice (and the choice may be motivated by a number of factors, including the cost, and just the sheer question of political trend or a public sentiment). This choice is not carved in stone as history has shown time and again.<sup>122</sup> Once made, it can have profound implications in terms of the type and format of information the system can handle as well as the type and format of the output it can produce.<sup>123</sup> Assume, for example, that lay jurors are, indeed, susceptible to overvalue statements made out of the courtroom and then offered into evidence to prove that the substance of the statement was true (hearsay).<sup>124</sup> If lay jury is the fact-finder of choice, the rules would have to include controls to compensate for its shortcomings if the system were still to produce accurate results.<sup>125</sup> Similarly, if one were to demand a written statement of reasons from a non-lawyer jury, the system would have to include measures to make this possible – perhaps special verdict forms should be used or a specially trained scribe should prepare the document. Different fact-finders will likely mean different sets of competencies and backgrounds, and thus also knowledge base and values. The Russians must have learned their lesson about fact-finder profiles when they, shortly after introducing juries, removed political offences from the ambit of jury trials.<sup>126</sup>

From the fact-finding accuracy point of view, I would argue that the choice of fact-finders is the most basic and most important one that dictates much of the rules of evidence and procedure as these must cater to the fact-finders' cognitive needs and abilities. In devising actual rules, there are of course countervailing goals and considerations that moderate this ideal – cost, fundamental rights, demilitarizing of societal conflicts and other goals that criminal adjudication may be expected to support or serve. Nevertheless, the starting point should be the decision about who it is that the power of adjudication is vested in and a

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<sup>122</sup> Jackson describes the history of procedure and evidence law on the European Continent in his *Theories of Truth Finding*, note 75. Nijboer points to radical shifts in the Netherlands as a result of the changes in general political situation – jury that was briefly transplanted as part of the French rule, was swiftly abolished in 1813 as soon as the French rule abated – Nijboer, note 18, at 302.

<sup>123</sup> Damaška, note 104, at 119. Getting ahead of myself, we will later see that the differences may not be as huge as often assumed.

<sup>124</sup> Christopher Mueller, Laird Kirkpatrick, *Evidence*, 5th Ed., (Wolters Kluwer: New York 2012), 2.

<sup>125</sup> Simon, note 49, at 214. See also, Lisa Dufraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 Queen's L.J. 261 (2008).

<sup>126</sup> See Gennady Esakov, *The Russian Criminal Jury: Recent Developments, Practice, and Current Problems*, 60 Am. J. Comp. L. 665, 668 (2012). Apparently, their move was not really motivated by the concern that the jurors would not be able to make sense of the evidence but rather by the fear that they would – and might acquit in exercise of their nullification power.

careful study of the needs and abilities of this type of fact-finder.<sup>127</sup> This also means that if different types of fact-finders actually have the same cognitive needs and abilities, different rules of evidence can only be warranted by the other goals and considerations.

Not only would fact-finder profile determine the substance of information that needs to be controlled but choosing the type of control must also take the fact-finders into account. In jurisdictions that employ unitary tribunals (e.g. a single professional judge or a mixed panel made up of professional and lay members), for example, input controls can be difficult to implement. When the law demands that certain information must be presented, the fact-finder can direct the parties to present the information or procure the information *sua sponte* (e.g. do a database search). Exclusionary input controls are more troublesome, however. Unless the evidence is pre-screened by someone other than the fact-finder himself, exclusionary rules that for a bifurcated tribunal (such as a lay jury with a professional judge acting as the gatekeeper) would serve as input controls, in effect transform into reasoning controls. The imperative in the law then is that the fact-finder must not base their decision on the information even though the information has become known to the fact-finder. Empirical evidence, as we will see later, suggests that efforts to make these reasoning controls work may prove futile even when decision making is entrusted to legally trained professional judges.<sup>128</sup>

Another consideration in selecting the appropriate control is the respective roles of the parties and the tribunal. When procedural initiative lies with the parties, they may seek to bring excludable information to the fact-finders' attention to advance their cause. Prior gate keeping can reasonably work only if procedural design includes complete pretrial discovery of evidence by the parties if pretrial motions by the party opponent are to be the vehicle for limiting evidentiary excesses. Alternatively, Italians have opted for a complete prior screening of information by a separate magistrate based on the prosecutor's file,<sup>129</sup> and the same idea is behind the regulation of the pretrial conference in Chile.<sup>130</sup> Conversely, where the parties have not complied with the requirement of the law that

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<sup>127</sup> See John Leubsdorf, Presuppositions of Evidence Law, 91 Iowa L. Rev. 1209 (2006) for an interesting discussion of inconsistent assumptions and pervasive ambivalence about juries underlying American evidence law.

<sup>128</sup> But note the argument by Maartens and Schwikkard that reasoning controls are actually superior to input controls as far as they force the fact-finder to confront the inadmissible evidence head-on and state their reasons to show how they have dealt with the information they were not supposed to consider. P.J. Maartens & P.J. Schwikkard, *A Juryless Jurisdiction and the Epistemic Rules of Evidence*, 128 S. African L.J. 513 (2011).

<sup>129</sup> For a description as well as a critical account of Italian criminal procedure, see Elisabetta Grande, *Italian Criminal Procedure: Borrowing and Resistance*, 48 Am. J.Comp.L. 227, 244 (2000).

<sup>130</sup> See Katherine Kauffman, *Chile's revamped criminal justice system*, 40 Geo. J. of Int. Law 25 (2010).

certain information be presented, procedural law accords courts everywhere the power to compel the production of evidence *via* contempt proceedings. And finally, failed input control could trigger the application of one of the reasoning controls – the burden of proof.

If, on the other hand, the fact-finder is expected to search, evaluate and process information independently of the parties, input controls that restrict information would have to be framed much more broadly or they might not work at all: the fact-finder must be able to spot the prohibited information without actually availing himself to it. In practice, this is difficult to achieve. While the law could put a general ban on, say, the use of prior convictions and the judge would actually refrain from viewing the criminal records database, the information about the defendant's priors could inadvertently be revealed by police officers testifying at trial, for example. Arguably less important in guilt determination, prior convictions are certainly an important factor in sentencing and if the trial is for both guilt and punishment, a flat-out ban on information about prior convictions would not be possible. In this situation, the United States for example have opted for bifurcated trials – to keep information about prior convictions from tainting the determination of guilt, they first hold the trial on guilt only and proceed to hear evidence relevant to the punishment after the defendant has been found guilty. The use of input control without the appropriate procedural arrangement and a bifurcated tribunal would likely be less effective.

This thesis will undertake the study of evidence law through three rubrics – evidence of prior convictions, hearsay evidence and standard of proof – that all represent important issues of evidence law. In addition to their representative qualities, these rubrics are easily tracked and in one form or another have a functional equivalent in most if not all jurisdictions as well as have a central enough role to have stirred up some discussion among both legal psychologists and legal theorists. The sometimes diametrically different regulation of the same issue across different jurisdictions only adds to the intrigue. My first question is how if at all this is connected to the rest of the procedural design or the fact-finder profile. Then, looking at what is known about human psychology in the pertinent area and keeping in mind the common goal of accurate fact finding, I will explore whether there can also be a common “best arrangement” that is conducive to accurate fact-finding.

The first two topics represent different kinds of information the fact-finder is called upon to process. Evidence of prior convictions represents one of the main concerns in evidence law – that the fact-finder may be unduly prejudiced by some evidence. Hearsay statements

are an example of another similarly prominent worry that fact-finder may not be able to adequately account for the lack of reliability of some evidence. In the following chapters we will see how control measures have been used and should be used in addressing these concerns in different procedural settings and for different fact-finder profiles.

The third rubric – standard of proof – is an example of a reasoning control that unlike the two other topics, is not directed at individual pieces of evidence but the final conclusion. The standard of proof presents the question of uniformly regulating and communicating to the fact-finders how they should go about their task in order to ensure optimal accuracy of the outcome of their endeavour. Here, too, different kinds of fact-finders and procedural designs may necessitate different approaches – or not.

### **Sample jurisdictions: general characteristics and observations**

In order to illustrate the variety of ways different jurisdictions deal with my selected rubrics of criminal evidence, I will examine the following jurisdictions: England and Wales, the United States (federal jurisdiction only), Estonia, Russian Federation, Chile and Germany.

These have not been picked at random but selected because they represent different combinations of fact-finder profile and procedural design thus going beyond a simple dichotomous approach. As we noted earlier, fact-finder profile is the choice that should at least very strongly influence the way evidence law deals with our three rubrics. So the sample jurisdictions feature a wide range of possible combinations of lay and professional fact-finders. We also noted that procedural design, in particular the allocation of initiative tends to have an effect on how effective different types of evidentiary controls are in a given jurisdiction. Two more systemic characteristics have often been said to impress on the state of criminal evidence law – the transition between pretrial and trial phase and the organization of the trial itself in terms of separating the decision making over guilt and sentence. As we noted earlier, these may sometimes transform the nature of evidentiary controls or render them ineffective altogether. The sample jurisdictions offer a wide variety of combinations for analysis and illustration of how the different features would or would not work in combination. In addition to serving as illustrative aids, the sample jurisdictions

will also be a source of inspiration in search of the universally suitable arrangement. Although exploration of Islamic or Indo-Chinese or African traditional criminal justice systems, for example, might prove very interesting as well, it will be an inquiry for another work and another time. Jurisdictions examined, albeit from different parts of the world, all belong to the modern Western rational criminal justice systems.<sup>131</sup>

I shall begin by offering a quick introductory survey of the key factors shaping criminal procedure and its concomitant law of evidence in each of the sample jurisdictions under the following heads

### ***Fact-finder profile***

Fact-finder may be a unitary tribunal where all its members decide both issues of law and fact, or a bifurcated tribunal where there is a division of functions – usually the functions are those of deciding the factual issue of guilt, deciding the punishment, and gate-keeping (i.e. deciding the admissibility of evidence). As far as qualifications go, jurisdictions use both professional judges and lay fact-finders – either as part of a unitary tribunal as a “mixed panel” or in the form of a jury – there the jurors normally decide guilt and the gate-keeper trial judge decides admissibility issues and the sentence. Not all jurisdictions use lay fact-finders. While lay judges are usually appointed for a longer term, jurors are picked *ad hoc*, normally through some vetting process (*voir dire*) where parties can exclude candidates who display bias and prejudice (*challenge for a cause*) – sometimes without indicating a specific reason for removal (*peremptory challenges*).

### ***The allocation of initiative between parties and the tribunal***

Prosecutors initiate criminal proceedings in most cases – and victims can, in some jurisdictions. Procedural initiative is most apparent in two aspects of trial process: who decides what evidence to present and does the presenting at trial, and whether parties can terminate the proceedings that have already been initiated (e.g. by dropping charges or

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<sup>131</sup> Whereas these are the main considerations for choosing the sample jurisdictions, access to the relevant legal materials in a language understandable to me played a part in the selection process as well and thus there is no guarantee that some real gems have not been overlooked.

pleading guilty). We see that most jurisdictions have shifted procedural initiative to the parties with varying degrees of court control except for Germany where the presiding trial judge is in charge of examination of evidence.

### ***Functions of pretrial phase and trial and how information collected during the pretrial phase is used in trial phase***

The most telling feature here is the dossier – a case file compiled by the police during pretrial investigation phase that is supposed to be all-encompassing. While in some jurisdictions no such file is put together, others compile the file but do not send it to the court and only use for discovery and as a depository of documents, and yet others forward the entire dossier, sometimes hundreds of tomes, to the trial court along with the charging document.

### ***The organization of the criminal trial***

A criminal trial may be unitary or divided into different stages designated to deal with specific issues such as separate guilt and punishment phases (bifurcated trial).<sup>132</sup> The rationale of bifurcation where it exists is to facilitate smoother logistics as well as to keep evidence that could only be relevant to the sentencing from contaminating the guilt determination. Sentencing may also be entrusted to the trial judge where the trial was by jury.

The following table summarizes the different combinations in our model jurisdictions.

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<sup>132</sup> A bifurcated trial does not necessarily mean a bifurcated tribunal: it is theoretically possible to have the same jury decide both guilt and punishment and leave the trial judge to decide only admissibility of evidence. And as we will shortly see, it is possible to have a bifurcated trial with a unitary tribunal.

Table 1. Basic Characteristics of Sample Jurisdictions

	Fact-finder profile	Allocation of Procedural Initiative	Pretrial and Trial	Trial Organization
<b>England &amp; Wales</b> <sup>133</sup>	<ul style="list-style-type: none"> <li>lay jury of 12</li> <li>3 lay magistrates</li> <li>district judge</li> </ul>	Initiated and terminated by public prosecutor or in some cases, private parties. Evidence presented by parties. Guilty pleas	No dossier, discovery of state's evidence	Bifurcated, magistrates may refer case to crown court for sentencing.
<b>United States Federal jurisdiction</b> <sup>134</sup>	<ul style="list-style-type: none"> <li>lay jury of 12</li> <li>trial judge (district court judge or a magistrate judge) alone<sup>135</sup></li> </ul>	Initiated and terminated by public prosecutor, sometimes charges subject to prior screening (e.g. grand jury). Evidence presented by parties. Most cases resolved by guilty plea <sup>136</sup>	No dossier, mutual discovery at the request and initiative of defence, motions <i>in limine</i> <sup>137</sup>	Bifurcated; in capital cases, jury must also determine if aggravating circumstances warrant death penalty <sup>138</sup>
<b>Estonia</b> <sup>139</sup>	<ul style="list-style-type: none"> <li>trial judge alone, or</li> <li>panel of one professional judge with two lay assessors</li> </ul>	Initiated and terminated by public prosecutor. Evidence presented by parties. Full trial in 7 % of all cases <sup>140</sup>	Pretrial dossier presented to the defence for discovery but not forwarded to the trial judge, pretrial motions rare.	Unitary

<sup>133</sup> For more information, see Ashworth & Redmayne, note 64.

<sup>134</sup> Federal jurisdiction is but one of the 51 that make up the "United States criminal justice system", its influence over the state systems is in part attributable to persuasion and in part to the federal Constitution that is binding on the states as well.

<sup>135</sup> The frequency of bench trial varies but is by no account trivial - see Sean Doran *et al.*, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 Am. J. Crim. L. 1, 11 (1995).

<sup>136</sup> Between 1 APR 2012 and 31 MAR 2013, apparently this percentage was 97 per cent of the cases not including those that ended in dismissal. - <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/D04Mar13.pdf> (link verified 08MAY2014).

<sup>137</sup> Fed. R. Crim. Pro. Rule 16.

<sup>138</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>139</sup> Criminal procedure and criminal evidence in Estonia is governed by the code of criminal procedure – Kriminaalmenetluse seadustik (KrMS), available at <https://www.riigiteataja.ee/akt/112072014008>, link verified on 18AUG2014)

<sup>140</sup> Statistical overview of judicial business in 2013 in Estonian courts of first and second instance, [http://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/i\\_ja\\_ii\\_astme\\_kohtute\\_menetlusstatistika\\_2013.a\\_koondandmed.pdf](http://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/i_ja_ii_astme_kohtute_menetlusstatistika_2013.a_koondandmed.pdf) (link verified 08MAY2014).



<b>Russia</b> <sup>141</sup>	<ul style="list-style-type: none"> <li>• lay jury of 12</li> <li>• trial judge alone</li> <li>• panel of 3 trial judges</li> </ul>	Initiated and terminated by public prosecutor. Evidence presented by parties. Guilty pleas in 60% of all cases <sup>142</sup>	Pretrial dossier presented to the trial judge or the panel; pretrial motions hearing in jury cases	Jury trials – bifurcated; otherwise unitary
<b>Chile</b> <sup>143</sup>	<ul style="list-style-type: none"> <li>• trial judge alone, or</li> <li>• panel of three trial judges</li> </ul>	Initiated and terminated by public prosecutor or in some cases, the victim. <sup>144</sup> Evidence presented by parties.	Pretrial dossier presented to the defence but not forwarded to the trial court; pretrial screening of evidence by a different judge.	Unitary or bifurcated at the court's discretion
<b>Germany</b> <sup>145</sup>	<ul style="list-style-type: none"> <li>• trial judge alone, or</li> <li>• panel of professional judges and lay assessors in various proportions<sup>146</sup></li> </ul>	Initiated by public prosecutor, evidence examined by the presiding judge, court may direct parties to collect additional evidence or collect evidence itself. Plea agreements allowed. <sup>147</sup>	Pretrial dossier presented to the trial court forms the basis of the trial.	Unitary

<sup>141</sup> Criminal procedure and evidence in Russian Federation is governed by the code of criminal procedure – УПК or Уголовно-процессуальный кодекс Российской Федерации – available at [http://www.consultant.ru/popular/upkrf/11\\_56.html#p4349](http://www.consultant.ru/popular/upkrf/11_56.html#p4349), link verified 14MAR14).

<sup>142</sup> See, for example Department of Court Administration, Annual Report on Federal Court Statistics for 2012, <http://www.cdep.ru/index.php?id=80&item=1911> (link verified on 09MAY2014).

<sup>143</sup> For a comprehensive overview of the Chilean criminal justice system, see Kauffman, note 130.

<sup>144</sup> Criminal procedure and evidence in Chile is governed by Chilean code of criminal procedure - Código Procesual Penal de Chile (CPPC), available at <http://bcn.cl/1i18v> (link verified 09MAY2014). According to CPPC Art. 53, examples include causing minor bodily harm, threats of publishing information of defamatory character or unauthorized disclosure of secrets entrusted to a professional such as an attorney.

<sup>145</sup> German criminal procedure and regulation of evidence is in the code of criminal procedure – Strafprozessordnung (StPO), available at <http://www.gesetze-im-internet.de/stpo/BJNR006290950.html> (link verified 15AUG2014).

<sup>146</sup> For a comprehensive overview of German criminal justice system and its courts, see Jörg-Martin Jehle, *Criminal Justice in Germany. Facts and Figures* (Federal Ministry of Justice, 2009), 23.

<sup>147</sup> Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 German L. J. 1, 81 (2014).

## **Summary**

To recap this chapter, a short summary is in order. We started by drawing a line between the law of procedure and the law of evidence – evidence law being the one that governs the collection, presentation and evaluation of information in order to ascertain what happened in the past. We then looked at two ways of discussing the comparative criminal evidence law – the divisive dichotomous approach and the defence rights approach but concluded that for our purposes a third approach would serve better – human fact-finders are the common element across all jurisdictions. We next examined the role of accurate fact-finding and found it to be of central significance everywhere – and proceeded to discuss the interplay between procedural design, fact-finder profile and evidentiary regulation. Lastly, I introduced the six sample jurisdictions we will use as inspirational and illustrative aids throughout this thesis. Now is the time to turn to our selected rubrics of evidence law.

## CHAPTER 2. EVIDENCE OF PRIOR CONVICTIONS

### Introduction

The rounding up of the “usual suspects” has always been one of the investigative techniques resorted to if the culprit is not caught red-handed.<sup>148</sup> The investigative process often proceeds in three directions simultaneously: the police follow the evidence found at the crime scene, work with people with obvious motive to commit the offence, and check the alibis of those having prior convictions and some situational link to the crime being investigated. The basis for this is the almost commonsense notion that possibly the most accurate predictor of future behaviour is the past conduct.<sup>149</sup> Some legal scholars have also argued that this may lead to an early bias in the system against those previously convicted.<sup>150</sup>

The extent to which evidence of defendant’s prior misconduct should be admissible at trial is a matter of disagreement amongst jurisdictions. On an imaginary axis, there are some jurisdictions where information about defendant’s prior criminal record is routinely included in the preliminary information packet that is sent to the court. At the other end of the same scale are jurisdictions where the use of prior misconduct is prohibited, save for very limited purposes.

Evidence of prior convictions is part of a broader notion of evidence of prior misconduct and that in turn relates to the broad topic of character evidence. Anderson argues that morality – the question of good versus bad is inherently present in any character evidence question and the main factor that sets character evidence apart from other propensity evidence such as evidence of habit. It is, according to Anderson, also the main reason why

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<sup>148</sup> Satnam Choongh, *Police Investigative Powers* in Mike McConville & Geoffrey Wilson, *The Handbook of The Criminal Justice Process* (OUP: Oxford, 2002), 47.

<sup>149</sup> Dale Nance, *Foreword: Do We Really Want to Know the Defendant?*, 70 Chi.-Kent L. Rev. 3 (1994). See also Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 Tex. L. Rev. 497, 529 (2012).

<sup>150</sup> Mike Redmayne, *The Relevance of Bad Character*, 61 Cambr. L.J. 684 (2002). See also, Jenny McEwan, *The verdict of the Court. Passing Judgment in Law and Psychology* (Hart Publishing: Portland, OR, 2003), 166.

character evidence would even deserve special regulation – non-moral propensity would not entail the threat of turning the fact-finders irrationally against the defendant.<sup>151</sup>

Depending on the particular jurisdiction, the law may or may not treat prior convictions differently from other types of character evidence. As we will see, however, the main issues animating the debate and underlying the legal framework are not much different and thus our treatment at first will be of prior misconduct evidence in general with particular reference to prior convictions where appropriate.

In this chapter, we will first examine how the problem of prior misconduct evidence has been conceptualized by legal scholars in order to understand what dangers and weaknesses have been identified with regard to the use of evidence of prior bad acts. We will then take a look at how the issue of prior misconduct has been addressed in our model jurisdictions and whether there are discernible patterns in relation to the fact-finder profile or procedural design. After looking at the sample jurisdictions, we will turn to see what the relevant psychological studies can teach us both about the problem and its potential solutions. Finally, I will offer some suggestions about how to manage the risks associated with evidence of prior convictions evidence.

## **Evidence of prior convictions and accurate fact-finding: the current discussion**

Evidence of prior convictions is one of the issues that is still hotly debated where such debates have started. While evidence law is certainly also shaped by other policies and considerations,<sup>152</sup> the bulk of the discussion regarding evidence of prior convictions revolves around accurate fact-finding. The main concern is that the fact-finder, upon learning of the prior misconduct, may be irrationally prejudiced by the information and this could lead to erroneous convictions. On the other hand, as Ho explains, most people would find it relevant that the defendant had committed similar acts in the past<sup>153</sup> and depriving

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<sup>151</sup> See Barrett J. Anderson, *Recognizing Character: a New Perspective on Character Evidence*, 121 Yale L. J. 1912 (2012).

<sup>152</sup> Lisa Dufraimont, *Evidence Law and the Jury: a Reassessment*, 53 McGill L. J. 199, 203 (2008).

<sup>153</sup> Bagaric and Amarasekara regard such evidence not only relevant but extremely probative, but not of mens rea but of the capability of engaging in the kind of behaviour – Mirko Bagaric & Kumar Amarasekara, *The Prejudice against Similar Fact Evidence*, 5 Int'l J. Evidence & Proof 71 (2001).

the fact-finder of it may lead to false acquittals.<sup>154</sup> The tension is thus between the perceived meaning and the rationally warranted effect of such evidence.<sup>155</sup>

In addition, there are also ethical qualms that when prior misconduct is taken to prove subsequent acts, are we then not judging a man for his character instead of his actions (and this would in turn mean that we should not be punishing him at all for obviously he does not have the power to control his actions)<sup>156</sup> or, in case of a prior conviction, are we not putting him to trial twice for the same offence?<sup>157</sup>

Roberts and Zuckerman point to three different mechanisms by which prior misconduct evidence may derail the fact-finding process by inducing faulty reasoning: prejudicial reasoning by improper weight assessment, prejudicial reasoning by diversion and moral prejudice.<sup>158</sup>

Prejudicial reasoning by improper weight assessment is a situation where prior conviction evidence is given inordinate weight by the jurors<sup>159</sup> causing them to think that given his prior record, the defendant must have done what he is being accused of.<sup>160</sup> The problem with this type of reasoning is not that prior conviction is deemed to have probative value – if it had none, it would be logically irrelevant. The problem here is that the jurors accord to it more probative value than is rationally warranted.

“Diversion prejudice” is a subspecies of prejudicial reasoning where having heard of the defendant’s prior conviction, the jury gets sidetracked into discussions about the prior offence and delivers the verdict based on their decision about the collateral issue (such as whether the defendant committed the prior crime used as evidence against him in the case at hand etc.), while neglecting the facts of the case at hand. This kind of misdirection is hard to conceive as it assumes all 12 jurors can be manipulated into not considering the facts that make up the charge. In fact, research shows that jury deliberations process may offer some protection against such digressions through jurors disciplining their fellow

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<sup>154</sup> Ho, note 94, 289.

<sup>155</sup> Id., 289.

<sup>156</sup> Id., 296.

<sup>157</sup> Roberts & Zuckerman, note 3, at 596.

<sup>158</sup> Id., at 591. See also Charles. McCormick, *Handbook of the Law of Evidence* (E. Cleary 2d Ed. 1972), § 186, cited in Miguel Angel Mendez, *California’s new law on character evidence: evidence code section 352 and the impact of recent psychological studies*. 31 UCLA L. Rev. 1003, 1006(1984).

<sup>159</sup> Roberts and Zuckerman write ‘jurors’ but the problem may easily be with all fact-finders.

<sup>160</sup> Roberts & Zuckerman, note 3, 591.

jurors' arguments.<sup>161</sup> Conceivably this kind of mental misdirection can be attempted by the parties, however, such ploys would normally be kept in check by the trial judge as causing confusion, needless presentation of cumulative evidence or waste of time.<sup>162</sup> This of course if the judge is able to detect it.

The third kind of prejudice stemming from the evidence of prior convictions is moral prejudice. It occurs where the fact-finder abandons the duty to decide the case based on evidence and renders a guilty verdict notwithstanding the lack of inculpatory evidence. Roberts and Zuckerman describe a number of possible mental constructs that can lead the jurors to decide the case against the defendant mostly based on the evidence of defendant's character. The jury may decide that the defendant is a bad person who deserves to be punished whatever the evidence in the current case. Perhaps the prior misconduct is such that the jurors deem the need to "put the dangerous offender behind bars" as being far more important than deciding the trivial case at hand. The jury may also effectively lower the standard of proof in their minds after having heard the evidence about prior misconduct.<sup>163</sup> Or, the moral prejudice could be blended with prejudicial reasoning in rationalizing along the lines of "he might not have done this one but there are undoubtedly many other crimes he has gotten away with."<sup>164</sup>

The concerns are not universally shared, though. As Nance and Damaška point out, discussions about prior misconduct evidence are much more intense in the Anglo-American world<sup>165</sup> and are much less interesting to jurists on the European Continent.<sup>166</sup> Damaška attributes this lack of discussion to the prevalent use of unitary tribunals and unitary trials – fact-finder is also the gate-keeper; procedure to determine guilt is also the procedure to determine the factors that are relevant to the sentence. As an additional reason, he cites the continental variety of the free proof doctrine according to

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<sup>161</sup> See, for example, Kamala London, Narina Nunez, the Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence, 85 J. Appl. Psychol. 932 (2000).

<sup>162</sup> Roberts & Zuckerman, note 3, at 591. Roberts and Zuckerman refer to English law but similar control measures are at the judge's disposal in just about every jurisdiction. See, for example Fed. R of Evid. 403 or New Zealand Evidence Act of 2006, s 8(1).

<sup>163</sup> Bagaric and Amarasekara argue that prior similar facts evidence will under no circumstances lower the standard of proof but they seem to be missing the point in their argument: while the normative standard of proof will indeed remain unchanged, the actual quantum of proof required for a conviction may not only be lower by virtue of the introduced evidence of prior misconduct but due to moral prejudice, the probative force of all other inculpatory evidence may be amplified. See Bagaric & Amarasekara, note 153, at 79.

<sup>164</sup> Roberts & Zuckerman, note 160, at 593...595.

<sup>165</sup> Nance, note 149.

<sup>166</sup> Mirjan Damaška, *Propensity Evidence in Continental Legal Systems*, 70 Chi.-Kent L. Rev. 55 (1994). Damaška also admits that even where the free proof principle is a regulatory device, discussions about evidence and their value are not necessarily absent but just pushed into "the dimly lit corners of evidence law." Damaška, note 111, at 348.

which no evidentiary information should be summarily rejected by law.<sup>167</sup> Nevertheless, it would apparently be doctrinally improper to infer guilt from prior crimes alone. The concern that the tribunal may be unduly prejudiced by the prior misconduct evidence rarely enters the discussion and the only remaining questions are those of the probative worth.<sup>168</sup> Similarly, one might argue that the whole issue of undue prejudice is blown out of proportion and there is not enough empirical evidence credibly pointing to the possibility of reasoning faults warranting any specific regulation of prior misconduct evidence.

Having outlined the issue troubling the legal scholars, it is now time to look at how lawmakers in different jurisdictions have addressed the issue.

## **Main features of the regulation of evidence of prior misconduct in the sample jurisdictions<sup>169</sup>**

### ***England and Wales***

Section 101 of the Criminal Justice Act of 2003 (the CJA 2003)<sup>170</sup> provides that "evidence of defendant's bad character" is admissible only in situations expressly enumerated in the law. Other than where the defendant agrees to the introduction of such evidence or is introducing this himself, the situations include the following

- a. important explanatory evidence (a vague clause more or less meaning that it helps the judge or jury to understand the other evidence in the case, also known as background evidence)<sup>171</sup>
- b. relevant to important issue between prosecution and defence (this includes propensity to commit similar crimes proven by convictions of similar (of same name or same type) crimes and propensity to be untruthful)
- c. substantial probative value in relation to an important issue between codefendants (only to refute a defence the substance of which seems to be shifting blame to codefendants. Convictions do not seem to be admissible under this section as only evidence adduced by the codefendant himself or a witness testimony can be used in this situation)

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<sup>167</sup> Damaška, note 166, at 57.

<sup>168</sup> *Id.*

<sup>169</sup> This section is intended as a rough sketch of the relevant regulation. Readers interested in a more nuanced picture and references to case law should turn to appropriate texts.

<sup>170</sup> <http://www.legislation.gov.uk/ukpga/2003/44/part/11/chapter/1> (link verified 18AUG2014).

<sup>171</sup> Roberts & Zuckerman, note 3, at 631.

- d. defendant has opened the door for character evidence by attacking another person's character or bolstering his own.

The CJA 2003 is a product of a lengthy reform process that abolished many common law evidence rules, including those pertaining to bad character evidence.<sup>172</sup> As a flip side, it did not touch the law as it stood regarding positive character evidence. What constitutes “bad” or “reprehensible”, is open to interpretation – Roberts and Zuckerman have a list of intriguing examples demonstrating that the answer to this question is far from clear and depends on the sensibilities of the trial judge.<sup>173</sup> The CJA 2003 is applicable to all criminal trials regardless of whether it is before a jury, a professional judge or a panel of lay magistrates. In all cases, the restrictions on the use of bad character evidence have been effectuated through input controls – some evidence of bad character is declared inadmissible and should be excluded. Here, too, the law provides for judicial discretion: the court must not admit evidence of defendant’s bad character to prove propensity or untruthfulness if admitting such evidence would result in the defendant not having a fair trial.<sup>174</sup> In addition, where the trial is by a jury, the judge must instruct the jury not to place undue reliance on previous convictions<sup>175</sup> or, when the evidence has been contaminated, direct the jury to acquit the defendant or discharge the jury if a retrial is to be held.

### ***The United States federal jurisdiction***

According to the Federal Rules of Evidence (FRE) § 404 (b), Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. There is a number of significant exceptions to the rule:

- a. where defendant is accused of sexual assault, evidence may be introduced to prove that defendant committed any other sexual assault.
- b. Where defendant is accused of child molestation, evidence that he committed any other act of child molestation may be introduced.

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<sup>172</sup> For the overview of the law of character evidence before the Criminal Justice Act 2003 and the main points of the reform, see *Evidence of Bad Character in Criminal Proceedings. Law Commission Report no. 273*

([http://lawcommission.justice.gov.uk/docs/lc273\\_Evidence\\_of\\_Bad\\_Character\\_in\\_Criminal\\_Proceedings\\_Report.pdf](http://lawcommission.justice.gov.uk/docs/lc273_Evidence_of_Bad_Character_in_Criminal_Proceedings_Report.pdf) - link verified 17AUG2014.).

<sup>173</sup> Roberts & Zuckerman, note 3, at 601...602.

<sup>174</sup> CJA 2003, s 101(3).

<sup>175</sup> *R v. Hanson*, 2 Cr. App. R. 21 (2005).



- c. Where defendant has introduced evidence in support of his claims of good character, the prosecution can offer evidence to rebut this claim.
- d. Prior crimes, wrongs or acts are admissible to prove motive, opportunity, intent, preparation, *modus operandi*, plan, knowledge, identity, absence of mistake, lack of accident and thus in essence, that the defendant acted in conformity with his prior misconduct.
- e. Where defendant has chosen to testify and
  - a. The evidence pertains to a felony conviction not older than 10 years subject to a balancing test between “probative value and prejudicial effect”, or
  - b. The evidence pertains to conviction of an offence involving falsity or dishonesty,
  - c. Or the evidence pertains to a conviction older than 10 years but advance notice is given and balancing test is satisfied.

The rules do not prescribe any specific form in which the evidence of prior conviction should be presented to the fact-finder. However, rule 405 (a) provides that evidence in chief about person’s character can generally only be introduced in the form of opinion or reputation. This restriction does not apply to cross-examination and to cases where character of the defendant is in issue – according to rule 405 (b) in those situations character may be proved by evidence of specific instances of conduct. Also notice that introducing evidence of prior convictions under rule 404 (b)(2) (to prove motive, opportunity, preparation, intent etc.) is not considered proving character and thus evidence of specific instances of conduct are admissible during the prosecution’s case in chief as well. In addition, Rule 406 provides for admissibility of habits and descriptions of routine practice in order to prove that at a given time, the subject followed the routine or performed habitually.

Thus, the rules support wide impeachment use (i.e. for attacking the credibility of a witness) of prior convictions and generally keep the door open for use of prior convictions to prove anything other than propensity. Propensity use is allowed where the defendant himself has opened the door for it or the charge involves a sex offence or child molestation.<sup>176</sup> Possibly the most controversial are rules 404(b)(2) and 406 – while neither

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<sup>176</sup> These provisions are later additions to the Federal Rules and did not take effect without much debate. The majority of scholars and judges were against the rules establishing exceptions for sex offence and child molestation cases, however, the amendments were made by the Congress anyway. Edward Imwinkelried,

explicitly allows the presentation of evidence of character or prior bad acts to support the inference that the defendant is guilty, identity, intent, knowledge, lack of mistake and *modus operandi* come very close to it. In essence, in spite of their apparently limited applicability, all of these instances still operate the same way: by allowing parties to present information that does not immediately pertain to the case at hand but supposedly allows an informed inference about some element of the charges. Evidence of habit or routine is also controversial as it may be difficult to draw the line between prohibited character evidence, evidence of instances of prior misconduct (allowed in limited circumstances) and evidence of habit (always admissible).<sup>177</sup>

The rules are framed in terms of input controls *via* admissibility and in jury trials, the judge will be responsible for keeping inadmissible evidence out. However, in bench trials the input controls will have to operate as reasoning controls because the same judge is both the trier of fact and law. Also, because at trials the guilt phase and the sentencing phase are separated, it may be easier to keep the inadmissible information out of the guilt phase.

## ***Estonia***

KrMS § 226 (4) (2) requires that a printout of the criminal record of the defendant be attached to the statement of charges when the prosecutor sends it to the court. Section 154 (1)(5) of the code provides that the introductory part of the charging document must state whether the defendant has a criminal record. Section 5 (2) of the Criminal Records Act (*karistusregistriseadus*) sets forth that upon a period of time after serving the sentence (that period depending on the maximum punishment available for the offence) the record of a conviction will be expunged - “archived” Archiving means that the conviction cannot be the basis for a tougher sentence or for treating the defendant like a repeat offender.<sup>178</sup> Section 20 that regulates who can request archived data does not include the courts – but does include the prosecutor’s office and the police. The archival data is stored for 50 years in cases of felonies and 10 years in misdemeanour cases.

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*Reshaping the “Grotesque” Doctrine of Character Evidence: the Reform Implications of the Most Recent Psychological Research*, 36 Sw. U. L. Rev. 741, 743 (2008). Courts have recognized these provisions as a vehicle to gain easier convictions. See, for example, *United States v. Castillo*, 140 F.3d 874, (10th Cir. 1998).

<sup>177</sup> See Kevin S. Marshall *et al.*, *Misguided Judicial Legacy: A Statistical and Psychological Primer*, 36 Law & Psychol. Rev. 1 (2012).

<sup>178</sup> E. Sup. Ct. No. 3-1-1-111-12.

Although the law restricts courts' access to the archived convictions, this information is routinely sent to the court along with the charging document or presented to the court at trial under the guise of the heading of "other information characterizing the defendant".<sup>179</sup> Moreover, the Supreme Court's civil chamber has muddied the waters by preferring a literal interpretation of Section 5(2) of the Criminal Records Act and holding that while archived convictions cannot be the legal foundation for a tougher sentence, where the law does not refer to "unexpired criminal punishment" but to the person "having been convicted of a criminal offence", archiving constitutes no legal bar to taking the criminal record of a person into consideration.<sup>180</sup>

KrMS § 68 (6) prohibits asking witnesses (and by virtue of KrMS § 294 also the defendant himself) about the defendant's prior behaviour unless the context of defendant's prior conduct is essential in determining the case at hand. The courts very rarely refer to the defendant's criminal record as evidence of guilt even though the Supreme Court has on at least one occasion held that circumstantial evidence, and *modus operandi* of previous crimes in particular is admissible to prove guilt.<sup>181</sup>

Estonia thus appears to be attempting to use a mix of input and reasoning controls in relation to prior misconduct evidence, however, the legal framework is unprincipled and is unlikely to actually complicate the admission of prior misconduct evidence. Whether the defendant's prior (mis)conduct is relevant to the case at hand is a matter of argumentation, however, the law only restricts questions inquiring into the defendant's prior conduct and does not provide that such information, if revealed, should not be considered by the tribunal. Similarly, while prior archived convictions should have no legal significance, the prosecutors have found creative ways of making the court aware of them, especially in cases where the archived convictions are for a similar offence. The latter information might still fall under the protection of a reasoning control measure suggested by the Supreme Court in its decision from 2001: there the court held that the expiration of a sentence should have the effect of releasing the individual from the adverse effects that having a criminal record entails.<sup>182</sup>

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<sup>179</sup> E-mail from Hon. Judge Katre Poljakova to the author on 20MAY2014, on file with author.

<sup>180</sup> E. Sup.Ct. No. 3-2-1-60-13. The case involved bankruptcy proceedings so it might not be immediately applicable in criminal matters.

<sup>181</sup> E. Sup.Ct. No. 3-1-1-32-05.

<sup>182</sup> E. Sup.Ct. No. 3-4-1-7-01. The case involved an application for a pistol permit that was originally denied based on an expired prior conviction. The court found the denial was unlawful and directed the police to reconsider.

## *Russia*

The Russian Code of Criminal Procedure (YPIK) is structured so that it first sets forth general conditions for trial procedure which is followed by special provisions for jury trials and trials by justices of the peace. In addition to the questions of guilt, Article 73 (1)(3) also stipulates that the character of the defendant is relevant in a criminal prosecution. Normally, therefore, evidence related to the defendant's character, including evidence of prior misconduct is admissible subject to the general rules about the form of evidence. In relation specifically to jury trials, Article 335 section 8 provides that evidence of the character of the defendant is to be examined in the presence of the jury only to the extent necessary to establish specific elements of the charge at hand. It is prohibited to examine information regarding the defendant's prior criminal record, of his being declared a chronic alcoholic or drug addict as well as other data that may create bias in the jurors with respect to the defendant. Where the judge is the trier of both fact and law, there is no legal limitation set on receiving evidence of defendant's prior convictions, however, the law does not require that the criminal record of the defendant be revealed to the judge.

Russian law thus appears to have distinguished between bench trials and jury trials in that for a bench trial, there are virtually no input controls placed on prior misconduct evidence, save for the need to receive evidence that could be the basis for sentencing. Since juries are not involved in sentencing more than having the power to recommend a more lenient sentence, the law uses an exclusionary input control to shield the jurors from character evidence that does not immediately pertain to the charge. In those cases, the trial would be bifurcated and the evidence relevant to sentencing decisions will be made available to the judge during the sentencing phase.

## *Chile*

The Chilean Code of Criminal Procedure (CPPC) does not expressly prohibit the presentation of documents indicating prior convictions, nor does it require that the trial court be provided with a criminal record report for the defendant. However, it does require

that all evidence be pertinent to the case at hand.<sup>183</sup> The trial is semi-bifurcated – the court may hold an additional sentencing hearing upon delivering a guilty verdict if such hearing is deemed necessary to receive evidence pertinent to sentencing.<sup>184</sup> While this hearing is not mandatory, the option seems to indicate that at least the original intent was against using "bad person" evidence in trial.

Chilean procedure appears to include no prohibition against the use of prior misconduct evidence, be it then in the form of prior convictions or other evidence of bad character. Nevertheless, given the structure of the procedure, one could argue that because sentencing is preceded by a separate evidentiary hearing, prior bad acts that pertain to the sentence or character rather than to the alleged crime at hand are not relevant during the trial and may be excluded under the relevance clause at the pretrial conference by the *juez de garantía* – thus there is a discretionary input control in place. The law explicitly renounces direct reasoning controls and declares that the assessment of evidence is free, constrained only by the rules of logic, maxims of experience and scientifically supported knowledge.<sup>185</sup>

## **Germany**

According to the German Code of Criminal Procedure (*Strafprozessordnung, StPO*) § 243(4), prior convictions of the defendant must be ascertained only to the extent that they are significant for the judgment. When the prior convictions are revealed, it is for the presiding judge to decide. Lemke and colleagues explain that this provision is designed to protect the defendant against “unnecessary exposure and prejudice of the lay judges”.<sup>186</sup> Usually this means that the presiding judge shows to the defendant the printout of the criminal record and asks the defendant to confirm that the information in the document is correct. Like in Estonia, convictions expire after a certain time has passed since the sentence was served. Unlike in Estonia, expired convictions are not subject to being read at trial (this does not necessarily mean that the judge would be unaware of them). As Lemke and colleagues write, even though the presiding judge decides when exactly the prior

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<sup>183</sup> CPPC Art. 276.

<sup>184</sup> CPPC Art 343.

<sup>185</sup> CPPC Art 297.

<sup>186</sup> Michael Lemke u.a., *Strafprozessordnung. Heidelberger Kommentar* (C.F. Müller Verlag: Heidelberg, 2001), 845, para 19.

record should be revealed, it should be done as late in the trial as possible.<sup>187</sup> In Germany, the trial court will receive the case file compiled as a result of the police investigation and is in charge of examining the evidence at trial. The file also contains the report of the defendant's criminal record. Commentators like Lemke instruct that absent a criminological link between the prior offence and the one charged, as well as possible relevance of the prior record to sentencing, prior convictions should not even be published at trial.<sup>188</sup> For practical purposes, however, there are no restrictions on the court's access to such information. Moreover, since Germany has unitary trials where guilt and punishment issues are decided in the course of the same proceedings, evidence of prior misconduct would usually be relevant to sentencing decisions. Germany adheres to the principle of free evaluation of proof which is enshrined in StPO § 261. Nevertheless, as Damaška reports, the German Supreme Court has on several occasions held that while prior misconduct can reinforce inferences drawn based on the evidence adduced at trial that pertain to the charge at hand, it is insufficient to independently warrant a finding of guilt.<sup>189</sup> Even though German evidence law does not impose input controls on prior misconduct evidence, the current doctrine with written reasoned judgments constitute a reasoning control. German law does not distinguish between impeachment use and substantive use of prior misconduct evidence.

### ***General observations and discussion***

This survey of different jurisdictions exposes a remarkable diversity in the regulation of the use of prior convictions. In some jurisdictions prior convictions are subject to the same regulation as evidence of bad character in general. There seem to be five uses for the evidence of prior convictions:

1. Propensity – to prove that the defendant committed a (similar) crime as in the past.<sup>190</sup> The underlying assumption is that individuals who have been convicted of some crime are prone to repeat similar crimes (or to commit crimes in general) in the future regardless of punishment served – or, at least are more prone to criminal activity than those who have no prior convictions.

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<sup>187</sup> Lemke, note 186, at 845, para 22.

<sup>188</sup> Lemke, note 186, at 845, para 23.

<sup>189</sup> Damaška, note 166, at 62.

<sup>190</sup> Notice that not only is it always open for debate, how similar is similar enough – similarity is not always required.

2. Bad character – to prove that the defendant is a "bad person" in a broader sense, i.e. a criminal as opposed to a law abiding decent citizen; someone who is capable of (and inclined towards?) committing crimes. This use of prior convictions evidence may be generally permissible (as in jurisdictions where "personal character of the defendant" is specifically on the list of things to be proven) but may also become permissible once the defendant has either attacked someone else's character or attempted to embellish his own thereby putting his character in issue (e.g. so-called tit for tat rule).
3. Truthfulness – to prove that the defendant is untrustworthy. In jurisdictions where this is distinguished from other "bad character" evidence, this is applicable only where the defendant has elected to testify. The prior convictions used for this purpose can be limited to convictions that involve dishonesty (e.g. perjury or fraud). The underlying rationale here is that a person who has acted dishonestly in the past is likely to do so again and his testimony should therefore not be believed.
4. Specific elements of the charge. Some offences include a prior conviction as a necessary element of the charge (mostly in the form of attendant circumstances, e.g. being a felon in possession of a firearm). Prior convictions can also be used to prove a variety of matters – intent, knowledge, modus operandi, absence of mistake or accident etc.
5. Preventive prognosis – prior criminal record is relevant and admissible to help determine the proper sentence if the defendant is convicted. Courts generally punish repeat offenders more harshly.

Not all sample jurisdictions recognize all five uses. There is virtually no restricting the use of prior convictions for sentencing or establishing specific elements of the charge, unlike proving propensity or character. The latter two are often subject to restrictions.

Our sample jurisdictions also show a colourful picture in terms of the types of control measures they impose on the use of prior convictions evidence and some of the choices are hard to explain. Take, for example, input controls imposed on a single-judge court in the United States or England and Wales. Given that neither jurisdiction requires their judges to write a reasoned judgment detailing their evaluation of evidence, input control as a choice is probably right – reasoning control would not be verifiable. Nevertheless, having the same judge act as the gatekeeper and then the decision-maker appears to assume that the judges are able to deliberately disregard the information they have ruled inadmissible. For

all practical purposes, an input control measure in this situation transforms into a reasoning control measure.<sup>191</sup>

While none of the sample jurisdictions have a flat ban on evidence of prior convictions, some treat prior convictions similarly to all other evidence of bad character but others have given prior misconduct that has culminated in a conviction a special status. An example of this is Estonia where the printouts of criminal records database must always accompany the charging document sent to court. Yet presenting evidence of other prior misconduct seems somewhat restricted.<sup>192</sup>

In some jurisdictions we can see reasoning controls coupled or reinforced by input controls: evidence of prior conduct can be admissible for limited purposes. This means that as a reasoning control, the court is directed to refrain from drawing inferences from the prior conduct evidence regarding certain issues; and where the proponent cannot successfully argue a legitimate purpose of the prior misconduct evidence, the court will also use the same provision as an input control and refuse to admit the document or hear the witness.

And then there are jurisdictions where there are no restrictions or controls imposed on character evidence, save for prevailing doctrine. Such is the case in Germany. There the default action is to defer to the discretion of the trial judge (judges) and not to regulate prior misconduct evidence by rules. While on the face value Estonia appears to restrict the use of prior misconduct evidence, the provision is only an extension of the general requirement that questions put to witnesses should remain within the limits of relevance, and there is no direct reasoning control imposed on Estonian judges either.

Our survey also shows that the regulation of evidence of prior misconduct has little to do with the adversarial-inquisitorial dichotomy or with the fact-finder profile. American and English law attempts to shield jurors from some prior misconduct evidence and directs judges to exclude evidence that is considered unduly prejudicial. Chilean judges have bifurcated trials and pretrial conferences held before a judge other than the trial judge but

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<sup>191</sup> Murphy argues that even though in a unitary tribunal the judge becomes aware of the inadmissible evidence, input control in the form of making an admissibility decision and excluding it right away is still beneficial as it avoids contamination of the entire trial by constant references to the disputed piece of evidence; it also helps keep the trial more focused and manageable. See Peter Murphy, *No Free Lunch, No Free Proof*, 8 J. Int'l Crim. Just. 539, 540 (2010).

<sup>192</sup> Note that the restriction applies only to questioning witnesses, defendant and the victim; written documents are apparently admissible as are spontaneous statements by the witness.



no rules requiring that prior misconduct be excluded or any rules regarding the inferences to be drawn from it. Germany uses both mixed tribunals and professional judges – and the use of bad character evidence is virtually unrestricted. In this sense, only Russia seems to be following the traditional assumptions: where trial is by jury, bad character evidence is generally excluded, however, there are no restrictions on receiving such evidence in bench trials where a unitary tribunal presides over a unitary trial. It also appears that neither the allocation of procedural initiative nor the existence of a “dossier” has any controlling influence over how prior misconduct evidence is handled – Germany (dossier, trial is controlled by the judge), Chile (no dossier, initiative with the parties), Russian bench trials (dossier, initiative with the parties) all come with a virtually unfettered freedom to admit and evaluate prior misconduct evidence.

This multifarious and puzzling picture may become a little bit more explicable in light of the history of these legal systems. Estonia, for example, decided in favour of the party-driven no-dossier setup fairly recently<sup>193</sup> and their judges have much more experience in the department where Germany is today.<sup>194</sup> Besides, the prior convictions are delivered to the court even without the dossier. The previous version of the Chilean code of criminal procedure<sup>195</sup> prescribed a classical 19<sup>th</sup> century inquisitorial procedure complete with the Roman-Canon style direct reasoning controls. No wonder then that like the pendulum effect, in the new code the legislature got rid of all rules that purported to prescribe how evidence should be evaluated.

From the fact-finding accuracy vantage point, however, history is not of much help. Clearly all jurisdictions agree that evidence of prior misconduct has some probative force. The disagreement is about whether such evidence can be accurately evaluated by the fact-finder or should be somehow regulated in order to ensure or enhance the accuracy of fact-finding.

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<sup>193</sup> The 2004 Criminal Procedure Code retained the dossier and switched to party-driven trial procedure but it turned out that the judges could not stay away from the inadmissible materials in the dossier and the problem of pretrial prejudice also persisted: judges received the dossier right after prosecutor’s opening statement. Some judges would then take a recess to study the dossier. Hence, since 2011 the court no longer receives the dossier.

<sup>194</sup> See Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure through the Amanda Knox Trial*, 30 B.U. Intl.L.J. 1 (2012) for a discussion of Italian criminal justice system that has apparently adopted elements from several “traditional models”.

<sup>195</sup> Código Procedimiento Penal, <http://bcn.cl/1mbaq> (link verified 10APR2015).

## Relevant discussion and findings of psychological research

### *Goals and concerns animating the regulation*

The accuracy of fact-finding with regard to making sense of and drawing accurate conclusions from the evidence of prior misconduct can be reduced to a few questions and corresponding assumptions animating the rules or the lack of any regulation. These are all empirical questions that cannot be answered through political statements or argumentation. Nevertheless, as evidenced by the vivid description of legislative debates over FRE 609, they can certainly be neglected or dismissed as irrelevant based on some policy declaration.<sup>196</sup> The first assumption is that prior acts in fact are predictive of future behaviour. Additionally, in order to make use of this, we should ideally also know the predictive power (for all practical purposes, this is what is meant by the oft-used phrase “probative force”) of prior conduct and our fact-finders should be able to accurately appraise these probabilities and factor them into their evaluation of evidence. If these two conditions are met, there is no need for any further discussion – all prior convictions should be made available to the fact-finders so they could reach an informed verdict. Estonian and German law seems to have been created with these assumptions in mind as they for all practical purposes do not impose any controls upon the use of prior convictions evidence (or any other prior misconduct evidence).

Suppose, however, that the probative force of prior misconduct is not known, we immediately run into problems: there is arguably no empirically substantiated normative basis for statements about what the fact-finders ought to make of such evidence or comparisons against their actual performance. Alternatively, however, considering the prospect of having someone convicted based solely on the evidence of one instance of prior misconduct (or some less gross overvaluation of prior convictions evidence of any variety described earlier), one would have to tackle both moral and epistemic problems by either introducing reasoning controls or input controls. Our model jurisdictions included examples of both approaches. For example, in the United States, there are several restrictions in place purporting to shield the fact-finder from prior convictions evidence by having the trial judge exclude it before it even reaches the jury (input control). Yet in some situations (including where the trial is by the judge alone) the law provides for a reasoning control – it prescribes what inferences from the prior conviction are permissible and directs

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<sup>196</sup> See Victor Gold, *Impeachment by Conviction: Judicial Discretion and the Politics of Rule 609*, 15 Cardozo L. Rev. 2295 (1994).

the judge to give the jurors a limiting instruction. A special case of this is the use of prior conviction evidence to undermine the credibility of the testifying defendant where the policy behind it is that the fact-finders are supposed to use the evidence of the conviction for credibility determination but not for any other purpose – like under FRE 609.<sup>197</sup> These regulation options entail the assumption that the fact-finders are able to compartmentalize their reasoning to use the evidence for the permissible purpose only; and to disregard it altogether when so directed by law. These assumptions pertain to the cognitive abilities of the fact-finders and must therefore be answered by empirical data as opposed to legal commentary or political wishful thinking.<sup>198</sup> We will now proceed to examine these assumptions.

### ***The probative value of prior convictions***

The question whether and to what extent prior conduct is predictive of subsequent actions, has been of interest to psychology for quite some time. As Edward Imwinkelried explains, in the 20<sup>th</sup> century, the psychological thinking about the probative value of prior conduct has evolved through three stages – the trait theory, situationism and interactivism.<sup>199</sup> The trait theory postulated that humans develop stable elements of personality that determine behaviour. The theory was proposed by a contemporary of Wigmore's, Gordon Allport.<sup>200</sup> Linked to this is the generality theory which posits that individuals are not only likely but very highly likely to behave in accordance to their character traits across many different situations. Consequently, one who lies in one situation is highly likely to lie, cheat, steal and not feel guilty in other situations.<sup>201</sup> As Lawson points out, this take on human character clearly underlies the rules allowing evidence of prior acts of dishonesty for the purposes of attacking the credibility of witnesses, including the testifying defendant.<sup>202</sup>

In late 1960s, when it turned out that empirical studies failed to confirm the main assumption of the generality or trait theory, situationism or specificity theory became the new majority view. According to this theory, it is not character traits but the specific circumstances of the situation that determine human behaviour. Therefore, predicting

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<sup>197</sup> Roger Park, *Impeachment with Evidence of Prior Convictions*, 36 Sw. U. L. Rev. 793, 810 (2008).

<sup>198</sup> Or naive psychological thought and supposed common sense as Lawson put it in 1975 when the Federal Rules were adopted. Robert Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 Notre Dame Law. 758, 759 (1975).

<sup>199</sup> Imwinkelried, note 176, at 747.

<sup>200</sup> See Lawson, note 198, at 780.

<sup>201</sup> Roger V. Burton, *Generality of Honesty Reconsidered*, 70 Psychol. Rev. 481, 482 (1963).

<sup>202</sup> Lawson, note note 198, at 781.

behaviour based on past events would be an effort in vain as situational factors are different. Especially dangerous is predicting behaviour based only on a small sampling of prior occurrences, as “[e]ven seemingly trivial situational differences may reduce correlations to zero”.<sup>203</sup> In the face of empirical research, even Allport himself had to admit that the trait theory lacked appreciation of the ecological and social factors that according to the empirical data were obviously relevant.<sup>204</sup> By the late 1970s, situationism enjoyed widespread support among psychologists.<sup>205</sup>

Extreme situationism did not fare much better than did pure trait theory. Re-evaluation of research results pointed to flaws in situationist research and suggested that while not by any means definitive, personality should still not be completely disregarded as one factor influencing behaviour. This new theory was dubbed interactionism and it rejects both trait theory and situationism as extreme and outlandish positing that human behaviour is a function of the situation and the person’s psychic structure.<sup>206</sup> In other words, neither situation alone nor character alone are good predictors of behaviour but there is an enduring consensus today that the interactive interplay of both stable personality traits as well as situational factors have the strongest predictive power. Thus, Imwinkelried concludes, the interactionist theory represents the most widely accepted and empirically supported understanding of the relationship between past and future behaviour.<sup>207</sup>

This interactionist perspective means that character traits cannot be conceptualized without a situational component as they are not universal but rather dispositions of the person in a particular situation<sup>208</sup> – traits are situation-specific.

As regards the narrower issue of prior convictions, the law authorizes their admission for the purpose of supporting an inference about the person’s character, be it then the character of truthfulness or that of violent predispositions or that of sexual misconduct, for example. The inference is then, that the crime once committed is indicative of the person’s character – and character is probative of the person’s behaviour in the instance under examination. As Lawson explained back in 1975, this is one instance where both situationists and trait

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<sup>203</sup> Imwinkelried, note 176, at 750, quoting the main proponent of the theory, Walter Mischel. See also Walter Mischel, *Toward an Integrative Science of the Person*, 55 Ann. Rev. Psychol. 1, 5 (2004).

<sup>204</sup> Gordon Allport, *Traits Revisited*, 21 Am. Psychologist 1, 2 (1966).

<sup>205</sup> Imwinkelried, note 176, at 750.

<sup>206</sup> Lawson, note 198, at 783. See also Brent W. Roberts & Avshalom Caspi, *Personality Development and the Person-Situation Debate: It's Deja Vu All Over Again*, 12 Psychol. Inquiry 104, 107 (2001).

<sup>207</sup> Imwinkelried, note 176, at 750.

<sup>208</sup> See Roberts & Caspi, note 206, at 105.

theorists are in agreement: the proposition that one instance of conduct can be a reliable predictor of future behaviour is unsound beyond question.<sup>209</sup> As Imwinkelried summarizes the state of affairs in 2008, contemporary psychologists have evidently completely abandoned any efforts to do precisely what [Federal] Rules [of Evidence in the United States] 413-15 authorize lay jurors to do.<sup>210</sup>

A similar issue is presented by, for example, evidence of prior convictions being offered to suggest untruthfulness of the testifying defendant.<sup>211</sup> Not only is the fact-finder authorized to infer general character of untruthfulness based on just one instance, the law<sup>212</sup> also authorizes fact-finders to infer untruthfulness from crimes that do not even involve dishonesty thereby endorsing the view that there is a character trait of general immorality – a generic bad character. This regulation takes already extreme trait theory one step further – commingling all character traits into just “good” or “bad” and completely disregarding any situational variables. As Berger notes, upon surveying the studies some of which specifically dealt with the issue of lying, cheating and stealing, the only kind of conviction that should be admissible to show propensity to perjury, is one of an earlier perjury as there is no such thing as a general character of untruthfulness. Other convictions, while not at all indicative of credibility, will spill over and contaminate the rest of the trial.<sup>213</sup>

Whereas interactionist psychology emphasizes that both the situation and traits must be taken into account – which is why a single prior instance of conduct would not be probative of anything – in his 2000 article “The relevance of bad character” Mike Redmayne challenges this approach.<sup>214</sup> Based on the crime statistics and in particular the recidivism studies he argues that there is a common element to criminal behaviour and that a previous conviction makes it much more likely that a defendant is guilty – for example, a previous conviction for burglary within the past two years made the defendant 125 times more likely to have committed the burglary in question, and the odds went up for all crimes in double digits. He also argues that the psychological studies of behavioural predictability do not accurately capture the reality in criminal adjudication: the studies assume that a

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<sup>209</sup> Lawson, note 198, at 788.

<sup>210</sup> Imwinkelried, note 176, at 761. Just as curious and scientifically unsound is the license to present evidence to the effect that the defendant is a “good law-abiding citizen” – a general global character trait like this simply does not exist.

<sup>211</sup> And granted, this is by far not the only problem – we will later examine the issue of limiting the impact of such evidence to the intended scope.

<sup>212</sup> Here, referring specifically to FRE 609 that permits impeachment of a witness by a felony conviction.

<sup>213</sup> Todd Berger, *Politics, Psychology and the Law: Why Modern Psychology Dictates an Overhaul of Federal Rule of Evidence 609*, 13 U. Pa. J.L. & Soc. Change 203 (2009-2010).

<sup>214</sup> Redmayne, note 150.

prior instance of conduct is all the information there is available. In a criminal case, the prior conviction is but one piece of the total body of proof against the defendant. Criminals, he points out, tend not to be narrow professionals but generalists<sup>215</sup> which means that conviction of any crime increases the probability of reoffending regardless of the specific offence. One should not, however, jump to the conclusion that the concern for undue prejudice is completely unfounded. While certainly satisfying the criteria for logical relevance, there are several problems associated with the use of prior convictions at trial. First, Redmayne argues, the crime statistics while impressive at the first blush, are also susceptible to several limitations. Even if evidence of prior convictions is excluded from trial evidence, it will nevertheless affect decisions by the police about who to pursue, possibly because of the tendency to start an investigation by rounding up the usual suspects or because of the enforcement efforts targeting repeat offenders. This may contribute to higher recidivism rates.<sup>216</sup> Secondly, Redmayne fears that we may not know enough about the reasoning process employed by the jurors in order to be confidently relaxing rules regarding prior convictions. On a more conceptual level, according to Redmayne, the problem is moving from the general propensity probability to the specific offender. Even if we had reliable statistics showing that a particular offender type has a 20 per cent greater chance of re-offending within two years of being released from prison, there is a huge variety of factors that may influence the particular offender and his situations that may either increase or decrease his chance of re-offending (e.g. rehabilitation programs undergone while in prison, different situational variables that cannot be accounted for but that may well affect the decision to re-offend).<sup>217</sup>

This last thought is also supported by the current thinking in psychology: a “situation” is not just easily described as “getting a good grade at school” or “being nagged by wife” but it is an associated complex of memories, physiological reactions, emotions and sensations that are the result of the individual’s past experiences – these complexes are called cognitive- affective units (CAU).<sup>218</sup> Thus, when one argues that there must be a “character trait of crime” because criminals not only tend to seek out the crime-inducing situations but also offend in seemingly divergent situations, one has misunderstood the concept of “situation.” A situation that, coupled with a trait of character, would produce behaviour is

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<sup>215</sup> Redmayne, note 150, at 698.

<sup>216</sup> It is also conceivable that prosecutors drop charges more readily for first-time offenders and thus even the individual’s first conviction already actually represents several acts of criminal behaviour.

<sup>217</sup> Redmayne, note 150, at 707 (citing Donald Gillies, *Philosophical Theories of Probability* (London 2000), pp 120...136).

<sup>218</sup> See, for example Yuichi Shoda *et al.* *Personality as a Dynamical System: Emergence of Stability and Distinctiveness from Intra- and Interpersonal Interactions*, 6 Person. & Soc. Psychol. 316 (2002).

not necessarily an external phenomenon but it is the cognitive-affective unit(s) that has been activated and then triggers the behavioural response.<sup>219</sup> Thus, Redmayne's example of someone convicted of a violent crime being more likely to steal as well misses the mark: the situation may seem different only to an outside observer. Moreover, we are also led to assume that criminal law prohibitions and overstepping these legal boundaries are part of either the situation or character trait that trigger individual's behaviour. The same CAU-s may be activated in other situations as well but those are simply not covered by criminal law and thus slip under the radar. If there was a way to map the CAUs this could be just what is needed to reconcile the seemingly irrational evidence law restrictions with the current thinking in psychology.

The special rules for sexual offences in place in the United States, however, do not make much sense at all. We earlier mentioned that the congressional discussions were not that much concerned with psychological science as they were with competing political views; the rules are not supported by recidivism studies either. Redmayne's English data squarely identified burglaries as the crime with the highest comparative recidivism figure. Rose reports the same: theft and burglary as well as drug crimes lead the list of the top recidivating offences. Sexual offences are at the bottom of the list.<sup>220</sup> An Estonian recidivism study shows the same trend: the most recidivism-prone are individuals convicted of theft and drunk driving. Sexual offences had the lowest recidivism rate.<sup>221</sup> Given this dynamic, a conviction for theft or burglary seems to have higher probative value than a conviction for a sexual offence – yet in the United States, a single conviction for a sexual offence is admissible to prove propensity to commit similar acts; a burglary conviction, on the other hand is not.

In conclusion, both psychological experimental research and the studies of recidivism support the proposition that evidence of multiple similar convictions has probative value to prove a subsequent similar act. However, there is no proof of a generalized character trait of "crime" and the notion of character traits independent of situational variables runs against what is currently known about human behaviour. Similarly unscientific are claims that an individual's character or propensity to act in certain ways can be ascertained by a

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<sup>219</sup> See Miguel Mendez, *Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters."*, 49 Hastings L.J. 871, 879 (1998).

<sup>220</sup> Charles Rose, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 N.M. L. Rev. 341, 359 (2006).

<sup>221</sup> *Recidivism in Estonia in 2010. Ministry of Justice Publication* ([http://www.just.ee/orb.aw/class=file/action=preview/id=50875/Retsidiivsusuuring\\_2010.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=50875/Retsidiivsusuuring_2010.pdf), link verified 20MAY2014), 168.

single instance of conduct even in the face of recidivism studies, or that the commission of any crime is probative of perjury. Nevertheless, studies in recidivism tend to indicate at least a scintilla of probative force even in a single conviction – possibly because most criminal convictions actually represent several instances of such misconduct.

### ***Prior convictions through the eyes of the fact-finders***

We saw that there may be some probative value to even one conviction (which may be just the tip of the iceberg and represent a behavioural pattern – but then again, it may also be just that – the first event of the kind ever) – and much more if the convictions are recent, numerous and for the same type of crime. This seems to suggest that there is nothing wrong with admitting evidence of prior convictions to prove that the defendant has a propensity to commit such acts. There is, however, the other side to the equation: how do the fact-finders perceive such evidence? As we saw earlier, there are two major concerns about prior convictions: that their probative value is overestimated, and that they may cause the fact-finder to convict based on the defendant's bad character rather than the evidence pertaining to the current charge.<sup>222</sup>

There are a number of studies examining how jurors react to prior conviction evidence and several will be examined below. Studies that focus on professional judges are unfortunately scarce. Much of the jury research has been conducted using mock juries and the degree of realism in those studies is varied.<sup>223</sup> Most of mock jury research just like much of psychological experimental research in general has been conducted using college students who are easily accessible for research. Also problematic is frequently seen focus on individual rather than group decision making.<sup>224</sup> While some researchers have also argued that individual jurors' pre-deliberation votes are an accurate indicator of the outcome of the

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<sup>222</sup> There are other reasons advanced in support of curbing the use of character evidence such as the logical consistency argument by Peter Tillers – if we view character evidence as proper basis for an inference of guilt then we tacitly reject the notion of personal autonomy and freedom of will and choice. This, however, also runs against the core principles of criminal responsibility. See Peter Tillers, *What is Wrong with Character Evidence?*, 49 Hastings L.J. 781 (1998).

<sup>223</sup> See Shari Diamond, *Illuminations and shadows from jury simulations*, 21 Law & Hum. Behav. 561 (1997) or Norbert L. Kerr & Robert M. Bray, *Simulation, realism and the study of the jury*, in Neil Brewer & Kipling Williams (eds.), *Psychology and the Law: An Empirical Perspective* (2005) 322 for discussion of mock jury research.

<sup>224</sup> Valerie Hans & Anthony Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim LQ 235 (1975).



first ballot and that the first ballot is an accurate indicator of the likely verdict<sup>225</sup>, the social interaction between jurors should not be underestimated. Sandys and Dillehay report that while the first ballot is largely indicative of the ultimate verdict, the individual jurors' pre-deliberation votes do not always accurately predict the division of votes at first ballot. Some research designs have involved entire actual mock trials but due to the logistical difficulties and the need for controlling the conditions, most make use of videotaped evidence or even just written materials that are then presented to the subjects. There are some studies that also use post-trial surveys of jurors in real cases but those are from the United States as in England and Canada such surveys and other kinds of research with jurors in real cases are barred by the law.<sup>226</sup> The criticism against mock jury research tends to focus on three factors: whether the "stimulus case" materials resemble the actual trial stimulus; whether the mock jury pool resembles the demographics of real juries; and whether the psychology of deciding a fictional case sufficiently resembles that of deciding a real case.<sup>227</sup> Bornstein has addressed the first two in his analysis and concluded that there is no indication the difference in the way the case is presented or the demographics of the mock jury pool systematically influences research conclusions.<sup>228</sup> As for the latter dimension, MacCoun concludes that there are many theories why real and mock juries' decision making process might differ, however, no research clearly supports the idea that mock jury experiments do not reflect the reality of jury decision making process. Not to mention that mock jury studies are the only way scientists can manipulate specific variables and study their effects on jury decision making.<sup>229</sup> MacCoun also argues that in order for the social science research to have more pull in policy making, it may be more important to make a good argument rather than defend arguably strong data.<sup>230</sup>

The early jury studies on the effects of prior conviction evidence were mostly focusing on decision making by individual jurors. One of those specifically addressing the effect of the

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<sup>225</sup> The classical work "The American Jury" by Kalven and Zeisel in fact treats the predeliberation vote the same as the first ballot which is not accurate as some juries engage in lengthy deliberations before even casting the first ballot. See Marla Sandys & Ronald Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 L. Hum. Behav. 175, 191 (1995).

<sup>226</sup> As Ferguson explains, this rule's origins are not clear, however, it is well established both in English in Scottish common law as well as backed by s. 8(1) the Contempt of Court Act of 1981. See Pamela Ferguson, *The criminal jury in England and Scotland: the confidentiality principle and the investigation of impropriety*, 10 Int'l J. Of Evid & Proof 180 (2006).

<sup>227</sup> Robert MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 Fla. St. U. L. Rev. 511, 512 (2005).

<sup>228</sup> See Brian Bornstein. *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 Law & Hum. Behav. 75 (1999). Bornstein's data encompasses jury research studies conducted and published over the course of 20 years including a number of studies directly comparing student and non-student mock jurors.

<sup>229</sup> MacCoun, note 227, at 516.

<sup>230</sup> Id., at 518.

evidence of prior convictions was published by Doob and Kirshenbaum in 1972.<sup>231</sup> In this study, a total of 48 subjects were presented with a hypothetical case where a man was charged with burglary. The case had four variations: one with no information regarding prior convictions; one with no information about prior convictions but where the defendant refused to testify; one where the defendant testified, gave no important evidence but was impeached by 5 previous burglary convictions; and one similar to the last but with added instruction by the judge to only consider the evidence of prior convictions for credibility assessment. Each variation was presented to 12 randomly selected subjects. The subjects were then asked to indicate on the scale of 1 (guilty) to 7 (not guilty) the likelihood of the defendant's guilt. While the first two scenarios produced mean results of 4 and 4.33 respectively, the information about prior convictions lowered the score to 3.25 and the added limiting instruction by the judge knocked an additional 0.25 points off the average. As the authors noted, the presence of the criminal record had a "dramatic effect". The authors also pointed out that the limiting instruction, while it should have produced similar results as where no criminal record was mentioned, actually moved the score towards conviction (although the change was statistically insignificant). This was attributed to the halo-effect (the tendency of people to attribute other negative characteristics to a person upon learning of one such characteristic. The same has been observed to work with positive characteristics).<sup>232</sup>

Hans and Doob conducted the first study that attempted to explore the ways knowledge of prior convictions influences jury deliberations and probability of conviction. Their study<sup>233</sup> was the first one done with groups, not individuals. As they explained, attempting to explore decision making processes of a group through individual decision making processes may not be entirely appropriate.<sup>234</sup>

The study made use of 160 randomly selected people and two variations of a burglary case. In addition to the written summary of the evidence, the test group was also informed that the defendant had one prior burglary conviction and they were also given the judge's limiting instruction telling the jurors to only consider the conviction to assess the

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<sup>231</sup> Anthony Doob & Hershi Kirshenbaum, *Some Empirical Evidence of s. 12 of the Canada Evidence Act upon an Accused*, 15 Crim. L. Q. 88 (1972).

<sup>232</sup> Halo effect was first described in Edward Thorndike, *A constant error in psychological ratings*, 4 J. of Appl. Psychol. 25 (1920). For other instances of halo effect in legal context, see also Michael Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in Simulated Jury Task*, 8 J. Res. Pers. 45 (1974).

<sup>233</sup> Hans & Doob, note 224.

<sup>234</sup> Id. at 236.

truthfulness of the defendant and not to infer guilt. Some of the participants were asked to take part in mock jury deliberations in groups of four. Others were asked to reach their verdict individually. The researchers were not only interested in the effect the prior conviction had on the verdict but they also compared the verdicts of individual jurors versus juries of four and analyzed the content of jury deliberations.

Hans and Doob reported that in individual decisions the single prior conviction did not produce a significant raise in conviction rate. They compared this result to the Doob and Kirshenbaum's study and opined that while in the 1972 study the test condition was five prior convictions, their study mentioned just one and this may have been too weak of a manipulation. Yet, in group decisions this "weak" manipulation turned into a strong one producing guilty verdicts.

The analysis of the deliberation process revealed that in the group where prior criminal record was known to the jurors, the deliberations started in a more negative way and evidence tending to indicate the defendant's guilt was brought up more frequently than in the no record group. The researchers also observed several misrepresentations of factual information that was not corrected by other members of the group and was generally consistent with the argument favoured by the speaker. The group that had no information of the prior record also tended to discredit other evidence against the defendant more frequently than members of the record group. This seems to indicate that jurors tend to pay more attention to evidence pointing towards conviction where they have information about the defendant's prior convictions. This effect is consistent with Dan Simon's more recent studies about coherence shifts.<sup>235</sup>

Hans and Doob seem somewhat disappointed that although the jurors were instructed to consider the prior conviction only for credibility, the jurors paid very little attention to that and the difference in the frequency of discussing credibility was only marginal not even being statistically significant. This correlates with what Lloyd-Bostock, Wissler and Saks and Eisenberg and Hans studies found later – prior convictions have little significance for discussions about credibility and will be used to judge propensity even in the face of judge's instructions to the contrary.

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<sup>235</sup> Coherence shift is a phenomenon where individual, upon having arrived at a preliminary conclusion, tends to interpret, evaluate and filter new information in a way that maximizes coherence with his conclusion. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. Chi. L. Rev. 511 (2004).

Wissler and Saks<sup>236</sup> hypothesized that perhaps the nature of the prior conviction is a determining factor in juror decisions about the credibility of the defendant and through this mechanism might contribute to higher conviction rates. Their study involved 160 randomly selected subjects who were presented with a two-page summary of a hypothetical case. There were four basic variations of the case – with a similar prior conviction, with a dissimilar prior conviction, with a conviction for perjury and with no prior convictions. The study produced some interesting results. First, while in all cases the “jurors” were instructed to consider the prior conviction for credibility only, the jurors deemed defendant witnesses to lack credibility regardless of any information about the defendant’s prior convictions. In fact, while other witnesses’ credibility was rated 7.3 on a 10-point scale, the defendant received a mean credibility score of only 3.18. As feared, the prior similar conviction also significantly increased the conviction rate in spite of the instruction not to use the prior conviction to decide guilt. In fact, 13 per cent of those mock jurors who decided to convict, also stated that the prior conviction was the critical factor in reaching their verdict (this in spite of the instruction by the judge that they should not even consider the prior conviction as evidence of guilt). Also consistently with other similar studies, jurors were much more prone to convict where the prior conviction was for a similar offence as opposed to perjury or a dissimilar offence. Notably, the effect of prior conviction of burglary in a murder case was less significant than the effect that a prior murder conviction had in a burglary case. The researchers opined that this may be because the jurors viewed the prior burglary conviction (a relatively insignificant offence in a murder prosecution) as an obvious attempt to create bias and were thus able to consciously discount it.<sup>237</sup> It may, however, be also due to the intuitively appealing idea that murder being the most severe offence, necessarily includes readiness to commit lesser offences (and this is straight out of the “crime as character trait” box). There are a few weaknesses in the Wissler-Saks study. As the authors themselves note, in a real trial the ratio of prior conviction evidence to other evidence is greater and the decisions will not follow immediately after hearing the evidence. The Wissler-Saks study also deals with individuals as decision makers, not groups. As the study by Hans and Doob indicates, this may be an important factor either amplifying or dampening the effect of prior conviction evidence. The main gist of the study, however, is well in line with the previous studies: prior conviction evidence increases the probability of conviction, does not lower the already low

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<sup>236</sup> Roselle Wissler & Michael Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum. Behav. 37 (1985).

<sup>237</sup> Wissler & Saks, note 236, at 44.

credibility of the defendant as a witness, and its effects cannot be controlled by a limiting instruction.

At the request of the English Law Commission, Sally Lloyd-Bostock conducted an experimental jury study into the effects of prior conviction evidence.<sup>238</sup> The focus of the study was to explore how jurors actually used information about defendants' prior convictions and how different variations of the information about the prior convictions could change the outcome and the reasoning. The Lloyd-Bostock study made use of 24 mock juries of twelve who were presented a video of a specially designed trial. The different variations of using prior convictions included information about a prior similar conviction, prior dissimilar conviction, prior conviction of indecent assault on a child (all three in two variations – from 13 months ago and five years ago), specific mention that the defendant had no prior convictions, and then the variant with no information given about prior convictions. The jurors were surveyed individually immediately after viewing the trial, and asked not only to indicate whether they would vote for conviction or acquittal but also indicate the perceived strength of evidence on a 100-point scale. Thereafter the jury deliberated and delivered a verdict according to the rules of procedure.

The Lloyd-Bostock study confirmed what had come out of previous studies: recent similar conviction significantly increased the probability of a guilty verdict. Unsurprisingly old convictions had less effect on the outcome than recent convictions. However, a dissimilar prior conviction was found to reduce the probability of conviction compared to the “base version” (no information regarding prior convictions given) and even compared to the version where evidence of good character had been introduced (specifically mentioned that defendant does not have a criminal record). The latter result is quite startling.

Apparently, the most favourable information was not that about “good character” but about prior dissimilar convictions. This, Lloyd-Bostock points out, contradicts the findings of the earlier study by Wissler and Saks. The initially counterintuitive result that information about an old dissimilar conviction was more favourable to the defendant than when no information was given and even more favourable than explicit information about defendant having no criminal record had an explanation, though. To the question whether in the absence of any information about prior record they would assume prior convictions anyway, nearly 65 per cent of jurors answered in the affirmative. This does not explain

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<sup>238</sup> Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study* ([2000] Crim LR 734).

why specifically mentioning the lack of criminal record was also less favourable than an old dissimilar conviction. Perhaps this too is due to some pre-conceived notions about stereotypical criminals and the sentiment that a person who has no prior convictions is much like a wild card whereas defendants with previous convictions can be more accurately judged based on what kinds of crimes they have committed in the past. This possible conclusion is alluded to by Lloyd-Bostock as well.<sup>239</sup>

Where the Lloyd-Bostock and Hans and Doob studies agree is that prior convictions have little effect on the credibility of the defendant and considerable effect on jurors' assessment of defendant's propensity to commit the crimes he was charged with. One major point that Lloyd-Bostock study exposes is the dramatic effects of sexual assault convictions, regardless of whether old or recent. While convictions for dangerous assault and handling of stolen goods had no effect on the credibility of the defendant, prior convictions for indecently assaulting a child or a woman reduced the defendant's credibility. When participants were told the defendant had a previous conviction for indecently assaulting a child, his testimony was least believed, he was perceived as most likely to have committed the kind of crime he was on trial for (which in no case was indecent assault on a child), most deserving of punishment, most likely to have committed crimes he had gotten away with, and most definitely not given a job where he would look after children; as well as most likely to tell lies in court.

Participants in the Lloyd-Bostock study were also asked to rate the likelihood that the defendant would commit specific offences in the future. The offences included each of the offences used as previous convictions, i.e. handling stolen goods, indecent assault on a woman, indecent assault on a child, and malicious wounding. In keeping with the rest of the results, a previous conviction for a similar offence clearly had the strongest effect; and a previous conviction for a dissimilar offence can be favourable possibly due to the belief apparently held by jurors that criminals are specialists. In addition, however, a previous conviction for indecently assaulting a child again produced a consistent and for some offences statistically significant increase in ratings of likelihood that the defendant would commit *dissimilar* offences.<sup>240</sup>

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<sup>239</sup> Id., at 753.

<sup>240</sup> Id., at 749.

This phenomenon has been more thoroughly described by Neil Vidmar in his article *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*.<sup>241</sup> Vidmar argues that in sex offence cases jurors often exhibit a generic prejudice directed not towards a particular individual but towards anyone associated with a particularly odious offence. Vidmar's survey of Canadian sexual offence trials reveals that some one-third of all jurors harbour such prejudice against child sexual abusers and admit that they would not be able to impartially judge a child molestation case if one were to be presented to them. This generic prejudice may be a product of personal experiences (e.g. a potential juror had been abused or an abuser) or a similarity between the victim and a family member of the juror. Vidmar also argues that there is evidence that mass media coverage of sexual assaults can inflame the prospective jurors to the degree that it creates a generic prejudice. It is thus conceivable that the dramatic effect of a sexual assault conviction in the Lloyd-Bostock study could easily be triggered by any other offence provided sufficient media coverage and societal awareness.

A different kind of study was conducted by Eisenberg and Hans. Unlike studies involving mock juries, this study used surveys of judges and jurors involved in over 300 actual cases in the United States. The study specifically addressed the relationship between three factors: the defendant's decision to testify, jurors' knowledge of defendant's prior criminal record and the decision to acquit or convict. The judges were surveyed before the jury verdict and after the verdict had been delivered or mistrial declared; jurors were asked to complete a survey after the verdict had been delivered. Among other questions, judges and jurors were asked to assess the strength of the prosecution's evidence on a 1 to 7 scale. The study shows that prior conviction evidence has almost no effect on the conviction rate where the perceived strength of evidence is very low or very high but produces a 30 per cent increase in conviction rate in cases where the perceived strength of the evidence is medium (3...3.5 on a 7-point scale). Thus, in the strongest of the weak cases, prior criminal record can cause a jury to convict. Eisenberg and Hans also suggested that the prior convictions did not cause the whole body of evidence to be reevaluated in the light of the defendant's past but that the prior conviction effectively lowered the standard of proof for defendants who had been convicted of previous crimes. What Eisenberg and Hans call 'troubling' is that although one of the rationales for admitting evidence of prior convictions is to attack the credibility of the defendant witness, in their study for jurors and judges alike the prior conviction did not affect the defendant's credibility but increased the

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<sup>241</sup> Neil Vidmar, *Generic Prejudice and the Presumptioun of Guilt in Sex Abuse Trials*, 21 L. Hum. Behav. 5 (1997).

likelihood that the defendant committed the crime he was charged with.<sup>242</sup> This is in contravention of the current scientific knowledge about character and also indicates that jurors are not capable of bending their mental processes to fit the law's instructions. Realization that fact-finders cannot restrict the significance of prior convictions to just credibility assessment casts in doubt the wisdom of the rules regarding the use of prior conviction evidence for undermining the credibility of the defendant as a witness. Eisenberg and Hans also point out that the decision about whether to testify is at least to some degree determined by the existence of prior record as evidence of prior convictions is often revealed to the jury during cross-examination for impeachment purposes.

Moreover, the study implies that in some cases evidence of prior convictions may actually be considered twice: once by effectively lowering the standard of proof,<sup>243</sup> and then the same prior conviction is also one piece of evidence supporting the finding of guilt by way of showing propensity to commit the offence. The prior record effectively leverages the existing evidence over the threshold needed to support conviction.<sup>244</sup> In other words, even though jurors regard evidence weaker than average, when a prior conviction is in the mix, they are significantly more likely to convict than where there is no evidence of prior conviction.<sup>245</sup> The phenomenon at work here appears to be the Fundamental Attribution Error – the tendency of fact-finders to associate behaviour with personality and drawing conclusions about the person's general dispositions or character traits based on even a single instance of conduct, situation notwithstanding.<sup>246</sup>

Laudan and Allen remark<sup>247</sup> that although some of the mock jury studies support the conclusion that prior convictions increase the conviction rate, others do not. Even if one were to believe that there is a reliable correlation, the design of the studies usually involves a borderline case where arguably the extra force in the form of the prior conviction *should*

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<sup>242</sup> Theodore Eisenberg & Valerie Hans, *Taking a stand on taking the stand: the effect of a prior criminal record on the decision to testify and on trial outcomes*, 94 Cornell L. Rev. 1353 (2009).

<sup>243</sup> Meaning that less evidence is required to produce the level of certainty in the jurors' minds that the defendant is guilty

<sup>244</sup> Eisenberg & Hans, note 242, at 1385.

<sup>245</sup> One could argue that perhaps the fact that a prior conviction raises the conviction rate is not unfounded per se. However, consider that the prior conviction procures a guilty verdict in a case where the strength of the total evidence in favour of the prosecution is rated at about 50 per cent or lower – can one then also argue that evidence with this strength rating could prove the defendant's guilt beyond a reasonable doubt?

<sup>246</sup> See Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 Vand. L. Rev. 1383, 1395 (2003). Note, however, that there is evidence that the degree of the fundamental attribution error dictating judgments differs from culture to culture. Collectivist cultures view situation as more influential than individualist cultures. See Joan Miller, *Culture and the development of everyday social explanation*, 46 J. Pers. & Soc. Psych. 961 (1984).

<sup>247</sup> Larry Laudan & Ronald Allen, *The Devastating impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. Crim. L. & Criminology 493 (2011).



increase the conviction rate and there is nothing wrong with this as it certainly has some probative value. In fact, two large scale studies of real life trials they surveyed indicate that prior conviction increases the conviction rate by about a third. More interestingly, this dynamic worked regardless of whether any evidence about prior convictions had been admitted or not. The jurors, Laudan and Allen argue, were able to fairly reliably infer the existence or non-existence of prior convictions probably by observing the trial tactics employed by the defence. What is more, the studies also indicate that where the defendant without prior convictions elected not to testify and no information was given about the defendant's prior record, the conviction rate was comparable to that of defendants who had a prior record<sup>248</sup> – possibly because the jurors had assumed that the decision not to testify was due to prior criminal convictions. This, Laudan and Allen argue, creates a strong prejudice against those defendants who choose not to testify in spite of having no prior convictions – jurors would assume prior convictions anyway, factor that into their calculus and possibly convict some people who are actually innocent. Laudan and Allen's solution is to make prior criminal record available in all cases. This would eliminate guesswork and the somewhat perverse consideration driving the tactical choice about taking the stand. In addition to more reliably identifying serial criminals, this move, they argue, would likely also protect those who do not have a criminal record yet do not want to testify.

The studies about the psychology of jurors can thus be summarized as follows. Experimental mock jury studies tend to show that a prior criminal conviction is accorded some probative value and studies of actual trials put the increase of probative value to about thirty per cent. Prior conviction evidence may also effectively lower the standard of proof (i.e. create the understanding that the charge against the particular defendant does not need to be subjected to the same scrutiny as that against a defendant who has no priors). Evidence of prior convictions (with the exception of prior convictions for sexual offences), while increasing the conviction rate, does not generally affect the credibility assessment of the defendant as a witness (and by extension, probably would not affect the credibility of any witness). In many cases, prior record is apparently assumed by the jurors even when no evidence to that effect is presented. Failure to take the stand seems to be the chief factor in making this determination. Conviction for a sexual offence, however, is a trump-ace for the prosecutor as it, regardless of the nature of the charge, not only undermines the defendant's credibility but also increases the likelihood of conviction for the offence charged through the operation of generic prejudice.

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<sup>248</sup> Id., at 506.

### *The effect of limiting instructions*

Where the law restricts the use of prior conviction evidence and the trial is by jury, there are two ways of effectuating the restriction. The first is through an input control – a gatekeeper judge will exclude the evidence and it will not be presented to the jurors. Sometimes the law also attempts to make a more nuanced use of prior convictions – the Federal Rules of Evidence 609 and 404 (b) are examples of this: while evidence of prior convictions is inadmissible to prove the defendant’s propensity to commit the crime he is charged with, the same evidence may still be admissible for another purpose, such as a credibility assessment or to prove motive, intent or lack of mistake or accident. The control measure used then to achieve this is a direct reasoning control: the judge instructs the jury to consider the evidence for a particular purpose and not for other purposes.<sup>249</sup> The question here, of course, is whether this can really work. An argument has been made at the highest level that it does not and that limiting instructions are but a legal fiction.<sup>250</sup>

Psychologists have proposed several theories to explain why people tend not to follow the instructions to disregard certain information.<sup>251</sup> Those theories are motivation (reverse psychology – rebellious attempt to regain decision making freedom), ironic process (the more one focuses on disregarding the information, the more one is thinking about it), mental contamination (different items of information are processed in light of what is previously known, “holistically”. Once forbidden information has entered the mind, it taints all related processes either by way of contaminated processing or belief perseverance – essentially coherence shifts as explained by Dan Simon).<sup>252</sup> David Myers opines that deliberate disregarding does for the most part not work<sup>253</sup> and several studies discussed above appear to confirm this. Not only are the jurors not able to delete part of their memory, apparently evidence is not processed in separate pieces where one could easily

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<sup>249</sup> The question about direct reasoning controls is hardly unique to jury trials. Where the trial is by a unitary tribunal, the court may be subject to the same kind of reasoning controls but instead of receiving instructions from an outside gatekeeper, the court is supposed to exercise self-restraint.

<sup>250</sup> *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) - Jackson, J., concurring: “The naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.”

<sup>251</sup> Chris Guthrie *et al.*, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U.Pa.L.R. 1251 (2005).

<sup>252</sup> This theory is in line with the constructivist theories of learning that have gained popularity. See Anita Woolfolk, *Educational Psychology*, 10th ed. (Pearson: Boston, 2007), 344.

<sup>253</sup> David Myers, *Social Psychology* (McGraw Hill: Boston, 2005), 622.

pull one out but it forms an entangled and non-articulate compact where the meaning of pieces of evidence is constructed much like in a learning situation. As Edwards and Bryan demonstrate, limiting instructions can not only prove useless (a point made over and over by many researchers) but may even incur a boomerang effect in that the limiting instruction in fact underlines the piece of evidence the jurors are commanded to ignore and thus the instruction proves counterproductive.<sup>254</sup> Rules on having discussions about admissibility of evidence outside the hearing of jurors are given credence by these results – the more emotionally charged the excluded piece of evidence, the less likely the limiting instruction is to have the desired effect.

While the studies that were so far examined generally suggest that jurors use prior conviction evidence for propensity and not credibility even in the face of the judge's limiting instruction, there is some evidence that suggests that limiting instructions are not universally powerless in affecting the way juries evaluate evidence. Fein, McCloskey and Tomlinson conducted a study to test the hypothesis that given the right reason, jurors may be able to erase the effects of inadmissible evidence that had come to their attention or the effects of pretrial publicity.<sup>255</sup> Their article describes two studies, one about pretrial publicity and the other about inadmissible hearsay testimony. Both studies manipulated the contents of the limiting instruction by the judge. In both studies the inadmissible information had the effect of increasing the conviction rate significantly where no limiting instruction was given as well as where a standard instruction to disregard was given to the jurors. This result is well in line with the previous studies reporting similar reaction to limiting instructions. In the third variation of the scenario the limiting instruction was modified to include an explanation why the jury would have to disregard the information. The result was interesting: whereas a plain limiting instruction completely failed to limit the effects of inadmissible information, the scenario where the motives behind the inadmissible information or the source's credibility were questioned led to a conviction rate similar to the condition where no inadmissible information had been introduced at all indicating that the jurors were able to disregard the information they perceived suspicious.

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<sup>254</sup> Kari Edwards & Tamara Bryan, *Judgmental Biases Produced by Instructions to Disregard: the Paradoxical Case of Emotional Information*, 23 Pers Soc Psychol Bull 849 (1997).

<sup>255</sup> Steven Fein *et al.*, *Can the Jury Disregard that Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*. 23 Pers. Soc. Psych. Bull. 1215 (1997).

This prompted Kassin and Sommers to hypothesize about reasons for selective compliance with limiting instructions. Their 1997 study<sup>256</sup> confirmed that jurors were able to comply with instructions to disregard where evidence was held inadmissible because it was unreliable, however, compliance was much lower where evidence was ruled inadmissible because of due process concerns. Kassin and Sommers's study also examined the perceived incriminating value of evidence introduced prior to introducing an inadmissible wiretap and after it had been introduced. Their findings confirmed that evidence was processed assimilatively: evidence introduced after the incriminating wiretap evidence was rated as more incriminating than the evidence presented before it. This two-way process confirms what Eisenberg and Hans later described as the inadmissible evidence leveraging the otherwise weak evidence past the standard of proof hurdle and what Dan Simon has dubbed coherence shifts. No similar leveraging effect was present where the wiretap was held inadmissible because of lack of credibility. Kassin and Sommers's study also seems to suggest that jurors tend to disobey judges' instructions where the instructions are motivated by what can be termed "legal technicalities" but are able to follow limiting instructions where the instructions imply that there is something wrong with the evidence in terms of its reliability or credibility. As the same authors express their argument in a follow-up article – the jurors are motivated by the desire to reach the "just" result.<sup>257</sup>

A meta-analysis of juror instruction compliance studies conducted by Steblay and others<sup>258</sup> summarized that inadmissible evidence has a statistically significant and consistent influence on verdicts and that instructions to disregard have some mitigating power but not enough to completely negate the influence of the inadmissible evidence. This has led Sklansky to argue that while it is clear that the limiting instructions do not work perfectly, they still work somewhat – in some situations more than in others.<sup>259</sup> His main point is that since instructions work imperfectly, one should take a more nuanced approach to using them in evidence law. One should, where possible, consider whether the instructions are given in the optimal way in terms of timing and wording. One might also want to consider whether the input control that the instructions is supposed to troubleshoot as reasoning

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<sup>256</sup> Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 Pers.Soc.Psych. Bull. 1046 (1997).

<sup>257</sup> Samuel Sommers & Saul Kassin, *On the Many Impacts of Inadmissible Testimony: Selective Compliance, the Need for Cognition, and the Overcorrection Bias*, 27 Pers. Soc. Psych. Bull. 1368 (2001).

<sup>258</sup> Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 Law&Hum. Behav. 469 (2006).

<sup>259</sup> David A. Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407 (2013). Sklansky also includes an extensive review of empirical studies and laments that most of the discussion both by psychologists and legal scholars tends to be slanted, contradicting studies tend to be conveniently forgotten and different methodologies make empirical projects hard to compare.

control should be retained at all – especially when no sensible explanation for the rule can be given to the jury in support of the instruction.<sup>260</sup> Where exposure to inadmissible evidence would constitute a harmless error in that it would not sway the outcome, a limiting instruction would be sufficient even though it may not work perfectly – or it could be omitted altogether. Where inadmissible evidence has the potential to cause a serious miscarriage of justice, the imperfect “curative” instruction should be replaced by declaring a mistrial. Sklansky’s take on the issue is refreshingly principled. Whereas there may not be enough information to fashion perfectly working reasoning controls (and indeed, Sklansky argues that since jury trial is a human affair, by definition, nothing about it can be perfect), the law should nevertheless not settle for maintaining the illusion of working while at the same time (sometimes even not so) tacitly admitting it actually does not work. Mistrial is of course a fairly drastic measure so it would be limited to only those cases where failure to control the fact-finding process would mean more than just a harmless error. It may also have to be backed up by other procedural levers to dissuade the parties from causing mistrials for tactical reasons.

### ***The impact of prior conviction evidence on judges***

The preceding discussion focused on lay fact-finders and often there is the argument that professional judges are more adept at handling evidentiary information in a way that does not pose the danger of irrational inferences.<sup>261</sup> Procedurally, judges are usually left to decide both admissibility and the issues of fact. This makes input control unattainable and means that fact-finding by unitary tribunals can only be subjected to reasoning controls unless a separate judge is tasked with deciding admissibility of evidence prior to the trial. The question begging for an answer is thus the one about the supposed judicial “superpower” to deliberately disregard.

Judges have been much less researched. This may be because judges are busy professionals who normally do not avail themselves to social science research projects. One may also wonder whether the somewhat mystical nature of judicial decision making is a value in itself that would be destroyed by looking into the thought process of judges (and perhaps

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<sup>260</sup> Similar suggestions have been made by others. See, for example Lisa Dufrainmont, *Limited Admissibility and Its Limits*, 46 U.B.C. L. Rev. 241 (2013).

<sup>261</sup> See, for example, Leo Levin & Harold K. Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U.Pa.L.R. 905, 916 (1971), arguing that the judges should be given more latitude in weighing the evidence by relaxing the rules of admissibility in comparison to those used for juries.

discovering that they lack the mental powers often attributed to the judicial office). The most telling is a recent study by Guthrie, Rachlinski and Wistrich who explored not only the effect that evidence about a prior conviction would have on judge's decision but also probed the judges' ability to ignore inadmissible evidence.<sup>262</sup> Their study was conducted on 265 federal and state trial judges in the United States. The research included 7 hypothetical cases where the test group was presented with evidence that included clearly inadmissible and damaging piece of evidence, and the control group received same cases without the inadmissible evidence. The results of the study showed that in general judges were unable to ignore the inadmissible information even where it was logically irrelevant to the case. The test case for prior convictions involved a lawsuit against a lawnmower manufacturer by a man who had been injured by the mower but who also had a criminal conviction for fraud from 14 years ago. Judges excluded the clearly irrelevant prior conviction but nevertheless awarded less damages than those who were not made aware of the prior conviction. This indicates their inability to ignore the evidence they had just ruled inadmissible. The only exceptions where judges were able to ignore tainted evidence were a case where a confession was obtained from the defendant in violation of his right to counsel, and a case which involved an illegal search. The two exceptions are somewhat unexpected as jurors were unable to disregard information that was inadmissible on due process grounds. The authors are not sure about the mechanism that produced this result and speculate that judges might be less reluctant to ignore highly incriminating evidence on policy grounds in real cases.<sup>263</sup> Perhaps this is due to judges having a different notion of what it means to make a "just" decision?

Further evidence that judges have trouble ignoring inadmissible evidence is a study by Rakos and Landsman.<sup>264</sup> In their study, they compared the effects of inadmissible evidence on jurors to the effects it had on judges in a civil case. Even though judges themselves confidently claimed not to be biased by inadmissible information, the numbers indicated otherwise: significantly more judges decided the case in favour of the plaintiff in the group that was exposed to the excluded prior remedial measure by the defendant. The effect on jurors was similar.

In short, it appears that despite being scant, the current empirical research does not support the idea that judges are consistently more capable of ignoring inadmissible evidence.

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<sup>262</sup> Guthrie *et al.*, note 251.

<sup>263</sup> Guthrie *et al.*, note 251, at 1322.

<sup>264</sup> Stephan Landsman & Richard Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 Behav. Sci. & L. 113 (1994).

## Conclusions and recommendations

Whereas different jurisdictions take a different view on whether prior convictions can be used as evidence of increased likelihood that the defendant is guilty, the fact-finders, both lay and professional, generally view prior convictions as relevant factors increasing the probability of guilt. Recidivism studies also clearly indicate that there is a correlation between offending and prior conviction. Even though the current thinking in psychology rejects extreme reliance on “character traits” as well as exclusive reliance on the situation as a predictor and determinant of behaviour, both traits and situation are recognized as factors acting together to cause behaviour. Thus, given similar situations, a person’s behaviour is likely to be similar. In conjunction, it then appears that empirical evidence supports admitting prior convictions for exactly the purpose that it is often deemed unsuitable for – to prove propensity. Studies also show that jurors actually take a fairly nuanced approach to calculating the effect of prior convictions; that they account for the similarity of the charge and the age of the conviction. And where no information is given about prior convictions jurors will, rightly or wrongly, assume them anyway.

Sexual offences seem to pose a more serious problem though. While with other convictions the reasoning process seems to remain rational, sexual offences apparently shut the rational assessment of evidence down in favour of irrational character assassination. So whatever the regulation regarding character evidence, it should have a control built in to counter character attacks like this.

In searching for a workable solution that would satisfy different procedural arrangements as well as be in line with psychology, England and Wales may offer a good starting point. Their approach is to admit relevant prior convictions through fairly broad “gateways” except when the judge determines that admitting prior conviction evidence would jeopardize the fairness of the proceedings creates a framework that is liberal and flexible yet equipped with a discretionary input control.

*R v. Hanson*,<sup>265</sup> one of the leading cases on bad character evidence demands that propensity evidence under CJA should be subjected to a two-pronged analysis before being admitted:

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<sup>265</sup> [2005] EWCA Crim 824, 2 Cr. App. R. 21.

- a. does the history of offences establish a propensity to commit offences like the one charged; and
- b. does that propensity make it more likely that the defendant committed the offence charged).

Additionally, the jury should also be instructed “not to place too much weight on propensity evidence.” *Hanson* certainly limits what can be admitted and guides the trial judge in the exercise of his discretion. Most importantly, it directs the judge to weed out evidence that is obviously designed for irrational character assassination – and this should not be determined according to a catalogue akin to what can be found in the Federal Rules of Evidence but will be time and place-specific. On the other hand, evidence that is clearly relevant can be introduced and will be assessed by the fact-finder.

Once evidence of a prior conviction has been found admissible, there may still be the concern that prior convictions may be given too much weight or that the fact-finders may draw conclusions based on their own misguided common sense instead of taking a more scientifically solid approach. These issues can be counteracted by educating the jury and substantiating the instructions with the reasoning behind it. Furthermore, prior convictions evidence should not be presented simply by noting that they exist but they should be accompanied by more specific detail so the jurors would get a more complete basis for assessing the significance of the prior conviction. This may have to take the form of an inclusionary input control: once the judge has found the prior conviction evidence admissible, he will make sure that the jury has the necessary background information for assessing the significance of the prior conviction evidence.

Another commendable feature of the English approach is that it does away with the dubious distinction between “normal prohibited propensity use” and the “special permissible back door propensity use” as well as the need to demand that the jury only consider the prior conviction to prove, for example, the intent or the *modus operandi* but not the propensity to commit the crime. This distinction is doubtful even in theory, and in practice it is just a pre-text for admission of propensity evidence. As Redmayne remarked, not recognizing propensity evidence for what it is would mean that proper analysis is skipped and proper jury instructions omitted.<sup>266</sup> When the instructions or the underlying rule is confusing, jury is likely to disregard the instructions and the intended reasoning control would not work. Thus, we should opt for input controls instead or simply abandon

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<sup>266</sup> Mike Redmayne, *Recognizing propensity*, 3 Crim L Rev 177 (2011).



the rule that makes no sense. As I proposed before, forcing in more details about the prior conviction would do away with the need for a catalogue of permissible uses and better manage the danger that the jurors might over- or underestimate the significance of the prior conviction.

Impeachment by prior convictions is where the law at least in the United States has it backwards. The rule allowing prior convictions to be presented to undermine the credibility of a witness is based on the now disproved idea of general negative character traits. Empirical science does not support the idea that a person's propensity to tell untruths could be ascertained based on the fact that he has prior convictions, let alone convictions not related to lying. Empirical studies also show that when evidence of prior convictions is presented, fact-finders tend to accept it as proof of guilt but not of diminished credibility even in the face of instructions by the judge to the contrary. This distorts the entire procedural design: it provides the defendant with a strong incentive not to testify which not only deprives the defence of one of its witnesses but also deprives the fact-finders of a source of evidence that might otherwise be available to them. Granted, the defendant's choice to testify is influenced by many other factors as well, not to the least by the answer to the simple question whether the fact-finder will like him or not.<sup>267</sup>

Nevertheless, as Jeffrey Bellin argues<sup>268</sup>, perhaps the law should encourage defendants to testify in order to increase the accuracy of fact-finding at criminal trials. Laudan and Allen's argument referenced earlier<sup>269</sup> supports the same position. Of course, the encouragement should not take the form of compulsion as this would run against many important constitutional principles such as the presumption of innocence or the privilege against self-incrimination – the encouragement means first and foremost removing the potential for adverse consequences. Bellin also touches on some measures to make it happen. He recommends completely outlawing impeachment by prior convictions except when rebutting defendant's direct statement to the effect that he does not have any previous convictions. Bearing in mind that the impeachment use of prior convictions has little effect on assessment of credibility and in fact goes straight to propensity, Bellin's recommendation sounds sensible, especially in conjunction with the approach taken

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<sup>267</sup> Interestingly, this advice appears in trial advocacy textbooks along with recommendations on how to train the defendant and the witnesses so as to make them more "palatable" to the fact-finders, especially juries. Trial advocacy, however, seems to be an almost unknown discipline in jurisdictions where judges are the main fact-finders.

<sup>268</sup> Jeffrey Bellin, *Improving the Reliability of Criminal Trials through Legal Rules that Encourage Defendants to Testify*, 76 U. Cin. L. Rev. 851 (2008).

<sup>269</sup> Note 247.

towards prior conviction evidence above. This would remove the dubious incentive not to testify as well – the admissibility of the defendant’s prior convictions would be subject to a legal standard not related to the defendant’s choice to testify. At the same time, convictions that would be otherwise inadmissible would still be a fair game if the defendant himself makes the false claim of having a clean record – but here the prior convictions are not being presented to show his character but to rebut the specific factual allegation.

So in summary, what I propose is a two-pronged input control:

- (a) exclude prior conviction if clearly not relevant or insufficient to establish propensity or jeopardizing the fairness of the proceedings;
- (b) if admitted under (a), ensure sufficient detail to facilitate adequate evaluation of the prior conviction evidence.

Finally, educate the jury about the science and caution them not to place too much value on the prior conviction.

Would this England-inspired approach also work for bench trials or trials with mixed tribunals? Research about judges, as we saw previously, points towards the conclusion that they, too, can overvalue prior convictions and once aware of their existence, would have difficulties disregarding them. More than with jurors, judges’ problems could be mitigated by education - not necessarily within the framework of the criminal trial but perhaps through continuing legal education programs that are in place in all surveyed jurisdictions. While jurors are transient figures, judges enjoy long terms of office and the task of educating them can be placed elsewhere in the system. Still, unitary tribunals also pose some specific challenges. The most obvious problem is the enforcement of input controls: while a jury would have the judge as a gatekeeper, for a unitary court, this role would have to be played by a different judge if input controls were to work as intended. Fortunately, prior criminal record is easily ascertainable ahead of time as are the particulars of the case. A pretrial motion regarding the admissibility of the prior record would thus be quite feasible and could be heard by a judge other than the one presiding over the trial. Chile, for example, has the necessary procedural framework in place already. My proposed regime is workable and warranted regardless of whether the procedural initiative lies with parties or the judge as long as the impermissible prior convictions are screened out before the preliminary investigation materials reach the trial judge and detailed information about the admissible priors is made available to him.

## CHAPTER 3. HEARSAY

### Introduction

One of the most well known yet also most controversial segments of the law of evidence is the hearsay rule. While the general design of this research is attempting to look at themes and topics that are common among the various jurisdictions, the hearsay rule does not seem to be one of them. One should nevertheless avoid falling victim to the labelling disease and instead of looking for the name track the phenomenon itself.

Closely related to the hearsay rule are the principle of orality, right to confrontation and the principle of immediacy. The relation is so close that sometimes the concepts are confused for one another. Lumped together, hearsay rule and the principles of confrontation, orality and immediacy are sometimes all regarded as an English creation only recently imposed on the rest of Europe, however, apparently the roots can be traced back to the Roman law and while under different names and shaped by different historical trends and events, the problems have been known across the entire spectrum of Western rational criminal justice systems.<sup>270</sup>

This chapter is structured so that first, I will explain the essence of the problem that underlies the hearsay rule – the need for the best available evidence balanced against the reality of having to do with what can be obtained even if miserably far from the best. Although the problem is common in all jurisdictions surveyed, the solution, I will demonstrate, can take different shapes even to the point that some jurisdictions do not have particular rules on hearsay and in those that have one, the scope and operation of the hearsay rule can be very diverse. I will look at different jurisdictions to see how they have dealt with the same issue.

Getting ahead of myself, there is again a variety in the approaches taken by different jurisdictions that is not easily explained. Once again, I will then look at the cognitive needs and abilities of the fact-finder as well as what contemporary psychology knows about the meaning of particular repeating themes in evidence with the goal of developing a solution most conducive to fact-finding accuracy that can be applied across jurisdictions.

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<sup>270</sup> For a detailed historical overview, see Frank Herrmann & Brownlow Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481 (1993-1994).

## **The dangers of second-hand evidence and longer chains of gossip**

Edmund Morgan has described the hearsay problem in his article in 1948<sup>271</sup> so well, that even today his article is cited for the statement of the issue far more often than for his discussion and proposed solution to it. Morgan explains that in terms of processing the information coming from a witness, a fact finder would have to go through a number of steps and make a number of interrelated conclusions.

“What Proponent expects Trier to do, and what Trier must do if he is to make the desired finding, is consciously or unconsciously to draw from his hearing of these sounds [that the witness makes on the stand] the inference that Witness seems to be saying that he saw or heard or otherwise perceived X. Until Trier determines what Witness seems to have said, he has no basis for giving any value to it. If he concludes that Witness seems to have expressed the proposition that he perceived X, Trier must make the following additional inferences, each of which, after the first, depends upon the one preceding it: (1) that Witness actually said what he seemed to have been saying; (2) that he intended thereby to express the proposition which Trier would have intended had Trier uttered the sounds; (3) that Witness then believed that he had perceived X, that is, that Witness believed the proposition to be true; (4) that this belief of Witness was due to an actual experience of Witness which at the time seemed to him to be the perception of X, that is, that Witness is remembering and is not reconstructing or attributing to himself the experience of another or otherwise unconsciously indulging his imagination; and (5) that what at the time seemed to Witness the experience of perceiving X was in fact the perception of X, that is, that the sense impressions of Witness corresponded with the objective fact.”<sup>272</sup>

In making these inferences, the Trier will utilize his own perception of the witness as the witness is testifying under oath and pursuant to the applicable regulations. However, if the witness is not testifying from his personal experience but merely states that he heard another person claim to have perceived X, the testimony can properly be used to confirm

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<sup>271</sup> Edmund M. Morgan, *Hearsay Dangers And The Application Of The Hearsay Concept*, 62 Harv. L. Rev. 177 (1948).

<sup>272</sup> *Id.*, at 177...178.

the fact that such claim was made and the true witness to X is the declarant. And as Morgan puts it,

“Reception of Declarant's utterance, therefore, would render nugatory most of the regulations imposed on witnesses. On what possible theory can Proponent be allowed to avoid the imposition of these conditions upon Declarant by the device of presenting his testimony through Witness? Consistency would require the rejection of all such hearsay utterances.”<sup>273</sup>

Hearsay is thus an out-of-court statement offered as evidence to prove the matter asserted.<sup>274</sup>

Essentially, the problem lies within the chain of communication between the fact-finder and the event or circumstance to be proven. Statements offered into evidence should preferably be based upon personal perception by the person making the statement. This is as close as witness testimony can bring the event or circumstances to be proven to the fact-finder.<sup>275</sup> The reason for this desire is the need to ensure some basic measure of reliability of the statement – the likelihood that the statement is an accurate description of what the witness perceived. The lack of reliability does not in itself mean that the statement is inaccurate. It simply means that there is no way of ascertaining just how accurate or inaccurate the statement is. Similarly, having the witness testify to what he personally perceived does not necessarily mean that the witness's account of the circumstances is accurate. The conditions for perceiving may have been less than perfect (the witness did not have his glasses or hearing aid, objects obstructed his view, speech was masked by ambient sounds, it was dark and the witness was observing from far away), the witness may have had trouble interpreting what he saw (misidentified persons or objects, could not understand the language well), the witness may suffer from poor memory (or, perhaps it is just that a long time had passed before someone discovered that he knew something of relevance), have a vivid imagination, or he may be lying on purpose. In trial procedure, examination of witnesses helps contain these problems and ascertain the possible reliability issues.

When the actual witness is not there to be examined, however, the problems go unchecked. Morgan sums these concerns up in his famous four “hearsay dangers”: misuse of language,

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<sup>273</sup> Id., at 179.

<sup>274</sup> Cross and Tapper's classic formulation can be found in the context of the exclusionary rule: “[A]n assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.” Cross and Tapper on evidence (8th Ed. 1995), p 46.

<sup>275</sup> Mortimer Kadish & Michael Davis, *Defending the Hearsay Rule*, 8 Law & Phil. 332, 349 (1989).

the lack of sincerity, defects in memory and defects in perception.<sup>276</sup> In spite of his article having been written more than 60 years ago, this still seems to accurately sum up the instances where witness statements may fail.<sup>277</sup> In its report<sup>278</sup>, the English Law Commission listed nine “justifications of the hearsay rule.” Most justifications are actually easily traced back to the four hearsay dangers Morgan was pointing out or refer to considerations that are not related to the accurate fact-finding objectives.

The easiest way to mitigate the dangers is to shorten the chain of communication - eliminate all intermediaries and have the person who perceived the relevant information be present and testify live at trial. Wigmore explains this in possibly the plainest terms: there are two sides to the rule against hearsay – a requirement that the extrajudicial speaker be called to the stand to testify, and that a witness who is already on the stand should speak of his own personal knowledge.<sup>279</sup> This eliminates possible distortions and data loss that would likely happen if the witness’s account of the events were to reach the fact-finder through some medium such as writing or another person. Authors also mention other reliability-enhancing devices such as the oath a witness would have to take, a face-to-face confrontation with the accused, and the process of cross-examination through which the testimony will be probed and its accuracy verified. Today most courts and scholars consider cross-examination rather than oath the most important reliability-ensuring instrument<sup>280</sup> and the fading of memory over time its main problem.<sup>281</sup>

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<sup>276</sup> Bergman argued that there are actually five hearsay dangers: Morgan’s four plus ambiguity – an inherent quality of language of conveying doubtful or uncertain meanings in spite of the best intentions of the speaker – see Paul Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 Ky. L.J. 841 (1986-1987). I will treat this as a special case of Morgan’s “misuse of language”.

<sup>277</sup> Morgan, note 271, at 186. Morgan’s approach is especially useful for our purposes as it stays clear of the reasons for the hearsay rule that are less associated with accuracy of fact-finding and sometimes simply appear to confuse the cause for the result. For example, oath is for the accuracy of fact finding purposes not important only as far as it has bearing on the accuracy of the statement. Should it turn out that oaths do not affect the statement’s accuracy, then the oath issue will be moot except perhaps for ceremonial purposes (which, to be sure, may in the grand scheme of things be important in their own right). While Morgan views reliability as something objectively describable through the different factors (the “dangers”), Richard Friedman in his article “Truth and its Rivals in the Law of Evidence and Confrontation,” 49 Hastings L.J. 545, 552 (1998) has a different view: to him, reliability or trustworthiness is not dependent on objective criteria characterizing the particular piece of evidence but rather it depends on whether the evidence is corroborated by other evidence in the case. If one were to define reliability as the believability in the context of other evidence, then Friedman is right – court cannot exclude evidence based on low reliability before all evidence has been received. Friedman’s definition of reliability, however, seems to defy the purpose of having such a parameter. Furthermore, if reliability were to derive from the entire body of evidence, what about a case where there is only one piece of evidence? It appears that Friedman has reduced reliability into something subjective and lumped it together with weight and credibility which are, indeed traditionally subjective and context-dependent descriptors.

<sup>278</sup> Evidence in Criminal Proceedings: Hearsay and Related Topics. Law Commission Report no. LC245 (1997).

<sup>279</sup> John H. Wigmore, *The History of the Hearsay Rule*, 17 Harv. L. Rev. 437 (1904).

<sup>280</sup> For diminishing significance of oath, see Morgan, note 271, at 186. For more recent account, see, for example, John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in Civil Proceedings Is Necessary to Protect the Integrity of the Civil Judicial System*, 79 Temple L. Rev. 773, 774-75 (2006).

Related to the evidence rules dealing with hearsay is the right of confrontation and the principles of immediacy and orality. In a broader sense, they too are aimed at eliminating extra links in the chain of information and increasing the reliability of witness statements.<sup>282</sup> However, these principles also have additional underlying rationale and broader application restricting the use of statements by anonymous witnesses or witnesses testifying through special arrangements, for example. And although in some jurisdictions confrontation rights work like a broader, more principled rule against hearsay, other jurisdictions claim adherence to the principles of orality, immediacy and confrontation but have no rule against admitting hearsay into evidence – the focus there is not so much on the source of the knowledge that the witness possesses but on the way it is relayed to the fact finder.<sup>283</sup> The justification for the immediacy and orality principles as well as the confrontation rights does not spring so much from the need to ensure reliability of evidence as it has to do with the moral reasons. The focus of this thesis, as already explained, is on accurate fact-finding and thus the reliability of evidence. We will now proceed to take a closer look at how different jurisdictions have dealt with hearsay in their legislation.

## **Main features of the regulation of hearsay evidence in the sample jurisdictions**

### ***England and Wales***

England and Wales is the home of the rule excluding hearsay as we know it.<sup>284</sup> The rule against hearsay did not develop until mid-18<sup>th</sup> century where court records quote judges saying things along the lines of “what you heard from another is not evidence. Is that

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<sup>281</sup> For extensive discussion of memory and its effect on witness testimony, see *Total Recall? The reliability of witness testimony* - New Zealand Law Commission’s Miscellaneous Paper 13 (1999).

<sup>282</sup> See, for example, Mirjan Damaška, *Of Hearsay and its Analogues*, 76 Minn. L.Rev. 425, 447 (1992).

And, as some scholars have pointed out, this may not even get close to being the main rationale.

<sup>283</sup> This can in some instances produce the strange result of formal compliance with the right of confrontation by having the witness testify and submit to questioning about a statement made to him by another – the questioning in this instance, however, cannot possibly shed light on the actual event or circumstances being proven but can only explore the circumstances surrounding the conversation between the declarant and the witness as Morgan’s scheme aptly demonstrates. Depending on how the “confrontation” is defined, this may or may not suffice.

<sup>284</sup> Remember the classic formulation of the rule in note 274 above.

person in the courtroom?”<sup>285</sup> Arguably driven by the introduction of defence counsel into criminal proceedings, this marked the advent of the rule excluding hearsay as an input control. Prior to that, historians agree, hearsay was routinely admitted with judges only occasionally commenting on its proper weight.<sup>286</sup> From its inception onwards the courts developed a complicated set of exceptions to the general rule excluding hearsay.<sup>287</sup> This in turn prompted calls for a radical overhaul and simplification of the law on hearsay evidence in criminal proceedings in England and Wales,<sup>288</sup> and pressure mounted especially after the hearsay rule was practically abolished in civil proceedings in the Civil Evidence Act 1995.<sup>289</sup>

A product of several years of consultations and a number of earlier failed attempts to fine-tune the complicated maze of hearsay law, the CJA 2003 wiped the slate clean by abolishing the common law and enacting Chapter 2 of Part 1 containing a new set of rules on hearsay.<sup>290</sup>

The central provision of the English hearsay law is section 114 of the CJA:

#### **114. Admissibility of hearsay evidence**

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—

- (a) any provision of this Chapter or any other statutory provision makes it admissible,
- (b) any rule of law preserved by section 118 makes it admissible,
- (c) all parties to the proceedings agree to it being admissible, or
- (d) the court is satisfied that it is in the interests of justice for it to be admissible.

This general provision is complemented by section 117 that sets forth an exception for business records and other documents, and section 118 that contains a list of specific exceptions to the hearsay rule. Section 116 enumerates the situations in which the admissibility of the out-of-court statement is based on the unavailability of the declarant –

<sup>285</sup> John Langbein, *The Origins of Adversary Criminal Trial*, (OUP, NY 2003), 235.

<sup>286</sup> See also, Damaška, note 282 or John Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263 (1978).

<sup>287</sup> As Jenny McEwan suggests, to receive statements of great probative value but lacking reliability. See Jenny McEwan, *Evidence and the Adversarial Process*. 2<sup>nd</sup> Ed (Hart Publishing, Oxford, 1998), 249.

<sup>288</sup> LC245, note 278, at 45.

<sup>289</sup> Roberts & Zuckerman, note 3, at 364.

<sup>290</sup> Now, while the Act does indeed in Chapter 2 Section 118 purport to specify which common law rules remain in force and to abolish all others by virtue of section 118(2), the list of common law rules (substantially hearsay exceptions) is quite long and as Roberts and Zuckerman note, “[t]he act effectively re-enacted the common law hearsay rule with most of its exceptions intact and some new statutory ones thrown in for good measure.” – Roberts & Zuckerman, note 3, at 365.



unavailability itself is the sole condition for admissibility of the declarant's hearsay statements and the statements need not satisfy any additional conditions. The declarant is deemed unavailable when he is dead, when his mental or physical illness prevents him from testifying, when he is located out of the country and his attendance is not practicable, or his location is unknown in spite of reasonable efforts. Where a person out of fear refuses to testify, his out-of-court statements may be read into evidence at the court's discretion. The consideration animating section 116 is necessity as the choice is between admitting a hearsay statement (albeit perhaps less reliable than live testimony would be) or doing without the statement altogether. As Roberts and Zuckerman concede, the mere fact that the witness is unavailable, makes his statements no more reliable, therefore the admission of the statements by an absent declarant must be carefully considered in light of the fair trial requirements. One of these safeguards prescribed in Section 116 (1)(b) is that in all instances, the declarant must be satisfactorily identified.<sup>291</sup> The other safeguard is enacted in Section 124 that permits introduction of additional evidence relevant to the credibility of the statement.

The exception for documents in section 117 is also fairly broad, admitting most business- or occupation-related documents as long as they were compiled based on personal knowledge. Recognizing the especially precarious position of "criminal process documents," the law includes an additional provision regarding the admissibility of those: the person who supplied the information contained in the statement found in the criminal process document and who had or may be reasonably supposed to have had personal knowledge of the matters must be unavailable within the meaning of Section 116 in order for the statement to be admissible.<sup>292</sup> The rationale behind the documents exception is the notion that anyone keeping records as part of their profession or trade or official duties is likely to do so accurately – more so than in the occasional note in one's diary or a similar private setting. This supplies the added reliability of statements found in the business-related documents.<sup>293</sup>

Section 118 has retained eight common law exceptions to the hearsay rule. Roberts and Zuckerman are not too keen on the English Parliament's law making here:

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<sup>291</sup> Roberts & Zuckerman, note 3, at 399.

<sup>292</sup> For a more thorough analysis, see *Id.*, at 412...413.

<sup>293</sup> *Id.*, at 410.

“This rag-bag list of special pleading for particular kinds of hearsay is a relic of time, [...]when judges were prepared to invent new exceptions to the exclusionary rule almost whenever probative value and convenience might dictate.”<sup>294</sup>

The exceptions are based on a variety of assumptions. The confidence in public records and registers seems reasonable and the admission of such documents saves a lot of time and money without generally jeopardizing the reliability of evidence. The exception for reputation as to character and the exception for reputation as to family tradition or history, however, are old common law relics based on the assumption that reputation is the product of the individual knowledge of many and therefore more reliable. The idea is that it is hard if not impossible to hide one’s character traits from the community. Similarly, reputation as to family tradition or history being the sum of the knowledge by many people has undergone sifting among the members of the community and its survival as the common reputation is testimony of its truth. Roberts and Zuckerman pull no punches when discussing these three exceptions that are in their words “useful restatements of common law” but otherwise simply archaic.<sup>295</sup>

The *res gestae* exception covers a number of different kinds of statements – excited utterances, composite acts, statements describing physical sensations and those pertaining to mental states of the declarant. The rationale underlying the exception for excited utterances has been described in *R v. Anderson*<sup>296</sup> as being based on the circumstances of making the statement being “so unusual or startling or dramatic as to dominate the thoughts of the victim so that the utterance was an instinctive reaction to that event thus giving no real opportunity for reasoned reflection”. The rationale for admitting the statements regarding physical sensations is quite similar – especially where the “statement” resembles an exclamation.<sup>297</sup> Simply put, the *res gestae* exception is based on certain assumptions about human psychology and interaction (and we will take a closer look at them later).

The law also preserved the exceptions for confessions and admissions by the defendant, the defendant’s agents or other persons who the defendant has authorized to speak for him. Probably the most important reason for admitting these statements is that a damaging statement coming from the defendant himself is less likely to be false than one purporting

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<sup>294</sup> Id., at 415.

<sup>295</sup> Roberts & Zuckerman, note 3, at 416

<sup>296</sup> [1987] AC 281.

<sup>297</sup> Roberts & Zuckerman, note 3, 426.

to work in his favour. Admissions and confessions can sometimes also constitute *res gestae*. The CJA also preserves the exception for admitting co-conspirators' statements. This had originally been developed by judges to make it easier to prosecute criminal conspiracies that are often clandestine and difficult to prove otherwise. While the underlying rationale and probative value of co-conspirator's statements may be questioned, the exception itself has become firmly rooted.<sup>298</sup>

As regards witnesses who do testify, Sections 119 and 120 permit the admission of their prior out-of-court statements for their substance as well as to attack the credibility of the witness. This effectively abolishes the dichotomy of purpose concept that is still found in the United States and will therefore be further explained in the next section.

The relatively broad exceptions are topped off by a "catch-all" provision of Section 114(1)(d) that is designed to give trial judges the legal authority to admit evidence that does not fall under any of the hearsay exceptions but conforms to the mostly reliability and necessity-related factors listed under Section 114(2).

At one point, this "catch-all exception" almost wiped out the entire rest of the hearsay regulation: Lord Justice Hughes in the Court of Appeal case *R v. Y*<sup>299</sup> insisted that Section 114(1)(d) should be given its "ordinary natural meaning" irrespective of its drafting history – and there was nothing in the statutory language to suggest that Section 114(1)(d) was somehow subordinated to sub-paragraphs a, b, or c. What Hughes suggested was tantamount to leaving the rest of the framework of hearsay rules without effect as the courts could simply apply 114(1)(d) in all cases and not even bother with the rest of the analysis. The Court of Appeal did remark though that the provision should be cautiously applied lest the provision circumvent the regulation of Section 116. Subsequent appellate decisions have affirmed the "cautious application" holding.<sup>300</sup>

There are three significant provisions that are meant to act as counterbalance to the generally liberal tenor of the hearsay rule: Section 124 provides for attacking and supporting the credibility of the hearsay statement, section 126 empowers the judge to exclude evidence subject to a separate balancing test "the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time,

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<sup>298</sup> See Keith Spencer, *The Common Enterprise Exception to the Hearsay Rule*, 11 Int'l J. Evidence & Proof 106 (2007).

<sup>299</sup> *R v. Y*, [2008] EWCA Crim 10.

<sup>300</sup> See, for example, *R. v. Horsnell*, [2012] EWCA Crim 227.

substantially outweighs the case for admitting it, taking account of the value of the evidence”. Finally, Section 125 directs the judge to acquit the defendant or discharge the jury if the case against the defendant is based wholly or partly on hearsay, and “the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe”.

The CJA 2003 hearsay law has been challenged on confrontation grounds<sup>301</sup> a few times, most notably and quite recently in the twin cases of *Al-Khawaja and Tahery*.<sup>302</sup> The case of *Al-Khawaja* was an indecent assault case where one of the victims had made a statement to the police but later, before trial, committed suicide for unrelated reasons. At trial her statement was read to the jury because the trial judge found the statement vital for the prosecution’s case. The defence could cross-examine other witnesses in the case and the judge instructed the jury to bear in mind that the dead victim had not been cross-examined. The jury found the defendant guilty and the claim brought to the ECtHR was that *Al-Khawaja* had been deprived of his confrontation rights under ECHR Article 6(3)(d). *Tahery* was found guilty of assault based primarily on the pretrial statement of a witness who had later not appeared at trial because he was too scared to do so. A similar confrontation clause violation claim was raised by the defendant. While the ECtHR has always maintained that admissibility of evidence is generally an issue for the national courts and national legislation,<sup>303</sup> the court’s jurisprudence also emphasizes the need to avail witnesses against the accused to questioning by the defendant himself or his counsel at some point in the proceedings. The *Al-Khawaja* and *Tahery* cases presented the ECtHR with a situation where there had been no questioning by the defence, the witnesses were unavailable at the time of the trial and their prior statements were admitted with cautionary comments from the judge about the relative credibility of the un-cross-examined statements.

Initially, the fourth chamber of the ECtHR held<sup>304</sup> that Article 6 was *always* violated when hearsay evidence was the sole and decisive evidence against the defendant. Later, after the UK Supreme Court in *R v. Horncastle*<sup>305</sup> had declined to follow the ECtHR’s holding in

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<sup>301</sup> The “confrontation clause is found in ECHR Article 6(3)(d) that sets forth that one of the rights of persons charged with a criminal offence is “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

<sup>302</sup> *Al-Khawaja and Tahery v. The United Kingdom*, 54 EHRR 23 (ECtHR Grand Chamber judgment of 15 DEC 2011).

<sup>303</sup> *Schenk v. Switzerland*, 13 EHRR 242 (1988).

<sup>304</sup> *Al-Khawaja and Tahery v. The United Kingdom*, 49 EHRR 1 (2009).

<sup>305</sup> [2010] 2 All ER 359.

*Al-Khawaja*, the case was referred to the Grand Chamber to be reconsidered. The Grand Chamber's judgment<sup>306</sup> was unsurprisingly ambiguous. The ECtHR affirmed the "sole or decisive" standard and forcefully defended it against the UK Supreme Court's concerns that such a retrospective standard would be difficult to apply at trial level. The Court then explained that even if a conviction is solely based on hearsay statements by a declarant that had never been subjected to examination by the defence, the trial as a whole was not necessarily unfair as long as there was sufficiently substantiated necessity for the admission of the statement and there were sufficient counterbalancing measures in place, including strong procedural safeguards.<sup>307</sup> Thus, the ECtHR concluded, in the case of *Al-Khawaja*, admission of the dead victim's statement was not a violation of the confrontation clause (the victim was dead, thus objectively unavailable). Tahery's rights to confront witnesses against him, however, had been violated – mostly because the witness was objectively available and excusing him from attending the trial was a choice, not a necessity, especially since the fear was not a direct result of the defendant's actions.<sup>308</sup>

### ***The United States***

The hearsay rule in the United States federal law is found in Title VIII of the Federal Rules of Evidence (FRE). Not unlike in England and Wales, the law on hearsay was first developed by judges on a case by case basis.<sup>309</sup> The difference in history is that the United States inherited English common law at the point where the hearsay rule had already crystallized.<sup>310</sup> Since then a major influence on the development of evidence law in the United States was John Henry Wigmore – possibly the most famous writer and influential legal scholar on evidence law in the world. His multi-tome treatise<sup>311</sup> on evidence helped

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<sup>306</sup> *Al-Khawaja and Tahery v. The United Kingdom*, note 302.

<sup>307</sup> In *Al-Khawaja and Tahery*, the court looked specifically for factors enhancing the reliability of the hearsay statements admitted in lieu of live testimony.

<sup>308</sup> For further discussion of this case and its implications for the English law on hearsay evidence, see Mike Redmayne, *Hearsay and the Human Rights: Al-Khawaja in the Grand Chamber*, 75 Modern L. Rev. 865 (2012) or William E. O'Brien, *Confrontation: the defiance of the English courts*, 15 Int'l J. Evidence & Proof 93 (2011).

<sup>309</sup> David H. Taylor, *Hearsay and the Right of Confrontation in American Trials by Jury*, 18 Chosun L. J. 3 (2011).

<sup>310</sup> The exact time when hearsay rule became what it is today is subject to some debate – see section on English hearsay law above. Arguably, even if not universally accepted in England in the beginning of 19<sup>th</sup> Century, hearsay rule along with the confrontation clause were much more fervently embraced in the American colonies and the newly established United States as a reaction to the abuses by the English colonial powers.

<sup>311</sup> John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (orig.1904),

make sense of evidence law and constituted a significant preparatory work for the several codifications of evidence law that culminated in the adoption of the FRE in 1975. The FRE were last edited in 2012 – then primarily to clarify and improve the language without making any changes in the substance.

According to FRE 801(c), hearsay is a statement that the declarant has not made while testifying in the current trial or hearing and that is offered to prove the truth of the matter asserted. In general, under Rule 802, hearsay statements are inadmissible except when they fall under an exception. The exceptions are enumerated in rules 803 and 804, and Rule 807 provides a so-called catch-all exception. According to Rule 801(a), a “statement” under the rules includes oral, written as well as non-verbal assertions.

By definition, certain types of verbal communication are excluded from the operation of the hearsay rule as not being ‘assertions’, such as imperatives and interrogatories (although a question by form may in it have a premise that amounts to a statement – consider most leading questions, for example). Also excluded are “verbal acts” or words of independent legal significance such as those forming an oral contract – they are not assertions but events in their own right. Another group of statements that are not considered hearsay because they do not satisfy the definition are various statements that are not intended to prove the matter asserted but are offered for some other purpose such as proving the declarant’s state of mind, his memory, his literacy, or the fact that the declarant was still alive at the time of making the statement. This creates a *dichotomy of purpose* – a statement may be inadmissible to prove its own substance but admissible for some other purpose. Excluded from the hearsay category are also a declarant’s own prior inconsistent statements (and consistent statements for the purpose of refuting allegations of recent fabrications) and statements consisting of identification. Also excluded are statements that are being offered against the party and were made by the same party or its agents or coconspirators (the party admission rule). The rationale for admitting party admissions is rooted in the common law sentiment that the party should always be responsible for the truth of his own statements and those of his agents. As the Advisory Committee notes, the exclusion of the party admission from the operation of the hearsay rule is based on the theory of adversary system rather than some extra measure of trustworthiness.<sup>312</sup>

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<sup>312</sup> Advisory Committee notes to Rule 801, citing John Strahorn, *Reconsideration of the Hearsay Rule and Admissions*, 85 U.Pa.L.Rev. 484, 564 (1937).

The exceptions to the hearsay rule are divided into two broad categories: those where the availability of the original declarant is immaterial (i.e. hearsay statements can be introduced even if the original declarant could be called to testify at trial) and those that only apply if the declarant is unavailable for the purposes of Rule 804(a).<sup>313</sup> The principal rationale underlying the hearsay rule is that hearsay is unreliable and should thus be excluded from evidence. The statements that fall under an exception, however, are for some reason deemed reliable enough to warrant consideration.<sup>314</sup> By framing the rule in terms of a general ban on hearsay and enumerated exceptions based on specific circumstances, the hearsay rule with its exceptions creates a minimum standard of reliability<sup>315</sup> for admissible statements.

The exceptions under Rule 803 are applicable regardless of whether the original declarant is available or not. In the necessity-reliability scale, therefore, these types of statements are deemed so reliable that they can be freely admitted even if the declarant could attend in person. Many of the exceptions have easily recognizable English counterparts. For example, Rules 803 (1) “Present sense impression” and 803(2) “Excited utterances” are the offspring of English *res gestae* doctrine, and rules 803 (19) thru 803(21) on the admissibility of reputation evidence can be traced directly back to the common law rules in their scope as well as the rationale. For the majority of the exceptions, the underlying rationale represents certain assumptions about cognitive processes. For example, present sense impressions are deemed more trustworthy because of the contemporaneity of the event and the statement made by the observing declarant; excited utterances are admitted based on the theory that the excitement stills the capacity of reflection and thus negates the possibility of fabrication; statements made for medical diagnosis and treatment (Rule 803(4)) are considered more reliable because the declarant would presumably tell the truth in order to receive proper treatment and this is why only statements pertinent to the medical issues are admitted under this exception.<sup>316</sup> As Mueller and Kirkpatrick explain, the “business records exception” found in Rule 803(6) rests in part on the necessity in the age of huge data masses that no individual could remember, and in part also on the notion that records kept for the business are more trustworthy because of the regularity and

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<sup>313</sup> FRE 804(a) lists five different situations where the declarant is deemed to be unavailable. These include infirmity or death of the declarant, the lawful or unlawful refusal to testify, the lack of memory and the failure to procure the attendance of the declarant as a witness in spite of reasonable efforts by the party proponent.

<sup>314</sup> As the Advisory Committee explains, certain statements possess circumstantial guarantees of trustworthiness justifying their admission even though they are hearsay. See Advisory Committee Notes on FRE 803.

<sup>315</sup> Which seems to be substantially the same as the trustworthiness invoked by the Advisory Committee.

<sup>316</sup> See for example *Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 277(5<sup>th</sup> Cir. 1991).

routine involvement of record makers in the practice, and “in the commercial context, market pressure and individual responsibility for job performance also reduce the risk”.<sup>317</sup>

Notice that the application of the exceptions to the law enforcement reports in criminal cases is limited.<sup>318</sup> The exception under Rule 803(14) for statements in tombstones, family bibles, burial urns or the like is admittedly one of the most arcane and bizarre,<sup>319</sup> and is based on the assumption that not only are these places significant for the family members, the inscriptions in them are also less likely to remain uncorrected if accessible to other family members, including those they may pertain to. In contrast to these, Rule 803(16) - the ancient documents exception - is justified by the Advisory Committee on historical grounds with reference to Wigmore and McCormick but no basis for the added trustworthiness is offered other than the age of the document. As Mueller and Kirkpatrick explain, the real reason for the exception is that of necessity – age does not make any document more credible or the person who once compiled it more reliable, however, the twenty years will have caused the witnesses to have forgotten much of what they may have once known, or to die or disappear. Thus the old document may simply be the best evidence available.<sup>320</sup>

While Mueller and Kirkpatrick in their commentary clearly look at both added guarantees of trustworthiness as well as a measure of necessity<sup>321</sup> as ideally coexistent justifications for any one of the hearsay exceptions under Rule 803, several exceptions, as we noted before, do not seem to spring so much from necessity in its strict sense but rather a measure of convenience. Similarly, some exceptions seem devoid of any added guarantees of trustworthiness, but are clearly the children of necessity (especially the variation of the ancient documents exception found in the FRE – other jurisdictions have made the admissibility of such documents contingent upon a finding that the document has previously generally been relied on).<sup>322</sup> The exceptions under Rule 803 supposedly possess the kind of trustworthiness that warrants the admission of respective statements regardless of the availability of the original declarant. The Advisory Committee argues that the theory

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<sup>317</sup> 4 Christopher Mueller & Laird Kirkpatrick, *Federal Evidence* § 8:77 (4th ed. 2014).

<sup>318</sup> The Supreme Court in *United States v. Oates*, 528 U.S. 890 (1999) held that the heightened concern about the confrontation rights and the specific mention of law enforcement records in the law rendered law enforcement reports similarly inadmissible under Rule 803(6).

<sup>319</sup> 4 Federal Evidence § 8:97 (4th ed.).

<sup>320</sup> 4 Federal Evidence § 8:100 (4th ed.).

<sup>321</sup> These considerations were surely not Mueller’s and Kirkpatrick’s own creation – it was the only two that Wigmore accepted as countervailing considerations limiting the applicability of the rule against hearsay – 5 Wigmore on Evidence § 1420 (Chadbourn revision), cited by Roberts, Zuckerman, note 289, 398.

<sup>322</sup> See, for example, California Evidence Code, Section 1331 (<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1330-1331> – link verified 19-Jan-13).



is justified by many exceptions developed by the common law and that Rule 803 is to a large degree a compilation of these rules. Whether the rationale underlying the various exceptions are also justified today, is a matter for discussion that I will address later.

Rule 804 provides an additional list of exceptions to the general rule against hearsay. These exceptions are applicable where the declarant is unavailable to testify. As the Advisory Committee notes, evidence admitted under Rule 804 is inferior to live testimony by a witness but nevertheless preferred to complete loss of evidence when the witness is unavailable. Thus, while the trustworthiness factor is admittedly lower, the necessity factor justifies admitting the statements even in the face of lower trustworthiness. One of the most notable exceptions is that of Former Testimony.<sup>323</sup> The trustworthiness of this kind of statement is similar to trial testimony. In fact, statements admitted under this exception are akin to trial statements in every respect except that the trier of fact will be deprived of the opportunity to observe the demeanour of the witness. The Advisory Committee notes that in terms of reliability, the former testimony by a witness appears to be the strongest of hearsay statements, however, it is precisely the lack of demeanour evidence that robs former testimony of the depth and meaning derived from the oath and cross-examination. The exceptions under Rule 803, the Advisory Committee argues, cover statements the significance of which does not depend that much on the possibility to observe the declarant's demeanour while making the statement – an argument that is loaded with several very broad and quite possibly misguided assumptions. Rule 804(b)(2) carves out an exception for the dying declarations. This exception is based on a traditional common law exception which in turn apparently proceeded on the assumption that “one preparing for meeting his creator is unlikely to lie”.<sup>324</sup> The Advisory Committee concedes that the original religious justification may have lost its conviction for some persons over the years but offers no other justification besides remarking that “it can scarcely be doubted that powerful psychological pressures are present”. The “forfeiture by wrongdoing exception” in Rule 804(b)(6)<sup>325</sup> is one of the more recent additions to the rules and is not based on the added trustworthiness theory but was enacted as a prophylactic rule to deter “abhorrent

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<sup>323</sup> Fed. R of Evid. 804(b)(1): “Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

<sup>324</sup> *The Admissibility of Dying Declaration*, 38 Fordham L.Rev. 509, 513 (1970).

<sup>325</sup> Following the numeration of the Federal Rules, I have skipped (5) which was originally the residual(catch-all) exception that has now been transferred to rule 807. FRE 804(b)(6): “Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability. A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant’s unavailability as a witness, and did so intending that result.”

behaviour that strikes at the heart of the system of justice itself.”<sup>326</sup> The Advisory Committee remarks that although the standards for establishing the forfeiture by the party have been somewhat different across circuits, a similar equitable solution had been adopted in most circuits. Mueller and Kirkpatrick point out that the forfeiture by wrongdoing exception would also survive a confrontation clause challenge based on the reasoning that confrontation rights are extinguished by the wrongdoing.<sup>327</sup>

Added to the “catalogue” exceptions is the “catch-all” exception set forth in Rule 807 that purports to make admissible all statements that are not covered by a hearsay exception but possess equivalent guarantees of trustworthiness, are offered as evidence of material fact, are the best available evidence on the issue and their admission is in the interests of justice.

As I mentioned above, in addition to the rules of evidence there is another player in the scheme to be taken into account: the Confrontation Clause in the Sixth Amendment.<sup>328</sup> While the Federal Rules are applicable in civil and criminal cases, the Sixth Amendment provides fundamental rights for those on trial for a criminal offence. The scope and application of the confrontation clause has been subject to development by the Supreme Court with the most recent major development coming in the landmark cases of *Crawford v. Washington*<sup>329</sup> and *Davis v. Washington*.<sup>330</sup> Before *Crawford* and *Davis*, the controlling precedent was *Ohio v. Roberts*<sup>331</sup> where the Supreme Court had held that an out-court statement by an unavailable witness can constitutionally be admissible against a criminal defendant even without cross-examination as long as the statement falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. In *Crawford*, the court noted that *Roberts* produces unpredictable results and allows the admission of “core testimonial statements” without there ever having been cross-examination. This, the Court reasoned, made the *Roberts* rule unacceptable. The court in *Crawford* held that the confrontation clause guarantees the right to cross-examine those making testimonial statements against the defendant, i.e. instead of being a minimum standard of reliability of the statement, the confrontation clause is a procedural guarantee that the reliability of the statement is tested in a particular way – through cross-

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<sup>326</sup> Advisory Committee notes to 1997 Amendment citing *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982).

<sup>327</sup> This seems to be the obiter dictum in *Crawford v. Washington*, 541 U.S. 31, 62 (2004).

<sup>328</sup> "In all criminal prosecutions, the accused shall enjoy the right[...]to be confronted with the witnesses against him."

<sup>329</sup> 541 U.S. 36 (2004).

<sup>330</sup> 547 U.S.813 (2006).

<sup>331</sup> 448 U.S. 56 (1980).

examination.<sup>332</sup> While the court in *Crawford* did not clearly draw the line between testimonial and non-testimonial statements, it ruled that only testimonial statements are subject to the confrontation clause while non-testimonial statements are governed by the rules of evidence. In *Davis v. Washington*, the Supreme Court considered the question that had been left undecided in *Crawford*: what constitutes a testimonial statement. At issue was a recording of a 9-1-1 call where the caller had reported an assault by her former boyfriend who had just left the scene. In *Davis*, the court held that a statement was testimonial when the primary purpose of making it was to assist in an investigation or to prove past events rather than obtain help in an ongoing emergency. This holding was reaffirmed and further explained in *Bryant v. Michigan*.<sup>333</sup> The Court emphasized that the inquiry into the primary purpose of the statement was an objective one and that an “ongoing emergency” would negate the possibility that the primary purpose of the interrogation and the statement is to assist in investigation or prosecution. This because an ongoing emergency is like the startling event in an excited utterance situation that would preclude fabrication.<sup>334</sup> The latter discussion seems very much like the Court is composing a separate catalogue of “confrontation exceptions” that would function much like yet another filter of admissibility before the hearsay rule. Judging from the reasoning of the court in *Bryant*, it also seems that the filter will be based on a theory that is a mix of the supporting rationale of the excited utterance exception and the statements for the purposes of medical diagnosis and treatment exception. In its discussion of confrontation rights, the court has been focusing on statements made to law enforcement officials – the police. Authors have opined that while certainly causing a fair amount of confusion, the *Crawford* line of cases have not strengthened<sup>335</sup> but have actually weakened the protection afforded to criminal defendants by the confrontation clause by exempting non-testimonial statements from its ambit.<sup>336</sup>

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<sup>332</sup> “Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 541 U.S.36, 61 (2004). For an analysis of the relationship between the hearsay rule and the confrontation clause after *Crawford*, see David A. Sklansky, *Hearsay’s Last Hurrah*, 2009 Sup. Ct. Rev. 1.

<sup>333</sup> 131 S.Ct. 1143 (2011).

<sup>334</sup> *Id.*, at 1161.

<sup>335</sup> Brooks Holland, *Crawford and Beyond: How Far Have We Traveled from Roberts after All?*, 20 J.L. & Pol’y 517 (2011-2012).

<sup>336</sup> See, for example, Fred O. Smith, *Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 Stan. L. Rev. 1497 (2008) or Liza Karsai, *The Horse-Stealer’s Trial Returns: How Crawford’s Testimonial - Nontestimonial Dichotomy Harms the Right to Confront Witnesses, the Presumption of Innocence, and the beyond a Reasonable Doubt Standard*, 62 Drake L. Rev. 129 (2013).

Mechanically, the hearsay rule purports to operate as an input control barring the presenting of hearsay statements. In practice, however, there are several instances where the rule cannot effectively function as an input control because the fact-finder will be aware of the statement before its admissibility is contested by one of the parties in the form of an objection. If the objection is sustained, the jury will be instructed to disregard and the judge in a bench trial will be expected to disregard. Moreover, unlike English hearsay rules, the American rules still have the dichotomy of purpose concept that works as a reasoning control directing the fact-finder to consider the statement for one purpose but disregard it for the other.

### *Estonia*

When Estonia regained its independence in 1991, the Soviet Code of Criminal Procedure was not immediately abolished but underwent gradual changes over the years in order to accommodate the new challenges of a different kind of society and legal order. In 1996, Estonia ratified the European Convention of Human Rights. When Estonia adopted its new Code of Criminal Procedure (*kriminaalmenetluse seadustik*, KrMS) in 2004, one of the main objectives behind the reform was to move away from the Soviet model so the new code was the product of a pendulum effect of sorts and was fashioned after Italy's code of criminal procedure. The next seven years developed a certain consensus that the Italian model, while an intriguing mix, has a number of deficiencies, not only in terms of the rules of evidence but also in terms of procedural design: the two were not mutually supportive. The latest major overhaul project of 2011 was openly motivated by the goal of incorporating elements of Anglo-American procedure to create a more effective and workable model for Estonia.<sup>337</sup> The current Estonian version of the hearsay rule is a product of political compromise and also a compromise with the principle of free evaluation of proof that the code of criminal procedure still currently includes. The rule as it stands in KrMS § 66 (2<sup>1</sup>) states that testimony by a witness is inadmissible if the witness has learned the substance of his statement from another person. This general rule is accompanied by four exceptions. Firstly, second-hand testimony will be admissible if the declarant with personal knowledge is not available to testify due to death, refusal to testify, serious illness, inability of being located despite reasonable efforts, or other reasons that

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<sup>337</sup> See *Kriminaalmenetluse seadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse seletuskiri*. ([http://www.riigikogu.ee/?page=pub\\_file&op=emsplain2&content\\_type=application/msword&file\\_id=795438&file\\_name=Kriminaalmenetluse per cent20seletuskiri per cent20\(602\).doc&file\\_size=736256&mnsensk=599+SE&fd=2011-04-13](http://www.riigikogu.ee/?page=pub_file&op=emsplain2&content_type=application/msword&file_id=795438&file_name=Kriminaalmenetluse%20seadustiku%20(602).doc&file_size=736256&mnsensk=599+SE&fd=2011-04-13))

would make procuring his attendance unreasonably costly or otherwise impracticable beyond reasonable measures taken by the proponent. Secondly, the statement is admissible if the declarant had made the statement while perceiving a startling event or immediately thereafter while still feeling startled. The third exception covers statements that were clearly against the declarant's interests such as an admission of criminal offence. The fourth exception is the coconspirators' exception – a statement made by the out-of-court declarant regarding a jointly committed crime is also admissible. Since the provision expressly applies to only witness testimony that is not based on personal knowledge, this rule does not exclude writings regardless of what the writings are based on. The rationale underlying the exceptions is normally ascertainable through the Explanatory Letters<sup>338</sup> accompanying the acts submitted to the Parliament for consideration. Curiously enough, while the first and broadest (and also the oldest) exception was motivated by the confrontation requirement in the ECHR and the spontaneous declarations exception is, according to the Explanatory Letter, brought on board as an English loan,<sup>339</sup> the other two have appeared in the text of the bills in the course of the legislative process without any official explanation. The bill was withdrawn after it met resistance in the parliament and redrafted – which is when KrMS § 66 was also amended – but the Explanatory Letter accompanying the modified bill makes no mention of these added hearsay exceptions. Nevertheless, the Explanatory Letters' abundant references to English and American evidence law leave a clear breadcrumb trail that allow the coconspirator's exception and declarations against interest exception to be traced back to their respective counterparts.<sup>340</sup> This also lends credence to the conclusion that adopting the exceptions, the Estonian legislation also adopted the underlying reasoning.

Written documents under Estonian evidence law fall into four broad categories: written statements made to and interview transcripts prepared by the police in the course of investigation, reports made by the police in the course of pretrial investigation, deposition testimony, and all other written documents. Reports prepared by the police are admissible under a special provision of KrMS § 63(1). This is based on the notion that the police

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<sup>338</sup> Estonian seletuskiri

<sup>339</sup> The letter explains that this type of hearsay exception is common in most jurisdictions with adversarial procedure, most notably also in England in the form of the *res gestae* exception. Note 337, at 13.

<sup>340</sup> *Seletuskiri Vabariigi Valitsuse algatatud kriminaalmenetluse seadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu (599 SE II) teise lugemise teksti juurde*. ([http://www.riigikogu.ee/?page=pub\\_file&op=emsplain2&content\\_type=application/msword&u=20130120030750&file\\_id=1302716&file\\_name=599SEII-seletuskiri\\_\(2010nov per cent20\)1.doc&file\\_size=237056&mnsensk=599+SE&etapp=11.11.2010&fd=28.03.2011](http://www.riigikogu.ee/?page=pub_file&op=emsplain2&content_type=application/msword&u=20130120030750&file_id=1302716&file_name=599SEII-seletuskiri_(2010nov per cent20)1.doc&file_size=237056&mnsensk=599+SE&etapp=11.11.2010&fd=28.03.2011)), at 7 appears to also allude that the two additional exceptions were added to compensate for leaving out confessions as a separate type of admissible evidence.

officer is not the source of evidence but merely a recorder of evidence and the report thus prepared is not derivative of the officer's perception but rather akin to an objective reflection of reality.<sup>341</sup> The Supreme Court has repeatedly affirmed that the investigative officers are normally not allowed to testify as witnesses but instead must prepare properly formatted written reports of their observations.<sup>342</sup> Written statements made to the police by witnesses during a pretrial investigation are admissible for attacking the credibility of the witness but not for substantive purposes as KrMS § 289 is interpreted by the Estonian Supreme Court.<sup>343</sup> Only in circumstances where the witness is unavailable due to death, serious illness or refusal to testify can the statement to the police be offered as substantive evidence, and even then the statement would have to pass a special balancing test set forth in KrMS § 291 (3). The rationale here is that in these instances the court is able to at least verify that the witness really existed or still exists.<sup>344</sup> Deposition testimony can be introduced for substantive purposes as well as for impeachment regardless of whether the witness is available or not. The status of all other documents that contain someone's statements is unclear. While KrMS § 296 seems to place them in the same category as statements made to the police in the course of pretrial investigation, the courts rarely exclude written documents even though most of them contain someone's out-of-court statements. This may be attributable to the relative novelty of the hearsay rule or a sense that written evidence is inherently more reliable. The hearsay rule in Estonia does not even purport to be an input control as the rule is directed to the judge deciding the case. This does not mean that objections against hearsay statements cannot be raised at trial, however, their practical significance is that of avoiding wasting of court's time rather than shielding the fact-finder against impermissible evidence.

Estonia has ratified the European Convention of Human Rights with its Article 6(3)(d) stating that in criminal prosecutions, the accused must have the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." The hearsay rule and its exceptions were fashioned with an eye on the case law of the European Court of Human Rights and the Estonian version of the hearsay rule is viewed as an extension of the ECHR's confrontation right.<sup>345</sup> Whether the broad definition of unavailability and thus the

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<sup>341</sup> This theory can be traced back to the Soviet era but seems to be well known in several other countries to this day.

<sup>342</sup> See for example E. Sup.Ct. No. 3-1-1-43-05 or No. 3-1-1-113-96.

<sup>343</sup> E. Sup.Ct. No. 3-1-1-1-07.

<sup>344</sup> Andreas Kangur, *Kohtuvälised avaldused tõendina kriminaalkohtumenetluses*, Juridica 8, 589 (2011).

<sup>345</sup> Id.

wide scope of the exception would actually satisfy the ECHR confrontation clause requirements, is a question not easily answered in the abstract.

## *Chile*

Chilean law does not have a rule excluding hearsay but it does include some fairly specific provisions regarding evaluation of witness testimony as well as statements found in written documents.

CPPC Article 309 provides that in criminal procedure, there are no incompetent witnesses but the parties may nevertheless question witnesses regarding their credibility and their affinity to the parties that may affect their impartiality, and witnesses must state whether the basis of their testimony is their personal perception, deduction or something learned from another.<sup>346</sup> This provision in combination with the ones declaring freedom of proof indicates that Chile, while aware of the hearsay issue, has opted for a different type of input control – a legal obligation to present information detailing the foundation of the statement to be introduced. CPPC Article 331 specifies the situations when prior statements of a witness can be introduced at trial. This provision expressly applies to written statements and police reports and operates to admit the prior written statements in four situations: where the declarant has become unavailable, when the parties agree to the admission of the statement, when the declarant has failed to appear to court due to the actions attributable to the defendant, and where the statement was made before a preliminary investigation judge by a noncompliant (i.e. has left the country or is otherwise evading prosecution) codefendant. Article 334 expressly prohibits admission of police reports but Article 333 makes no mention or special provision for reception of documents leading to the conclusion that while transcribed pretrial witness statements are subject to special provisions, other documents are not and statements contained therein are admitted without hearsay analysis. The Chilean approach is a mix of input controls and reasoning controls. Since trials in Chile are by a unitary tribunal, use of exclusionary rules may seem impracticable, however, with the pretrial conference held before the *juez de garantía*, exclusionary input controls are actually feasible. The specific provisions excluding law enforcement reports as well as prior official witness statements can be attributed to the pendulum effect: CPPC, as I noted before, is a decidedly sharp move away from its inquisitorial predecessor where official pretrial statements were the main evidence.

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<sup>346</sup> CPPC, note 144, Art. 309.

## ***Russia***

The УПК <sup>347</sup> does not include a hearsay rule and unlike that of Chile, it does not even imply awareness of the doctrine. Article 240 sets forth that “[i]n court proceedings all evidence in the criminal matter must be examined by the court directly unless otherwise stated elsewhere in the code. The court will hear the testimony of the defendant, the victim, witnesses and experts; inspect physical evidence, disclose police reports and other documents and conduct other activities in examining the evidence.” Article 240 (2) further stipulates that disclosing the testimony by witnesses given in the pretrial proceedings is allowed only in cases expressly provided by law. The reading into record of pretrial testimony is provided for in articles 276 and 281. According to Article 281, witness statements can be read into record if the witness has failed to appear and the parties agree to the disclosure of the pretrial interview report. Without the agreement of the parties, pretrial statements may be read into record in situations enumerated in the law: if the witness has since died, become severely ill or refuses to testify, or a *force majeure* prevents the witness from attending the trial. Upon the motion of a party, the court may also allow pretrial statements of a witness whose trial testimony is in substantial contradiction with their pretrial statements. There is no mention anywhere in the code of the dichotomy of purpose and it must thus be surmised that an inconsistent pretrial statement is admissible for its substance as well.

## ***Germany***

StPO § 244(2) provides that the trial court must *ex officio* extend its inquiry to all facts and evidence that are relevant for the judgment. As Lemke and his colleagues explain, this means that the court must seek out the best available evidence. As regards witnesses, this obligation means that the court must examine eyewitnesses whose testimony can directly establish whether a fact relevant to the charge exists or not.<sup>348</sup> Nevertheless, the commentators continue, examination of the eyewitness does not rule out the concurrent use of police interview reports or documents, especially when the witness is unreliable

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<sup>347</sup> УПК, note 141.

<sup>348</sup> Lemke u.a., note 186, at 854, para 9.



(*unzuverlässig*). German law does not preclude the use of hearsay witnesses (*Zeugen vom Hörensagen*) but only if witnesses who possess firsthand knowledge of the matter are for some reason unavailable. An example of this would be undercover police officers or confidential informants whose cover would be blown and security possibly threatened if they were to testify in open court. Instead, courts accept the testimony by the agent handlers and where appropriate, Section 247a allows testimony via CCTV.<sup>349</sup> Whenever second-hand derivative evidence is used, it is to be carefully evaluated.<sup>350</sup>

German courts also have at their disposal all police reports, including pretrial witness interview transcripts and other written documents that have been collected in the dossier. Section 250 nevertheless as a rule prohibits the use of written statements in lieu of live testimony by a witness with personal knowledge. This rule does not preclude the use of such written materials to jog the witness's memory, complement the trial testimony or for proving not the content of the document but its existence.<sup>351</sup> The reason for the general rule barring the reading out of written pretrial statements, as the commentators explain, is that examination of the witness at trial provides for enhanced reliability through questioning by the parties<sup>352</sup> and a threat of criminal punishment for giving a false statement. This is an expression of the principle of immediacy (*Unmittelbarkeitsprinzip*).<sup>353</sup>

In general, there are two kinds of exceptions to this rule. Some documents, much like the verbal acts and words of independent legal significance, do not contain a "statement of one's perception" and thus are not covered. While pretrial interview transcripts are generally not permitted in lieu of live testimony, transcripts of judicial examination are permitted when the declarant is unavailable or when the parties agree.<sup>354</sup> Similarly, transcripts of other pretrial interviews are permitted to take the place of a live examination when the parties agree or when the person examined has since died.

German law is certainly aware of the hearsay problem and has a complex set of rules designed to mitigate the hearsay dangers. The text of German procedural code is fairly laconic and many of the nuances described above are of judicial or scholarly creation.

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<sup>349</sup> For more detail, see Lemke u.a., note 186, at 854-855.

<sup>350</sup> Lemke u.a., note 186, at 1003, para 33.

<sup>351</sup> Indeed, this looks a lot like the dichotomy of purpose as seen in the United States or Estonia.

<sup>352</sup> Apparently a full-out questioning by the parties is still rare and the German Kreuzverhör (StPO § 239) – cross-examination happens rarely as it is taken to suggest distrust towards the presiding judge – Lemke u.a., note 186, at 828 para 1.

<sup>353</sup> Lemke u.a., note 186, at 927.

<sup>354</sup> StPO § 251.

### *Some general conclusions and observations*

The examination of the study jurisdictions allows for some generalizations to be made but also raises some questions.

The issue of secondhand statements is at least at a theoretical level known in all sample jurisdictions. In very broad terms, there seem to be two ways of dealing with them: either their secondhand nature is considered as a factor that undercuts reliability or it is taken to influence the weight of the statement. Where hearsay is a matter pertaining only to the weight of the evidence, no exclusionary input controls are imposed and the fact-finder is free to evaluate hearsay statements together with any other evidence in the case. Conversely, where hearsay is considered less reliable than firsthand accounts, there is a variety of controls, including exclusionary and inclusionary input controls as well as reasoning controls. Additionally, some hearsay may be covered by constitutional confrontation clauses and even where not subject to input controls derived narrowly from the operation of the hearsay rule itself, may nevertheless incur control measures that are imposed in order to implement constitutional provisions. We will, however, not get into the specifics of the constitutional right to confrontation here and must therefore keep the hearsay rule and confrontation clause separated.

The United States is a good example of a jurisdiction that considers hearsay evidence of lower reliability and imposes both input and reasoning controls upon hearsay evidence. England and Wales looks more liberal at first sight but their approach is not fundamentally different in spite of the wide inclusionary discretion possessed by the trial judge. At the other end of the spectrum we find Russia and Germany that have no special provisions for hearsay evidence. As regards the types of controls used, the law purports to have input controls in place in Estonia,<sup>355</sup> the United States and England and Wales, however, all three jurisdictions employ unitary tribunals in at least some cases, which makes actual exclusion virtually impossible. Similarly, even in jury trials hearsay statements may appear suddenly in the midst of other testimony and then the exclusionary input control would normally turn into a reasoning control taking the shape of an instruction to disregard. The United

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<sup>355</sup> Probably the first Estonian Supreme Court case to distinguish reliability from weight or credibility was E. Sup. Ct. No. 3-1-1-89-12.

States and Estonia in also use reasoning controls to enforce the dichotomy of purpose regulation.

Whereas the earlier quoted general hearsay definition encompasses oral and written hearsay, the definition in our sample jurisdictions that have one may be different. The approach of the United States and England and Wales follows the classical all-inclusive definition and includes secondhand oral as well as written statements. Still, statements contained in written documents are often subject to different treatment such as the exceptions for business records or public records, for example. Estonia stands out from the lineup for its treatment of written hearsay statements. Whereas oral hearsay is normally filtered out, written hearsay, including most police reports, is freely admitted without even raising the issue of hearsay dangers. In contrast, Chile has no hearsay rule but police reports are specifically subject to an exclusionary input control. The German take on “documentary evidence” is also somewhat restrictive: witnesses must be examined orally in court and their written accounts will generally not suffice.<sup>356</sup> This, of course, does not mean that police reports or other documents are not admitted even though they, too, actually contain statements by their authors about their observations.

One might expect the choice of controls to be related to the fact-finder profile as it has been posited quite a few times that the hearsay rule is the child of the jury system.<sup>357</sup> The survey of jurisdictions does not support this assumption – while England, the United States and Russia all have juries, Russia does not have a hearsay rule. At the same time, Estonia does not use juries has adopted a legal framework where hearsay statements are not left to the fact-finder for free evaluation but are excluded unless they conform to specified criteria. Exclusionary input controls there, however, are not feasible and turn into reasoning controls, the feasibility of which is a matter for empirical inquiry not unlike the deliberate disregarding of prior convictions we looked at in the previous chapter.

One might also expect that the hearsay rule is related to the division of procedural initiative between the court and the parties. Historically, the increasing role of the parties has sometimes been blamed for emergence of the hearsay rule.<sup>358</sup> Here too, there seems to be no clear divide. Germany, while putting the procedural initiative on the judge, has no hearsay rule. Yet neither do Russia or Chile where the parties are in charge of presenting

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<sup>356</sup> Lemke u.a., note 186, at 180, para. 3.

<sup>357</sup> See Sklansky, note 332 at 31.

<sup>358</sup> Damaška, note 282, at 434.

evidence. Recent developments are also interesting – England has moved towards a more discretionary approach and abolished the dichotomy of purpose,<sup>359</sup> federal evidence law in the United States has been somewhat stirred up by the confrontation clause jurisprudence,<sup>360</sup> and Estonia has tightened the screws and enacted rules to curb judicial discretion. If anything, this indicates the convergence of the different systems in terms of their treatment of hearsay evidence: those traditionally very relaxed have become somewhat stricter; those traditionally having strict rules excluding hearsay have relaxed their standards.<sup>361</sup>

Even in jurisdictions that do not have a rule excluding “derivative testimony” or “hearsay”, there is often a rule requiring that witnesses be produced at trial for questioning. Examples of this include Russia and Germany. The effect of this regulation may not be very different from a straight hearsay rule in many cases – witnesses will have to appear at trial and testify and their personal appearance cannot be substituted by reading their pretrial statements. The orality and immediacy rule, however, does not necessarily require that the testimony be based on the personal perception of the witness and while it does bar some forms of written hearsay such as statements made to the police or notarized affidavits, it does not prevent secondhand live testimony. Furthermore, the orality and immediacy rule may be circumscribed by exceptions based on procedural economy. For example, in Germany, StPO § 251 allows for reading out pretrial deposition testimony of a witness if the personal attendance of the witness is too costly as compared to the value of his testimony. Additionally, when the defendant is represented by counsel and all parties agree, pretrial statements of a witness given at a police interview may also be substituted for live testimony.

This being said, the Estonian example illustrates that even where both hearsay rule and the orality and immediacy requirements are in place and the confrontation clause of the ECHR applies, written out-of-court statements may nevertheless be admitted without any difficulty under the heading of “documentary evidence” – a class of evidence defined through its form rather than its substance or creation process. Whereas certain documents (such as business records) enjoy special status in the United States or in England and

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<sup>359</sup> And New Zealand all but abolished the hearsay rule in both criminal and civil cases altogether in spite of using juries and tasking the parties with presentation of evidence - see New Zealand Evidence Act 2006, section 17...18 (<http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393463.html> - link verified 25MAR2013).

<sup>360</sup> This could be a prelude to relaxation of evidentiary exclusionary rules further down the road but looking at the sheer number of the hearsay exceptions, relaxing the rules may not be necessary any time soon.

<sup>361</sup> A similar trend has been observed by others as well – see Sklansky, note 332 at 32.

Wales and can be presented in lieu of live testimony, Estonia, Russia and Germany all admit documents as if they were somehow separate and independent of their creators.

As already briefly mentioned, the rule about producing witnesses for trial is often augmented (or necessitated) by some constitutional provision or a provision in some international treaty guaranteeing a right to confront witnesses against oneself. While the United States Constitution, for example, is interpreted to guarantee a face-to-face confrontation with the prosecution's witnesses,<sup>362</sup> the right to confrontation under the ECHR is interpreted only to guarantee a right to question the prosecution witnesses at some point during criminal proceedings<sup>363</sup> (and even there the ECtHR, if driven into a corner, will balk and be ready to approve the proceedings as fair in spite of no confrontation with the main prosecution witness at any stage).<sup>364</sup> This being the minimum standard, individual member states may well still require a face-to-face encounter. The confrontation rights and the hearsay rule may come from different sources and be framed in different terms but they nevertheless often accomplish the same outcome – questioning a witness at trial (or before the trial if procedure allows). The confrontation right could also render inadmissible writings and other media that contain out-of-court statements offered into evidence in cases when the hearsay rule does not extend to derivative statements not offered through a live witness.<sup>365</sup> The curious question still not answered in spite of the survey of different jurisdictions is this: if all jurisdictions recognize the superiority of live in-court direct testimony by eyewitness, why do some attempt to exclude the inferior evidence altogether but others seem content admitting it? While the reasons may have to do with historical tradition, we will next examine what would be the better way of handling the issue from the accuracy of fact-finding viewpoint.

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<sup>362</sup> See *Coy v. Iowa*, 487 U.S. 1012 (1988). The court in *Coy* cites the Acts of the Apostles and explains that the right to confrontation dates back to ancient times and is distinct from the right to cross-examination. "There is something deep in the human nature that regards face-to-face confrontation between accused and accuser essential to a fair trial in a criminal prosecution," the court argued. Thus, placing a screen between the child victim of abuse and the defendant at trial would be a violation of the confrontation clause.

<sup>363</sup> See for example *Kostovski v. the Netherlands*, 12 EHRR 434, *Doorson v. the Netherlands*, 22 EHRR 330, *Delta v. France*, 16 EHRR 574.

<sup>364</sup> See *Al-Khawaja and Tahery v. United Kingdom*, 54 EHRR 23 (2011), as discussed earlier in this chapter.

<sup>365</sup> Ashworth and Pattenden point out that many jurisdictions place their preference in documents rather than oral testimony – Rosemary Pattenden & Andrew Ashworth, *Reliability, hearsay evidence and the English criminal trial*, 102 LQR 292, 293 (1986).. Regardless of reliability of such written statements, confrontation rights may well make a live testimony mandatory.

## The psychology of evaluating hearsay evidence

### *Is hearsay a weight or reliability problem?*

The main argument justifying the rule excluding hearsay goes like this: fact-finders (and juries in particular) are unable to adequately appreciate the limitations of hearsay evidence and tend to overvalue it. Because hearsay is inherently and objectively unreliable, rules of evidence must impose exclusionary input controls to keep such dangerous information from the fact-finders, or must impose reasoning controls in order to prohibit any reliance on this unreliable evidence.<sup>366</sup> Hearsay problem may also be viewed as one of weight rather than reliability and so the alternative position is that hearsay might be less weighty than firsthand testimony but it nevertheless has probative value and its precise weight in a given case is for the fact-finder to assess. The latter notion also reflects the doctrine in some jurisdictions where asking the weight vs. reliability question may make little sense (such as Estonia until recently or Germany). There, the term ‘reliability’ seems to not even exist outside scholarly writing, or mean anything other than believability or the weight of the evidence. There is also some confusion as to what reliability means even where the term is used.<sup>367</sup>

Lumping weight, credibility and reliability together as is done in some jurisdictions, creates an undesirable ambiguity, especially if decisions about admissibility of evidence are to be made separately from the decisions regarding the ultimate findings of fact (the evaluation of evidence in its stricter sense). I will therefore adopt the definition of reliability used by the United States Supreme Court in *Dutton v. Evans*.<sup>368</sup> While the court in *Dutton* never expressly stated what reliability is, it did explain how sufficient reliability for admission should be determined. The court in *Evans* looked at four different factors which were, not at all surprisingly, the opportunity of the declarant to observe and perceive, the possibility of misrepresentation, the possibility of faulty memory, and the substance of the statement. Thus reliability can be defined as a degree of certainty that the statement accurately conveys the events or circumstances it pertains to. Defined this way, reliability can be used

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<sup>366</sup> Roger Park, *A Subject-Matter Approach to Hearsay Reform*, 86 Mich. L. Rev. 51, 59 (1987-1988).

<sup>367</sup> In addition to Friedman (note 277), Michael Seigel in his otherwise very logical article (note 440, at 912) has also viewed the initial reliability screening and the ultimate weighing and evaluating as one process. In the effort to demonstrate that the current system of categories of admissible evidence in the United States excludes evidence that poses no danger yet fails to exclude evidence that carries with it some hearsay danger, he also argues that reliability can only be adequately assessed in the context of all evidence in the case. He is certainly right, however, that determination of reliability cannot result from only one mitigated or managed hearsay danger.

<sup>368</sup> 400 U.S. 74 (1970).

as a criterion for an input control measure. If reliability were to be defined through the statement's subjective believability, weight, or through the degree of corroboration by other evidence, it would be of no use in input controls.<sup>369</sup>

Our inquiry here is not as much concerned with the labels but their implications and the real question is – are fact-finders able to adequately evaluate hearsay statements or should the rules of evidence impose either reasoning controls or input controls in order to enhance the accuracy of fact-finding? Paul Milich is right when he argues that fashioning a rule on hearsay that is conducive to accurate fact-finding must take fact-finders' cognitive abilities into account.<sup>370</sup>

### *How do juries deal with hearsay?*

Unlike eyewitness (identification) testimony and even propensity evidence, hearsay and its effect on the fact-finding process has not been subject to many studies.

Probably the first<sup>371</sup> published study devoted to exploring the effects of hearsay statements on jurors was the study conducted by Landsman and Rakos in 1991.<sup>372</sup> The study involved 147 student subjects and a hypothetical case file of a criminal case. There were twelve different combinations of hearsay of various strength and other evidence of various strength levels. Each of the subjects was assigned to one of the 12 conditions. Upon reading the hypothetical trial transcript, they were each asked to complete three questionnaires: the trial decision questionnaire (asking for their verdict and an evaluation of their confidence in the verdict), the trial reaction questionnaire (asking to assess the defendant's character, the importance of the different pieces of evidence and five criteria pertaining to the integrity of the trial procedure) and a questionnaire on sources of personal judgment that sought to explore what kind of information and derived from what sources the subjects would normally base their decisions on. The analysis of the data indicated that

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<sup>369</sup> This is not to say now that admissibility must necessarily be dependent on pre-judged reliability or that input controls are the desirable or necessary method of ensuring accuracy of fact-finding.

<sup>370</sup> See Paul Milich, *Hearsay Antinomies: The Case For Abolishing The Rule And Starting Over*, 71 Or. L. Rev. 723 (1992).

<sup>371</sup> Roger Park & Tom Lininger, *The New Wigmore. A Treatise on Evidence: Impeachment and Rehabilitation*, s 1.7 (available at <http://www.westlaw.com> – link verified 15AUG2014). I have not been able to locate an earlier study either.

<sup>372</sup> Stephan Landsman & Richard F. Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 Law & Psychol. Rev. 65 (1991).

the hearsay manipulation had no influence on the outcome of the case and that the verdict was based on the strength of the evidence (77 per cent conviction rate when evidence was strong *versus* 48 per cent when evidence was weak). The study also showed that those jurors who in their everyday interactions would rely on hearsay, viewed hearsay evidence as more important than those who normally would not rely on it in their everyday dealings. However, even strong hearsay (where the statement was that of an eyewitness-declarant whose credibility had been bolstered by the fact that he subsequently became a police officer<sup>373</sup>) failed to influence the verdict in the face of other evidence in the case being weak. Landsman and Rakos offer two explanations: either the jurors evaluate evidence in its totality without assessing the individual parts specifically or they really acknowledge that hearsay is a weaker form of evidence and accord less weight to it. The latter assumption is supported by the answers to the sources of information questionnaire where the mock jurors consistently held personal interaction to be more important than hearsay.

Landsman and Rakos's study leaves a lot of questions unanswered and their research design is rudimentary at best, warranting all the criticism mock jury research usually attracts – after all, the study involved only college students and there was not a single attempt to liken the setting of receiving the information to an actual criminal trial. Landsman and Rakos also recognize that the study and their inferences are “suggestive at best” and that more research in the area is needed before making any conclusions.<sup>374</sup> In fact, their essay devotes an entire chapter on suggestions for follow-up research and improvements in research design.

The next year saw the publication of some other studies exploring the impact of hearsay statements and their impact in comparison to live testimony. The study by Kovera, Park and Penrod<sup>375</sup> used a more elaborate research design involving a set of videotaped interviews that had been staged for the purposes of the study. The interviews related to a particular scene in a motion picture that the students playing witnesses in the interviews had either watched themselves or been told about by other students who had viewed the movie. Some “witnesses” were interviewed just a day after they had learned the information, others were interviewed after a week had passed. This created a number of statements with differing degrees of closeness to the events being related. The study

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<sup>373</sup> While one might doubt whether this fact in a criminal prosecution is really a credibility-enhancer or hurts credibility instead, the study confirmed that this statement was in fact considered stronger than the alternative where the declarant made a similar statement but had not joined the police force.

<sup>374</sup> Landsman & Rakos, note 372 at 76.

<sup>375</sup> Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 Minn L. Rev. 703 (1992).



indicated that not only were the statements that were closer in time to the events more accurate, they were also perceived as more accurate by the mock jurors and this both for eyewitnesses and hearsay witnesses. In terms of accuracy and quality, the mock jurors (undergraduate students again) rated direct eyewitness testimony higher than hearsay testimony. Juror ratings of witness character, usefulness and the sufficiency of evidence the witness provided were also higher for eyewitnesses.<sup>376</sup> The authors note that the study refutes an earlier concern that exposure of jurors to hearsay testimony of any quality may cause the jurors to doubt the legitimacy of the trial process in general<sup>377</sup> – the mere introduction of hearsay evidence did not have any such effect.

The study also showed that witness testimony is of higher quality the closer in time the witness is called to testify, and that the higher quality of an eyewitness account is also reflected in the quality of the hearsay testimony relating this original declarant's statement to the fact-finder. This link can hardly be described as ground-breaking or surprising: that passing of time causes memories to fade is a well known fact of life that virtually everyone has experienced. What is more important about this incidental by-product is that it allows us to say something about the actual accuracy of the testimony as opposed to just settling for the assumption that hearsay is an inferior type of evidence. Roger Park has repeatedly criticized other studies for neglecting what he considers to be the main issue in hearsay research – whether hearsay helps or hurts the accuracy of fact finding.<sup>378</sup> To answer this question, he posits, the research design must not only replicate the trial process as closely as possible but should also be based on actual events and measure the accuracy of the verdicts.<sup>379</sup> Park's point about the need to achieve greater ecological validity is dead-on: opening and closing statements, the judge's instructions and most significantly, cross-examination will hopefully have an effect on the outcome of the trial (if not, why have them?). On the other hand, introducing all these factors into the research design makes it that much more difficult to control for them and identifying the precise cause of effects observed will become more difficult. It is also hard to disagree with the argument that cross-examination has potentially a very profound influence on the impact of witness testimony, whether that of an eyewitness or a hearsay witness. The problem, however, remains: the research design would have to control for the tradecraft of the cross-examining attorney (and quite possibly the same issue is present with the direct

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<sup>376</sup> Kovera, Park, Penrod, note 375, at 718.

<sup>377</sup> The authors had hypothesized that the admission of hearsay may be deemed so outrageous by the jurors that the legitimacy of the entire trial process would be questioned.

<sup>378</sup> See, for example Roger Park, *Visions of Applying the Scientific methods to the Hearsay Rule*, 2003 Mich. St. L. Rev. 1149, 1169 or Park & Lininger, note 371, at 2.

<sup>379</sup> Id.

examination – it does not appear that the hearsay studies have controlled for different examination techniques). Park quite astutely remarks that cross-examination of an eyewitness would be different from that of a hearsay witness as the foundation of their testimony is different and also recognizes the near-unfeasibility of the type of research he would be satisfied with.<sup>380</sup>

In 1992, Miene, Park and Borgida published a study on the impact of hearsay evidence.<sup>381</sup> In this study the researchers had used a videotaped trial based on real events that had been staged for the purposes of conducting this experiment (a purported theft observed by some people later used as eyewitnesses and then related to others who would later become hearsay witnesses). The study involved four different sets of evidence: circumstantial only, circumstantial evidence with hearsay, circumstantial evidence with eyewitness testimony and circumstantial evidence with both hearsay and eyewitness testimony. The undergraduate mock jurors were shown a videotaped trial and asked to reach a verdict as well as provide other assessments. The circumstantial evidence only condition produced a 36 per cent conviction rate. Where hearsay testimony was added to the circumstantial evidence, the conviction rate went up by four per cent. Coupling circumstantial evidence with eyewitness testimony yielded a conviction rate of 62 per cent but having the jurors view all available evidence only rendered a conviction rate of 55 per cent. As the researchers conclude, hearsay evidence did not significantly affect the mock juror verdicts.<sup>382</sup> Also interesting is what the study revealed about the reasoning process of the jurors. Instead of the expected “discounting” of hearsay after acknowledging it, most jurors did not even mention the hearsay testimony as an influencing factor in their decision making process. Instead, the universally top-ranked piece of evidence was the statement by defendant’s landlord who testified that he found the stolen computer in defendant’s apartment. Where jurors were exposed to eyewitness testimony, in the majority of cases it was ranked second in terms of comparative importance. In the hearsay group, 75 per cent of those who voted for a guilty verdict regarded the lack of eyewitness testimony as the most important evidence supporting a finding of not guilty. In the eyewitness group, the poor description of the defendant turned out to be the most important factor in favour of the defence. The study also tentatively concluded that the jurors discounted hearsay

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<sup>380</sup> Park, note 378, at 1168.

<sup>381</sup> Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 Minn. L. Rev. 683 (1992).

<sup>382</sup> Miene, Park & Borgida, note 381, at 892.

independently of judicial instruction to that effect because of its perceived lack of reliability and usefulness.<sup>383</sup>

There are also studies, however, that tend to show that in some situations jurors do not discount hearsay and instead actually even regard it as *more* influential than first-hand testimony. One example of this is the study by Ross, Lindsay and Marsil.<sup>384</sup> This study involved two experiments. In one experiment, the mock jurors were shown a highly realistic videotaped child sexual abuse trial where, in the eyewitness condition, the child testified as to what was done to her. In the hearsay condition, the child's mother related to the jury what the child had told her. Conviction rates were much higher in the child condition versus the hearsay condition, consistently with other similar studies. In the second experiment, jurors read a trial summary of a sexual abuse case where either the child testified or the child did not testify and hearsay testimony was given by either the child's mother, doctor, teacher, or neighbour. Conviction rates were significantly lower in the child condition versus each of the hearsay conditions but not when the neighbour testified as the hearsay witness. Researchers offered several explanations for this result, for example that the reliability of the hearsay statement depends on the prestige and status of the hearsay witness who is testifying. The second experiment also used a different medium – a trial summary which does not convey the trial context fully (most notably missing is the opportunity to listen to the precise words of the witnesses and to observe their behaviour, not to mention the opening and closing statements or judicial instructions to the jury). The researchers recognized the issues posed by this difference in stimulus and hypothesized that it may have become an additional variable that influenced the outcome of the case. They also opined that all hearsay vs. live testimony situations are not equal and that child witness testimony is evaluated differently from that of adult witnesses.<sup>385</sup>

An earlier study involving testimony of children was conducted by Golding, Sanchez and Sego and published in 1997.<sup>386</sup> The study also made use of written trial summaries and

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<sup>383</sup> Miene, Park & Borgida, note 381, at 698. Similar results were reported by Angela Paglia & Regina A. Schuller, *Jurors' Use of hearsay Evidence: The Type and Timing of Instructions*, 22 Law & Hum. Behav. 501 (1998).

<sup>384</sup> David F. Ross, R.C.L. Lindsay & Dorothy F. Marsil, *The Impact of Hearsay Testimony on Conviction Rates in Trials of Child Sexual Abuse: Toward Balancing the Rights of Defendants and Child Witnesses*, 5 Psychol. Pub. Pol'y & L. 439 (1999).

<sup>385</sup> The child's fear of the defendant may be something the jurors expect to see in a truthful child witness and indeed saw in the videotaped trial. The written summary did not convey this fear and robbed the testimony of the indicia of reliability the jurors had expected. Thus, compared to the fearful child's own testimony, the mother's hearsay testimony has less probative force than when compared to the written statement.

<sup>386</sup> Jonathan M. Golding, Rebecca Polley Sanchez & Sandra A. Sego, *The Believability of Hearsay Testimony in a Child Sexual Assault Trial*, 21 Law & Hum. Behav. 299 (1997).

looked at the comparative effects of hearsay testimony and firsthand testimony by an alleged child victim. The results of the study indicated that the adults testifying as to what the child had told them about the alleged sexual assault were generally believed as much as the children themselves. The researchers propose several reasons that could explain this result but one seems especially significant as it also appears to explain why in certain cases jurors are able to follow judicial instructions to disregard certain evidence: it is supported by common sense. In this particular instance, potential jurors are able to rationalize why the alleged victim does not appear in court to testify about the assault. I cannot help but wonder whether a good commonsense explanation could also reduce the impact of “no eyewitness testimony” in a theft case like the one Miene and his colleagues experimented with. The results described by Golding, Sanchez and Sego (as well as Ross, Lindsay and Marsil) also support the hypothesis that fact-finders treat child abuse cases and child witnesses differently from cases involving adults. So one should be very cautious in proposing more general theories based on these studies. Let us also not forget that while in some instances the fact-finders were able to withstand the urge to draw irrationally prejudicial conclusions from prior convictions, if the prior conviction was one of child sexual abuse, the conviction rate skyrocketed regardless of the charge or other evidence against the defendant. One possible and very uncomfortable explanation is that a child molestation charge, whether subject to the present trial or successfully (or perhaps even unsuccessfully) fielded against the defendant in the past creates a bias to convict and this not only stills the rational discourse regarding the probative force of a prior conviction but also skews the reasoning process for all other evidence. A research design to explore this possibility should vary not only the mode of presenting prosecution’s evidence but also evidence favourable to the defence. It appears that hearsay studies to date have not considered or explored this.<sup>387</sup>

Schuller and Paglia explored the impact of hearsay evidence from yet another angle – what if the hearsay statement is presented by an expert witness who is called to testify about his opinion and its basis?<sup>388</sup> The participants were presented with a written summary of a murder trial and asked to assume the role of jurors. In all cases, the defence presented an expert witness – a psychiatrist who opined that the defendant was unable to form the necessary criminal intent. The opinion was based on the psychiatrists’ interview with the defendant who elected not to testify. To varying degrees, different variations of the case

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<sup>387</sup> A list of leading experimental studies in hearsay psychology can be found in Roger Park & Tom Lininger, *The New Wigmore. A Treatise on Evidence: Impeachment and Rehabilitation* s 1.7 (2013).

<sup>388</sup> Regina A. Schuller & Angela Paglia, *An Empirical Study: Juror Sensitivity To Variations In Hearsay Conveyed Via Expert Evidence*, 23 Law & Psychol. Rev. 131 (1999).

included statements by the expert about what the defendant had told him during the interview. In some variations, the jurors were also instructed that the hearsay portion of the expert's testimony should not be used as substantive evidence. In control conditions, the hearsay statements were either otherwise independently admitted or omitted altogether. The study showed that the jurors were sensitive to the second-hand nature of the information underlying the expert testimony and, where a limiting instruction was given, viewed the expert testimony as less credible as compared to where there was no limiting instruction or where the evidence had been admitted independently. Nevertheless, compared to where no information was given, jurors were more inclined to convict the defendant of murder when hearsay statements had been related to them by the expert witness.

Based on these studies, I tend to agree with Professor Park when he argues that the few studies regarding hearsay and its effects and impact do not paint a clear picture of what the value of hearsay is nor do they demonstrate conclusively how hearsay evidence is processed by the fact-finders.<sup>389</sup> The evidence does suggest, however, that the early commentators complaining that the jurors are primitive, tend to indiscriminately take hearsay evidence for face value and be unable to recognize the dangers in this, may not be correct. At least some studies indicate that jurors are able to tell a good hearsay witness apart from a poor one and appreciate the added reliability gained through eyewitness testimony. The studies taken in conjunction with what we know about juror reactions to prior convictions also indicate that fact-finders may be less prone to rational or logical reasoning in certain types of cases (such as those involving sexual offences) but this too requires more specific probing.

### ***Judges***

Hearsay, like in all other areas, when it has been explored, it has tended to be in relation to juries and jury decision making process rather than that of judges. I agree with Frederick Schauer<sup>390</sup> when he points out that this disparity is regrettable and that the judicial decision making process certainly deserves a closer look. Schauer also argues based on studies on specialist confidence in decision making that judges are most likely no better at properly evaluating hearsay evidence and may actually turn out to be worse because of their overly

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<sup>389</sup> Park, note 378, at 1170.

<sup>390</sup> See Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. Pa. L. Rev. 165 (2006).

confident attitude. That judges' confidence in their superior cognitive ability may be misplaced, is further augmented by studies conducted by Wistrich, Guthrie and Rachlinski.<sup>391</sup> Their conclusion there was that judges are often not able to ignore inadmissible evidence even after they had ruled it inadmissible themselves.

Paul Robinson and Barbara Spellman make a similar point about fact-finding in general: current studies do not indicate that judges are better fact-finders than juries; not only are they similarly prisoners of their personal backgrounds and biases, the trial judge often also sits alone which means that he is confined to his own life experience and insights.<sup>392</sup> Although Schauer, Robinson and Spellman are right in that the comparative effectiveness of juries and judges as fact-finders merits more research (and also that current empirical research does not directly address this question), it also appears that the assumption that judges are better fact-finders is not warranted. Thus, at least tentatively one can extrapolate the results of jury research to judicial fact-finding as well (and according to Robinson and Spellman, if anyone receives undeserved credit from this extrapolation, it is the judges).

### **The scientific research pertaining to the hearsay dangers**

Focusing on how fact-finders use hearsay evidence in their reasoning process and what impact if any it will have makes sense in the context of the urge to liberalize the use of hearsay evidence. Some scholars have already hailed the results of the few experimental studies as providing the necessary empirical support for abolishing the hearsay rule. This approach, however, seems a bit unsophisticated – its logic often being something like “hearsay is an inferior kind of evidence but just how inferior, we cannot measure so let us admit it all and throw it at the fact-finders and have them figure it out case-by-case because we have seen that they are able to discount its value.” One can but only wonder whether the different hearsay dangers have different “discount rates” attached to them in jurors' minds and precisely what moves the jurors (and judges?) to accord hearsay evidence less weight or disregard it altogether. The present state of research does not allow for any solid

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<sup>391</sup> Chris Guthrie *et al.*, note 251, at 1330-31; see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 821 (2001) (“Like the rest of us, [judges] use heuristics that can produce systematic errors in judgment.”).

<sup>392</sup> See the discussion of judges and juries as fact-finders in Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decisions Nature*, 105 Colum. L. Rev. 1124, 1138-1146 (2005).

conclusions about the cognitive abilities or the precise thought processes of the fact-finders in relation to hearsay evidence.

What about the actual reliability of hearsay evidence though? Roger Park seems to be the only legal scholar complaining that the designs of the hearsay experiments often only look at the perception of evidence by the fact-finder but do not attempt to compare and contrast this perceived reliability with the *actual* reliability of hearsay statements. It seems, however, that the empirical research about actual reliability of hearsay statements is in part supplied by studies dealing with the individual hearsay dangers - memory, perception, sincerity and language use. We will now take a closer look at the four hearsay dangers from the point of view of cognitive psychology.

### ***Perception***

Perception, one of the four main hearsay danger areas, is actually a fairly complex matter. While lawyers tend to casually talk about “sensory perception” or the lack thereof, psychologists often view sensation and perception as two adjacent and related but still discrete disciplines.<sup>393</sup> Sensation, Johannes Zanker explains, normally refers to the low-level signal processing that is not available to higher functions and is inarticulable. Perception on the other hand is the “high level stuff” that is available to consciousness and can therefore be communicated to others. Zanker abandons the distinction as impractical. However, for the purposes of making sense of the different stages where information processing<sup>394</sup> may go wrong (the hearsay dangers), it is helpful to keep sensation and perception distinct and separate. Sensation refers to the ability of sensory organs to detect various forms of energy (light waves or heat, for example); perception is the process of constructing a description of the outside world based on the sensations. It is easy to see how defects in sensory organs affect the information that the witness possesses. A colour blind person might not be able to describe the colour of the car that caused an accident in terms other than dark or light. A witness who has trouble hearing would not be able to

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<sup>393</sup> Johannes Zanker, *Sensation, Perception and Action. An Evolutionary Perspective* (Palgrave MacMillan: London, 2010), 5.

<sup>394</sup> Information processing is the current paradigm of understanding perceptual and cognitive systems which dates back to the mid-twentieth century. Edmund Morgan’s treatment of hearsay and hearsay dangers seems in this sense to have been somewhat ahead of his time. His systematic approach that focuses on information acquisition, selection, storage, recall and processing is in line with the contemporary thinking about cognitive processes and this probably explains why it is so viable even more than sixty years later.

confirm (nor deny if his disability is exposed in time) that shots were fired in a location sufficiently close to a witness for a gunshot normally to be audible. A witness who normally wears glasses but was not wearing them at the time could not identify the license plate number of a suspect vehicle. Examples could go on and on and lawyers routinely explore such deficiencies during cross examination.

Perception, the process of making sense of the sensations, is equally relevant in the context of the witness statements. In fact, there are two kinds of perception – perception for action and perception for recognition – that involve different neural mechanisms and apparently run concurrently (albeit the channel for action-related perception is said to receive information faster and the channel for recognition-related perception is said to be more accessible to consciousness).<sup>395</sup> Perception for action is a bottom-to-top processing mechanism answering the question “where?” while perception for recognition also involves the use of pre-stored information (allowing one to answer the what-question).<sup>396</sup> The legal process is much more interested in perception for recognition and rightfully so: there is evidence that the answer to the “what”- question is often a result of incomplete sensory data interpreted and supplemented in light of the pre-stored or externally supplied information. So, for example, the declarant may have only seen a human figure from a long distance in the dark of the night but because of the clothes worn by the individual, automatically concluded that he saw a woman (whereas actually it may have been a man wearing a kilt). When relating this experience to another, the actual data would be lumped into this convenient conclusion and our hearsay witness would swear that he heard the declarant speak about a woman – and the witness would be correct.

There are two more concepts of cognitive psychology that lawyers fit under the label of perception: attention and recognition. The main function of attention is to be a mechanism to help us focus on a particular segment of the sensory data being collected while filtering out the rest. Perception requires attention. As Peter Naish puts it, attention is the process which gives rise to conscious awareness.<sup>397</sup> Attention also is a vital factor in joining together the features that make up an object and collecting related data from different senses. As Naish explains, there is a great deal of parallel information processing going on in the brain but the conscious information processing is happening serially. For example,

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<sup>395</sup> Graham Pike & Graham Edgar, *Perception*, in Nick Braisby & Angus Gellatly, eds, *Cognitive Psychology* (OUP: London, 2005), 75.

<sup>396</sup> See Pike & Edgar, note 395, at 99...106.

<sup>397</sup> Peter Naish, *Attention* in Nick Braisby & Angus Gellatly, eds., *Cognitive Psychology*. (OUP: London, 2005), 67.



visual data is captured in parallel (one sees everything within the visual field) but the assembly of this data is a serial process (one only becomes consciously aware of the objects one looks at). Psychologists also distinguish between episodic (the external characteristics of an object and its position) and semantic (the object's identity/meaning) information in visual data. Attention therefore means binding the two together. Episodic detail alone is easily forgotten or confused. Semantic information alone, however, does not reach conscious awareness unless linked with episodic detail.<sup>398</sup> As far as auditory information goes, psychologists report a similar pattern: the listener is normally unable to report significant details about auditory data that he is not attending to and only the most recent unattended information is available for a short period of time in the echoic memory. This suggests again parallel acquisition of all available auditory data with subsequent serial processing to determine the meaning of one attended message. Nevertheless, the information that is not attended to is not completely blocked out but only "shadowed" and meaning is extracted even from the unattended material.<sup>399</sup> Questions to the witness about what he was paying attention to or was primarily occupied with while allegedly observing the legally relevant events are thus very much to the point: it is likely that any account given by a witness of an event he was not paying attention to will not be very accurate.

Recognition is primarily of interest in terms of facial recognition. Although eyewitness accounts and in-court identifications are powerful evidence, there is a number of studies showing that not only are people relatively unreliable at recognizing unfamiliar faces but that the conditions of both the first encounter and identification have a great effect on the accuracy of facial recognition.<sup>400</sup> For example, a meta-analysis of 19 studies about the weapon-hypothesis (claiming that the accuracy of identification declines when a weapon is involved in the commission of the crime as attention is diverted and focused on the weapon) found that the weapon makes a small but statistically significant difference in the accuracy of identification thus confirming the hypothesis.<sup>401</sup>

Poor perception by the declarant is one of the four main dangers associated with hearsay evidence and the foregoing overview illustrates that there are all sorts of things that can go wrong. The potential for misperception is also involved in the hearsay witness perceiving the statement as it is made by the declarant. While the latter instance of misperception can

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<sup>398</sup> See Naish, note 397, at 54.

<sup>399</sup> Naish, note 397, at 45.

<sup>400</sup> See, for example, Carol K. Wong & J. Don Read, *Positive and Negative Effects of Physical Context Reinstatement on Eyewitness Recall and Identification*, 25 Appl. Cognit. Psychol. 2 (2011).

<sup>401</sup> NZLC MP13, 14.

be explored through cross-examination when the hearsay witness is in court, the possible misperceptions by the declarant will quite probably remain hidden from the fact-finder if only the hearsay statement is presented. Psychological research involving the different aspects of perception reveals that there are a number of questions one should always ask of the witness in order to verify that the statement is adequately reflecting what was actually perceived. The study of perception also reveals that some of the common hearsay exceptions such as the ones for excited utterance, present sense impression, public records or police reports where such blanket provision exists that purport to provide for admission of especially reliable statements actually fail to control for errors in perception. The pioneers of “psychology-driven evidence scholarship,” professors Hutchins and Slesinger argued back in 1928 that the excited utterances exception to the hearsay rule is based on incorrect assumptions and an incomplete picture of human psychology.<sup>402</sup> The requirements of near contemporaneity and excitement, Hutchins and Slesinger argued, may contribute to the sincerity of the statement as the self-interest would not have had time to kick in. However, what little the speed and excitement help gain in terms of sincerity, is lost due to poor perception of the events by the eyewitness who is startled and excited. Hutchins and Slesinger cite several by now classic studies in psychology of perception and attention in support of their argument that stress and excitement have devastating effects on the ability of witnesses to accurately observe and reproduce the startling events. This in turn means that while perhaps even justified in regards to some hearsay dangers, admission of such statements under the categorical exceptions may lull the fact-finder into believing the statement’s enhanced overall reliability which may not in fact be true. The lack of cross-examination in these situations prevents the fact-finder from appreciating the reliability problems. The situation is further exacerbated if the hearsay statement is presented in written form and no cross-examination takes place.

## ***Memory***

Morgan listed memory as another of the four hearsay dangers because the lack of cross-examination would not allow the fact-finders to see just how much the declarant really remembers of the events in question.<sup>403</sup> Lawyers and psychologists mean the same thing by memory – the encoding, storage and retrieval of information. This process is of course

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<sup>402</sup> Robert Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 Colum. L. Rev. 432 (1928).

<sup>403</sup> Morgan, note 271 at 188.

closely linked to attention, perception and recognition and therefore also often discussed together with these phenomena. Psychologists draw a broad distinction between working memory and long-term memory. Depending on the issue at hand, evidence law may also be interested in working memory<sup>404</sup> but more often it is long-term memory and its accuracy that concerns evidence law. Theorists also talk about different memory systems – most well known is the distinction between episodic and semantic memory – but some argue there is more, and that there may be as many as five main memory systems.<sup>405</sup> Research indicates that memory is not a static store of information akin to a desk drawer as often thought by people,<sup>406</sup> but a dynamic process of construction and reconstruction.<sup>407</sup> This means memories are vulnerable to distortion and, as is well known, first deteriorate at a rapid pace and then continue deteriorating more slowly. Memories can also change as a result of exposure to other similar experiences, talking about the event and obtaining additional information about it.<sup>408</sup> Bornstein and others cite several studies in their article about the effects of emotions on memory – emotional arousal at the time of perception and encoding apparently enhances the memory of the central event (such as the crime itself) but inhibits the memory of events both before and after the emotionally arousing event.<sup>409</sup>

In terms of the hearsay rule, memory factors act as a double-edged sword. It would be desirable to have the witness present at trial for cross-examination about the limits of his memory and to explore any information the witness may not have been previously asked about. On the other hand, testimony at trials taking place several months or years after the events in question will be subject to any number of those distorting forces mentioned above – this all in addition to the natural fading of memory that happens over time anyway. Experiments show that people integrate subsequently acquired information into their memories, either supplementing their memory or altering or adding to their memories.<sup>410</sup> People are particularly susceptible to having their memories modified when the passage of time allows the original memory to fade, and will be most susceptible if they repeat the

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<sup>404</sup> For example, in determining the likely accuracy of the business records or the accuracy of a near-contemporaneous statement about the declarant's observation.

<sup>405</sup> Andrew Rutherford, *Long-term memory: encoding to retrieval*, in Nick Braisby & Angus Gellatly, eds., *Cognitive Psychology* (OUP: London, 2005), 278.

<sup>406</sup> See NZLC MP13, note 281, or Ralph Norman Haber & Lyn Haber, *Experiencing, remembering and reporting events*, 6 Psych. Pub. Pol'y & Law 1057 (2000) for widely held and empirically wrong beliefs about memory.

<sup>407</sup> NZLC MP13, note 281, at 5...6.

<sup>408</sup> NZLC MP13, note 281, at 6.

<sup>409</sup> Brian Bornstein *et al.*, *Intuitions About Arousal And Eyewitness Memory: Effects On Mock Jurors' Judgments*, 32 Law & Psychol. Rev. 109, 112 (2008). The researchers also explain that even though some of the jurors' beliefs of different factors and their effects on memory are in supported by empirical research, other beliefs are not.

<sup>410</sup> NZLC MP 13, note 281, at 20.

misinformation as fact. There is apparently no consensus whether over time subsequent interfering information completely obliterates the original memory or merely obscures it so it is still retrievable under the right conditions.<sup>411</sup> Thus considering the memory-related hearsay dangers alone, the passage of time is quite possibly the greatest danger that may not be mitigated by cross-examination.<sup>412</sup> Of course, the memory issues are not limited to second-hand testimony but plague eyewitness testimony too. The realization of the frailty of memory makes it very clear how important it is to have the trial as quickly as possible or to somehow reliably preserve the testimony as soon as feasible after the event and not only in hearsay situations. Specifically in the hearsay context, however, the studies regarding memory certainly lend credence to the rules that provide for admission of various records and statements made at or near the time of the observed event (such as the recorded recollection exception under Federal Rule of Evidence 803(5), the business records exception or the rule admitting excited utterances). Yet once again, while these rules appear to have it right in terms of ensuring that memory problems are kept to a minimum, they control less successfully for the other hearsay dangers.<sup>413</sup> Moreover, as Haber and Haber explain in their excellent overview of memory-related issues,<sup>414</sup> even early accounts by eyewitnesses may be subject to several distorting forces emanating from police procedure or other factors related to the making of the statement. Knowing the different problems and pitfalls related to the encoding, storing and retrieval of information in human memory at least enables the fact-finder to be more sensitive to possible issues posed by them, and relevant instructions to counteract the often held false beliefs about memory<sup>415</sup> might be a simple way to mitigate the potentially grave results of ignorance.<sup>416</sup>

### *Language use*

It seems that while Morgan mentioned defects in narration and misuse of language as hearsay dangers, he himself too caused a fair amount of confusion leading some scholars to

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<sup>411</sup> NZLC MP 13, note 281, at 21.

<sup>412</sup> This is the concern voiced in Edward Iwinkler, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt – and Quickly Forgotten*, 41 Fla. L. Rev. 215, 217 (1989).

<sup>413</sup> On its face value, the business records exception appears to control for most dangers, however, laying foundation for the records to be admitted is still dependent on the declarant's or record custodian's memory about the process of making the record.

<sup>414</sup> Haber & Haber, note 406.

<sup>415</sup> Haber & Haber, note 406, at 1057...1058.

<sup>416</sup> As Lawrence Kubie points out, memory issues are not only related to the memory of witnesses but also to that of the fact-finders (Lawrence Kubie, *Implications For Legal Procedure Of The Fallibility Of Human Memory*, 108 U. Pa. L. Rev. 59, 71 (1959...1960)).

believe that such issues are in practice only present in statements by people not proficient in the language and thus fairly negligible.<sup>417</sup> Others became convinced that Morgan confused misuse of language with insincerity and thus did not even consider the ambiguity inherent in language use.<sup>418</sup> Psychologists researching language, however, can tell us that ambiguity is not only common but near inescapable and that all people, not just small children with undeveloped vocabularies or foreigners with insufficient language skills, are susceptible to ambiguity in verbal communication. Paul Bergman explains that lexical (use of words that have multiple meanings) and syntactic (lack of clarity due to unclear sentence structure) ambiguities, even though troubling to linguists, are not of particular issue in the legal world because lawyers offer into evidence not isolated sentences to be analyzed but entire stories that offer clarifying context for both kinds of ambiguities or alternatively afford two competing inferences to be drawn – which is normal in the legal process.<sup>419</sup> A more relevant ambiguity is derived from the use of abstract terms – for psychologists an issue of concept formation and categorization.<sup>420</sup> Some words are inherently more ambiguous than others because their connotations are abstract – examples of those are emotions and feelings which in their subjectivity have a meaning more related to the listener’s personal experiences than those of the speaker. Other examples of this would include words pertaining to broad categories of objects such as ‘vehicle’, for example – it can mean any number of things and without clarification or additional context the listener may have in his mind a picture quite different from that of the speaker. Another categorization and concept-forming problem is posed when words are used to convey a non-standard meaning – when the declarant is a member of a social group that uses particular slang or jargon, or comes from a specific region where words or colloquialisms are used differently from the fact-finders, for example. The lack of opportunity to cross-examine the declarant about the true meaning in standard language means that this actual meaning could be lost for the fact-finder.

Bergman argues that another relevant ambiguity for the legal process is the polarity of language – lack of vocabulary to describe the middle ground between the opposite ends of a spectrum. He argues<sup>421</sup> that in English, things tend to be either good or bad, people stingy

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<sup>417</sup> John M. Maguire, *The Hearsay System: Around And Through The Thicket*, 14 Vand. L. Rev. 741, 745 (1961). See also R. Lempert & S. Saltzburg, *A Modern Approach To Evidence* 351 (2d Ed. 1982).

<sup>418</sup> This claim is made by Paul Bergman, note 276.

<sup>419</sup> Bergman, note 276, at 855.

<sup>420</sup> See Nick Braisby, *Concepts* in Nick Braisby & Angus Gellatly, eds., *Cognitive Psychology* (OUP: London, 2005), 163 *et seq.*

<sup>421</sup> Bergman, note 276, at 858, citing Gail Myers & Michele T. Myers, *The Dynamics Of Human Communication* (McGraw Hill:1976), 103...107.

or generous, our life either safe or dangerous and our endeavours either a success or a failure with no room for the “grey shades”. While it may be true that people tend to generalize and express their assessments of affairs in the extremes, it seems that there are actually words and expressions available and often used to convey the middle ground (*improvable, fair, OK, average* or *satisfactory* in between *good* and *bad*, for example) and if not with a single word, the position between the extremes of the scale is often expressed using one of the modalities (*somewhat, rather, fairly, sometimes*, and in modern usage by adding the suffix *-ish* to indicate leaning towards one end of the scale). The danger of polarizing of course calls for clarifications during cross-examination. For example, if a witness states that it was dark outside, the examiner could ask additional questions to elicit information about just how dark it was. Or if the witness states that his relationship with another person was “good”, the examination would explore just what the witness had in mind. Assuming that Bergman is right about people’s tendency to describe things in extremes, however, it is easy to see how the lack of live witness examination can deprive the fact-finder of the detailed, accurate account of what the declarant really had in mind.

There is also the phenomenon of filling – an insidious kind of ambiguity as it both potentially creates distortions in meaning and covers them up. Bergman demonstrates this through a simple exercise: assume all that is known is that “Jones robbed Smith at gunpoint” yet nevertheless one would have no difficulty telling a longer story or even drawing a picture of the event – all due to the tendency of one’s own mind to fill in the blanks based on one’s own knowledge and prior experience. The special danger here is that while the ambiguities are arguably fairly easy to recognize in the other instances, filling does not create the feeling of lacking knowledge but quite the opposite – it makes the fact-finder – or the hearsay witness retelling a story heard from the declarant – feel like he knows and understands what happened.<sup>422</sup>

One category of ambiguities not covered by Bergman in his article is the ambiguity related to mixed message.<sup>423</sup> A famous example of this is type of ambiguity is in the motion picture *Presumed Innocent* where the prominent prosecutor accused of murdering his colleague answered the question “did you kill her” with “yeah, right” and this was subsequently offered into evidence as his confession. The trial judge in that case explained, “If Mr. Sabich was from where I come from, he would have said, “yo mama” but where he comes from they say “yeah, right” which means the same thing – you are wrong.” While

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<sup>422</sup> Bergman, note 276, at 862.

<sup>423</sup> One could argue that this falls under the non-standard language use category but ironically, it is not clear.

language of course can be reduced to words and written text is arguably even more ambiguous than spoken language, there are instances in spoken language where the words say one thing and the intended meaning as is obvious from the facial expression, intonation, gestures and the situation is quite the opposite. In the legal process, this type of ambiguity is most problematic when hearsay is not presented by a live witness who can be examined about the circumstances of hearing the statement from the original declarant but instead hearsay statement is contained in a written document or an audio recording. Both of these media severely restrict the information being transferred and thus have a potential of obscuring the real meaning of what was said.

All in all, ambiguity in language is a very real danger. Even where the witness testifies of personal knowledge, the examiner has a daunting task to perform: to paint the picture in the fact-finder's mind through the words of the witness. This means that the examiner must recognize possible ambiguities and have the witness clarify them. At least supposedly the witness has the knowledge that enables him to do this. When the witness is not testifying from personal knowledge but is only relaying a statement made by another, questioning will not be of much assistance in clearing up ambiguities and will in many cases only elicit assumptions, conclusions and "filling" by the witness about what the declarant may have tried to convey. It will then be up to the fact-finder to recognize the potential for misunderstanding. Possibly the only hearsay exceptions that control for the ambiguities in language are those that provide for admission of standardized routine records where the boundaries of meaning of specific words, phrases or figures are possibly somewhat more settled through their routine use. Written statements by witnesses, however, are probably the worst option – a hearsay witness could possibly know and remember information that may assist in putting the declarant's statement in perspective and elucidating its meaning whereas a written transcript most likely would not contain this kind of information.

### *Sincerity*

The last hearsay danger is the possible lack of sincerity by the declarant. Through cross-examination, the argument goes, lies can be exposed and because the testifying witness is in court available for observation, fact-finders are able to discern the measure of truthfulness of the witness by observing his behaviour on the stand. Consequently, the lack of opportunity to cross-examine or observe the testimony would mean that lies would go unchecked.

The possibility of a dramatic Perry Mason moment in court is fairly low, as is pointed out in most trial advocacy textbooks. Evidence scholars have identified five different types of impeachment – demonstration of a motive to lie (a bias), a tendency to be dishonest (character attack), lack of memory or defects in sensory perception, disclosing prior inconsistent statements made by the witness, or exposing problems with the internal consistency of the testimony or inconsistencies with other evidence.<sup>424</sup> These tools do not necessarily require that witness be examined in court: evidence of bias or prior instances of dishonesty as well as prior inconsistent statements or contradiction between the statement of the witness and other evidence in the case can be established through other evidence; the lack of memory or sensory perception may be apparent from the statement itself or be established by other evidence as well. The drama of having the person admit discrediting facts of course would be lacking if there is no cross-examination. Setting the value of cross-examination and the proper way of conducting it aside, I am left with this question: are fact-finders able to recognize a liar by looking at one?

Danielle Andrewartha<sup>425</sup> explains that lies are a common feature in everyday communication and it is highly unlikely that they would be any less prevalent in litigation. There are three types of lies: outright lies (also most common), exaggerations, and subtle lies where literal truths are used to create a wrong impression. Most liars lie for selfish reasons and most lies are about the speaker himself.<sup>426</sup> The commonly held confidence among people that they are able to detect lies by observing the visual and verbal cues, however, appears to be misplaced. Andrewartha cites several studies that have almost unanimously agreed – people, regardless of their profession, age, special interest, gender or other variables are poor lie detectors, their reliability being no higher than chance. One of the few exceptions is the study by Ekman and O’Sullivan<sup>427</sup> where US Secret Service agents, police officers, polygraph specialists, psychiatrists, college students and judges were asked to watch ten videos of people who were either being truthful or lying. Significantly, in this study the individuals in the videos displayed some measurable indications in the form of either facial movements or changes in the tone of voice that allowed a lie detection with 86 per cent accuracy using a computer-assisted analysis. The study found that only the Secret Service agents achieved a higher than chance reliability in

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<sup>424</sup> Mueller & Kirkpatrick, note 124, at 483.

<sup>425</sup> Danielle Andrewartha, *Lie Detection in Litigation – Science or prejudice?*, 15 *Psychiatry Psychol. & L.* 88 (2008).

<sup>426</sup> See, for example, Bella M. DePaulo *et al.*, *Lying in everyday life*, 70 *J. of Pers. & Soc. Psych.* 979, 992 (1996).

<sup>427</sup> Paul Ekman & Maureen O’Sullivan, *Who Can Catch A Liar?* 46 *American Psychologist* 913 (1991).



lie detection. Those more successful at catching liars reported using non-verbal cues and were also better at spotting microexpressions than the others. In general, studies indicate that people tend to not only fail to pay attention to the behavioural signals but very often misinterpret them. The commonly held beliefs about what a typical lie looks like are often erroneous. Jeremy Blumenthal in his article<sup>428</sup> drives the point home – while the courts have always regarded observing the behaviour of a witness of vital importance for assessing the credibility, fact-finders look for the wrong things and make unwarranted conclusions – often to the extent that truthful witnesses will be perceived as liars and trial lawyers risk losing the case if they do not employ credibility-enhancement trickery ranging from rehearsals to dressing specifically for the occasion.<sup>429</sup>

Empirical research shows that there are indicators that correlate with deception. Some of them are visual (shrugs, hand to face gestures and grooming – “adaptors”, pupil dilation) but most are auditory (speech errors, speech hesitations, response length, pitch, irrelevant information, negative statements, non-immediacy, and levelling) owing to the fact that the auditory channel is more difficult to control than the visual.<sup>430</sup> Most troubling, however – the commonly held beliefs that liars have shifty eyes, shifty bodies and shifty feet, that they tend to blush or go pale, that they fidget excessively and avoid eye contact by moving their head a lot – are not supported by current empirical research and the actual behaviour of a liar is often the exact opposite: they sit still and avoid fidgeting.<sup>431</sup> The auditory cues commonly associated with deception – hesitation, higher pitch of voice and speech errors – seem to be in line with the empirical data but as Blumenthal points out – are easily missed when the fact-finder focuses on verbal cues or visual information. The conclusion here is that while visual cues may be unreliable for lie detection, auditory indicators are much more reliable and much harder to control by the lying subject. Research also indicates that with proper instruction, fact-finders are able to make use of auditory cues.<sup>432</sup>

Assumptions on the mental processes involving lying have also directly inspired some of the hearsay exceptions. Hearsay statements are deemed more trustworthy when the time period between the observed event and the statement has been relatively short (the argument being that the declarant would not have had time to concoct a lie – exceptions for

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<sup>428</sup> Jeremy A. Blumenthal, *Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility*, 72 Nebr. L. Rev. 1157 (1993).

<sup>429</sup> For usefulness of demeanour evidence, see also Olin Guy Wellborn III, *Demeanour*, 76 Cornell L. Rev. 1075 (1991).

<sup>430</sup> Blumenthal, note 428, at 1193.

<sup>431</sup> *Id.* At 1194.

<sup>432</sup> *Id.* at 1201.

present sense impression, excited utterance, then existing state of mind being the examples of this) or the reason for making the statement has been such that making a truthful statement was in the interests of the declarant (business records, statements for medical diagnoses or treatment). Myers and others explored some of these assumptions and the current relevant research in their article.<sup>433</sup> Their conclusion is one of uncertainty: while there is no empirical evidence showing that stress inhibits lying, there is indirect evidence that lying is a mental task that requires extra effort, and that under stressful conditions, humans tend to perform at mental tasks more poorly.

This all means both good and bad news for the law of evidence as it currently stands. The bad news is that fact-finders are generally baselessly confident in their ability to spot a liar – and the insistence that witnesses should be brought to court so the fact-finder could observe them blush and fidget as they lie is therefore misplaced. On the other hand, with a little bit of guidance fact-finders can be helped to be better at lie detection and once that happens, having an opportunity to observe and especially listen to a witness while he is testifying may help weed out some untruthful statements. This will only work in relation to the witness who is testifying in court and to the substance of the testimony based on his personal knowledge.<sup>434</sup> As regards the truthfulness of hearsay statements, many exceptions to the hearsay rule are specifically designed to mitigate the risk of insincerity. However, while intuitively attractive, assumptions behind exceptions like “excited utterance” or “present sense impression” or “dying declaration” do not have empirical support. Moreover, as Bellin demonstrates, modern times and contemporary communication habits present new challenges to the hearsay exceptions: in the age of smartphones, Facebook, Twitter and instant messaging, the present sense impression exception that was conceived with oral and verifiably contemporaneous communication in mind, has lost much of its footing.<sup>435</sup> Some hearsay exceptions are conditioned on ascertaining that the declarant had or did not have a specific motive such as the “business records exception”. Those may fare better, but the result of their application depends on the accuracy of fact-finding regarding the declarant’s motive and quite possibly here too, societal changes may have rendered

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<sup>433</sup> John E.B. Myers et al., *Hearsay Exceptions: Adjusting The Ratio Of Intuition To Psychological Science*, 65 Law & Contemp. Probs. 3 (2002).

<sup>434</sup> David Crump argues that cross-examination is overrated and in some instances could be more effectively performed on the hearsay witness rather than the original declarant. His argument is entirely proper if the purpose of the cross-examination is to demonstrate the limitations of the hearsay witness’s knowledge about what and how the declarant actually knew at the time of making the statement. It will not, however, help the fact-finders nearer to the actual event in question. David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 Hofstra L. Rev. 585, 617 (2006).

<sup>435</sup> Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. Pa. L. Rev. 331 (2012).

once important motives or mechanisms less relevant.<sup>436</sup> This all being said, even if these exceptions help at least to some extent guard against admission of unchecked lies, they often leave the other three hearsay dangers unchecked.

## **What should the law on hearsay be like?**

In order to facilitate accurate fact-finding, we observed there are two main issues: the cognitive abilities and needs of the fact-finders, and the characteristics of the particular kind of evidence. We looked at the four areas in which hearsay evidence may prove inaccurate without the inaccuracy always being detectable. We also looked at what is currently known about the ability of fact-finders to take these potential inaccuracies into account in their assessments and evaluation of the evidence (be it termed reliability or lumped together under “weight”). Now the main task begins – to assess what kind of legal framework would best facilitate accurate fact-finding in regards to hearsay evidence, given what is known about hearsay and fact-finders.

In terms of regulation, the English Law Commission<sup>437</sup> identified six different ways of dealing with hearsay evidence. The list is instructive as the Law Commission not only enumerates the various options but also comments on their respective strengths and weaknesses. The options that were weighed included blanket admissibility, admissibility based on the best evidence principle, a general rule of admission with discretion to exclude, a general rule of exclusion with discretion to admit, and automatic admissibility of certain categories. The Law Commission in its report dismisses them all for one reason or another. Most discretionary rules are regarded as problematic because of their unpredictability, the Law Commission argues. The free admissibility approach would likely infringe the ECHR confrontation clause, open the door for untested rumours and cause waste of court time. In explaining why instead of just submitting the evidence to the fact-finder for evaluation, hearsay should be excluded (and English law at least by default excludes hearsay), Roberts and Zuckerman argue that the dangers of fabrication are too great to ignore in the criminal procedure setting – a criminal conviction should not be based on police officers “testilying” or someone’s poor memory, off-the-cuff remark, misunderstood comment or

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<sup>436</sup> Speculatively, such may be the case regarding exceptions based on reputation, for example.

<sup>437</sup> See LC245, note 278, at 69-79.

vicious gossip – all of which could easily go unchecked without the requirement that witnesses testify from personal knowledge and in court subject to cross-examination.<sup>438</sup>

The Law Commission was much more worried about the apparent harmful side-effect that excluding hearsay apparently had – the rule's strict and inflexible application prevented courts from admitting cogent and probative evidence on points for which no other better evidence was available.<sup>439</sup> So not only did England and Wales relax their hearsay rule to the point that it is now fairly hard to imagine a situation where a party would need to rely on a hearsay statement but be unable to do so, New Zealand has chosen to practically abolish theirs and many scholars have advocated relaxing it if not outright abolishing it in the United States.<sup>440</sup>

Yet all seem to agree to one thing – hearsay evidence is of inferior quality if it is not amenable to cross-examination for precisely that same reason – the lack of cross-examination. It has been said countless times that the best tool we have devised for testing witness evidence for its reliability is cross-examination at trial.<sup>441</sup> Park and Lininger went even as far as to argue that the value of a hearsay rule is equal to the value of cross-examination.<sup>442</sup> In the discussion above, we saw that there were two other tools for ensuring reliability that have been mentioned: oath and face-to-face confrontation with the accused. Those two particular tools, however, seem only to assist in ensuring the sincerity of the witness in giving the statement but are even on their face value worthless in exploring, let alone enhancing the quality of perception, memory or narration.

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<sup>438</sup> These justifications, as Roberts and Zuckerman point out, are the instrumental, accuracy-of-fact finding-related ones. Roberts & Zuckerman, note 3, at 368.

<sup>439</sup> The two English cases cited almost everywhere in support of this point are *Myers v DPP* [1965] AC 1001 and *R v. Blastland* [1986] AC 41. In *Myers*, prosecution sought to present records of cylinder block numbers stamped on the engine blocks of cars in order to prove that cars sold by the defendants were not the ones referred to in the accompanying log books and had in fact been stolen. The records had been prepared by anonymous workmen on the assembly line and were held inadmissible by the House of Lords. *Blastland* was a murder case where the defence sought to have admitted a statement by one M at his return home shortly after the murder had taken place to the effect that a "child has died today" – the argument was that the statement together with M's state of mind tended to prove the defence claim that M and not the defendant had committed the murder. The statement was ruled inadmissible on hearsay and relevance grounds.

<sup>440</sup> See, for example Milich, note 370, or Mike Madden, *Anchoring The Law In A Bed Of Principle: A Critique Of, And Proposal To Improve, Canadian And American Hearsay And Confrontation Law*, 35 B.C. Int'l & Comp. L. Rev. 395 (2012), or Morgan, note 271, at 218, or Ronald J. Allen, *Commentary: A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 Minn. L. Rev. 797, 800 (1992); Michael Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule* 72 B.U. L. Rev. 893 (1992) (not advocating complete abolition but a change in fundamental principles), or Crump, note 434.

<sup>441</sup> Most famous is probably Wigmore's confident statement that "cross-examination is beyond doubt the greatest legal engine ever invented for the discovery of truth" - 5 J. Wigmore, *Evidence* § 1367, at 32 (Chadbourn Rev. Ed. 1974). Who the hearsay rule protects is a different question: Morgan argued that it is not so much the fact-finder but the opposing party who will get an opportunity to explore the adverse evidence – Morgan, note 271, at 183...185.

<sup>442</sup> Park & Lininger, note 371.

And even the statement about the potency of cross-examination must be qualified: its power to unearth information about and test the accuracy of statements regarding an event going back months or years is severely limited by the memory of the witness and, as Lininger argues, cross-examination has a distinct “dark side” that may make it not only less effective than has been thought but also a tortuous ordeal to the victims and witnesses that in the longer run would prove counterproductive to the objectives of the criminal justice system.<sup>443</sup>

### ***Starting point – admit where necessary***

The starting point for my approach comes from Michael Seigel.<sup>444</sup> Seigel explains the issue of admitting or excluding hearsay in terms of inductive logic and the need to improve the conditions for rational fact-finding. The more fact-finders know and the more evidence they have to base their decision on, the more likely that decision will be accurate, unless the information is such that it corrupts the fact-determination process. Seigel argues that hearsay statements fall in two basic categories: those that are incomplete and those that are outright false. While incomplete statements may still prove useful in determining the facts (albeit only to the extent that they contain relevant information), the outright false statements may be harmful if their falsehood is not detected. The falsehood, of course, may be the result of any one of the hearsay dangers. According to Seigel’s thesis, the rule against hearsay must filter out statements that may be false and do not allow for the evaluation of the accuracy of the statement – primarily then those statements that are not accompanied by sufficient information about the circumstances of making the statement or perceiving the fact or condition by the original declarant.

Seigel also recognizes that a more relaxed approach towards hearsay evidence may produce what amounts to an unhealthy incentive to keep the primary witnesses away from the trial and instead produce hearsay witnesses out of tactical cunning or convenience. To

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<sup>443</sup> Tom Lininger, *Bearing the Cross*, 74 Fordham L. Rev. 1353 (2006). Lininger’s main argument is directed towards taking a closer look at the legal regulation of cross-examination of victims in sexual offences and domestic crimes cases where the victims are especially vulnerable and arguably often re-victimized by court procedure leading them to avoid cooperating with the law enforcement altogether.

<sup>444</sup> Michael Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule* 72 B.U. L. Rev. 893, 909-910 (1992).

counter that, he proposes a best evidence rule – not a new idea<sup>445</sup> but certainly presented much more eloquently and articulately than his precursors have managed to do, and I will return to this later.

Seigel's point about more evidence, unless false and corrupting, being better for accurate fact-finding is hard to argue against. Even though the conclusions about the current empirical research showing jurors' ability to accurately assess the value of hearsay evidence are a bit premature (given the small number and somewhat inconsistent results of the studies as well as the limitations of the methodology used), the majority of these studies indicate that juries are able to recognize the diminished reliability of hearsay statements and appreciate the various factors that affect reliability. This suggests that instead of imposing strict exclusionary input controls that would deprive fact-finders of the evidence completely, other "less destructive means" may help fact-finders make better informed decisions.

Exclusionary input controls are also difficult to implement, not only in the obvious case of trials by unitary tribunals but also in jury procedure. Unless the trial is preceded by comprehensive discovery and pretrial screening for detectably inadmissible evidence, hearsay statements are often uttered first and objected to only once the fact-finder has already been exposed to them. At that time, input control transforms into reasoning control which may not be effective. My approach will thus start from the premise that hearsay evidence should be admissible and I will next consider whether there are circumstances that warrant restrictions on its admissibility.

Although some scholars advocated wider admissibility of hearsay evidence even before the empirical studies about jurors' cognitive abilities started coming in,<sup>446</sup> for me the "let them have it all, surely they can sort it out" approach does not appear convincing even in the face of arguments citing routine reliance on hearsay in everyday business such as buying real property.<sup>447</sup> Memory gets distorted and fades, language is inherently ambiguous, perception is a complex phenomenon where lots can go awry, and sincerity is hard to evaluate. These dangers are well documented. Sure, they are present in eyewitness accounts as well but the difference is that cross-examining the hearsay witness will offer

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<sup>445</sup> See, for example Dale A. Nance, *The Best Evidence Principle*, 73 Iowa L. Rev. 227 (1988). Nance argues that even at present, the law in the United States actually includes such prescription but this is not always followed or recognized.

<sup>446</sup> Even Morgan himself argued that wider admissibility is more in the interests of justice and accurate fact-finding than the common law regime.

<sup>447</sup> See Crump, note 434.

only limited opportunity to check for potential issues with the original declarant's statement and even less so when the out-of-court statement is offered in writing. Nevertheless, many hearsay dangers are not known to or sufficiently appreciated by the fact-finders (jurors and judges alike), as we saw earlier with regard to popular beliefs about memory and lie detection. Even if fact-finders intuitively discount the value of some hearsay,<sup>448</sup> the rules must ensure the fact-finder will get as close to the source of the information as possible. This is arguably one of the original aims of the hearsay rule anyway – to shorten the chain of information by forcing the proponent to bring in the most direct evidence (best evidence) – at the threat of excluding the information altogether if the chain is still too long. Thus, blanket admissibility with no additional conditions will not work as it does not ensure that the fact-finder has adequate information to evaluate the hearsay statement and understand which of the hearsay dangers might still be present. One might argue that blanket admissibility is more suitable for professional fact-finders who have received training<sup>449</sup> on the weaknesses of hearsay evidence and are thus able to look out for what is not there even when the deficiencies are not directly highlighted by the parties. This seems to be the main argument in support of the regulation (or lack thereof) in jurisdictions like Chile or Germany where no fact-finding body is composed of untrained individuals only. Nevertheless, imposing quality control measures in those jurisdictions is equally important to reduce the possibility that parties' lack of diligence coupled with the fact-finders' ignorance leads to inaccurate findings. For this reason, I reject the option of complete deregulation and blanket admissibility of hearsay evidence. Roberts and Zuckerman are right: the risk is too great and stakes too high.

I also reject the option of using a default rule excluding hearsay with categories of exceptions – a scheme like in the Federal Rules of Evidence. This model has several problems even when coupled with the inclusionary discretion like in the CJA 2003 or the catch-all exception in FRE 807.

For starters, discretionary inclusion creates inconsistency in application and thus unpredictability – as the English Law Commission pointed out.<sup>450</sup> One could probably guide and limit this discretion by adding normative constraints like in FRE 807. However, this still does not provide a safeguard against an ill-informed judge, let alone one who is

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<sup>448</sup> And all that possibly in the wrong situations and for the wrong reasons.

<sup>449</sup> This assuming that they have received such training. Not only may a cursory treatment of basic psychology be insufficient to bring the fact-finding to a higher level – there is no guarantee that the professional fact-finders have received such training.

<sup>450</sup> LC 245, note 278, at 76.

biased. Simply put, even with the guidelines in effect, the judges may reach a conclusion that is at odds with what we know about human psychology.<sup>451</sup> Categorical admission of certain types of hearsay could work to ensure more uniformity, however, this happens to be exactly the situation with the hearsay rule in the United States at the moment. An argument could be made that some of the categories are ill-defined and this causes the hiccups in the system, thus, the remedy should be a careful review of the categories with adjustments where needed. Perhaps this is so. However, in spite of numerous efforts by scholars and legislators to frame a set of exceptions that would not be too broad or narrow, no successful and well-received set of exceptions has emerged. The existing exceptions hailed as embodying centuries of judicial wisdom such as the excited utterance exception, the exceptions pertaining to reputation evidence or the dying declarations, for example, have turned out to be insufficient in guarding against the hearsay dangers and are often at odds with psychological research.<sup>452</sup>

Some scholars have opined that the problem lies in the focus of the hearsay rule and its exceptions. Ashworth and Pattenden argue, “[a] truly functional approach would, however, be more closely tied to the precise dangers against which the hearsay rule guards”.<sup>453</sup> Logic therefore dictates that if there are exceptions to the rule excluding hearsay, the exceptions should cover instances where cross-examination “could not be expected to assist the court to evaluate the reliability of the evidence (as where the compiler of routine records could not be expected to recall the circumstances in which he included or excluded a particular entry) and wherever the original declarant *is* available for cross-examination although he has forgotten the facts underlying his out-of-court statement.”<sup>454</sup> Good point – especially considering that sometimes the main thing cross-examination does is demonstrate what is not known about the statement. However, considering the four hearsay dangers, what kind of statement would obviate the need for cross-examination to the point that fact-finders would be as informed without cross-examination as they are if cross-examination takes place?

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<sup>451</sup> The United States Supreme Court in its opinion in *Crawford v. Washington*, note 329, at 62 explains how judicial discretion tends to produce inconsistent results even when applying the same test. Apparently in some cases, the same criterion has prompted diametrically different conclusions by different judges.

<sup>452</sup> An article to the point about three particular and well-known exceptions is one by Myers *et al.*, *Hearsay Exceptions: Adjusting the Ratio of Intuition to Science*, 65 Law & Contemp. Probs. 3 (2002).

<sup>453</sup> Pattenden & Ashworth, note 365, at 327.

<sup>454</sup> See Pattenden & Ashworth, note 365.



Edward Imwinkelried argues that the exceptions to the hearsay rule should be dictated by the relative importance of the respective hearsay risks.<sup>455</sup> So, the argument goes, if the principal risk is that the declarant might lie, the exceptions to the hearsay rule ought to be fashioned so as to allow the admission of those statements where the risk of insincerity is somehow lower. If, however, the main concern is that the declarant's memory might fail or there are errors in transmission, the exceptions should be targeting statements where those risks have been reduced to acceptable levels. One of the main points Imwinkelried makes is that most common law hearsay exceptions are excessively focused on the danger of insincerity, yet disregard the danger of fading memory. In Imwinkelried's opinion, the FRE include several exceptions such as those allowing for present sense impressions, recorded recollections or business records that, if correctly applied, serve to take the memory factor into account as well as provide for additional guarantees of sincerity. Imwinkelried's point is well taken and naturally hearsay exceptions that provide for added guarantees are preferable to those that purport to mitigate only one of the hearsay dangers. The unreliability of a hearsay statement can stem from any one or more of the four hearsay dangers, including memory. However, I cannot agree with Imwinkelried's assessment that the risks to be mitigated should be chosen based on the frequency with which they are posed. If categories of admissible hearsay are drafted, they should be framed so that fact-finders will have sufficient information to evaluate the statement's reliability or so that the reliability is assured by the nature of the statement. In the present sense impression exception that Imwinkelried seems satisfied with, for example, the risk of memory fading is low because of the contemporaneity of the observation and the making of the statement by the declarant; and the possibility of insincerity could be mitigated by the lack of time to concoct lies. However, even if we concede that lying takes mental effort and the self-interest motivation may not have kicked in yet, there are still the risks of faulty perception and miscommunication that are not dealt with unless more information is presented or there is a demonstration of the lack of reliability because more information is not available. Plus – knowing that fact-finders tend to be overly self-confident about their lie-detecting abilities, insincerity might be a greater danger after all.

One can also argue that the hearsay exceptions are nothing more than minimum standard for reliability and any further assessment will be done by the fact-finder but we need to protect the fact-finder against the kind of evidence that falls below the minimum standard or, as Gordon van Kessel posits, protect us against unwarranted and non-reviewable

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<sup>455</sup> Imwinkelried, note 412, at 217.

verdicts by the fact-finder.<sup>456</sup> This argument would be fine, however, it still leaves the question of what the minimum standard is based on – is mitigation of two out of four danger factors (e.g. memory and sincerity for present sense impression) sufficient to admit, for example? Additionally, as we saw earlier, parts of the current lists of exceptions have been discredited by empirical research showing that assumptions that the “judicial wisdom” is based on may not be true (anymore). One of the most eloquent attacks on the validity and workability of the categorical admission model is by Eleanor Swift who points out that the greatest problem with the categorical approach is that it cannot be validated yet is based on the assumption that the categories actually increase accuracy and reliability.<sup>457</sup>

In rejecting the categories of automatic admission with a default exclusion model I would also point to the tendency of any kind of rigid system to be sooner or later found producing absurd results – this mostly because life has great variety to offer, especially in different parts of the world. This diversity is also one reason why there could not be a universal list of categories of admissible hearsay: any statement’s added reliability is deeply rooted in the culture and tradition in any particular place at a particular time and possibly even confined to a specific segment of the society. Categorical exceptions make generalizations that sweep with a broad brush. For example, even if the majority of the society are devout Christians and statements in family bibles would to this majority have a special meaning, the statement made in a family bible-turned paper weight by the passionately atheist declarant would be admitted but completely without any valid reason. The problem with categorical exceptions is that while certainly ensuring uniformity, they can produce results that do not help the fact-finding process. The diversity of situations, declarants, witnesses and statements means that decisions about reliability must also be individualized as opposed to sorted into pre-arranged boxes. Can a minimum standard of reliability be defined through universally (or at least generally) applicable objective criteria? It appears to me that this may be an effort in vain and thus reliability should not at all be a pre-condition of admissibility of hearsay statements but instead it should be determined on a case-by-case basis by the fact-finder in the context of the particular time-space. Admissibility should be conditioned upon the availability of the information enabling the fact-finder to reach an informed reliability judgment. This would mean for the most part doing away with exclusionary input controls but imperatively introducing the relevant

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<sup>456</sup> Gordon van Kessel, *Hearsay Hazards in the American Criminal Trial: and Adversary-Oriented Approach*, 49 Hastings L. J. 477 (1988).

<sup>457</sup> Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 Cal. L. Rev. 1339, 1352 (1987).

background information. This is very similar to the foundation fact approach proposed by Eleanor Swift<sup>458</sup> and also bears resemblance to the Chilean approach.

***So – admit but under what conditions?***

Eleanor Swift argued that the current law of hearsay in the United States is indefensible as it is based on external filtering of information reaching the fact-finder but the filtering process is not validated, cannot be validated and in some instances has been empirically proven wrong. In other words, the list of exceptions is arbitrary and does not make sense. The same criticism is still in the air, not only about the law in the United States but also in England and Wales (the CJA 2003 includes several of the common law exceptions later proven to have dubious foundation; the trial judge's discretion to admit mitigates the effects of this to some degree). Swift also offered an alternative – the foundation fact approach. The gist of the proposed alternative is that hearsay evidence should be presented to the fact-finder for evaluation if the proponent is able to produce a witness (or several witnesses) with knowledge of the foundation facts related to the statement – how the declarant was able to perceive the events; how much time had passed between the original event and when the declarant made his statement and whether anything else may have affected his ability to remember the events in question; what were the circumstances of making the statement, including who was the statement made to (to show sincerity and language use). Based on this information, the fact-finder would be able to conclude how reliable the statement was and in doing so would not be constrained by the arbitrary external filter of the hearsay exceptions. Foundation facts about perception or memory could also form part of the statement itself. Where information about perception conditions is not available, the missing part of process foundation may be supplanted by identity foundation – but only to the degree that it in the opinion of the trial judge still allows for informed evaluation of the hearsay statement. For example, if the process foundation witness does not know how the declarant perceived events in question, another foundation witness may be called to testify about the sensory faculties and punctual character of the declarant (Swift refers to this as adjusted foundation). Whatever the situation, the foundation fact approach requires that there always be at least one witness who can be cross-examined about the hearsay statement, the only exception being cases where judicial notice can be taken.

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<sup>458</sup> See Swift, note 457.

Swift's approach solves a lot of problems mainly because it is flexible and empowers the trier of fact to make reliability determinations by supplying the necessary information as opposed to forcing the fact-finder into external and possibly arbitrary constraints. It also serves the policy goal of getting the fact-finder as close to the original declarant as possible. In her article, Swift demonstrates how even the current hearsay exceptions can relatively easily be made to conform to the foundation fact approach or are already substantially in conformity such as the business records exception; or why some statements currently admitted under one of the hearsay exceptions would not qualify under her model and why they should not either. An example of this situation would be dying declarations or statements for medical diagnosis or treatment where applying the exception currently only requires that the proponent prove, for example, the condition of the declarant at the time of making the statement but requires no proof regarding the situation at the time of perception. Where this foundation fact is not available and cannot be supplemented through adjusted foundation, the statement should not be admissible. Similarly, ancient documents exception where the only criterion for reliability is the age of the document, should be eliminated, Swift argues.<sup>459</sup>

Swift's foundation facts approach is designed for a bifurcated tribunal as it is the trial judge who needs to exercise control over whether sufficient foundation for hearsay evidence has been laid or not. As she has envisaged it, exclusionary input control would still be the tool of choice. Her approach also does not include a mechanism to differentiate between situations where hearsay evidence is truly needed and where it is just a matter of convenience that deprives the fact-finder of the opportunity to have the declarant himself testify. These two aspects appear in need of some more attention for the model to really take off and work in a paradigm where hearsay is by default admissible.

The problem with having the trial judge decide whether to admit hearsay statements or not is twofold. First, in unitary tribunals the exclusionary input control will not have the desired effect. Furthermore, even where the trial is by jury, hearsay statements are often uttered by witnesses at trial without any forewarning. If the proponent is then not able to produce the foundation witness(es) or if the foundation proves insufficient, the statement should be excluded. By that time, the fact-finders will have heard a great deal about the witness, the declarant and the statement (or they will have sat in the jury room while the judge and the opponent conduct *voir dire* of the foundation witnesses) making sure that

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<sup>459</sup> Swift, note 457, at 1409.

they remember very well what they must disregard thereby possibly defeating the purpose of the whole exercise. One way to fix this would be to require parties to give each other advance notice of their intention to present hearsay evidence and having statements with insufficient foundation excluded during pretrial procedure, possibly by a judge who will not try the case. This would also solve the problem with deliberately disregarding that would otherwise haunt a unitary tribunal, however, would still not solve the problem with hearsay statements blurted out by witnesses inadvertently and unexpectedly. One could argue that the jurors would disregard this anyway and that limiting instructions might have some effect as they would be based on reliability as opposed to some esoteric legal concepts.<sup>460</sup> Another option is to rely on cross-examination and instead of excluding hearsay that has insufficient foundation, allow the opponent to demonstrate the lack of foundation facts through questioning and possibly by calling an expert to testify about the significance of one foundation factor or the other. This would, of course, assume skillful trial advocates and competent experts (but this seems to be the assumption in all criminal procedure). To augment the effect of such cross-examination for a bifurcated tribunal, the presiding judge could also instruct the jury about the dangers of hearsay statements that lack foundation. Not excluding hearsay evidence, however, would save court time and empower the fact-finder to make an informed decision. This also follows the principle of internal validation. The judge would still retain the general power to exclude evidence that tends to create undue prejudice or cause needless waste of time.

As regards the best evidence issue, Seigel's model appears promising.<sup>461</sup> Seigel recognizes that because of deteriorating memory, in some cases hearsay may be the best evidence there is available. Very useful in those cases is the requirement that the witness, in spite of his poor memory about the event observed, would still come to court whenever possible. This would constitute an additional safeguard against fabrication, especially if the hearsay statement is in writing. The witness would also provide the necessary foundation for the statement and be available for cross-examination.

Seigel's approach may be too accommodating in cases where the declarant cannot be identified.<sup>462</sup> This increases the chances of fabrication and opens the door for anonymous gossip. Combining Seigel's and Swift's proposals could make for a workable solution for different kinds of tribunals and this is what we are looking for.

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<sup>460</sup> For the effect of limiting instructions, see previous chapter of this thesis.

<sup>461</sup> Seigel, note 444 at 932-939.

<sup>462</sup> In his proposed rule, Seigel would also admit hearsay by declarants who cannot be found or identified – Seigel, note 444 at 933.

### **Proposal: best evidence with foundation facts**

The combination of the best evidence principle and foundation facts approach would create a legal framework where, in general, hearsay evidence is admissible provided that two conditions are met: the proponent is able to present the foundation facts that enable the fact-finder to assess the reliability of the statement, and the hearsay statement is the best evidence available. The control method used in such a scheme is a combination of input and reasoning controls, however, focusing the fact-finder's attention to the foundation facts and the possible hearsay dangers would likely have the effect of directing any fact-finder to make a more informed decision about the reliability of the statement and discount it where appropriate – and this all without anyone excluding evidence. The definite advantage of this kind of input control is that there will be no need to maintain the dubious notion of dichotomy of purpose or to “un-ring the bell” when the fact-finder has accidentally become aware of a hearsay statement. Therefore, this approach is suitable for both unitary and bifurcated tribunals.

As regards the best evidence principle guiding the reception of hearsay statements in lieu of firsthand accounts, this would serve two closely related purposes: to prevent wasting time and to get the fact-finder the best information available. This must nevertheless not become a license to have the eyewitnesses give written statements and then stay out of court with the pretext that they do not remember anything (which, depending on the time that has elapsed before the case comes to trial may actually be the truth). The presumption here must be that the best available evidence is firsthand testimony and hearsay statements would become an option only when it has been ascertained to the satisfaction of the court that firsthand testimony is for some reason not the best evidence. Nevertheless, even when the witness no longer remembers the details he recorded right after the event, his testimony would still constitute the necessary foundation facts to allow for the presentation of the hearsay statement. This, too, would be amenable to any type of trial by any type of tribunal – and would even satisfy the confrontation requirement in the cases where the original declarant can appear to the court.

## CHAPTER 4. STANDARD OF PROOF

### Introduction

The standard of proof might just as well have been the first rubric out of the three and not the last. While the exclusionary rules attempt to control the fact-finding process by controlling the input and limiting the array of evidence available to the fact-finders, the standard of proof deals with the question of the level of certainty of the fact-finder's decision. The question of certainty, however, is ironically anything but certain and debates are ongoing even about how to conceptualize what it is that the fact-finder needs to be certain of.

In this chapter I will take a closer look at attempts to ensure the accuracy of fact-finding through enacting the minimum level of certainty. Input controls such as exclusionary rules or mandatory form of proof rules aim to regulate the information flow to the fact-finder and in effect filter out or force in some types of information in order to provide the fact-finder with 'palatable food for thought as well as a balanced diet'. The standard of proof is at work nearer to the other end of the information processing chain – it determines at which point the fact-finder can say it is legally able to make findings of fact with the required level of confidence.

The history of the standard of proof is colourful. The mental processes of the fact-finder are elusive and difficult to describe, hence the desired end state is not simple to formulate. A meaningful standard should be measurable to at least some degree of objectivity. Here even deciding what parameters should be described is subject to dispute. Should we describe the standard of proof in subjective terms by telling the fact-finder how convinced they should be before rendering a verdict? Perhaps the standard could be expressed in objective terms instead – setting forth, for example, what kind of evidence legally constitutes the required level of proof. As we will shortly see, both approaches have been in use and are currently in operation in one jurisdiction or another. But should the standard also be expressed or defined in different terms depending on the procedural design or the fact-finder profile? And are the standards actually capable of guiding the fact-finder or is there really just one standard for being convinced much like an on-off switch,<sup>463</sup> *i.e.* are

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<sup>463</sup> This was the approach in continental Europe before Feuerbach and Mittelmaier – two legal giants of their time – argued that there are actually different degrees of persuasion - George Fletcher, *Two Kinds of Legal Rules: A Comparative Study of burden-of-Persuasion practices in criminal Cases*, 77 Yale L. J. 880, 901 (1968).

humans even capable of rating the various degrees of doubt? What if the current research in psychology were to confirm that the standard of proof is a useless tool in guiding the fact-finder and no matter how formulated, the expression of the standard has no real control over what level of probability causes the fact-finder to act?

In this chapter, I will first see how this reasoning control device fits into the system of other devices – the burden of proof and the presumption of innocence. A short historical overview is also in order before turning to the sample jurisdictions for specific examples of how the standard of proof is conceptualized and used. Based on this comparative overview, I will explore the mechanism of the fact-finder's decision making process from psychological point of view and the various mechanisms by which the standard of proof interacts with fact-finding decision making. Finally, I will once again attempt to offer a common framework regarding the standard of proof suitable for all sample jurisdictions.

### **The interrelated concepts of presumption of innocence, burden of proof and standard of proof**

The standard of proof cannot be considered in isolation from two other concepts in criminal evidence law: the burden of proof and the presumption of innocence. In fact, the three concepts are so close that sometimes they are regarded as different facets of the same control measure. As Underwood explains,<sup>464</sup> the burden of proof is a guide for the fact-finder to help decide close cases. It first entails a standard for how the fact-finder should determine whether the case is a close one, and then it determines who should win a close case. Analytically, the burden of proof is actually a term that lumps together two different burdens. We need to distinguish between burden of production and burden of persuasion. The burden of persuasion is a rule that allocates the risk of non-persuasion – the party who bears the burden but fails to meet its demands will lose the case. Or in Underwood's terms, the burden of persuasion determines the winner in a close case. The burden of persuasion is also referred to as the 'legal burden' or the 'fixed burden' and this implies that it does not shift during the trial. As we will see later, in some circumstances it actually does. It is a

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<sup>464</sup> Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977).



classical example of such burden allocation that, in a criminal case, the burden of persuasion rests with the prosecution.<sup>465</sup>

The burden of production (also known as the burden of adducing evidence or the evidential burden) means the party's obligation to present or point to evidence in support of their claims. The burden of production is usually at least initially collocated with the burden of persuasion and in that context means that the party who bears the burden of production will automatically lose if they fail to come forward with evidence to enable a reasonable person to find in their favour.<sup>466</sup> This amount of evidence is also known as the *prima facie* evidence. Once the party with the burden of persuasion has met their burden of production, the onus of presenting or pointing out of evidence is shifted to the party seeking to disprove the initial contention.

As Mueller and Kirkpatrick explain, in general, the burdens of proof are allocated to the party who seeks court's action.<sup>467</sup> There are, however, additional considerations that bear on how the burdens of proof are divided amongst the parties. The burdens can be allocated to serve substantive policy objectives such as to make certain lawsuits easier to pursue. Sometimes the allocation of burdens reflects which party is more likely to be able to carry the burdens due to the access to evidence, for example. The allocation of the burdens of proof sometimes also reflects the probable truth of a party's claim as compared to the opposite claims.<sup>468</sup> Finally, in some instances the unavailability of definitive proof requires that the burden of proof be allocated accordingly.<sup>469</sup> While in criminal cases the burden of proof is universally known to be on the prosecution, the allocation of the burden of proof is actually a bit more complex even in criminal cases and in regards to some facts the burden may lie with the defence. This is, historically speaking, no new development. Most notably, the burden of proof to establish affirmative defences such as self-defence, insanity or duress was on the defence in most if not all Western jurisdictions well until the middle of nineteenth century (representing rare uniformity in approaches taken by both Common law and Civil law traditions, arguably influenced by how private law disputes were

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<sup>465</sup> Dennis, note 2, at 452.

<sup>466</sup> Mueller & Kirkpatrick, note 124, at 105.

<sup>467</sup> Mueller & Kirkpatrick, note 124, at 107.

<sup>468</sup> Kergandberg argues that the default state of affairs should be what is legally presumed and in this sense, the presumption of innocence makes no sense at all as most defendants turn out to be guilty in the end. – Eerik Kergandberg *et al.*, *Kriminaalmenetluse seadustik. Kommenteeritud väljaanne* (Juura: Tallinn, 2012), 55.

<sup>469</sup> Mueller and Kirkpatrick bring the example that absence for seven years without tidings raises the presumption that the person is dead and places the burden of proof on the party seeking to show that the person in question is actually alive. See Mueller & Kirkpatrick, note 124, 109.

conceptualized in Roman law).<sup>470</sup> Both Blackstone and Mittelmaier<sup>471</sup> in substance agreed that while the prosecution was under an obligation to prove inculpatory circumstances, the exculpatory side of any criminal case was to be championed and proven by the defence, albeit to a lower standard than the prosecution's case would have to be proven.<sup>472</sup> Inspired by Blackstone, the same approach was adopted in the United States.<sup>473</sup> George Fletcher argues that in places where the prosecution now bears burden of disproving the defences, this arrangement is but a more advanced form of the drive to better protect the rights of the defendant. This movement kicked off independently in both the United States and in continental Europe in the late nineteenth century and stems from the realization that criminal and civil law matters are fundamentally different. Criminal sanctions can only be imposed on those who the state can prove have committed a crime.<sup>474</sup>

Presumptions belong to the same toolbox as burdens of proof and they operate to shift the burden of proof in regards to some specific facts. One could also say that every burden of proof carries with it a presumption to the contrary: unless the proponent succeeds in persuading the fact-finder, the factual allegations are presumed to be false. In criminal cases, the most famous and fairly universally accepted “presumption” is the presumption of innocence. According to it, a person is deemed not guilty unless a court has determined the contrary. The history of the presumption of innocence seems to be somewhat murky. As Rinat Kitai explains, the notion of presumed innocence developed into its contemporary form some time during the Enlightenment but the concept itself in continental Europe is much older and is sometimes traced back to ancient Hebrew law, Roman law, canon law or 12<sup>th</sup> century Italian law.<sup>475</sup> The substance of the presumption was not necessarily what it is today – in medieval Italy, for example, one school of thought held that it was contingent upon the defendant's social status, good name and prior life and thus not everyone enjoyed

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<sup>470</sup> Fletcher, note 463, at 886. While this may have been true in its own time, the trend seems to have since reversed, especially with more regulatory offences on the books.

<sup>471</sup> Historical legal scholars of comparable stature in England and Germany, respectively.

<sup>472</sup> This “lower standard” was actually a novelty in both German and French legal systems where until that point, apparently no discussion of different standards of proof had been had. According to Fletcher, the new “standard” was by a probability – also embraced by the French criminal law scholars at the time. – Fletcher, note 463, at 899.

<sup>473</sup> This in spite of the fact that Blackstone's and his contemporary Foster's argument apparently rested on only one case where the jury had issued a special verdict stipulating that the defendant had killed a man in a fight over a game of cards. The judges of the King's Bench found that where the verdict found no “sudden quarrel”, the killing was murder because it was upon the defendant to prove sudden quarrel. – *R v. Oneby*, 2 Ld. Raym. 1485, 92 Eng. Rep. 465 (K.B. 1727). In the United States, the jury did not issue special verdicts and thus, instead of determining whether the defence had been proven by a preponderance of the evidence as the court framed its inquiry in *Commonwealth v. York*, 50 Mass. (9 Metc.) 93 (1845), the jury could have simply acquitted the defendant because it had reasonable doubt.

<sup>474</sup> Fletcher, note 463, at 912.

<sup>475</sup> Rinat Kitai, *Presuming Innocence*, 55 Okla. L. Rev. 257, 261 (2002).

the protection of the presumption of innocence. Canon law at the same time held that presumption of innocence is applicable to all people regardless as people were supposedly good by their nature.<sup>476</sup>

Although today the presumption of innocence has gained near universal acceptance, there are still critics arguing it should not even be a guiding principle in criminal procedure. According to Kitai, there are those, for example, who earnestly claim that even the fact of pending criminal investigation should be enough to strip the suspect of the presumption of innocence, that the medieval Italian model of fact-based presumption of innocence should be followed, or that because our life experience shows that defendants predominantly turn out to be guilty, presuming them innocent would not only be hypocritical but also detrimental to the criminal justice system's ability to combat crime.<sup>477</sup> Some of these arguments may well help us understand the forces influencing fact-finders in their judgment – for example, as we saw earlier, fact-finders convict more easily those who have prior convictions as compared to those who have none. Thus, once known to the fact-finders, previous convictions may well in fact have exactly the effect that the critics of the presumption of innocence argue they should have – that of reversing the presumption and the associated burden of proof.

Often the presumption of innocence is regarded as not really a presumption at all.<sup>478</sup> The argument goes, it is not based on specific facts but is more of a policy statement and a moral declaration rather than a true presumption. Many regard it as just a restatement of the burden of proof.<sup>479</sup> The burden generally lies with the prosecution and means that the prosecution bears the risk of losing the case, should it fail to prove any element of the charge.<sup>480</sup> The paradigm where the “presumption restates the burden” is surprisingly widely accepted: for example, Mueller and Kirkpatrick in their book and Dennis in his both subscribe to the same approach. Yet this approach seems to put the cart before the horse. The presumption of innocence, at least in the modern times, is regarded as a fundamental human right animated by appreciation of such very profound values of liberal society as

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<sup>476</sup> Id., at 262.

<sup>477</sup> Id., at 266-267. The sources Kitai cites, are from some 30 years back so one may assume that this faction of critics is even less populous today.

<sup>478</sup> Mueller & Kirkpatrick, note 124, at 115. Mueller and Kirkpatrick also point out that in criminal cases in the United States, the presumptions of law as well as the irrebuttable presumptions have been held unconstitutional and incompatible with the presumption of innocence as they relieve prosecution from its burden of proof – see *Carella v. California*, 491 U.S. 263 (1989).

<sup>479</sup> Dennis, note 2, at 455.

<sup>480</sup> Mueller & Kirkpatrick, note 124, at 136.

liberty, dignity, privacy and reputation of the individual.<sup>481</sup> This makes the presumption of innocence, not the burden of proof, the starting point and the basis for procedural design. At the same time, the presumption of innocence is also the control measure that sets the starting point or base value for the reasoning process by fact-finders. The allocation of the burden of proof to the party officially charged with proving the defendant's guilt is but a logical corollary of the decision to presume all people innocent until proven otherwise.<sup>482</sup>

So how does the standard of proof fit into this scheme? The standard of proof or the standard of persuasion describes the weight of the burden of proof. While the burden of proof on the one hand determines what the fact-finder should do if the case before it is factually a close one (meaning that no one party has a clear advantage), it is the standard of proof that defines for the fact-finder what a close case means.<sup>483</sup> In other words, how far ahead the party bearing the burden of proof must be of the other in order to overcome the associated adverse presumption. Or, to use the analogy of the scales of justice – by how much should one weighing pan outweigh the other for the party to prevail.

As we observed before, the allocation of the burden of proof has been justified in a number of different ways. The same can be said about the standard of proof. Placing the burden of proof in criminal cases on the government reflects the inherent imbalance between the individual accused and the government intent on punishing someone – not only has the government more resources to collect evidence but it is also the government seeking the court's action.<sup>484</sup> By placing the burden of proof on the government, the law reflects the gravity of a potentially erroneous conviction for the individual, and the much-reiterated understanding that it is far better to let the guilty go free than to punish an innocent person.<sup>485</sup> The standard of proof further helps to ensure that this allocation of burden will actually work. As Underwood explains, any standard of proof that is higher than “more likely than not” rigs the scales in favour of the defendant and reduces the chances of conviction in all cases. It may do so to offset the systemic imbalance of the scales of justice – perhaps fact-finders are for some reason more prone to convict than acquit. But setting the standard of proof high may do more than just re-balance the scales: it may rig the scales

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<sup>481</sup> Dennis, note 2, at 456.

<sup>482</sup> The German example will demonstrate to us later that while logical, this corollary is nevertheless not inevitable and the burden of proof may be shared with the court, for example – or, perhaps, not exist at all.

<sup>483</sup> Underwood, note 464, at 1301.

<sup>484</sup> Jenny McEwan argues that the presumption of innocence and associated burden of proof on the government is but an application of the basic theory of trial – it is the government that wishes the machinery of law to assist it – McEwan, note 287, at 74.

<sup>485</sup> Dennis, note 2, at 455.

in favour of the defendant so the fact-finder will not convict unless the prosecution is winning by a landslide.<sup>486</sup> This kind of pre-rigging of scales by imposing a high standard of proof has the general effect of making convictions harder to obtain – both when they would be warranted and when they would be erroneous. Thus, the decision to rig the scales this way essentially reflects the need to avert abuse of power in close cases by fact-finders or prosecutors and a notion that the cost of erroneous conviction is higher than that of erroneous acquittal.<sup>487</sup> There is also another function to the higher standard of proof and that is to impress on the public and the fact-finders the importance of the judgment in a criminal case.

The standard of proof can be articulated as a form of words thought best to describe the required level of certainty. An example of this is the famous “beyond a reasonable doubt” formulation. Other formulations of this sort share a similar tenet: they all purport to objectively describe how much one side should outweigh the other, and this in spite of the subjectivity of evaluation of evidence. On the other hand, and we will be seeing this shortly, there are jurisdictions that do not have a specific formulation for the standard of proof worded in terms of objective difference in weight. This of course does not mean that they in fact do not have a standard – the standard may describe the fact-finder’s subjective level of conviction instead – or have simply remained unarticulated. Since the standards, even where articulated, are not universally quantified and are mathematically speaking, imprecise,<sup>488</sup> even the same formulation of the standard of proof may turn out to mean different things in different jurisdictions and to different fact-finders.

Stating a standard of proof is a measure of direct reasoning control: an imperative to the fact finder regarding the level of confidence they should have in their decision. The picture would be incomplete, however, if one were to not appreciate the alternative control measures in place that also tend to affect the level of certainty required of the fact-finders. One such measure is the form of decision. While nominally controlling only the “output format”, the requirement that the fact-finder should state their reasons for the findings of fact could in effect also impact the reasoning process which would now have to cater for

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<sup>486</sup> See Underwood, note 464, at 1307.

<sup>487</sup> For functions of the standard of proof, see also, John D. Jackson, *Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry*, in Duff et al. *The Trial on Trial*, vol 1 (Hart Publishing: Oxford, 2004), 127.

<sup>488</sup> Robert Thompson, *Decision, Disciplined Inferences and The Adversary Process*, 13 Cardozo L. Rev. 725, 731(1991).

the required output format.<sup>489</sup> Similarly, appellate review standards may influence the fact-finders. Where the appellate courts are to reevaluate evidence anew on appeal, their decisions can create a more particularized and nuanced framework of corroboration-and-sufficiency rules that in effect take the place of a general standard of proof. Then again, if the appellate institution is prohibited from engaging in any fact-finding of their own, it may be the lower courts working from the more general standard and this would probably mean less uniformity.

Before turning our attention to the sample jurisdictions, one more remark is in order. It may be tempting, as I mentioned before, to lump the intimately intertwined concepts of the burden of proof, standard of proof and presumptions into one and deal with them as if they were just different facets of the same idea. In fact, this is often done and the well known article by Underwood cited above is one example of this. While this “aggregated approach” may be useful for some purposes, it is rather dysfunctional for our inquiry that focuses on the psychological aspects of different evidentiary controls on fact-finding. And from this perspective, to merge the three into one means not recognizing their operational differences.<sup>490</sup> For this reason, while the survey of jurisdictions will occasionally and briefly touch upon the presumption of innocence and the allocation of the burden of proof, I do so only to provide the reader with some more context<sup>491</sup> and will not delve into the intricacies of these other adjacent concepts.

Now it is time to turn to our sample jurisdictions and see how their respective laws deal with the burdens and standard(s) of proof in criminal cases. To make this account comparable, I will provide a general overview of the allocation of burden of proof and then look at whether and how the jurisdiction has articulated the standard of proof. I will also attempt to identify whether (especially in those jurisdictions that do not articulate a specific standard) there are any additional controls that indirectly aim to regulate the level of certainty of the decision, such as a requirement of a unanimous verdict, for example.

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<sup>489</sup> See Thompson, note 488. Thompson is making an argument for more precise and scientific fact-finding method and in his article also points out that the more scientific method is better supported by having fact-finders provide reasons for their findings of fact. Different pieces of evidence and their individual effect on the outcome would have to receive a more particularized treatment in decision making process in order to comply with the requirement that reasons be provided.

<sup>490</sup> The operational differences lie in the fact that the three control different parts of the evidentiary process. While the standard of proof controls the level of confidence with which the final decision must be made, the presumption of innocence sets the base line for deliberations and evidentiary gaps, and the burden of proof is a clever adapter-like piece that translates the baseline value into procedural initiative.

<sup>491</sup> This is especially relevant as regards the standard of proof in situations where the burden of proof is shifted onto the defence.

## **Main features of the regulation regarding the standard of proof in the sample jurisdictions**

### ***England and Wales***

The fact-finder in England and Wales can mean a number of things. If the case is to be tried in the Crown Court, the trial is before a jury of twelve. According to Section 17 (1) of the Juries Act 1974, the verdict need not be unanimous but at least ten out of twelve or eleven jurors must concur and jurors must have had sufficient time to deliberate. If by the close of the case, there are only ten jurors, nine must concur on the verdict. Section 17(4) sets forth that the Crown Court must not accept a majority verdict unless the deliberation time has been at least two hours. If, however, a sufficient majority cannot be reached, the judge will declare a mistrial and the case can be retried if the prosecution so chooses. The jury does not have to give reasons for their verdict. Where the trial is by a panel of magistrates, they do not have to write reasoned findings of fact either but when the case is appealed, they must “state the case” for the appellate court. Stating the case means writing up a statement of facts that the court found proven.

The defendant is presumed innocent until proven guilty and the burden of proving criminal charges lies with the prosecution, although the allocation of the burden of proof is not all that straightforward. In the 1953 case of *Woolmington v. DPP*<sup>492</sup>, the court speaking through the words of Lord Sankey refused to presume malice and place the burden of disproving the *mens rea* on the defence. Yet in some instances,<sup>493</sup> the defendant bears the burden of proof. Probably the most well-known example of this is the insanity defence where the defendant bears the full burden of proof (meaning, both the burden of persuasion and the burden of production). There are also other exceptions to the general burden of proof rule where the burden of proof with regard to some element of the offence is placed on the defendant.<sup>494</sup> Although the presumption of innocence and its corresponding

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<sup>492</sup> [1953] A.C. 462

<sup>493</sup> In fact, apparently all common law defences – Dennis, note 2, at 459.

<sup>494</sup> For example, Sexual Offences Act 2003 s. 75 establishes a presumption of absence of consent if sexual act was preceded by violence, threat of violence, was perpetrated while the victim was asleep or disabled etc.; Criminal Justice Act 1988 s. 139 places upon the defendant the burden of proving that he had the blade or

allocation of the burden of proof on the prosecution is hailed as “the golden thread” that weaves through the fabric of English criminal law,<sup>495</sup> the law in its current state is actually somewhat unprincipled and offers the prosecution easy ways out in quite a few situations.<sup>496</sup> As the allocation and shifts of burdens of proof are beyond the scope of this thesis, they will not be discussed any further.

The standard of proof in criminal cases in England and Wales is “beyond reasonable doubt” and this standard is applicable to all criminal cases regardless of which court the case is pending in. The ubiquitous question of what is meant by a reasonable doubt has given rise to two approaches in case law. Historically, the standard probably crystallized in its current formulation some time in the 18<sup>th</sup> century but could have in some shape or form been in use even earlier.<sup>497</sup> There are those who attempt to explain this formulation by bringing analogies or defining the kind of mental state the jurors should have to warrant conviction (or the kind of doubt that would bar a conviction). One common analogy is that of business decisions – if the fact-finder harbours doubts that would cause them to stop and think in their more important business dealings, they should know that they are having reasonable doubts.<sup>498</sup> A well-known description can be found in *Walters v. R*,<sup>499</sup> where the court remarked that

“[p]roof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to prevent the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable,’ the case is proved, but nothing short of that will suffice.”

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sharp and pointy instrument with him in a public place for a “good reason”; Misuse of Drugs Act 1971 s. 28 places upon the defendant the burden of proving that he had no knowledge and did not suspect that he was in possession of a controlled drug. There is also the potentially far-reaching principle that where the evidence is peculiarly within the knowledge of the defendant, the defence should carry the burden of proof. This is also known as the implied shift of the burden of proof.

<sup>495</sup> *Woolmington v. DPP*, [1935] A.C. 462, 481.

<sup>496</sup> Ian Dennis, *Reverse Onuses and the Presumption of Innocence: In Search of Principle*, [2005] Crim. L. Rev. 901.

<sup>497</sup> See Barbara Shapiro, *The Beyond Reasonable Doubt Doctrine: Moral Comfort or Standard of Proof?*, 2 Law & Human. 149 (2008). Shapiro’s article is mainly meant as a critical response to the theory by James Whitman who in his book argued that ‘beyond reasonable doubt’ was not a minimum standard for fact-finding certainty but the roots of the reasonable doubt rule lie within medieval Christian theology and the “standard” had nothing to do with finding particular facts but, rather, aimed at coaxing, comforting and prodding anxious and reluctant Christians. Similarly, he argues that the unanimity rule was never meant so much to ensure the accuracy of fact-finding but to share the moral burden the jurors must have felt in “taking responsibility for the act and imposing the punishment for it” – see James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press: New Haven CT 2008).

<sup>498</sup> See, for example, *R v. Ching*, 63 Cr. App. R. 7 (1976). But see also *R v. Gray*, 58 Cr. App. R. 177 (1973) where the court found that an explanation that a reasonable doubt is the kind of doubt “which might affect you in the conduct of your everyday affairs” set the standard too low and was therefore improper.

<sup>499</sup> 2 A.C. 26 (1969),



Appellate courts have discouraged trial judges' attempts to explain what reasonable doubt means – not only are the jurors a diverse population with likely different reasonability standards and value judgments,<sup>500</sup> but there is supposedly also a risk of confusing the jury by the explanations.<sup>501</sup> The courts do, however, agree that the standard of “beyond reasonable doubt” is a high one and while proving the case beyond any doubt would be near impossible, the measure of certainty in the fact-finders' mind should be such that the jurors “are completely satisfied” or “feel sure of the prisoner's guilt”.<sup>502</sup> More recently, the Court of Appeal has emphasized that in their instructions to the juries, judges must make clear that juries should decide cases based on the evidence and set aside their feelings, convicting only when they are “sure” of guilt.<sup>503</sup> The Crown Court Bench Book also takes the approach that the jury should be simply instructed to convict only if they are “sure that the defendant is guilty” and that any further explanations would be unwise.<sup>504</sup> Ian Dennis explains that in cases where conviction depends wholly or partly on inferences drawn from circumstantial evidence, the “beyond reasonable doubt” standard means that the fact-finder cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If there are innocent explanations to the circumstantial evidence that are more than just merely fanciful, these inferences would constitute reasonable doubt.<sup>505</sup> Although the standard of proof in criminal cases is generally “beyond reasonable doubt,” this standard is not applicable to factual issues where the burden of persuasion lies with the defence: there the standard is the “balance of probabilities”<sup>506</sup> – a lower standard that has been described as requiring a conclusion on behalf of the fact-finder that the proponent's factual allegation is “more probable than not”.<sup>507</sup>

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<sup>500</sup> Dennis, note 2, at 493 – Dennis points out about the business analogy that even different businessmen may have different standards of what is or is not reasonable. Not to mention the jurors who are probably not all businessmen and therefore likely to have trouble discerning what a businessman's perspective on reasonability would be.

<sup>501</sup> This is the concern voiced by Goddard, CJ in *R v. Kritz*, 1 KB 82, 90 (1950).

<sup>502</sup> *R. v. Hepworth*, 2 Q.B. 600 CCA (1955). But see *Bater v. Bater*, [1950] 2 All E.R. 458, where the court implies that the reasonable doubt standard is actually a flexible one – doubts that may be reasonable in the context of some cases may be unreasonable in others. The idea that proof requirements should vary according to the seriousness of the charge is currently out of favour – see *In re D*, [2009] 1 AC 11. There the court also rejected the suggestion that there should be a third standard of proof in English law somewhere between the “balance of probabilities” and the “beyond reasonable doubt” standard, akin to American “clear and convincing evidence.”

<sup>503</sup> *R. v. Wickramaratne*, [1998] Crim. L. R. 565.

<sup>504</sup> JSB Crown Court Bench Book. Directing the Jury ([http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook\\_criminal\\_2010.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf) – link verified 08FEB2014).

<sup>505</sup> Dennis, note 2, at 495.

<sup>506</sup> *Gatland v. Metropolitan Police Commissioner*, [1968] 2 Q.B. 279 DC.

<sup>507</sup> *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 at 374 KBD.

## *United States*

The Sixth Amendment to the Constitution guarantees the right to a trial by jury to defendants in all criminal prosecutions. Nevertheless, jury trial is actually not available to defendants charged with “petty offences” – misdemeanours and infractions where the maximum punishment is a 5000 dollar fine (10,000 dollars for organizations).<sup>508</sup> In other more serious cases, jury trial is the default option but the defendant may waive this right and be tried by either a magistrate judge<sup>509</sup> or a district judge sitting alone.

A Federal jury is normally composed of twelve jurors but if both parties agree, the size of the jury can be reduced. Jury verdicts must be unanimous and where the jury cannot agree to a verdict, mistrial may be declared and the count of the indictment that caused the jury to deadlock may be retried.<sup>510</sup> The jury does not have to give reasons for their verdict,<sup>511</sup> but judges are required to issue written findings of fact according to Federal Rule of Criminal Procedure 32.

The law on burdens and standards of proof in the United States has inherited a great deal from its predecessor, English law. There is a presumption of innocence and the burden of proof is placed on the prosecution. The standard to which this burden must be carried out is “beyond a reasonable doubt.” Although it is subject to some debate when exactly this standard crystallized in American case law and whether the standard that was used before it was higher, lower or similar to it,<sup>512</sup> the rule that the prosecution must prove the defendant’s guilt beyond a reasonable doubt is well established and as the Supreme Court ruled in *In re Winship*,<sup>513</sup> is applicable to the states through the Due Process Clause of the Fourteenth Amendment. In *Winship*, the Court explained that the presumption of innocence and the government’s burden of proof beyond a reasonable doubt are bedrock axiomatic and elementary principles that are indispensable to reduce the risk of erroneous

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<sup>508</sup> Fed. R. of Crim. Pro. Rule 58.

<sup>509</sup> Still a professional judge but of a lower ‘rank’ unlike in England

<sup>510</sup> According to Fed. R. of Crim. Pro. Rule 31, the decision whether to have a retrial or not is one for the prosecutor.

<sup>511</sup> For an example of a verdict form, see ([http://www.investigativeproject.org/documents/case\\_docs/999.pdf](http://www.investigativeproject.org/documents/case_docs/999.pdf), link verified on 18AUG2014).

<sup>512</sup> Anthony Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507 (1975). Morano makes an argument that the original standard of proof was “beyond any doubt” – and that this was actually much higher than its contemporary counterpart. Thus, he argues, today’s beyond a reasonable doubt standard is actually a concession made to prosecutors to facilitate easier convictions.

<sup>513</sup> 397 U.S. 358 (1970).

convictions. This, the court explained, expresses an important value judgment in a society that values a person's good name and his liberty. Moreover, the presumption of innocence and the corresponding allocation of burden of proof impress upon the fact-finders the need to "reach a subjective state of certitude of the facts in issue" and help build confidence in society about the applications of the criminal law.<sup>514</sup> In the same opinion, the Supreme Court also *expressis verbis* states that the burden of proof is on the prosecution in regards to all elements of the charge.

This being said, the burden of proof is still in some instances shifted to the defendant. Most notably, this is the case with affirmative defences – the kinds of defences where the defence is not relying on disproving an element of the crime but seeks to establish additional facts that would bar conviction – the insanity defence is a good example. As Mueller and Kirkpatrick note, the defendant has the burden of going forward with regards to either type of defence. In affirmative defences, however, the defendant may also bear the burden of persuasion.<sup>515</sup> In *Patterson v. New York*<sup>516</sup>, the Supreme Court held that it was unconstitutional to shift the burden to the defence with regard to *mens rea* which is an essential element of the offence. However, it also potentially opened the door for the legislature to frame the substantive law so that more of what the defence can do would fall under the heading of affirmative defences – for example, cutting the *mens rea* out of the elements of the crime and setting forth that the absence of the requisite mental state is an affirmative defence.<sup>517</sup>

The standard of proof in criminal cases for the prosecution is "beyond a reasonable doubt" and just like in England, there is a divide between those judges who think it should not be muddled by trying to further explain it,<sup>518</sup> and those who attempt to clarify it by explanations or analogies.<sup>519</sup> The Supreme Court has approved of different instructions

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<sup>514</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>515</sup> Mueller & Kirkpatrick, note 124, at 136-137.

<sup>516</sup> 432 U.S. 197 (1977).

<sup>517</sup> It did so in an interesting balancing act: the Court found that placing the burden on the prosecution with regard to disproving the affirmative defences (and New York law according to the Supreme Court at the time had 25 of them on the books) would possibly cause the state to abandon those defences altogether – *Patterson v. New York*, 432 U.S. 197, 207 (1977).

<sup>518</sup> See, for example, *United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988) where the court found that the trial judge was correct in refusing to define reasonable doubt to the jury even when the jury requested a more precise definition. "Jurors know what is 'reasonable' and are quite familiar with what is meant by 'doubt'", the 7th Circuit wrote.

<sup>519</sup> See, for example, *3rd Circuit Criminal Jury Instructions* – reasonable doubt is the kind of doubt that would "cause an ordinary reasonable person to hesitate to act in matters of importance in his or her own life" (<http://federalevidence.com/pdf/JuryInst/3d.ModelCrimJI.pdf> - link verified 08FEB2014) or *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* - "Proof beyond a reasonable

given to the jury as to what ‘reasonable doubt’ means. For example, in *Victor v. Nebraska*,<sup>520</sup> the trial court had instructed the jury that ‘beyond a reasonable doubt’ means an abiding conviction as to guilt. Similarly, in *Holland v. United States*<sup>521</sup> the Court upheld an instruction that a reasonable doubt would be the kind of doubt that would cause a reasonable person to hesitate to act in the more important affairs in their own lives.<sup>522</sup>

In *Cage v. Louisiana*<sup>523</sup> the Supreme Court cautioned lower courts not to set the standard too low by exaggerating the degree of doubt needed for an acquittal. There the trial court had characterized reasonable doubt as “grave uncertainty” and “actual substantial doubt” while also equating the beyond a reasonable doubt standard with “moral certainty”. The Court opined that taken as a whole, this could have lowered the standard for conviction to an unacceptably low level.

When the burden of proof lies with the defendant, the standard is usually lower – by a preponderance of the evidence.<sup>524</sup> Occasionally and especially with regard to the insanity defence, higher standards are required in statutory law<sup>525</sup> and upheld by courts.<sup>526</sup>

## ***Estonia***

In Estonia, criminal cases are tried before a single professional judge for felonies in the second degree (maximum punishment does not exceed five years imprisonment) or before a panel composed of one professional judge and two lay assessors where the charge is one of a first-degree felony. In a collegial court, judgments are by a simple majority and the lone dissenter may file a dissenting opinion if they so choose, according to KrMS § 23.

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doubt is proof that leaves you firmly convinced the defendant is guilty.”<http://federalevidence.com/pdf/JuryInst/8.2010.Final.Criminal.pdf> – link verified 08FEB2014).

<sup>520</sup> 511 U.S. 1 (1994).

<sup>521</sup> 348 U.S. 121 (1954).

<sup>522</sup> Some earlier Supreme Court case law seems to be more hesitant to define reasonable doubt. See, for example, *Miles v. United States*, 103 U. S. 304, 312 (1880): “Attempts to explain the term reasonable doubt do not usually result in making it any clearer to the minds of the jury.”

<sup>523</sup> 498 U.S. 39 (1991).

<sup>524</sup> Note that while the United States evidence law doctrine generally refers to only three different standards of proof, there are actually more in use – “probable cause”, “reasonable suspicion” and arguably (see Herman Johnson Jr., *The Evolving Strong-Basis-in-Evidence Standard*, 32 Berkeley J. Emp. & Lab. L. 347 (2011)) also “strong basis in evidence” are all standards that lie below the preponderance standard and are usually applied to some preliminary stages of the procedure.

<sup>525</sup> 18 U.S.C. § 17 (b) requires that insanity defence be proved by clear and convincing evidence.

<sup>526</sup> Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R. 3d 346.

Note that according to KrMS § 306(4) the dissenting opinion of a member of the panel in the trial court will be added to the case file but not promulgated with the judgment. In practice, dissents at trial level are extremely rare.

The presumption of innocence is enshrined in Article 22 of the Constitution which reads in relevant part as follows.

No one may be deemed guilty of a criminal offence before he or she has been convicted in a court and before the conviction has become final. No one is required to prove his or her innocence in criminal proceedings.

The presumption of innocence is reiterated in KrMS § 7 (3): “all unresolved doubts about the guilt of the suspect or defendant shall be interpreted in favour of the suspect or defendant”. These provisions form the backbone of the regulation regarding the burden and standard of proof in criminal cases.

The Supreme Court has on a number of occasions stated that while the burden of proof is on the prosecution and the defence is entitled to refrain from presenting any evidence of their own, if the defence choose to adopt a more active tactical stance, especially by claiming *alibi* defence, it must also present evidence in support of the alibi or at least offer information that would enable the prosecution to verify the defence version.<sup>527</sup> The court does not explain how this kind of shift in the burden of proof is reconciled or balanced against/with the presumption of innocence.

The standard of proof in Estonia is not clearly articulated in statutory criminal procedure law. According to KrMS § 60 (1), “Circumstance is considered proven if, based on the evidence presented, the judge is convinced of its existence or non-existence,” and KrMS § 61 (2) provides that “The court evaluates all evidence as a whole according to its inner conviction.”

The case law of the Supreme Court’s different chambers is illustrative of the concept of standard of proof being somewhat confusing. The administrative law chamber explains that in tax law, the standard for making a *prima facie* case of fraud is “reasonable doubt,” and that the standard of proof for guilt in criminal cases is significantly higher.<sup>528</sup> The civil law chamber, on the other hand, explains that the standard of proof in misdemeanour cases is

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<sup>527</sup> E. Sup. Ct. No. 3-1-1-82-06, E. Sup. Ct. No. 3-1-1-112-99.

<sup>528</sup> E. Sup.Ct. No. 3-3-1-15-13.

much higher than in civil matters, as evidenced by significant formal restrictions on admissibility of evidence.<sup>529</sup> Apparently they view the standard of proof as a quality or reliability standard of individual pieces of evidence.

The Court has consistently in the opinions by all three chambers emphasized the requirement for the reasoned finding of facts which is a mandatory part of trial court judgments.<sup>530</sup> According to the oft-quoted mantra, the judgment must spell out what facts based on what evidence were found to have been proven, what evidence was rejected or disregarded and for what reason so that the reader is able to follow the formation of the judge's inner conviction about the facts of the case.<sup>531</sup> The criminal law chamber, however, has taken the issue of standard of proof a bit further by attempting to explain what the lower court should do in cases where there is some doubt about the prosecution's guilt hypothesis. In felony cases, the Court has found that "where the doubts about the prosecution's version of events cannot be reconciled by methods available to criminal procedure, the doubts must be interpreted in light favourable to the defendant."<sup>532</sup> In a recent case<sup>533</sup> the Court admonished that it is up to the prosecution to present evidence in support of the defendant's guilt and the court must not on its own initiative take over the role of the prosecution and start looking for inculpatory evidence where the prosecution has failed to prove some element of the charge.<sup>534</sup> This kind of judicial assistance to prosecution is considered a reversible error. Curiously, in misdemeanour cases that are governed by an older Code of Misdemeanour Procedure, the Court has held that the trial court, faced with ambiguities or gaps in the evidence, should take steps to reconcile the ambiguities and fill the gaps by collecting additional evidence.<sup>535</sup>

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<sup>529</sup> E. Sup. Ct. No. 3-2-1-10-09.

<sup>530</sup> Save for the judgments in short format where findings of facts and legal reasoning is omitted and the judgment only consists of introduction and the operative part.

<sup>531</sup> See, for example E. Sup.Ct. No. 3-1-1-75-11, or E. Sup.Ct. No. 3-1-1-21-10.

<sup>532</sup> E. Sup.Ct. No. 3-1-1-73-05.

<sup>533</sup> E. Sup.Ct. No. 3-1-1-89-13. The defendant was charged with illegal possession of a large quantity of a controlled drug. Under Estonian law, large quantity means a quantity that is sufficient to cause intoxication to at least ten people. There was expert opinion in the case as to what substances were found in the powder seized from the defendant, however, prosecution offered no evidence about the quantity needed to intoxicate one person as „the criminal law judges know these quantities anyway“. The judge in her opinion cited a forensic pharmacology textbook in finding what a single dose of the drug was and convicting the defendant.

<sup>534</sup> See also, E. Sup.Ct. No. 3-1-1-91-07, or E. Sup.Ct.No. 3-1-1-67-06. While similar lapses can occur anywhere when prosecution seems weak and the defendant appears guilty, in Estonia they are certainly historical artifacts. Most judges have for a long time worked under the previous version of the CCrP which placed on the court the obligation of independently finding evidence and investigating the charges. The Code of Misdemeanour Procedure in effect in 2013 is still following the same logic.

<sup>535</sup> E. Sup.Ct. No. 3-1-1-125-12.

Even though the Estonian legislator has apparently regarded articulating an objective standard of proof in criminal cases a futile matter, the case law of the Supreme Court has taken a different approach and come up with some broad statements framed in terms of the level of certainty and doubt. Upholding the judgments of lower courts, the Supreme Court explained that not all doubts need to be interpreted to the defendant's advantage. Instead, the *in dubio pro reo*<sup>536</sup> principle in Estonian criminal procedure means that only doubts that are substantiated,<sup>537</sup> realistic and credible<sup>538</sup> should warrant this consideration. Apparently the Court in Estonia is struggling with the same issue that has puzzled courts in the United States and England: how best to define the kind of certainty required for a criminal conviction in objective or interpersonal terms. The result apparently is moving in the same direction as well – not every shadow of a doubt should thwart a conviction and absolute certainty is not required. Curiously, the standard of proof required for arrest warrants and pretrial detention has been articulated much more clearly: the prosecution must present evidence that “create a reasonable suspicion that the person to be arrested has committed a criminal offence, and that there is reason to believe that if not detained, the person will flee or commit more crimes.”<sup>539</sup> We do not see in Estonia the attempts to describe the requisite levels of doubt or certainty by analogies from everyday life. Perhaps it is assumed that professional judges would not benefit from those kinds of explanations anyway. While there is considerable theoretical discussion going on about the standard of proof in both England and the United States, no such discussion has ensued in Estonia, save for a few articles about whether criminal procedure concerns itself with finding the truth or has ceased to pursue this high aspiration after “becoming adversarial” in 2004,<sup>540</sup> and the Commentaries to the KrMS published in 2012.<sup>541</sup>

## Chile

The fact-finder profile in Chile is entirely professional. While lesser offences are decided by a single judge, more serious criminal matters are tried before a panel of three

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<sup>536</sup> For some reason, the Estonian Supreme Court likes to use the Latin phrases.

<sup>537</sup> E. Sup.Ct. No. 3-1-1-82-06.

<sup>538</sup> “eluliselt usutav” - E. Sup.Ct. No. 3-1-1-38-11.

<sup>539</sup> E. Sup.Ct. No. 3-1-1-108-09.

<sup>540</sup> The latest one on this topic is Uno Lõhmus, *Peajoonest kõrvalekalduvaid mõtteid kriminaalmenetluse eesmärgi ja legitiimsuse kohta*, Juridica III, 201 (2013). While the topic of the legitimacy and truth-seeking is certainly connected to the standard of proof issue, that link is not explored in the article.

<sup>541</sup> Note 468.

professional judges of the criminal trial court. There are no lay fact-finders in Chilean courts.

CPPC Article 4 sets forth that no person may be considered guilty of a crime unless convicted by a court judgment that has come to force. This formulation mirrors provisions establishing the presumption of innocence in other jurisdictions and has the same general effect of placing the burden of proof upon the prosecution.

According to CPPC Article 295, the circumstances that are relevant to the adjudication of the criminal matter may be proved by any means produced and incorporated in accordance with the law. Article 297 states that the tribunal is free in their evaluation of evidence but must not contradict logic, the maxims of experience or scientific knowledge. As I have pointed out previously, this freedom in evaluation of evidence is a fairly recent development and a radical shift from the previous regime which closely resembled the Roman-Canon system of legal proofs.

The tribunal must prepare a written judgment where it spells out the weight and significance it accorded to each piece of evidence, including those it chose to disregard. In the latter case, specific reasons for disregarding particular evidence must be written out.

Article 340 contains a clear statement of a standard of proof: “No person may be convicted of a crime unless the tribunal is, *beyond all reasonable doubt convinced* that the crime described in the charge has indeed been committed and that the defendant participated in the commission thereof in a manner punishable by law.” The law also stipulates in the same article that the court can form its conviction only based on the evidence adduced at trial and that nobody can be convicted based on his own statement alone. According to Article 19 of the Court Organization Act (*Codigo Organico de Tribunales*),<sup>542</sup> the criminal trial courts decide cases by a simple majority vote. However, when there is a difference of opinion among the judges, Section 2 of the same article requires that the judge who proposed the disposition most unfavourable for the defendant, must join one of his colleagues’ votes. This peculiar provision is apparently designed to prevent the three-judge panels from deadlocking.

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<sup>542</sup> <http://bcn.cl/1lzzy> (link verified 07SEP2014).



## Germany

The fact-finder profile in Germany may have many different shapes depending on the severity of the charge and the court the case is tried in. Minor offences are dealt with by a judge sitting alone or by a judge sitting in a panel with two lay assessors. Where the defendant is charged with a more severe crime, the case will proceed in a regional court with three professional judges and two lay assessors. When the regional court is hearing an appeal from the local court, the court will be composed of two professional judges and two lay assessors. The appeal is both on issues of law and fact and can take the shape of a retrial (albeit where no procedural errors are averred or new evidence presented, can be a trial on the record of the initial hearing).<sup>543</sup>

Neither the German Constitution (*Grundgesetz*) nor the StPO includes provisions that would pertain to the presumption of innocence or the corresponding allocation of the burden of proof. Nevertheless, being a member state of the Council of Europe and the ECHR, the presumption of innocence must also be a guiding principle of German criminal procedure through Article 6 of the ECHR. Fletcher also references six different lines of reasoning finding support for the presumption of innocence in German law.<sup>544</sup> This also means that the burden of proof regarding the defendant's guilt or innocence cannot primarily rest with the defence (the defence would have nothing to prove). Indeed, commentators point out that while the defendant does not have to prove his innocence, it is the obligation of the court with the help of the prosecutor to ascertain the facts necessary for reaching a judgment.<sup>545</sup> As Roxin explains, German criminal procedure, unlike their civil procedure, adheres to the principle of inquiry (*Untersuchungsgrundsatz*) and seeks to ascertain material truth as opposed to formal truth.<sup>546</sup> This is not just the court's right but also its obligation. The principle of inquiry means that the court must investigate the matter *ex officio* and is not bound by the parties' motions or evidence presented by the parties.<sup>547</sup> A German trial court is nevertheless not unrestricted in its power to conduct inquiry: StPO § 155 sets forth that "The inquiry and judgment shall extend only to acts averred and individuals named in the indictment." This arrangement, however, means that while the defence does not have the burden of proof, the burden is not on the prosecution either – it

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<sup>543</sup> Claus Roxin, *Strafverfahrensrecht: ein Studienbuch*, 22.Aufl. (München: Beck, 1991), 358-359.

<sup>544</sup> Fletcher, note 463, at 881.

<sup>545</sup> Lutz Meyer-Goßner, *Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, 44.Aufl. (München: Beck, 1999), 612, para.3.

<sup>546</sup> The distinction and its further implications have been discussed earlier in the first chapter of this thesis.

<sup>547</sup> Roxin, note 543, at 77.

is the court's responsibility (to be carried out with the help of the prosecutor's office) not only to adjudicate but also to investigate and convince itself that there is no other evidence that could help ascertain relevant facts of the case and should be examined. This court's obligation is expressed in StPO §§ 244(2) and 244(4).

The German take on the standard of proof is found in StPO § 261. According to it, "The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole." As Meyer-Großner and others explain, the "forensic truth" that the criminal process is based on is the judge's full conviction that is gleaned from the trial that has been conducted according to the principles of immediacy and orality.<sup>548</sup> The kind of certainty required for a judgment of guilty is the degree of certainty that "according to the judge's life experience is sufficient to be beyond reasonable doubt".<sup>549</sup> This certainty must be achieved through careful consideration of all relevant circumstances both for and against the defendant, and while purely theoretical doubts in the defendant's guilt should be disregarded, "mathematical certainty" is not required. A German trial judge will have to set forth his reasons in a written judgment. Commentators emphasize that while the judgment must be based on the judge's personal inner conviction formed on the basis of evidence adduced at trial, it must nevertheless conform to the rules of logic and is subject to review according to "objectivated criteria of probative force" by higher courts.<sup>550</sup> The trial judgment is required to include a careful analysis of evidence and it must clearly state the factual conclusions the court has reached. The judgment must reflect that the court has taken into account all evidence in the case, exhaustively assessed the same, and has been aware of all at least somewhat plausible alternative conclusions that the evidence in the case could warrant.<sup>551</sup> As far as the *in dubio pro reo* principle is concerned, it is regarded not as an evidentiary provision but as a rule of decision for the case when the judge actually has doubts about some circumstances of the case (and the existence of these doubts has been spelled out in the judgment – the *in dubio pro reo* does not force the judge to entertain doubts that do not arise in his mind; it is not prescriptive in this sense).<sup>552</sup> In addition to this general principle about what to do in case of doubt, commentaries often include lengthy digests of higher court judgments and scholarly texts on evaluation of

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<sup>548</sup> This does not exclude information that the judge has through his own personal experience or from reading of the case file but information not presented in open court can only be used as long as its use does not violate the principle of trial publicity.

<sup>549</sup> Meyer-Großner, note 545, 905, para. 2. Albeit it sounds like a legal standard, it is the creation of the commentators, not part of the law.

<sup>550</sup> Lemke u.a., note 186, 993, para. 8.

<sup>551</sup> Lemke u.a., note 186, 997, para. 21.

<sup>552</sup> Meyer-Großner, note 545, 913, para. 26.

particular types of evidence (e.g. the factors that should be considered in evaluating the statements of a witness or a defendant).<sup>553</sup>

## *Russia*

In Russia, the trial of crimes punishable by imprisonment for no longer than three years is before a justice of the peace. Other more serious crimes are tried before a federal judge or upon the motion of the defendant, can be tried before a jury of twelve. In certain enumerated offences, the trial court must be composed of three professional judges and some particular offences (most notably, terrorism and crimes against the state) cannot be subject to a jury trial even if requested by the defendant.<sup>554</sup>

According to YPK Art. 354, appeals against judgments of federal judges and federal juries can only be predicated on errors of law; if a judgment by a justice of the peace is appealed, the appeal can encompass issues of fact determination as well.

In Russia, YPK Articles 14 and 17 entail the basic principles of standards and burdens of proof in criminal cases. Article 14 provides that all defendants shall be presumed not guilty until a judgment of conviction has become effective. According to section 2, “[t]he suspect or the accused is not obliged to prove his innocence. The burden of proof of the charges and the refutation of the arguments given in defence of the suspect or the accused, rests on the prosecution.” Section 3 further elaborates on the topic: “3. All doubts about the guilt of the accused, that can not be removed in the manner prescribed by this Code shall be interpreted in favour of the accused. 4. A conviction can not be based on assumptions.”

Complementing this article, YPK Article 17 sets forth the principles of evaluation of evidence: “The judge, jury, and the prosecutor, the investigator, the investigator evaluate the evidence according to their inner conviction based on the totality of the available evidence in a criminal case, guided by the law and conscience. 2. No evidence has a predetermined force.” According to an earlier version of the YPK, investigators, prosecutors and the court had the obligation to take all legally prescribed measures to achieve full and objective clarification of the circumstances of the case, both inculpatory

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<sup>553</sup> For example, see Lemke u.a., note 186, 998-1010.

<sup>554</sup> YPK Art. 30.

and exculpatory factors as well as aggravating and mitigating circumstances. The commentators have argued that this obligation demands that the fact-finders ascertain “objective” truth rather than “formalistic” one and that the defendant’s guilt must be ascertained with “absolute certainty”.<sup>555</sup> This version of the Code has since been abolished and instead, УПК Article 15 now stipulates that the court must guarantee the conditions necessary for the parties to perform their obligations and exercise their rights. One cannot but wonder whether this means that the “absolute certainty” requirement of guilt was also abolished.

As was noted earlier, while the judge in a bench trial has the obligation of writing a reasoned judgment, the jury has no such obligation and only has to answer questions posed to it in the verdict form. Here again, the code makes no mention of the level of certainty or the quantum of evidence necessary for a guilty verdict. According to УПК Article 339, the jury will be called to answer three questions about each count of the indictment: (1) whether the act in question took place; (2) whether the defendant committed the act; and (3) whether the defendant is guilty of the act. In addition, there may be more questions presented to the jury – like, whether there are mitigating circumstances, whether the defendant had the requisite criminal intent, or whether the defendant, if found not guilty of the offence charged, is guilty of a lesser included offence. These questions serve to shed some light on the jury’s reasoning process and as Esakov pointed out, constitute a sort of special verdict (as opposed to a general verdict that would only answer the general question of guilty/not guilty). Esakov also relates that formulation of the verdict form is one of the most difficult tasks for Russian trial judges presiding over jury trial these days – the questions must be phrased in factual and non-lawyerly terms.<sup>556</sup>

Another feature may be instructive about the standard of proof in Russian jury trials - the regulation of jury voting. Although УПК Article 343 stipulates that the jury should strive towards a unanimous verdict, it also provides a relatively easy way out: if no consensus has been reached within three hours from the start of deliberations, the verdict will be by majority vote. A verdict of guilty requires simple majority of the jurors to vote for conviction; if at least six jurors out of the legally mandated twelve vote for an acquittal, the verdict will be “not guilty.” While the code makes no mention of the required standard of proof, an argument could be raised that the standard ultimately turns out to be “by a

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<sup>555</sup> Александр Рыжаков, *Научно-практический комментарий к Уголовно-процессуальному кодексу РСФСР* (Moscow: Prior, 1999), 69. One could also translate the relevant comment as meaning “the participation of the defendant in criminal activity must be an absolute truth.”

<sup>556</sup> See Esakov, note 126.

majority of jurors' votes" which basically means that there are more jurors who think the defendant is guilty than those who believe he is innocent. Taking the jury as a whole, in the mind of this collective fact-finder, the guilt must then be "more likely than not." The time limit set for the unanimity requirement of course becomes fairly odd – the standard of proof seems to drop from absolute certainty (everyone must agree) to "at least 58.3 per cent probable" in just three hours and for no reason other than perhaps to save time on jury deliberations. If the jury delivers a verdict of not guilty, the trial judge must acquit. A guilty verdict does not possess similar binding effect: the trial judge can, if the verdict is obviously ill-founded, set the verdict aside and acquit the defendant notwithstanding the jury's verdict or declare a mistrial and set the case for a retrial.<sup>557</sup>

Appeals can be taken by all parties – not just the defence and prosecution but the victim as well. In regards to fact-finding errors, VPK Article 380 stipulates that reversal will follow in particular where the findings of fact are not supported by admitted evidence,<sup>558</sup> where the judgment contradicts itself, where the court failed to take into account circumstances that could have changed the outcome of the case, or where the court failed to account for why some evidence was taken into consideration and other evidence was disregarded. Pursuant to Article 385(2), acquittals by a jury can be appealed only based on a claim that the prosecution was unlawfully prevented from presenting evidence to the jury or that a procedural error affected the questions put to the jury for deliberations.

### ***Some general observations***

The jurisdictions that we have looked at are all in accord about the general principles: the defendant is presumed innocent and does not have the burden of disproving the charges against him.<sup>559</sup> Similarly also, the burden of proof actually is in some instances shifted to the defence. The rules for shifting the burden of proof, however, offer some variety not only in terms of whether the burden is shifted in a particular situation but also in terms of the extent to which the shift occurs.

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<sup>557</sup> Константин Гуценко, *Уголовный Процесс* (Зерцало: Moscow, 1998), 381. See also Esakov, note 126, 683-687 for an overview of the appellate procedure.

<sup>558</sup> As Estonian Supreme Court practice suggests, this formulation is actually a back door for the higher court to re-evaluate evidence under the guise of deciding questions of law.

<sup>559</sup> Just who this burden lies with, is another matter – prosecution might be the most obvious choice but in Germany, where the court is not regarded as arbiter but rather an enquirer, it also bears at least part of the burden of proof.

Aside from the allocation of burdens, the standard of proof also offers intriguing questions. To start off, there seem to be two kinds of approach to the issue of the standard of proof – just like many scholars have pointed out before. As Fletcher wrote in 1968, there are those jurisdictions that define the requisite standard of proof by a specific form of words, and those that do not (and instead, rely on the Latin maxim *in dubio pro reo* – all doubts to be resolved in favour of the defendant – and stipulate that the fact-finder must have the “inner conviction”).<sup>560</sup>

Surprisingly enough, here the only line that still seems to somewhat hold is the mainstream dichotomy of Anglo-American and Continental camp: while England and the United States at least formally adhere to the standard of proof beyond (a) reasonable doubt in criminal cases, Germany and Russia make no mention of any standard at all besides the *intime conviction* of the fact-finder. And then there is Chile that expressly demands that the court be convinced beyond all reasonable doubt, and Estonia where the code of criminal procedure prescribes no specific objective or interpersonal standard of proof for decisions of guilt or innocence but the Supreme Court has developed a standard that sounds very close to “beyond reasonable doubt” while still also referring to the *in dubio pro reo* maxim.

One would think that there is a strong correlation between articulating a particular standard of proof and the fact-finder profile or the trial design – the argument being that the articulated standard of proof is needed for jurors who are not trained in law and do not have to provide reasons for their verdict.<sup>561</sup> Not so in this world anymore, though: Russia only refers to the free evaluation of evidence principle and makes no special provisions for their jury. Chile with their standard in statutory law has no jury and the Estonian Supreme Court has developed their own standard formulation even though no standard is expressly provided for in procedural law.<sup>562</sup> Germany, where lay assessors are also routinely used at trial level, has no standard of proof articulated in the law; in England where lesser offences are tried by a panel of lay magistrate judges, the same rules of standard of proof apply as would for a jury trial or a trial by a professional judge: the standard is “beyond reasonable doubt”. Thus, there seems to be no correlation between the fact-finder profile (professional

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<sup>560</sup> See, for example, Fletcher, note 544.

<sup>561</sup> This theory is in great detail set out by Damaška in his *Evidence Law Adrift*, note 21.

<sup>562</sup> And then there is Norway where the standard of proof is not articulated even for their appellate trial by jury, however, if the judge or judges find that the acquitted defendant is actually “undoubtedly guilty”, the verdict will be set aside and there will be a new trial by professional judges sitting with lay assessors. See Norwegian CCrP Section 376a.

or amateur or a mixed panel; solo or in a group) and the use of an articulated standard of proof as a reasoning control measure.

If one were to control for the format of the decision by the trial court, we are equally at a loss: German courts must prepare a reasoned judgment that spells out how the judge's inner conviction was formed. The same is required of Russian judges sitting without a jury, Chilean three-judge panels and of Estonian judges, regardless of whether they have lay assessors sitting with them or they are the sole arbiters of fact. While German and Russian law does not purport to articulate any specific standard of proof, Chilean law includes the "magic words" and the Estonian Supreme Court has carved out a standard themselves. The Estonian and Chilean standards remain anomalous and their genesis could deserve a closer look but the overall pattern seems clear: in countries where there is no articulated standard of proof, the requirement of reasoned judgment serves as the reasoning control measure instead of the standard of proof.

## **Discussion**

In an attempt to find a suitable approach to work across the board, we will first look into the assumptions underlying the choices in different jurisdictions – how are standards of proof supposed to work and what controls are in place to ensure that they do. We will then take a look into what is known about the reasoning process of fact-finders and whether and how these assumptions pan out. Upon this study, I will offer my recommendations regarding the use of standard of proof for enhancement of the accuracy of fact-finding.

### ***Mechanics of the standard of proof: a reasoning standard***

The actual functioning of the standard of proof deserves a closer look. Is the standard of proof even an actual standard against which the trial court's reasoning process is compared? Hock Lai Ho argues that it cannot be conceptualized as an effective "external" standard in pursuit of fact-finding accuracy for several reasons.<sup>563</sup> One, that the "required

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<sup>563</sup> Hock Lai Ho, note 94, at 178.

level of confidence” does not say anything about what this confidence is based on; two, that the standard of proof being unquantifiable cannot serve as a decisional threshold; and three, having an external standard like this is morally indefensible (even if it were quantifiable or feasible, the standard of proof cannot be an arbitrary measure used to promote policy goals at the expense of doing injustice in individual cases). If one were to attempt using it as an actual standard in reasoning, the fact-finder’s decision making process would have to be made “visible” to the reviewer and the standard of proof itself would have to be concrete and objective enough (or at least, intersubjective) to enable meaningful review (this does not necessarily dispel all Ho’s criticisms). Standards of proof, where articulated in law, actually are worded in a way that implies that there is an objectively ascertainable level of certainty. Estonia and Chile are the two sampled jurisdictions that seem to have gone down this path by articulating a standard of proof while seeking to make the reasoning process underlying the fact-finding more transparent through reasoned judgments.

Demand in these jurisdictions that the fact-finders provide reasons for their decisions is an attempt to crack the lid off the black box of fact-finding and to make the reasoning process itself subject to review. To what degree this attempt is successful is unclear.<sup>564</sup> After all, a reasoned judgment is not a verbatim transcript of the judge’s thought process but a carefully crafted and considered document unlikely to have been written in complete disregard for its fate in the appellate process. Thus, while gross errors in logic or obvious discrepancies between the trial record and the judgment can be an indicator that the case did not receive the careful consideration it deserved (or that the judge was not able to competently handle it in spite of his efforts), there would still be cases that can escape reversal if the writer is skillful and insincere.<sup>565</sup> While reasoned judgments may not really provide insight into the actual process of forming the decision about facts they answer a different question: can the findings of fact be justified according to the prevailing canons of reasoning?<sup>566</sup> Perhaps one can argue that the required level of certainty can by definition be achieved only as long as the conclusions of fact can be justified by rational reasoning?<sup>567</sup>

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<sup>564</sup> Jenny McEwan argues that in jury trials, judges probably do not even want to know what goes on in the jury room as it would deal a lethal blow to the illusion of propriety. She cites some fairly outrageous instances of jury misconduct. See McEwan, note 150, at 91...92.

<sup>565</sup> See also, Richard Lempert, *Anglo-American and Continental Systems: Marsupials and Mammals of the Law* in John Jackson *et al.*, eds. *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Hart Publishing: Oxford, 2008), 405.

<sup>566</sup> While one could of course insist that the reasons set out in the judgment should be centered around the judgment’s genesis, the theory that providing reasons really is more about demonstrating rational support according to existing canons seems more realistic and closer to what is actually done. Thus, quite possibly the



According to Damaška, historically the articulation of a standard of proof and reasoned judgments had been more or less mutually exclusive. They serve a similar purpose but target different parts of the decision forming process. Damaška proposes a number of reasons for this development – the court bifurcation and fact-finder profile being central among them. Nevertheless, it seems premature to conclude that this historical convention must continue to guide the regulation (and indeed, as evidenced by Chile and Estonia, it does not): while any desire to relieve judges from their writing assignments seems to be mostly motivated by the need to conserve judicial resources,<sup>568</sup> calls to make juries more accountable or abolish them as amateur and arbitrary are more frequent and seem to have gained some traction.<sup>569</sup> Stephen Thaman, for example, argues for having reasoned verdicts based on the practice in Spain and Russia where instead of general verdict, juries must deliver a special verdict. In the Spanish case the verdict should not only set forth specifically what facts were found proven but also include a reference to the evidence in record that the jury drew the inference from.<sup>570</sup> Verdict forms for special verdicts like this can be developed by the trial judge specifically for each case or can be more generic as in the Russian case. In addition to elucidating the reasoning behind fact-finding, verdict forms like this can also help structure the fact-finders' deliberation process to ensure that all legally relevant aspects of the charge are covered in deliberations. As Damaška explains, in mixed panels, the presiding professional judge is a “towering figure”<sup>571</sup> who incidentally also leads the deliberations. Although procedural law may provide a list of questions to be decided by the court – essentially a generic verdict form,<sup>572</sup> the trial judge chairs the deliberations and ensures that legally important steps are not skipped. The professional judge is ultimately also responsible for writing the judgment even in the unlikely event of being outvoted by the lay members.<sup>573</sup>

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real shaping factors are much more emotional and perhaps even inarticulable. Or, perhaps outright forbidden if the lone judge has been exposed to evidence he later has ruled inadmissible. Damaška, note 21, at 43.

<sup>567</sup> Apparently, the issue is far from moot – a jury verdict in *R. v. Young*, 2 Cr App R 379 (1995), was quashed after it turned out that some jurors had consulted a Ouija board to form their decision.

<sup>568</sup> Nobody should dismiss this goal off the bat – overloaded judiciary means delay and/or sloppy work, both of which are capable of destroying public confidence in the court system.

<sup>569</sup> Damaška himself regards this as undesirable, however – Damaška, note 21, at 44.

<sup>570</sup> See Thaman, note 120. Apparently the sometimes heard lamentation that jurors are incompetent is not only true but even if jurors are not able to write like judges – and the collective decision making process certainly makes drafting a single text amenable to everyone more difficult – this can be overcome. In Spain, for example, the jurors can summon the help of the clerk of court who will assist them in formulating answers to the questions posed in the verdict form. See also Richard Lippke, *The Case for Reasoned Criminal Trial Verdicts*, 22 Can. J. L. & Jurisprudence 313 (2009).

<sup>571</sup> This is an apt figurative description of the judge's role in mixed panels by Damaška – see note 11, at 539.

<sup>572</sup> Like the one in KrMS § 306 .

<sup>573</sup> Quite possibly it is precisely his influence that keeps the occurrences of outvoting rare and may actually mean that while nominally equal members of the tribunal, the lay judges are actually relegated to the role of advisers to the decision maker.

### *The mechanics of the standard of proof: exhortation*

Arguments have been raised that the reasoning process in fact-finding is by its very nature not amenable to a rational itemized account and the increase or decrease of the level of confidence is an aggregate not attributable to specific pieces of evidence. This argument speaks against insisting that the reasoning process behind fact-finding be set out in transcript-like manner where every piece of evidence is analyzed and every fact explained. If so, we need to look at the standard of proof from quite a different perspective.

Ho and Thompson are right – “beyond reasonable doubt” by itself does not correspond to any numeric probability figure, even if one were to conduct fact-finding by assigning mathematic probability to the facts the charge is based on and calculating the total probability on the basis of the probability of the component facts.<sup>574</sup> Moreover, such strictly probabilistic approach to fact-finding still appears to be a theoretical concept rather than something actually practiced in courts anywhere in the world. So when expressions like “beyond reasonable doubt” are used to express the standard of proof, there is really no exact scientific method to determine whether in fact such certainty of decision was achieved or not, and there is even no consensus as to what numeric probability figure would correspond to which standard.<sup>575</sup>

As a reasoning control, a standard of proof is often included in the instructions to the jury. The judge instructs the jury that they should not convict unless they are convinced of the defendant’s guilt beyond reasonable doubt (or whatever the standard happens to be). The jury, so we hope, will heed the judge’s instructions and acquit the defendant unless the prosecution’s case is so solid that no reasonable doubt remains about it in the jurors’ minds. Here the standard of proof serves as an exhortation, a call for the jury not to convict unless they have the proper level of confidence about their decision. The decision making process itself, however, remains a black box. Whether or what kinds of doubts the jurors

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<sup>574</sup> Thompson, note 488, 731.

<sup>575</sup> Ho, note 94, at 181. Judge Weinstein places his preference at 95 per cent - Jack Weinstein, *Comment on the meaning of Beyond a Reasonable Doubt*, 5 Law Prob. & Risk 167, 169 (2006). C.M.A. McCauliff’s 1982 study that involved a survey of 171 federal judges had the judges set the probability threshold at 89 per cent with 63 per cent of the surveyed judges responding with a threshold of 90 per cent or higher. See C.M.A. McCauliff, *Burdens of Proof. Degrees of Belief Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand. L. Rev. 1293 (1982). For an even earlier study, see also Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof. A View from the Bench, the Jury and the Classroom*, 5 Law & Soc’y Rev. 319 (1971).

actually harboured or what went into their calculus of guilt or innocence is left to their own conscience (unless the jury returns a special verdict). Usually the appeals process after a trial by jury is about whether the jury instructions were proper. The appeals court may also grant a retrial if the judicial exhortation in the jury instructions was improperly done (as in some cases where the higher courts have found that the trial court explained the standard of proof incorrectly) and we have examined a few examples of that already. Claims that the verdict is wrong in that the assessment of evidence was erroneous are much harder to make and a general verdict can be overturned usually only if it is manifestly unsupported by the evidence.<sup>576</sup> The standard of proof (beyond reasonable doubt) is not necessarily the same standard enforced through appellate review. English law, for example, provides that a conviction can be reversed if it is “unsafe”. The approach in the United States is possibly best explained by the circuit court in *U.S. v. Cook*:

In reviewing a challenge to the sufficiency of the evidence supporting a conviction, the Court of Appeals views the evidence in the light most favourable to the government, resolving evidentiary conflicts in favour of the government and accepting all reasonable inferences drawn from the evidence that support the jury's verdict; the Court will reverse only if no reasonable jury could have found the defendant guilty.<sup>577</sup>

Thus, the standard of proof, when used as an exhortation, is a guide to the fact-finders but not a standard against which one could compare the resulting judgment and complain that the standard was not followed. For a trial lawyer, however, it is the latter and not the former that counts.<sup>578</sup>

Ho has taken a similar position. He argues that standard of proof can only be conceptualized as an “internal” standard, and argues that instead of standardizing the level of confidence in the facts found, the standard should focus on the fact-finder’s attitude

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<sup>576</sup> And sometimes not even then – overturning a not guilty verdict and ordering a retrial would amount to double jeopardy in the United States, for example.

<sup>577</sup> *U.S. v. Cook*, 603 F.3d 434 (8th Cir. 2010).

<sup>578</sup> Anderson and Twining argue that it is the appellate review standards and not the stated standards of proof that serve as the operative legal standards. This with two caveats – appellate judges are fully capable of marshaling the case facts so as to give them reason to overturn any fact-determination by the lower court, and the measure of discretion allowed by the appellate standards may not be the same as the measure of discretion actually exercised. Terence Anderson & William Twining, *Analysis of Evidence: How to Do things with Facts based on Wigmore’s Science of Judicial Proof* (NWU press: Evanston, 1998), 366. Jon Newman argues that it is primarily the appellate courts that have relegated the “beyond a reasonable doubt” standard in the United States to the status of a mere incantation and calls for clarifying the instruction to the jury and the applicable standard of review as well as for more vigorous appellate scrutiny to turn the “beyond a reasonable doubt” into an enforceable legal standard. See Jon O. Newman, *Beyond ‘Reasonable Doubt’*, 68 N.Y.U. L. Rev. 979 (1993).

towards the deliberation process.<sup>579</sup> Thus, instead of the level of confidence in the end result, what matters is the level of caution exercised by the fact-finder – and this should be varied in accordance with the severity of the potential consequences (a not necessarily novel idea, as Ho also notes). Because caution is distributed differently in different cases, the attitudes must correspond. The fact-finder’s attitude in criminal matters should be one of “protection” reflecting the value judgment that convicting the innocent is far worse than acquitting the guilty.<sup>580</sup> This “attitude standard” approach seems to be reminiscent of Whitman’s theory that instead of fact-finding accuracy, the articulated standard “beyond reasonable doubt” was a moral comforting device<sup>581</sup> and resonates with Miller Shealy’s calls to include in the instructions phrases that underline the gravity of the task that the fact-finders are about to embark upon.<sup>582</sup>

The use of an articulated standard of proof or even a standard of caution/attitude as an exhortation assumes that such a device would actually work and that a fact-finder, having heard or read the standard of proof statement is somehow influenced by it so that he is more demanding towards the evidence, more rigorous in his analysis and more aware of the level of confidence or doubts he has about a conviction. In fact, since the law knows many different standards of proof,<sup>583</sup> the assumption is that these standards would all evoke a different target level of confidence in the fact-finder. If there is no scientific evidence of such effects, insisting that the defendant’s guilt be proven beyond a reasonable doubt or to any other standard may well be just ceremonial. Whether exhortations work or not, is something we will have to look into from a cognitive science perspective.

There is another assumption implicit in the use of articulated standards of proof as a control measure. The standards of proof describe the required level of confidence the fact-finder must have in their decision. Let us for a moment remember the reason why such standards are articulated in the first place – it is to avoid erroneous convictions. The standard has been raised high in order to make sure that innocent people do not get convicted, at the expense of some guilty probably walking free, authors often add.<sup>584</sup> Insisting that the fact-finder must be very confident that the defendant is guilty seems also

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<sup>579</sup> Ho, note 94, 185.

<sup>580</sup> Id.

<sup>581</sup> See Whitman, note 497.

<sup>582</sup> See Miller W. Shealy Jr., *Reasonable Doubt about ‘reasonable doubt’*, 65 Okla. L. Rev. 225 (2013).

<sup>583</sup> Let us not forget that in addition to the “beyond reasonable doubt” standard there is also “preponderance of the evidence”, “clear and convincing evidence”, and “reasonable suspicion” – and also inner conviction.

<sup>584</sup> An interesting exposé about just how many guilty erroneously freed might still be acceptable, can be found in William Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 333 (1995).

to assume that there is a correlation between this confidence (or attitude, as the case may be) and the accuracy of the decision. This assumption by itself is outright illogical<sup>585</sup> and must entail two more – that the necessary “ingredients” for an accurate decision can be adequately controlled for, and that the fact-finder possesses the skill necessary to make an accurate determination based on the information supplied.

Now we have sifted out three questions that law itself cannot answer but the answers to which would be necessary if we were to design a reasoning control that works. We first need to look at the nature of fact-finding – how do human decision makers naturally go about figuring out what happened in the past based on information they are presented. We will then examine whether cognitive scientists have determined a correlation between confidence and competence. Our third inquiry is into the impact of exhortations. These three factors may well help us understand what the law can reasonably expect from fact-finders and what is just a historical artefact and should be reconsidered in the interests of ensuring more accurate fact-finding.

## **How does fact-finding work?**

In order to design a procedural device that would control the process of fact-finding we would first need to know what exactly it is that we are controlling and how it works. Similarly, in order to assess whether a device already in place is capable of handling its function, we need to be able to articulate the intended outcome. Christoph Engel makes the link clear: whether courts make materially wrong decisions depends on what judges and jury members do. A behaviourally informed perspective is paramount.<sup>586</sup> As Dennis remarks, there is a surprising neglect of fact-finding theory in evidence textbooks and many of the formal rules are based on untested assumptions about how fact-finders approach their task of evaluating evidence.<sup>587</sup> Cognitive psychologists who have researched decision-making in legal settings agree. Dan Simon describes the discourse in legal literature as more or less a battle between two camps: the rationalists who posit that judicial decisions (including but not limited to fact-finding) should proceed as a rational

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<sup>585</sup> And also unjustified – remember the ouija board in *R v. Young*, 2 Cr App R 379 (1995).

<sup>586</sup> Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavioural Perspective on a Conflict Between American And Continental European Law*, 33 Vt. L. Rev. 435, 448 (2009).

<sup>587</sup> Dennis, note 2, 125.

logical inquiry making use of deductions, inductions and analogies;<sup>588</sup> and the Critics who argue that the Rationalist approach is not descriptive of what is actually happening in judicial minds and that the mood swings and intuitions of the judge are more determinative factors than the rules of logic. This latter approach is especially closely associated with legal realist school of thought.<sup>589</sup>

The approach of this work should come as no surprise by now – instead of untested assumptions and historical tradition, we will look at the current research in cognitive science in order to first understand how fact-finding actually works, and then see what the role of the standard of proof can and should be.

### ***Ideal Juror and other ideal models***

Empirical research into adjudicative fact-finding began in earnest with the mock jury experiments of Pennington and Hastie. In 1981 they published an article<sup>590</sup> where they set out to describe jurors' tasks in a trial and evaluate the various attempts that had been made to mathematically model the fact-finding process, given the empirical research that had been undertaken by that time. They called their model the "ideal juror model" – because it represents assumptions and expectations of the law for juror decision making. The authors argue that jurors at least strive to adhere to the ideal as instructed by the judge.<sup>591</sup>

According to this model, the juror's task of reaching a pre-deliberation verdict is divided into seven subtasks. First, the juror is expected to record and encode the trial information – this includes not only the substance of testimony or documents but instructions by the judge and observations by the jurors themselves. The next task is to learn the verdict categories – the juror, once again through the judicial instructions, will be made aware of the legal basis for his judgment. Pennington and Hastie view this in terms of four dimensions: the identity of the defendant, the actions of the defendant, the mental state of the defendant and the attendant circumstances of what happened at the time of the crime. Each of these dimensions may be (and usually in one form or another is) represented in the substantive criminal law applicable to the case at hand. For example, in a murder trial, lack of criminal intent (mental state) would prevent conviction of murder but may nevertheless

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<sup>588</sup> An example of this is Wigmore's Chart Method as described and explained in Anderson & Twining, note 51, at 108-155.

<sup>589</sup> Simon, note 235, at 512.

<sup>590</sup> Nancy Pennington & Reid Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 Psychological Bull. 246 (1981).

<sup>591</sup> *Id.*, at 250.

not constitute an obstacle to conviction of a lesser included offence such as manslaughter or negligent homicide. This even when all other dimensions have been established. Once the legal framework is in place, the juror will proceed to select from all available trial information the information that is legally admissible as evidence. An ideal juror would discard information that the judge has ruled inadmissible or that is no evidence at all (such as the behaviour of trial attorneys or the opening statement). Subtasks 4, 5 and 6 are the intertwined inferential operations of creating a sequence of events, evaluation of evidence for its credibility and evaluation for implications – whether the created and credibility-evaluated event supports a finding of guilty in some of its dimensions or would rather support the opposite conclusion. The seventh, final subtask is the one of hypothesis-testing.<sup>592</sup> The ideal juror would take the hypothesis of not guilty as the default (this because of the presumption of innocence), and methodically compare or eliminate other competing hypotheses using the standard of proof as a guide to either accept or reject the hypothesis of guilt. Upon completion of this process, the juror would reach his predeliberation judgment according to the categories learned during subtask 2.

Although this model is created with lay jurors in mind, the principal scheme of a judge's fact-finding process is not very different. The main difference is that whereas jurors start learning about judgment categories only at the close of the evidence from the judge,<sup>593</sup> the judge has the benefit of drawing on his legal training even before the start of the trial. The other difference is that unless the case is heard by a panel of judges, what would be only a preliminary, predeliberation judgment for jurors, will be the final judgment for a judge (save for the possibility that he changes his mind at the opinion writing stage when he realizes that his original fact determination cannot be justified according to the prevailing canons).

The model by Pennington and Hastie is logically organized and the steps it entails represent the various mental operations that logically must be undertaken in order to reach the verdict. As the authors themselves conceded back then, an actual “perfect juror” is a rarity.<sup>594</sup> Real jurors are less than perfect encoders, have the potential to misunderstand judge's instructions, are quite possibly incapable of filtering out the information about the

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<sup>592</sup> Id., at 255.

<sup>593</sup> This may not always be the case – many trial advocacy texts actually recommend that the attorneys start educating jurors about the applicable law within permissible limits already at voir dire or in their opening statement at the latest. See, for example, Thomas Mauet, *Trial Techniques*, 5th ed. (Aspen: New York, 2000), 42.

<sup>594</sup> Pennington & Hastie, note 590, at 252.

case that they have received but are not supposed to consider, and may be less methodical than necessary to conduct a full analysis of all facts.

There have been several attempts to describe the fact-finding process by algebraic formulae, however, these attempts have not gained traction in legislative circles or the courts. Pennington and Hastie's article contains a good overview of the different algebraic models. The one characteristic that unites all of the models is that the mathematical models do not account for the idiosyncrasies of actual fact-finders and are thus empirically not descriptive.<sup>595</sup> Some models, while purportedly descriptive, suffer from oversimplification. Such is, for example, apparently the information integration model that in its form as reviewed by Pennington and Hastie,<sup>596</sup> does not take into account the effect of the order in which evidence is presented – and the order of presentation undisputedly has effects. Then some stop half-way through the process – while they purport to describe how jurors decide the probability of the guilt hypothesis, they do not deal with the issue of establishing the threshold for a guilty verdict – incidentally, the part that is most relevant to this work. An example of the latter is the sequential weighting model that takes into consideration the order in which evidence is presented but does not explain the role of the standard of proof in reaching the final verdict. Pennington and Hastie also criticize the mathematical models for the assumption that guilt or innocence is a unidimensional parameter. They argue that, in fact, there are at least four different dimensions in determining the guilt or innocence of the defendant: the perpetrator's identity, mental state, actions and attendant circumstances.<sup>597</sup> All of the four factual dimensions are represented implicitly or explicitly in the elements of the criminal offences and must be established in order to reach a verdict of guilty.

Possibly the most successful and certainly the most well-known of the mathematical models is Bayes' theorem. It purports to describe how fact-finders get from "prior probability" – the probability that a particular piece of evidence would be found if the accused were guilty – to "posterior probability" – the probability of the accused being guilty given the new piece of evidence that was just added. This calculation can be repeated as many times as is necessary and at the end it purports to yield a figure indicating the probability of the guilt of the defendant, given all the evidence.<sup>598</sup> Bayes' theorem has also been used to explain probability analysis by cognitive psychologists, however,

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<sup>595</sup> Id., at 255...57.

<sup>596</sup> Id., at 262.

<sup>597</sup> Id., at 254.

<sup>598</sup> Roberts & Zuckerman, note 3, at 154.



experiments provided ample evidence that the theorem did not describe human judgment accurately (the subjects failed to adequately revise their opinions in light of the new evidence – a phenomenon that was labelled conservatism in the late 1960s).<sup>599</sup>

With the emergence of research into heuristics, biases and the discovery of base-rate neglect in 1970s, the research focus in cognitive psychology shifted away from Bayes' theorem. Nevertheless, legal psychology was not disturbed by this shift in the mainstream and arguments in favour of organizing the fact-finding process or at least the discussion about it around Bayes' theorem went on well into the late 1990s<sup>600</sup> and still occur today.

What makes Bayes' theorem attractive to lawyers is that the origin of the assessment of probability of individual events or facts is the subjective belief of the fact-finder rather than some objective empirical data. Even though this makes Bayes' theorem more appealing both in describing fact-finding in courts and as a guide for fact-finders to conduct their inquiry, this also provides ammunition for the critics saying that the theorem is nothing but a scientific-sounding smokescreen to disguise what really goes on.<sup>601</sup> The critics do not stop there and have objections to the application of the theorem every step of the way. For example, setting the initial "prior probability" figure is argued to be just a guess as there is no known base value; calculations themselves have been found so numerous as to surpass human capabilities, and even if the calculations had been grouped together<sup>602</sup> and properly performed, the resultant figure has no counterpart in the law – the standard of proof does not come with a probability figure attached to it<sup>603</sup> and quite possibly one cannot be assigned.<sup>604</sup> As Roberts and Zuckerman summarize, by now, the "Bayesians" have conceded that the theorem is not descriptive of actual fact-finding process and the

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<sup>599</sup> Peter Ayton, *Judgment and decision making*, para 5.2, in Nick Braisby & Angus Gellatly, eds., *Cognitive Psychology* (OUP: Oxford, 2005), 402.

<sup>600</sup> See, for example, Richard D. Friedman, *Towards a (Bayesian) Convergence?*, 1 E&P 348 (1997).

<sup>601</sup> Or, as Allen argued in 1991, the thinking about human affairs (such as history) is fundamentally different from the thinking about, say, physics. Just like thinking about physics like a historian would render suboptimal results, so is forcing fact-finders to sort out human affairs, essentially history, according to mind models used in physics counterproductive. Ronald J. Allen, *The Nature of Juridical Proof*, 13 Cardozo L. Rev. 373 (1991).

<sup>602</sup> This 'batching' is what Friedman suggests in response to the skeptics' argument in Richard Friedman, *Assessing Evidence*, 94 Mich. L. Rev. 1810 (1996) – similar scenarios should be grouped together to reduce the number of necessary calculations to a manageable number.

<sup>603</sup> Calls to remedy this situation and thus help resurrect discussions about the applicability of Bayes' theorem have been made as recently as in 2005. See Harry D. Saunders, *Quantifying Reasonable Doubt: A Proposed Solution to an Equal Protection Problem* (December 7, 2005), bepress Legal Series. Working Paper 881 (<http://law.bepress.com/expresso/eps/881> - link verified 28JAN2014).

<sup>604</sup> Not because one could not make a sensible probability scale that jurors would understand but because it might be difficult to agree on the target figure.

“Bayesian skeptics” agree that the theorem has at least educational value.<sup>605</sup> Van Koppen agrees and puts it more bluntly:

In fact, hypothesis testing is so far off what actually happens in court that it is not only unsuccessful as a descriptive model, but also too alien to the legal tradition to be of use as a prescriptive model either.<sup>606</sup>

### ***The Story Model and dual processing***

Empirical studies indicate that fact-finding process is much better described through a different model that Pennington and Hastie developed through empirical research in the 1980s and outlined in their article in 1991 - the Story Model.<sup>607</sup> The model was inspired by the work of two political scientists, Bennett and Feldman,<sup>608</sup> who in 1981 pointed to the tendency of trial lawyers to start their opening statements by saying, “Our story is...” While often easily dismissed as just a convenient form of words, Bennett and Feldman argued that the expression actually reflected human thought and decision making process on a much deeper level.<sup>609</sup> Pennington and Hastie anchor their story model to the general psychological framework called *explanation based decision making*.<sup>610</sup> A large body of research by social scientists and psychologists indicates that people intuitively use mental structures - “schemas” or “scripts” in order to explain how the world around them works.<sup>611</sup> These schemas are based on the person’s own life experience and the cultural context and entail assumptions about what typically happens when certain facts are present, or what typically follows when certain events have taken place. The scripts contain notions

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<sup>605</sup> Roberts & Zuckerman, note 3, 157.

<sup>606</sup> Peter J. Van Koppen, *Judges’ Decision-making* in Ray Bull & David Carson, *Handbook of Psychology in Legal Contexts* (John Wiley & Sons: Chichester, 1995), 592.

<sup>607</sup> Nancy Pennington & Reid Hastie, *A Cognitive Theory of Jury Decision-Making: the Story Model*, 13 Cardozo L. Rev. 519 (1991).

<sup>608</sup> W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (Rutgers U. press, 1981).

<sup>609</sup> Neil Vidmar & Valerie P. Hans, *American Juries. The Verdict* (Prometheus Books: Amherst. NY, 2007), 132.

<sup>610</sup> Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory and Structure on Judgment*, 14 J. Exp. Psych. [Learn Mem Cogn] 521 (1988).

<sup>611</sup> For Pennington and Hastie’s own research specifically addressing decision making by jurors in trial setting, see Pennington & Hastie, note 61. Their subjects were shown a videotaped trial and later interviewed about their verdict and what prompted them to reach that verdict. Interviews indicated that subjects organized their account not based on the structure of the legal norm or based on the order of evidence presentation at trial but around the stories they had constructed based on the evidence they had heard. The stories were consistent with their choice of verdict and provided an account of what supposedly happened complete with actors, activities, causal links, actors’ motives and goals. About half of the story content was directly derived from the trial evidence while the other half was inferred from evidence based on the jurors’ own experience to make a complete and coherent story.

of social and physical causation and assumptions about what is usual or unusual, normal or abnormal. Should the factual predicate be ambiguous or incomplete, people fill the gaps relying on what they know about the world around them. The goal of these mental operations is to construct narrative explanations about events. Ambiguous or disputed facts are then interpreted depending on the script that is superimposed on them and thus the same facts could yield different narratives, although some may be more plausible than others.<sup>612</sup>

Thus, decisions about facts are based on three types of information: the information about the case at hand learned at the trial; the fact-finder's world knowledge, and the knowledge about story structure. Based on these three inputs, the fact-finder constructs narratives (one or many) that would explain the evidence in the case. One of these narratives will be ultimately chosen based on four factors: coverage, coherence, uniqueness, and goodness-of-fit.<sup>613</sup> Coverage means that the story encompasses the evidence presented. The more evidence remains unexplained, the less likely the story. Coherence means that the story is internally consistent, plausible (i.e. corresponds to the fact-finder's knowledge of how the world typically works) and has all the elements of a full "episode" – initiating events, physical states, psychological states, goals, actions and consequences.<sup>614</sup> The three components make up the story's coherence. If there is more than one coherent story, the stories lack uniqueness and that means decreased confidence in picking one over the others.

According to the Story Model, it is the story that the juror constructs that determines their predeliberation verdict – upon learning the verdict categories, the fact-finder will perform a classification task of finding the best verdict category to fit their story. This is the stage at which according to the story model standard of proof is applied: the goodness-of-fit analysis. If the fact-finder concludes that none of the stories reaches the threshold, there must be a default judgment available. In criminal cases this is supplied by the presumption of innocence.

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<sup>612</sup> Vidmar & Hans, note 609, at 133.

<sup>613</sup> Pennington & Hastie, note 595, at 521.

<sup>614</sup> These closely track the elements of a crime: identity, mental states, circumstances and actions. Both crimes and story episodes are culturally determined generic human action sequences. Pennington & Hastie, note 607 at 531.

The story model of decision making has become the orthodox model for jury decision making<sup>615</sup> but just like its creators wrote, it is not complete.<sup>616</sup> While its basic point about information organization into story structure is supported by empirical studies,<sup>617</sup> other scholars point out that there are still aspects of fact-finding decision making that the Story Model does not address, at least not explicitly. The most important question not explicitly addressed by the story model is probably this: where do the stories come from?<sup>618</sup> The theory that helps explaining the initiating mechanism of story creation is that of dual processing – and it is fairly universally accepted.<sup>619</sup>

The dual processing theory posits that humans have two separate systems for information processing and decision making: the automatic system and the controlled or deliberate system. Glöckner and Betsch<sup>620</sup> explain that the automatic system tackles complex decision making tasks quickly and effortlessly, processes information in parallel and the individual himself is not even aware of the decision making process – the result just appears naturally (or intuitively). This automatic system is responsible for most everyday decisions and works based on what the individual has learned and experienced in the past, using different “mental shortcuts” rather than careful, consciously controlled and directed step-by-step logical analysis. This heuristic-based rather than analysis based quick thinking can demonstrably produce false conclusions.<sup>621</sup> Today researchers agree that intuitive thinking may be derived from two different sources. Heuristics and biases may have a detrimental effect on solving issues of drawing inference based on limited information but intuitive decision making can also be the product of true expertise where experience has honed the individual’s ability to recognize and weigh different options quickly and unconsciously. In

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<sup>615</sup>Skalsky, note 259, at 413.

<sup>616</sup> Pennington & Hastie, note 607, at 557.

<sup>617</sup> John Blume *et al.*, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defence*, 44 Am. Crim. L. Rev. 1069, 1088 (2007).

<sup>618</sup> In addition, Simon posits that there are also issues that are not amenable to story creation as they do not involve all necessary story elements such as human intentionality but rather concern only situations or states of affairs. The story model may also be inapplicable in situations that do not involve a fact-finding situation based on evidence. Simon, note 235, at 564.

<sup>619</sup> See, for example Walter Schneider & Richard Schiffrin, *Controlled and Automatic Human Information Processing: I. Detection, Search and Attention*, 84 Psych. Rev. 127 (1977) for the general theory and a description of a classical dual processing model. Also see Dan Kahneman & Shane Frederick, *Representativeness revisited: attribute substitution in intuitive judgment*. In T. Gilovich, D. Griffin & D. Kahneman (Eds.), *Heuristics and biases: The psychology of intuitive judgment* (New York: Cambridge University Press, 2002), 49-81 for overview of dual-processing theories. For a more accessible format, see Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Books: London, 2011).

<sup>620</sup> Andreas Glöckner & Tilmann Betsch, *Modeling option and strategy choices with connectionist networks: Towards an integrative model of automatic and deliberate decision making*, 3 Judgment & Decision Making 215 (2008).

<sup>621</sup> See Kahneman, note 619.

the latter case, problem solving will greatly benefit from trained intuition.<sup>622</sup> The deliberate system, on the other hand, is under the conscious control of the individual, processes information serially and uses effortful logical operations. The deliberate system is thus amenable to various control mechanisms such as checklists, flow charts, limiting instructions etc.

There are different theories about how the two systems interact or when and how one would switch between the two systems. The latest theories are connectivist: the two systems are in bidirectional interaction and work in concert to achieve coherence in cognition, i.e. a coherent story. Glöckner and Betsch explain that the automatic system is the primary system of information processing that starts organizing information as soon as it comes in and automatically generates narrative explanations. Where lack of information is detected, the secondary system (deliberate system) springs into action constructing inferences and selecting new strategies to search for more information.<sup>623</sup> Information integration as well as the application of the selection rule are both operations of the automatic system.

The knowledge of how the human mind processes information has several important implications for the trial procedure. For starters, story construction does not start at the close of the evidence but drives the front end of the information processing chain – the encoding phase – from the very beginning of the trial<sup>624</sup> even though the fact-finder may not be aware of this happening (this is a function of the automatic system).<sup>625</sup> This means that a fact-finder at trial is not like a tape-recorder that passively takes in all information presented and then ‘plays it back’ at the end to inform the decision making process, but is actively constructing knowledge all the time.<sup>626</sup> Wyer and Srull report that such goal-directed selective encoding not only influences how information is interpreted (i.e. what any given piece of evidence means) but also which information is encoded (i.e. what the juror will remember and include in their story construction and what will be

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<sup>622</sup> See, generally Daniel Kahneman & Gary Klein, *Conditions for Intuitive Expertise: A Failure to Disagree*, 64 Am. Psychol. 515 (2009).

<sup>623</sup> See Glöckner & Betsch, note 620.

<sup>624</sup> Jacqueline Horan, *Juries in the 21st Century* (the Federation Press: Sydney, 2012), 78.

<sup>625</sup> Most jurors start leaning towards a verdict choice during the presentation of prosecution’s evidence. Nicole Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. Empirical L. Stud. 513, 521 (2009).

<sup>626</sup> Shari Seidman Diamond *et al.*, *Juror Questions During trial: A Window into Juror Thinking*, 59 Vand. L. Rev. 1925, 1934 (2006).

disregarded).<sup>627</sup> An example of this effect is also discussed in Pennington and Hastie's 1986 study where subjects remembered the evidence that supported the story that corresponded to their verdict choice better than the facts that were pointing in the opposite direction.<sup>628</sup> Dan Simon in his seminal article<sup>629</sup> explains this as a function of the coherence maximization process and demonstrates that the process is bidirectional: incoming new information initially helps to form the story but then the story also starts to influence the encoding and perception of new information. In order to achieve cognitive coherence,<sup>630</sup> information that is consistent with the developed narrative receives amplified attention and is often overvalued; inconsistent information, on the other hand, tends to be heavily discounted, reinterpreted and undervalued. These bidirectional interactions are called coherence shifts and they have been widely observed.<sup>631</sup> Wyer and Srull also point out that encoding of information occurs at the time information is first received and that once information has been encoded, "concepts that are activated subsequently have little influence on either the interpretation of the already encoded information or the recall of it".<sup>632</sup> The crucial stage of encoding and the forces that influence it also explain why the meaning of any particular piece of evidence is dependent on other evidence in the case and why for example judicial limiting instructions have only a limited effect.

This calls to question the wisdom of giving jury instructions at the end of the trial and seems to set the legally trained fact-finder apart from their untrained counterpart: they possess the knowledge of the substantive criminal law and the elements of the charge (in effect the verdict categories) before hearing the evidence. The idea is not novel<sup>633</sup> and has in some jurisdictions been implemented with generally positive effects.<sup>634</sup> Simon

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<sup>627</sup> Robert S. Wyer Jr. & Thomas K. Srull. *Memory and Cognition in its Social Context* (Lawrence Erlbaum Associates: Hillsdale, NJ, 1989), 140. This phenomenon is of course coupled with other non-goal directed selective encoding that may happen due to priming effects or the subject's mood at the time, etc. Pennington and Hastie note that vivid, personally observed events have a more forceful effect on the mind and on social attitudes than tightly constructed logical arguments or carefully organized instructional lectures. – Nancy Pennington & Reid Hastie, *The O.J. Simpson Stories: Behavioural Scientists' Reflections on The People of the State of California v. Orenthal James Simpson*, 67 U. Colo. L. Rev. 957 (1996).

<sup>628</sup> Pennington & Hastie, note 61, at 251.

<sup>629</sup> Simon, note 235, at 512.

<sup>630</sup> Simon defines coherence as a state where the decision maker feels that one decision option is supported by strong considerations and the alternatives have only weak support – Simon, note 629, at 512.

<sup>631</sup> Simon, note 629, at 517.

<sup>632</sup> Wyer & Srull, note 627, 143.

<sup>633</sup> Prettyman suggested giving jury instructions before the start of the trial already in 1960 claiming that it would greatly enhance juror comprehension of the law, trial process and evidence – E. Barrett Prettyman. *Jury Instructions- First or Last?*, 46 ABA J 1066 (1960).

<sup>634</sup> See report on research project on real civil juries in Wisconsin - Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 L. & Human Behav. 409 (1989). The researchers reported better understanding of the evidence, the law and the application of the law to the facts. As Simon notes, the law in many jurisdictions, including the United States federal system, does not preclude pre-instructions and leaves this to the discretion of the trial judge. Simon, note 629, at 558.

summarizes arguments for and against pre-instructing juries and concludes that the positive effects outweigh the possible counterarguments.<sup>635</sup>

Another conclusion that follows from the exposé of empirical research into the decision making process is that presentation and substance of evidence can hardly be viewed separately. As Michael Pardo noted,<sup>636</sup> evidence law and scholarship tends to rely on the assumption that fact-finders evaluate evidence in an atomistic fashion, however, the message of the empirical research is that evidence evaluation proceeds holistically – the value of any particular piece of evidence is determined to a great degree by the interpretation given to the other evidence in the case.<sup>637</sup> This is something that trial advocacy scholars have taken notice of and smart trial lawyers make use of.<sup>638</sup> Especially instructive on this point is the 1988 study by Pennington and Hastie that demonstrated the significant effects of good storytelling by attorneys. There different groups of mock jurors were exposed to the same evidence, however, the researchers varied the order of evidence presentation for both the defence and the prosecution. It turned out that where the prosecution evidence was presented in an order organized by the story logic as compared to the witness order, conviction rate jumped from 63 to 78 per cent (in both cases the defence evidence was in story order). The difference was even more drastic when the defence evidence was presented in the story order and prosecution evidence in witness order – the conviction rate was only 31 per cent. Also noteworthy is that the jurors were more confident about their decision when evidence was presented in story order thus facilitating comprehension.<sup>639</sup> This also seems to be consistent with the coherence shifts theory proposed by Simon – confidence levels are higher when fact-finder is able to construct stories that are clear opposites.

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<sup>635</sup> Simon, note 629, at 558.

<sup>636</sup> Michael S. Pardo, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 Nw. U. L. Rev. 399, 405 (2000). His view stands out as more empirically enlightened than those of most legal scholars writing on evidence and still clinging to the unrealistic rational-reasoning models.

<sup>637</sup> The United States Supreme Court in *U.S. v. Old Chief*, 519 US 172 (1997), is often hailed as a welcome break from the unrealistic assumptions and expectations the law harbours about human cognition and fact-finding. There the court considered the balancing of prejudicial impact against the probative value of the evidence and found that an item in evidence cannot be assessed as an island separate from the other evidence in the case or the story that the proponent is trying to tell by introducing the evidence. See also Richard Sherwin, *The Narrative Construction of Legal Reality*, 6 J. Ass'n Legal Writing Directors 88 (2009) for a good example and a discussion of story construction.

<sup>638</sup> See, for example, Kenney F. Hegland, *Trial and Practice Skills in a Nutshell* (West Publishing Co.: St Paul, MN, 1978), 101; or Peter Murray, *Basic Trial Advocacy* (Maine Law Book Company, 1995), 53; or Mauet, note 593, at 13...26.

<sup>639</sup> Pennington & Hastie, note 610, at 529. One might assume that confidence was even higher when the evidence for the winning party was presented in story order and the other evidence was in witness order. Not so – confidence ratings peaked when both sides presented their evidence in story order; researchers surmised that this gave jurors the extra confidence that they had understood all evidence in the case.

## *The role of emotions in decision making*

Faithful to the often touted goal of keeping emotions out of the realm of law and judging, works on fact-finding decision making tend to be silent about the role of emotions<sup>640</sup> or values in the fact-finding (story-making) calculus.<sup>641</sup> One of the authors of the Story model, Reid Hastie, concedes that the role of emotions has been consistently neglected and explains that emotions can play an important part in the phase of story pattern selection.<sup>642</sup> Empirical studies indicate that emotions like sympathy or anger will not only influence decisions about punishment (and one may argue that there it may even be appropriate as a measure of community reaction to the crime) but about fact determination as well.<sup>643</sup> Based on reviewing the relevant literature, Feigenson and Park distinguish five paths by which emotions can come to bear on fact-finding decisions.

First, emotions can influence information processing strategy. Some emotions are more conducive to a top-down approach and may lead to resorting to stereotypical reasoning (e.g. anger). Others have in their cognitive structure uncertainty that leads to more cautious bottom-up information processing. Thus the effects on the strategy are not based on the general valence of the emotion (positive or negative) but on the specific characteristics of the particular emotion.<sup>644</sup>

There is also the mood-congruency effect that tends to affect information encoding. For example, jurors experiencing some negative emotion tend to be more attuned to negative information both in terms of perception and memory. For example, emotions evoked by

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<sup>640</sup> Emotion includes feelings, cognitions and actions or inclinations to act and its function is to signal the individual about relevant changes in their environment. Emotions include an implicit appraisal of the significance of the change for the person, and are supposed to help the person choose and coordinate between competing goals and values. Emotions have distinct appraisal structures or core relational themes (e.g. the cognitive structure of anger is disapproving of someone else's blameworthy action and being displeased about the related event). Moods are like emotions but less intense, more diffuse, relatively enduring and often not directly related to any particular cause.

<sup>641</sup> The courts and the legislators, at least in the United States, demonstrate much more acute awareness of the potential that emotions have. A prime example is FRE 403 which allows the trial judge to exclude otherwise relevant evidence if it will likely cause undue prejudicial effect. In the same vein, the courts have excluded evidence that may be relevant but is liable to evoke emotions capable of impeding rational reasoning about the case.

<sup>642</sup> Reid Hastie, *Emotions in Jurors' Decisions*, 66 Brook. L. Rev. 991, 1007 (2000).

<sup>643</sup> Neil Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 Law & Hum. Behav. 143 (2006).

<sup>644</sup> *Id.*, at 147.



gory images of the crime scene tend to sway the fact-finders towards better remembering negative information about the defendant.<sup>645</sup>

These two mechanisms work side-by-side and, depending on the particular person, can mitigate or compound each other. There is also evidence that the initial, perhaps pre- (sub) conscious decision “which way the verdict should go” is made intuitively before the rationally calculating system kicks in and starts generating the justification for the initial decision by building stories around it.<sup>646</sup> Knowing that intuitive decisions are made first, fast and easy may also explain where the initial impetus for selection of the schema or story pattern is derived from.

Emotions (whether they be elicited by the target of the judgment or completely unrelated) may also become the input that indirectly (as an appraisal tendency) or directly inform the ultimate decision. For example, angry people tend to blame more easily. Thus, information which might otherwise be amenable to interpretations either way will be interpreted by the angry people as part of the guilty-story.

## ***Judges***

Since most research cited thus far explicitly deals with jurors or mock jurors, one cannot help but wonder: what about professional fact-finders – judges? Is the research equally applicable to judicial fact-finding or is there some truth to the assumed “judicial exceptionalism?”

We already identified one difference that may have an impact on fact-finding by judges as compared to that by juries – judges have prior knowledge of the applicable law. This may allow judges to pay more attention during trials to information that is relevant according to the legal rules the judge will later have to apply in the case. As discussed earlier, such

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<sup>645</sup> Id., at 148. Evidence of this effect is abundant and several studies are cited by Feigenson & Park. For a study dealing with gory pictures of a corpse specifically, see Kevin S. Douglas *et al.*, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 L & Human Behav 485 (1997).

<sup>646</sup> See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 Psych. Rev. 814 (2001). See also, Chris Guthrie *et al.*, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1 (2007).

background information can have an effect on what information is encoded and how it is perceived.

One may also wonder whether judges' legal training may cause them to rely more on their deliberate system rather than settling with automatic gut reactions. After all, if one is aware of one's cognitive tendencies, their impact may be mitigated; also, being repeatedly exposed to the accounts of criminal behaviour might moderate the affect it creates. By the same token, however, one may also hypothesize that judges may be liable to convict more easily as the stories of criminal behaviour intersect with their lives more frequently (on a daily basis!) and may thus appear more plausible than innocent explanations.

Studies of judicial fact-finding as opposed to juror fact-finding are scant but do nevertheless paint a picture demonstrating that differences are insignificant and judges engage in similar patterns of fact-finding as do jurors. Linda L. Berger explains that one should distinguish between two types of cognitive tasks judges perform: passing judgment (such as predicting whether one poses a flight risk or assessing credibility of testimony – fact-finding, that is) and problem solving (such as selecting the relevant law, interpreting the law and sometimes making the law).<sup>647</sup> The distinction is important in the context of intuitive thinking. Judges, just like the rest of the population, use both the automatic system and the deliberate system and for them, too, the automatic system is the primary information processing tool that produces quick intuitive judgments and processes information non-consciously. Judges may actually benefit from their expertise-based intuitive problem-solving<sup>648</sup> but as regards their fact-finding, Berger concludes, judges are no different than other people. Expertise-based intuition, Kahneman and Klein explained, can be developed in an environment where tasks are adequately practiced and the individual receives immediate feedback<sup>649</sup> – such as driving a car where driver's handling of the controls of the vehicle is immediately reflected in the changes of direction or speed. Fact-finding in courts is not such a task, mostly due to the lacking feedback. Thus, when it comes to fact-finding, what was said about jurors and their liability to fall victim to heuristics, biases and coherence shifts is also applicable to judges.

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<sup>647</sup> Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 Legal Comm. & Rhetoric JAWLD 1 (2013).

<sup>648</sup> Berger's examples of judicial problem-solving are all connected with legal reasoning problems but trial management skills may be even more amenable to developing the high level expertise and skill in that would then inform the intuition much like in the case of airplane pilot or a military commander – examples used by Berger herself. See Berger, note 647, at 23.

<sup>649</sup> Kahneman & Klein, note 622, at 520.

Is the story model applicable to judges as well then? Dutch researchers Van Koppen, Wagenaar and Crombag developed the Story Model further and posited that there are ten universal rules of evidence that, although developed based on Dutch system where there are no juries, should, they argue, hold true for all legal systems.<sup>650</sup> They call their theory the Theory of Anchored Narratives and yes – judges and juries alike appreciate a good story that has a central action and provides cues explaining why the actors acted the way they supposedly did. So much so, the Dutch researchers found, that with a very good story that fits expectations and makes sense, prosecutors can get defendants convicted even in cases where evidence is virtually absent.<sup>651</sup> Where the Anchored Narratives theory takes it one step further is the notion of anchoring. Anchoring means that all essential elements of the charge narrative must be independently based in the “knowledge of the world in the form of rules which are generally true” beyond a reasonable doubt.<sup>652</sup> While Pennington and Hastie’s Story model is descriptive, the Anchored Narratives theory includes a normative component – decisions, Van Koppen argues, go wrong because of defective or insufficient anchoring. While the individual fact-finder may consider a story plausible because of their own personal experience and world knowledge, failure to connect to the “generally true” – an objectively verifiable fact may easily cause the decision to be based on false assumptions that would not withstand closer scrutiny. The strength of the evidence is entirely dependent on the safety of the anchors and thus decision makers should be required to spell out the basic rules or knowledge that their evaluation of evidence is grounded in.

Just like the Story Model, the Anchored Narratives Theory does not explicitly account for the phenomenon of dual information processing that explains how and why specific narratives are constructed and evidence is evaluated. Furthermore, the Anchored Narratives theory posits that evidence is interpreted and should be evaluated by anchoring it back to some generally accepted truths about the world that are articulable, however, empirical research, as we observed earlier, tends to disprove this assumption and indicates that most of the evaluations are actually intuitive rather than deliberative and coherence shifts will make the evidence seem supportive of the story that has been picked over the other possible variants. Its descriptive ambiguities and possibly inconsistencies aside, the Anchored Narratives theory nevertheless appears to offer a welcome framework for judges

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<sup>650</sup> Van Koppen, note 606, at 600, citing Willem Wagenaar *et al.*, *Anchored Narratives: the Psychology of Criminal Evidence* (Harvester Wheatsheaf: New York, 1993).

<sup>651</sup> *Id.*, at 598.

<sup>652</sup> *Id.*, at 597. Some of these rules are laws of nature, but they can also be commonsense notions about credibility and reliability – all evidence will eventually boil down to witness evidence, van Koppen observes.

to subject their intuitive judgments to reflective scrutiny. Spelling out the “ground anchors” may alert the judge to reasoning fallacies and cause them to take another look at their fact-determination.

Guthrie, Rachlinski and Wistrich report a study conducted with American trial judges.<sup>653</sup> Their study that included several different tests was specifically aimed at exploring judges decision making patterns (legal decision making, not just fact-finding). The results to a large degree proved what was to be expected: judges like all people are not “syllogism machines” and make most of their decisions intuitively. Intuitive decisions, the authors remark, can be remarkably accurate but also certainly entail a potential for mistakes. Specifically, their research shows that judges’ decision making process is subject to the same idiosyncrasies of the automatic system have been observed in people outside the legal context.<sup>654</sup>

The authors describe an unexpected aberration from this pattern of intuitive snap judgments. When called to decide the legality of a search performed by a police officer without a warrant versus deciding the permissibility of the search based on the same facts minus the knowledge of what the search actually produced, the differences were statistically insignificant. The authors hypothesize that this somewhat surprising result is due to the complex and fairly rigid regulation of search and seizure law. The complex structure of the regulation, they argue, must have signalled the judges to abandon the intuitive decision making and switch over to the deliberate system.<sup>655</sup> The findings of the study indicate that judges are capable of overriding the automatic system by the deliberate system. The authors argue that judges are not wrong in using their intuitive judgment but should be given incentives and conditions that promote overriding the intuitive mode by using the deliberate mode of decision making, if for no other reason then to verify the original intuitive judgment. Guthrie and his colleagues suggest measures like appropriate continuing education and feedback, various checklists, a legal requirement that the reasons for the judgments be set forth either in writing or orally in open court, and that courts and judges be given sufficient time to deliberate.<sup>656</sup> They also propose that, where possible,

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<sup>653</sup> Chris Guthrie *et al.*, note 646. See also Chris Guthrie *et al.*, *Judging by heuristic: Cognitive Illusions in Judicial Decision Making*, 86 *Judicature* 44 (2003). For a full discussion of the study regarding the use of heuristics by judges, see Chris Guthrie *et al.*, *Inside the Judicial Mind*, 86 *Cornell L. Rev.* 777 (2001).

<sup>654</sup> The study tested for framing, egocentric bias, inverse fallacy, anchoring and hindsight bias that were all present.

<sup>655</sup> Guthrie *et al.*, note 653, at 27.

<sup>656</sup> This connection is further explored in Brian Sheppard, *Judging Under Pressure: A Behavioural Examination of the Relationship Between Legal Decisionmaking and Time*, 39 *Fla. St. U. L. Rev.* 931 (2012).

decision making authority should be allocated so as to minimize the potential for reasoning fallacies such as anchoring or hindsight bias.<sup>657</sup>

Now that judges have been exposed as primarily intuitive fact-finders, much like jurors, one would probably wonder whether the judges' everyday work has also primed them to convict more easily. After all, the steady stream of criminals passing through their courtrooms on a daily basis could be just the backdrop needed to prime judges to automatically start constructing and easily accept narratives supporting guilty verdicts.<sup>658</sup> Indeed, even the United States courts have hinted that defendants might be better off opting for a jury trial at least in some cases.<sup>659</sup> The question of the defendant's relative chances with judges and juries was examined by Harry Kalven and Hans Zeisel in their 1966 book "The American Jury" where the two explored judge-jury agreement and found that for the most part (in 78 per cent of all cases), judges and juries were in agreement about verdicts. The disagreement if present, however, would be somewhat asymmetric: juries tended to acquit when judges would convict much more than juries tended to convict when judges would acquit. Substantially the same results were reported by Eisenberg and others who claim based on their study of state-court jury trials that judges have a lower threshold for conviction.<sup>660</sup>

The long-standing consensus that juries are more lenient may, however, have some limitations as exposed by Andrew Leipold. His article<sup>661</sup> reveals a curious pattern. While he himself and many others have traditionally considered it common wisdom that having a jury trial would be advantageous for the defence, the conviction rate for federal jury trials over the examined 14-year period (1989...2002) was 84 per cent, whereas the conviction rate for bench trials was a mere 55 per cent.<sup>662</sup> Leipold notes that these conviction rates are a relatively recent development and that in mid-20<sup>th</sup> century the proportions were reversed. Even during the period examined by Leipold the jury conviction rate continued going up

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<sup>657</sup> Guthrie *et al.*, note 653, at 35-42.

<sup>658</sup> Glöckner & Betsch point out that individuals routinely and automatically record characteristics of the world around them, and frequency of events among other parameters. Glöckner & Betsch, note 620, at 216. The particular phenomenon I am referring to is called the availability heuristic – people tend to assess probability by the ease of recalling a prior instance of similar occurrence. See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman *et al.* eds., 1982).

<sup>659</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>660</sup> Theodore Eisenberg *et al.*, *Judge-Jury Agreement in Criminal Cases*, 2 J. Empirical Legal Stud. 171 (2005). For a neat comparison table of the results of different judge-jury agreement studies, see Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 Fla. St. U. L. Rev. 469, 479 (2005).

<sup>661</sup> Andrew Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 Wash. U. L. Q. 151 (2005).

<sup>662</sup> *Id.*, at 152.

and the bench trials conviction rate kept decreasing. Leipold sees a number of factors as possible causes for this divergence. Firstly, the divergence may be caused by the choices made by the litigants in regards to whether to prefer a bench trial or a jury trial. The defence decision to choose jury trials over bench trials can have many explanations. Perhaps defence attorneys are not aware of the new dynamic, or they are aware and disregard, or they are aware and make rational choices based on the nature of the cases. Apparently the notion that juries are more acquittal-prone than judges is well established within the legal profession and considered common knowledge.<sup>663</sup> Leipold posits that it is probably a combination of all three.<sup>664</sup> Leipold also suggests another reason for the steady decline in bench trial conviction rates – judges may have felt straitjacketed by the federal sentencing guidelines and opted to acquit where the guideline-mandated sentence appeared too stiff. Yet another possible explanation surfaces through reading Paul Holland’s article on bench trial advocacy.<sup>665</sup> There Holland aptly points out that judges like juries are liable to take mental shortcuts and succumb to automatic decision making. This coupled with their intimate knowledge of trial mechanics and tactics employed by the attorneys makes them a special audience as fact-finders and it is, indeed, baffling that many attorneys still regard bench trials as something inferior or simpler than a jury trial. This, Holland argues, causes attorneys to neglect the need for well-prepared story-telling as if bench trials would not benefit from it. Perhaps the low conviction rates on United States federal bench trials are a product of poor trial advocacy by prosecutors?<sup>666</sup> But what may have caused the seemingly different results of the earlier judge-jury agreement studies? The answer may be in the research design. Kalven and Zeisel, just like Eisenberg and his colleagues only examined jury trials – cases where the jury option had been chosen and the case tried before a jury; Leipold also examined federal cases that were not included in the sample of the judge-jury agreement studies. Thus it is perhaps premature to declare that judge-jury agreement studies no longer hold valid – the methodologies for the archival study by Leipold and the studies about judge-jury agreement are just too different to be comparable.<sup>667</sup> And one more point on which most scholars appear to agree: while we may compare judges and juries against each other or to some normative model we have devised,

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<sup>663</sup> Leipold attributes this “common knowledge” to Harry Kalven & Hans Zeisel’s research and some follow-up studies essentially confirming Kalven & Zeisel’s findings.

<sup>664</sup> Leipold, note 661, at 219.

<sup>665</sup> Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 Clinical L. Rev. 195 (2009).

<sup>666</sup> Notably, no significant difference was reported in civil cases – plaintiffs were comparably likely to win a judge trial as they were to win a jury trial. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124 (1992).

<sup>667</sup> More of the non-comparable department: how is it that federal judges only convict in 55 per cent of their cases but their Estonian counterparts in 95 per cent (see p 29 of Estonian MoJ crime survey of 2012 available at [http://www.just.ee/orb.aw/class=file/action=preview/id=58971/Kuritegevus\\_Eestis\\_2012.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=58971/Kuritegevus_Eestis_2012.pdf) - link verified 03FEB2014).

there really is no base line in this kind of research of fact-finding accuracy. As MacCoun comments, if there was, it would probably have replaced trials by now.<sup>668</sup>

### ***Group decision-making***

Following up on the research on individual decision-making by Pennington and Hastie, James Holstein looked at mock jurors' deliberations. Individual jurors' interpretations of evidence may differ to a great deal and it is the deliberations where the jurors work to sort out their individual differences. Sklansky argues that the fact that jurors deliberate is an advantage juries have over single judges – not only because of the variety of perspectives brought to the table but also because deliberations help discipline the reasoning process and enforce reasoning controls.<sup>669</sup> Edward Schwartz and Warren Schwartz note that jurors also have different understandings about the standard of proof and what level of certainty is required when the standard is set at “beyond a reasonable doubt”.<sup>670</sup> Nevertheless, Devine and colleagues found that jury instructions are fairly well comprehended (contrary to the usual fear that jurors are not able to understand their instructions<sup>671</sup>), however, depending on the quality of deliberations, analysis of evidence and considering alternate viewpoints may be less than optimal depending on the style of deliberations, factioning of the jury and the existence of a strong leader in the group.<sup>672</sup>

Holstein's study examines discussions between mock jurors that indicate that the story model presented by Pennington and Hastie with regard to individual decision-making also extends to group decision-making: individual jurors are bringing different narratives to the deliberations and try to reconcile their interpretations in order to arrive on a consistent story they can all agree on. The narratives themselves then become justifications for a verdict choice the particular juror is advocating.<sup>673</sup> Holstein's study reveals that jurors' deliberations are not organized around the elements of the charge as instructed by the judge

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<sup>668</sup> MacCoun, note 227, at 517.

<sup>669</sup> Sklansky, note 259, at 415. Still, Simon cites several studies that tend to show that the disciplining effects of jury deliberations are not consistent or significant. See Simon, note 54, at 197...201.

<sup>670</sup> Edward Schwartz & Warren Schwartz, *And So Say Some of Us... What to Do When Jurors Disagree*, 9 S. Cal. Interdisc. L. J. 429, 431 (1999). Empirical studies proving this point are numerous, interesting, very much to the point of this work and will be examined later.

<sup>671</sup> There have been earlier studies supporting this fear – see, for example, Phoebe Ellsworth, *Are Twelve Heads Better Than One*, 52 Law & Contemp. Probs 205, 219 (1989) where the study of mock jury deliberations showed among other things that no mock jury got the law 100 per cent right and the most forcefully presented interpretation usually prevailed in deliberations, whether it was correct or not.

<sup>672</sup> See Dennis J. Devine *et al.*, *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. Empir. Legal Stud. 273 (2007).

<sup>673</sup> James Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 Law & Hum. Behav. 83, 95 (1985).

but jurors seek to determine “what really happened”. This produces an interesting situation: more narratives invariably mean longer deliberations and higher chances of a hung jury - and this even when most of the narratives support the same verdict choice. As Holstein explains, the deliberations turn into an inadvertent competition of the stories and advancing several theories supporting the same verdict will actually decrease the chances of the jury unanimously agreeing to it. Similar observations have been reported in the study by Diamond and Vidmar who had the opportunity to observe actual trial juries during their deliberations.<sup>674</sup> Diamond and Vidmar’s study involved observing civil juries in Arizona where a new rule had just been adopted that permitted juries to discuss the case during trial and quite predictably showed that real jurors, just like mock jurors, attempt to make sense of the evidence, compare and contrast different versions of “what happened” and fill the gaps in their stories. In another article, Diamond and Vidmar analyze the discussions in the jury room and conclude that while “admonitions” and “blindfolding” may have some effect and provide jurors with an argument for use during deliberations, they are overall ineffective at keeping jurors from filling in gaps and interpreting evidence based on their own life experiences.<sup>675</sup>

John Manzo looked at the particular techniques jurors use to justify or “sell” their positions to their fellow jurors and described three main ones that purport not only to argue in favour of one version or another but also introduce new information. Jurors often use normative assertions (“that’s what a reasonable person should do”), claims of expertise (“I have been in the industry for twenty years, I know how it’s normally done”) and declarations of knowledge (“I live nearby, I know that intersection”).<sup>676</sup> The latter technique, Manzo notes, is very rare and in the deliberations observed by Manzo also not as closely linked to the actual case. This is probably due to the jury selection process seeking to identify and exclude from jury individuals who would have personal knowledge of the case. As authors describe, though, avoiding jurors bringing into the deliberations information that has not been introduced in the course of the trial is becoming increasingly difficult: jurors share

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<sup>674</sup> Shari Diamond & Neil Vidmar, *Inside the Jury Room: Evaluating Jury Discussions During Trial*, 87 Judicature 54 (2003).

<sup>675</sup> Shari Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1915 (2001). Their analysis indicates that jurors engage in forbidden discussions in spite of judicial instructions to disregard some evidence and consider, for example, attorney’s fees and insurance coverage in civil cases even though such evidence is irrelevant in assessing the damages. But see also Shari Seidman Diamond *et al.*, *A ‘Kettleful of Law’ in Real Jury Deliberations: Successes, Failures and Next Steps*, 106 Nw. U. L. Rev. 1537, 1591 (2012) where the authors describe jury deliberations where jurors effectively police attempts to consider forbidden evidence. The authors argue that in many instances the jury’s failure to stick to the admissible evidence may have been caused by unintelligible jury instructions.

<sup>676</sup> For examples from jury discussions and detailed analysis of the samples, see John Manzo, *You Wouldn’t Take a Seven-Year-Old and Ask Him All These Questions: Jurors’ Use of Practical Reasoning in Supporting Their Arguments*, 19 Law & Soc. Inquiry 639 (1994).



their experiences on social media such as Twitter or Facebook, and, given an opportunity, will run an internet search to uncover information that was not presented to them.<sup>677</sup>

As Allison Orr Larsen aptly points out,<sup>678</sup> the jury deliberations in fact turn into something commonly not associated with a jury trial – a bargain. One of Larsen’s main points is that instead of denying the bargaining or viewing it as a breach of their sacred duty by unprincipled jurors, we should embrace it as a natural part of jury deliberations, especially given that 95 per cent of all criminal cases are disposed of by plea-bargains. Larsen argues that through the doctrine of lesser included offences, bargaining has always been part of the jury trial<sup>679</sup> and cites several studies showing that negotiations between jurors routinely happen. Most importantly for our purposes, however, a study conducted by the National Center for State Courts<sup>680</sup> indicated that while only 6.2 per cent of all juries hung, there was at least one disagreeing juror in 54 per cent of all juries at the end of the deliberations. This indicates that unanimous verdicts do not actually mean that all jurors have reached the same conclusion in the matters being tried but that they all have agreed to a verdict they are amenable to.<sup>681</sup> Waters and Hans report based on the same study that minority jurors favouring acquittal were more adamant and 35 per cent of them ended up hanging the jury versus the 12.5 per cent of the minority jurors favouring conviction.<sup>682</sup>

## **The link between the human mind and standard of proof**

The excursion into the empirical studies on fact-finding appears to cast a shadow on the effectiveness of standard of proof statements as an actual reasoning control. Fact-finders use their automatic system to reach quick conclusions and construct stories to explain evidence in terms of human interaction narratives as opposed to engaging in a Bayesian calculation. Once the initial conclusion has been reached, it starts tainting the perception

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<sup>677</sup> See, for example, Caren Myers Morrison, *Jury 2.0*, 62 Hastings L.J. 1579 (2011). Morrison proposes a number of measures to help jurors cope with their role such as allowing jurors to take notes, ask questions, learn about the potential sentence for the defendant and to institute some kind of forum for the jurors to vent about their experience after they have completed their tasks. The argument goes, none of these measures is incompatible with the original idea of an impartial jury yet they might be needed to cope with jury “misconduct.” See also, Valerie P. Hans, *U.S. Jury Reform: the Active Jury and the Adversarial Ideal*, 21 St. Louis U. Pub. L. Rev. 85 (2002).

<sup>678</sup> Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 Geo. L.J. 1567 (2011).

<sup>679</sup> *Id.*, at 1572.

<sup>680</sup> Paula L. Hannaford-Agor *et al.*, *Nat’l Ctr. For State Courts. Are Hung Juries a Problem?* (2002), [http://www.ncsconline.org/WC/Publications/Res\\_JuriesHungJuriesProblemPub.pdf](http://www.ncsconline.org/WC/Publications/Res_JuriesHungJuriesProblemPub.pdf) - link verified 15AUG2014.

<sup>681</sup> As Simon notes, this is not necessarily a bad thing as it eliminates much of the idiosyncratic bias of individual jury members. – Simon, note 54, at 197.

<sup>682</sup> Waters & Hans, note 625, at 525.

and interpretation of subsequently introduced information to support a coherent picture of the events in question. Not only is the average fact-finder guided by heuristics and emotions, they are also confident that they have reached the right conclusion as long as most of the evidence has been neatly fitted into a plausible narrative. And their confidence is not necessarily a reliable indicator that they have accurately assessed the probability of the allegations based on the evidence – this due to bidirectional processing and coherence shifts. We have also discovered that judges are not immune against these cognitive “issues.” This unfortunately means that a standard of proof that is conceptualized as a standard of fact-finder’s confidence is by itself not very effective in avoiding errors. And as pointed out before, it will not work as a standard against which one could check the reasoning process itself either – not only is most of the reasoning process done by the automatic system of which the subject is unaware, the conclusions are inherently subjective and depend on the person just as much as on the information adduced. For this reason, substantive appellate review of fact-finding would turn into simple re-evaluation of the evidence.

Now the question left is whether the standard of proof would have any effect on fact-finding accuracy if used as an exhortation. Christoph Engel claims that different standards of proof are psychologically feasible – in terms of the story model, fact-finders under a higher standard would

apply a stricter standard of coverage, coherence, and uniqueness. They acquit if minor pieces of evidence do not find a place in the story told by the prosecution. They do not tolerate a shade of doubt regarding the logical consistency of the story. In light of their world knowledge, they require high plausibility for this story. They apply a strict standard of scrutiny when testing the completeness of the prosecution’s story. Finally, they impose a large minimum gap in plausibility if there is more than one story that can be told based on the evidence.<sup>683</sup>

In terms of mental mechanisms, one could argue that the automatic system always processes information as long as it results in more than minimal change in the activation of options, and that the standard of proof simply manipulates the threshold at which an alternative is sufficiently activated. Glöckner and Engel’s experimental research suggests that there is more to it.<sup>684</sup> In their experiment, mock jurors were divided into different

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<sup>683</sup> Christoph Engel, note 586, at 462.

<sup>684</sup> Andreas Glöckner & Christoph Engel, *Can We Trust Intuitive Jurors? Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning*, 10 J. Empir. Legal Stud. 230 (2013).

groups and presented with the same evidence. The different groups were given different instructions as to the standard of proof and the researchers also manipulated the probative value of the evidence (in one group, the eyewitness stated that she was 80 per cent certain, in another, that she was 95 per cent certain; in one group the number of individuals having the key to the place where the crime had been committed was higher than in the other). The jury instructions used were those used by the U.S. Court of Appeals for the 9<sup>th</sup> circuit (requiring jurors to be ‘firmly convinced’ of guilt for a conviction). The results of the experiment showed that jurors set their confidence threshold higher where the standard of proof is beyond reasonable doubt as compared to the preponderance of the evidence. The results also showed that the threshold probability of guilt was higher when the standard of proof was “beyond a reasonable doubt” as compared to when the standard was a mere “preponderance of the evidence.” In numeric terms, unlike the 95 per cent that Judge Weinstein argued should correspond to the ‘beyond a reasonable doubt’ standard,<sup>685</sup> the mock jurors in Glöckner and Engel’s study only reported needing on average an 85 per cent certainty level to convict.<sup>686</sup> The study confirmed that the jurors use primarily coherence-based reasoning to handle the vast amount of data thrown at them during trial. Coherence shifts occurred both in case of acquittals and convictions, however, were more pronounced in convictions. Coherence shifts differed according to whether the jurors had been given the preponderance standard or the beyond reasonable doubt standard to decide by. This asymmetry indicates that standard of proof is not (only?) working as a deliberate process scrutinizing the product of the automatic information processing but is already at work at the intuitive level. One may now wonder whether coherence shifts could reduce the effect of the standard of proof – perhaps the higher standard is simply achieved by more vigorous inflation-deflation in processing of the evidence? The study found no such effect – a higher standard of proof translated into lower conviction rates and higher probability of guilt thresholds just as expected. On the other hand, what was not happening was manipulations of the probative value having effect on the verdicts or the probability of guilt as indicated by the participants. This goes to show again that people do not mathematically integrate probabilities – people are “storytellers, not meter readers.”<sup>687</sup>

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<sup>685</sup> See note 575.

<sup>686</sup> Glöckner & Engel, note 684, at 242. Note that in the preponderance of the evidence condition the average confidence threshold was 76 per cent - way more than the standard actually requires.

<sup>687</sup> Id., at 231. Although this math-aversion seems very disturbing indeed, studies indicate that intuitive judgments, too, can be very accurate and yield results that are compatible with results of a Bayesian calculation – see Marc Jeckel *et al.*, *The Rationality of Different Kinds of Intuitive Decision*, 189 *Synthese* 147 (2012). The accuracy measures can be as high as 73.7 per cent or 88.8 per cent approximation.

The good news is that different standards of proof are psychologically feasible. What we still need to find out is how to use legal text (jury instructions, standard of proof provisions, etc) to calibrate the standard. Apparently the precise wording matters as the study conducted by Horowitz and Kirkpatrick<sup>688</sup> suggests. In this study the researchers took the different definitions of “beyond reasonable doubt” that had been used and upheld by courts in the United States and examined whether different instructions evoked different thresholds of certainty in the minds of jurors. As we saw earlier, the “beyond a reasonable doubt” formulation is in some courts used without any further explanation as to what it means but there are also courts where jurors are provided with an explication in order to help them understand what the standard should mean. ‘Beyond a reasonable doubt’ has in some courts been defined as being convinced to a “moral certainty”; there are jury instructions where the jury was told they had to be “firmly convinced” (this was also the kind of standard used in the later studies by Engel and Jeckel),<sup>689</sup> or that reasonable doubt is the kind of doubt that would cause a “reasonable person to hesitate to act” in important matters. The study tested for four different instructions<sup>690</sup> and it also tested for the condition where no further explication was offered (as we observed earlier, there are some scholars and courts who think that the concept of reasonable doubt is by itself sufficiently clear and any attempt to define it would simply muddy the waters). Mock jurors (jury-eligible adults representative of the community, not just college students) were first played a version of an audiotaped trial (one where evidence was strongly supportive of a guilty verdict or the other where the prosecution’s evidence was much weaker) and then given one of the five instructions and sent to deliberate. Later they were asked to indicate their verdict choice before deliberations, their confidence in their verdict before and after deliberations, and the minimum probability of guilt they would require for a guilty verdict – also before and after the deliberations.

The study yielded two interesting results. In general, different instructions produced different threshold probabilities and different levels of confidence. The conviction rates in strong and weak cases were also appropriately different. None of the instructions produced a high enough self-reported guilt probability thresholds to be acceptable in the authors’ opinion – the highest threshold was triggered by the instruction requiring that jurors must be “firmly convinced” of the defendant’s guilt<sup>691</sup> (68.87 per cent before deliberations for a

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<sup>688</sup> Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: the effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 Law & Hum. Behav. 655 (1996).

<sup>689</sup> See notes 684 and 687.

<sup>690</sup> Horowitz & Kirkpatrick. Note 688, at 659.

<sup>691</sup> *Id.*, at 664.

case where evidence supporting conviction was weak; 72.25 per cent when evidence was strong, both thresholds went up after deliberations – 80.75 per cent for the weak case and 81.87 per cent for the strong case). Most importantly, however, the study did prove that depending on how ‘beyond a reasonable doubt’ is explained to the jurors, the same standard of proof evokes in jurors’ minds a different threshold probability of guilt as well as a different level of confidence required for a guilty verdict.<sup>692</sup>

The overall conviction rate was 75 per cent for the strong case and a surprisingly high 50 per cent for the weak case where the researchers had expected the juries to uniformly acquit. Only the instructions using the phrase ‘firmly convinced’ appeared to elicit the desired response in jurors. Note that in the “moral certainty” instruction group, all juries convicted, regardless of the strength of evidence. The results of this study are at odds with several prior studies where mock jurors had reported significantly higher threshold probabilities<sup>693</sup> and the authors hypothesize that the difference may be due to jurors valuing crime control in comparison to due process more than earlier, or because the earlier studies were primarily using college students as the test subjects.

Faced with the fact that the same beyond reasonable doubt standard evokes different threshold levels of decision certainty, some scholars have called for a numeric representation of the desired threshold level. Harry D. Saunders has argued that this divergence constitutes an equal protection violation and makes the need to repair the standard an urgent priority.<sup>694</sup> His idea is not novel: Dorothy Kagehiro argued for a numerical representation of the standard of proof based on several experiments she conducted that tended to show that while different verbal instructions failed to convey the desired heightened standard, combining a numeric representation with verbal explanation (“that is, you have to be at least 91 per cent certain in order to convict”) or numeric representation alone tended to convey the desired threshold value.<sup>695</sup> Simon and Mahan’s study reported another interesting effect: jurors approached their task much more carefully after they had indicated their threshold probability of guilt for a guilty verdict.<sup>696</sup> Not surprisingly, the suggestion of quantifying the standard of proof has been received with a

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<sup>692</sup> See also for similar results, Norbert L. Kerr *et al.*, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. Personality & Soc. Psychol. 282 (1976).

<sup>693</sup> For a list of those, see Horowitz & Kirkpatrick, note 688 at 656.

<sup>694</sup> Harry D. Saunders, note 603.

<sup>695</sup> Dorothy Kagehiro, *Defining the Standard of Proof in Jury Instructions*, 1 Psych. Sci. 194 (1990). The article also contains references to Kagehiro’s earlier works.

<sup>696</sup> See Simon & Mahan, note 575, at 329.

certain lack of enthusiasm. Glöckner and Engel, for example, are seemingly relieved that their study yielded reasonably high probability thresholds and concluded that expressing the probability threshold in numeric form is not necessary.<sup>697</sup> Similarly, while Lawrence Solan expresses his concern about the fact that jury instructions regarding reasonable doubt are confusing and in some forms tend to convey threshold probabilities much lower than the commonly accepted 85 per cent or more, he too does not even make an argument against Kagehiro's suggestion and just dismisses the recommendation.<sup>698</sup> Solan himself advocates the use of jury instructions that would, instead of focusing on the level of doubt, focus on the government's burden of proving the defendant's guilt – the “firmly convinced” instruction that has been adopted in some jurisdictions in the United States. The standard has been tested in some empirical studies mentioned earlier<sup>699</sup> and unlike some others, evoked threshold level of probability of guilt that has come closest to the at least 85 per cent probability deemed appropriate by the judges. Solan's argument, however, seems to be contradicting itself: while busy advocating a particular formulation of jury instructions, he justifies the need to review the instructions by none other than citing studies indicating that jurors perceive some of the instructions in use as allowing for too low threshold probability of guilt. In face of empirical research suggesting that jurors are greatly assisted by specific probability figures in the jury instructions even without turning the entire trial into a Bayesian calculation, it is difficult to find a reason for not taking advantage of this tool.<sup>700</sup> Solan's main concern is probably the prospect of seeing appeals based on the claim that “the proof adduced does not amount to the prescribed 94.5 per cent probability of guilt” thus introducing “trial by mathematics” through a back door.<sup>701</sup>

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<sup>697</sup> Glöckner & Engel, note 684, at 246.

<sup>698</sup> Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt*, 78 Tex. L. Rev. 105, 126 (1999). Solan points towards Lawrence Tribe's article *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971) as the basis for his dismissive attitude towards expressing threshold guilt probability numerically. Tribe's argument is directed against viewing a trial as a purely probabilistic exercise – this would neglect the notion of trial as a ritual of peaceful social problem solving. It is possible to read Tribe's criticism to also oppose spelling out any numeric representation of the minimum probability of guilt necessary for a conviction but one could argue that it is equally damaging to accept a situation where jurors are left with an ambiguous phrase that fails to effectively set any minimum standard for convictions.

<sup>699</sup> See notes 684 and 688 with the corresponding discussion of two studies that have specifically tested for the 'firmly convinced' formulation of the 'beyond a reasonable doubt' standard.

<sup>700</sup> Adding a numerical figure to the usual non-numerical explanation is also suggested by Judge Weinstein, note 575, at 172. Similar suggestion has been offered by Tillers and Gottfried and they make a salient point here: quantifying the standard of proof is not about mathematics or statistics but about the clear communication of the idea of what level of doubt is still acceptable. Peter Tillers & Jonathan Gottfried, *Case comment-United States v. Copeland*, 369 E Supp. 2d 275 (E.D.N.Y. 2005); *A Collateral Attack on the Legal Maxim That Proof Beyond A Reasonable Doubt Is Unquantifiable?*, 5 Law Prob. & Risk 135, 150 (2006).

<sup>701</sup> See Tillers & Gottfried, note 700, for discussion of this danger.

Nevertheless, in light of what is known about human mental processes, numeric thresholds are not indispensable. Fact-finding is to a large extent handled by the automatic system that does not deal in percentages but in attitudes and emotions. Engel posits that the mental mechanism mediating the standard of proof and the automatic system's decision making processes is that of setting a somatic marker.<sup>702</sup> According to the somatic marker theory, emotions are instrumental in real-life decision making and this means that the standard of proof, if it is to have effect, must speak to the automatic system both to guide the evaluation of the proof as well as to cause the fact-finders to engage their deliberate system.<sup>703</sup>

Changes in the environment cause a complex of responses that change body or brain state and can manifest in endocrine release, elevated heart rate etc. or in physiological changes that are observable even from the outside (e.g. posture, facial expressions, etc.). The responses aimed at the brain can trigger neurotransmitter release (such as dopamine, serotonin, etc), an active modification of the state of somatosensory maps such as those of the insular cortex ("as-if-body-states"), and a modification of the transmission of signals from the body to somatosensory regions. A package of these changes in the body and brain is what makes up an emotion and the perception of it is the "feeling" that can be pleasant or unpleasant.<sup>704</sup> Emotions can be evoked by primary or secondary inducers. Primary inducers are the actual experiences of the innate or learned source of the emotion such as the encounter with the source of fear or burning yourself with hot water. Secondary inducers are memories or thoughts of primary inducers – although weaker, similar emotions are produced by even recalling the original painful event. This, Damasio and Bechara argue, is the mechanism through which people who have once burned themselves on a hot stove, learn to stay away from hot water – or learn to avoid risky moves on the stock market. Primary and secondary inducers can be activated at the same time. Apparently individuals with brain damage in the particular area that is responsible for recreating the emotional states, while having no issues with intellectual abilities, are not able to learn from their past mistakes (of which they are intellectually aware, i.e. are able to "talk the talk") and keep acting disadvantageously (i.e. not "walking the walk"), thus proving the instrumental role emotions play in decision making – their brain is not able to link specific events to the

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<sup>702</sup> The theory of somatic markers has been explained and experimental evidence in support of this theory reviewed in Antoine Bechara & Antonio R. Damasio. *The somatic marker hypothesis: A neural theory of economic decision*, 52 Games & Econ. Behav. 336 (2005).

<sup>703</sup> This is in line to what Ho suggested the standard of proof should do – instead of assigning a probability figure as an external standard, the standard of proof should be a standard of attitude. See Ho, note 563.

<sup>704</sup> Bechara & Damasio, note 702, at 339.

patterns of “what it feels like”.<sup>705</sup> Similarly, in situations of uncertainty and ambiguity, the conscious calculating system (deliberate system) is offering certain choices, but it is the automatic system that is much better at detecting patterns and thus a “good feeling” signalled by a positive somatic reaction about a decision is what will often bias the individual towards the best choice.<sup>706</sup> Damasio and Bechara also explain that while pertinent and task-related emotions<sup>707</sup> are instrumental in making the right decisions, the feedback can be distorted by background emotions that bias the automatic system. The standard of proof in this sense is one part of the mechanism that creates the background emotion which will then in effect influence the level of certainty felt by the fact-finders.

According to Engel, the standard of proof operates in conjunction with the ritual of swearing the jurors or appointing the judge, giving instructions and the courtroom decorum that “makes accountability salient” – impresses upon the fact-finder the gravity of their task and the serious role they play in the justice system thus making them more aversive towards risky, i.e. unfounded decisions, especially those convicting the innocent.<sup>708</sup> This could explain why the mock jurors consistently report a lower probability threshold for convictions than judges<sup>709</sup> or than the expectations of legal scholars. While apparently some configurations of jury instructions are more effective than others at influencing the emotional state and bringing about the appropriate background emotion, the ceremonial aspect of trial has largely been neglected in mock jury experiments – the trials have been substituted by watching a slide show and listening to audiotapes<sup>710</sup> at best or more commonly reading summaries or transcripts,<sup>711</sup> and judge giving instructions has been substituted by written instructions only. The explicit mention of a numeric probability figure as in Kagehiro and Stanton’s study<sup>712</sup> had its effect through the same mechanism but for a different reason: it engaged the somatic markers associated with a high level of certainty. Apparently the other “legal-verbal” standards are more open to interpretation and

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<sup>705</sup> Id., at 348.

<sup>706</sup> Id., at 359.

<sup>707</sup> That is, emotions evoked by the evidence adduced at trial rather than extrajudicial events or conditions that the adjudicators have brought into the courtroom with them.

<sup>708</sup> Christoph Engel, note 586, at 464.

<sup>709</sup> See Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof. A View from the Bench, the Jury, and the Classroom*, 5 L. & Soc’y Rev. 319 (1971). Judges were asked: “What would the likelihood or probability have to be that a defendant committed the act for you to decide that he is guilty?” and the median response was 97 per cent. See also, McCauliff, note 575, at 1325 where 126 out of 171 federal judges gave threshold levels of 90 per cent or higher.

<sup>710</sup> Horowitz & Kirkpatrick, note 688.

<sup>711</sup> Glöckner & Engel, note 684. Similarly, Francis Dane, *In Search of Reasonable Doubt*, 9 Law & Hum. Behav. 141 (1985), Dorothy Kagehiro & W. Clark Stanton, *Legal vs. Quantified definitions of Standard or Proof*, 9 Law & Hum. Behav. 159 (1985).

<sup>712</sup> Kagehiro & Stanton, note 711.



liable to misunderstanding and do not directly engage with any particular probability threshold.<sup>713</sup>

The studies about judges' conviction thresholds of course have their limitations as the surveyed judges have probably all been exposed to legal literature and scholarly discussions of what the probability threshold for the "proof beyond a reasonable doubt" standard should be. Thus their self-reported standards may in part be dictated by these expectations. As we noted earlier, there are some studies that indicate that judges actually tend to use a lower certainty threshold for convictions. Paradoxically, this would also reinforce the claim that it is the ceremonial and emotional aspect of trial that is responsible for raising the bar – judges sitting alone are not exposed to much ceremony or exhortations calling them to be especially cautious in finding defendants guilty – judging is their daily job.

## **Conclusions and suggestions**

Standard of proof is the minimum level of evidence needed for a conviction. A definition equally applicable across different jurisdictions, this is as precise as it can get because what is measured or evaluated to assess the requisite "level of evidence" is not something that has been universally agreed upon. Is it the level of confidence evoked in the fact-finders or is it a measure of probability created by the aggregation of all available evidence? Or, perhaps it is a pre-determined minimum set of particular types of evidence needed to justify a conviction? Or, perhaps it is neither and actually refers to the ability of the fact-finder to write a convincingly reasoned opinion substantiating his verdict? And then there is the level itself – the desirable quantum of whatever is being measured – which is a political decision about how easy or difficult it should be to obtain a conviction. As we saw earlier, the higher the threshold for convictions, the more guilty will also be set free. But this is just half of the equation – the standard itself. We also need to think about its application in procedural terms: would the standard operate as a reasoning control reviewable through appellate procedure or is it more of a guide or an incantation directed at the fact-finder? All of the options are or have been on the table. However, if the standard is to do its job – enhance the accuracy of fact-finding - it must take into account the cognitive abilities of the fact-finders.

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<sup>713</sup> Horowitz and Kirkpatrick observe, for example, that where "moral certainty" was invoked, juries convicted in both strong and weak evidence conditions. They hypothesize that "moral certainty" was taken as a licence to vilify defendants. Horowitz & Kirkpatrick, note 688, at 667.

The law often views human fact-finding as a primarily logical operation characteristic of the deliberate system, however, there is empirical evidence that the primary tool of decision making is the automatic system – decisions are made quickly and effortlessly based on massive amounts of data, engaging emotions and without the decision-maker himself being aware of the decision process. Facts are organized in narratives and once the initial choice has been made, information is processed bi-directionally: incoming information shapes the story that is under construction, and the story makes for a filter selecting and interpreting information that gets processed. What story of all possible options is selected seems to be determined by the fact-finder's emotional state as well as world knowledge and experience. We also know that the automatic system has a number of weaknesses and humans are no fact-finding experts although they frequently think that they.

Empirical studies indicate that most evidence processing happens automatically. Nevertheless, if and when engaged, the deliberate system is able to override the results of the automatic reasoning process. Although judges are frequently thought to be more inclined to using their deliberate system, empirical studies generally do not support this assumption and we will therefore treat them the same as jurors or lay assessors in regards to their information processing habits.

How should the standard of proof then be conceptualized? A mathematical probability approach is really attractive: the legislature would set a threshold probability and the fact-finders would only have to calculate the probability of guilt given the evidence introduced. This would result in an objectively reviewable decision. There are, however, problems with this kind of approach that render it impractical – starting from the philosophical question by Ho about where the target probability figure is taken from and how to even justify a legislatively mandated margin of error in adjudication (that assuming the law would not require absolute certainty and thus resolve to set all guilty defendants free). The probability enhancing power of individual pieces of evidence is open to dispute and on top of it all, the number of calculations and possible inferences may simply be unmanageable for human fact-finders. Empirical research also shows that the kind of atomistic evaluation of evidence that calculating a probability figure would call for is not what real fact-finders normally do – they construct stories and evaluate evidence as a whole.

Once we abandon the idea of mathematical objectivity, the standard of proof can no longer logically be about the probability of guilt but is rather about the fact-finder's level of confidence in his guilty verdict. This seemingly semantic change solves the legitimacy issue: the guilty verdict is no longer wrong with ten per cent probability<sup>714</sup> and there is no longer a ten per cent probability that the defendant is innocent but the fact-finder is now 90 per cent sure that the defendant is guilty. This being said, expressing the required levels of certainty in terms of percentages has in several studies succeeded conveying the idea better than mere forms of words such as “by a preponderance of the evidence” or “beyond a reasonable doubt”.

This kind of standard, however, is not a legal standard amenable to appellate review. There are no objective criteria for the appellate court, to say that the trial court erred because the evidence on record actually leaves reasonable doubts or, if numeric value is included in the standard, because the evidence only supports a confidence rating of 70 per cent instead of the required 95. Any appellate court going down this road would be simply substituting the trial court's findings of fact with their own.<sup>715</sup>

There is one more problem with defining the standard of proof through the measure of the fact-finder's confidence. Confidence is not the parameter to measure as it does not always correlate with accuracy. Very confident decisions may also be very wrong. I therefore have to agree with Ho – a standard of proof conceptualized as the level of confidence in the verdict cannot serve as an external standard against which the accuracy of fact-finding is measured.

Empirical research has fairly consistently demonstrated that fact-finders are able to distinguish between strong and weak evidence and apply different standards to their decision making by adjusting the threshold level of evidence according to the wording of different standards. Empirical research also shows that depending on whether and how a standard is explicated to the fact-finders, the same standard may evoke different target levels of evidence. The research by Glöckner and Engel demonstrated that standard of proof is applied at the level of the automatic system. Apparently the standard of proof

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<sup>714</sup> Hypothetically setting the threshold probability at 90 per cent – while apparently supported by some judges and scholars, this is still a completely arbitrary figure.

<sup>715</sup> This in itself is not a problem – reviewing and reversing lower court decisions is what appellate courts do. However, in jurisdictions where lay participation in fact-finding is valued, having a professional appellate court overturn the verdicts of lay fact-finders in effect turns lay participation in fact-finding into a pointless gimmick – especially where the all-professional appellate court can engage in their own fact-finding instead of remanding the case for a retrial.

instruction creates a certain emotion or attitude towards evaluation of evidence which then affects how stringently the evidence is scrutinized and what kinds of doubt are entertained.<sup>716</sup> In light of this insight, there is some wisdom in Estonian Supreme Court's developing a standard: their opinions are in effect instructions to the fact-finders albeit aimed for future cases. While the studies about threshold evidence strength levels have been concerned with the existing phrase 'beyond a reasonable doubt' used to denote the standard of proof, an easier solution than trying to come up with an instruction explaining the current phrase might be to simply rephrase the standard so that it evokes the desired attitude (perhaps also taking the advice of Kagehiro and Weinstein who advocated including a numeric representation of the minimum level of confidence expected). Exactly how a "perfect" standard of proof instruction should read, I cannot propose here for it entails a political decision about how heavy the "thumb on the scales of justice" should be and then empirical research in order to calibrate the standard so that it adequately carries this idea. The current "beyond reasonable doubt" alone, however, appears to be not sufficiently powerful by itself and should be augmented or expanded to ensure that it evokes the proper attitude in the fact-finders.

The power of the instructions may be further enhanced by the courtroom ceremony and atmosphere through helping the fact-finders tune in to their task. This would also explain why professional judges would have reportedly convicted defendants on less evidence than lay fact-finders: for judges adjudication entails less ceremony and has become business as usual. To my knowledge, this specific hypothesis about courtroom ceremony has not been tested and additional empirical research would be useful in designing optimal procedure. One studying the ceremonial aspects of court procedure would also have to take into consideration the fact-finder profile: instructions to jurors are common practice and instructions to lay members of mixed tribunals are conceivable, however, bench trials pose a problem since the judge is alone in charge of the conduct of the proceedings and any rituals would quickly become empty routines and incantations simply would not have a logical place in a bench trial order. I would, however, strongly caution against stripping trials of any ceremonialism and turning them into simple overregulated meetings.

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<sup>716</sup> One may now wonder about the jurisdictions that seem to have no articulated standard of proof and use exclusively or predominantly professional fact-finders. Germany provides an instructive example: while the law indeed does not spell out even the presumption of innocence, the authoritative higher courts, commentators and law professors have spelled the principles out with precision and the substance of the standard may actually not be too different from the well-known 'beyond reasonable doubt.' See my discussion about Germany earlier for more detail.

The fact that active narrative construction starts right at the beginning of the trial and fact-finders start preferring one side over the other during the presentation of evidence already, suggests that a standard of proof instruction aimed at evoking the scrutinizing attitude should be given at the beginning rather than at the close of the trial. One further step to enhance the accuracy of fact-finding would be providing juries with the trial transcript or video as well as the text of the applicable law and instructions at the close of the evidence – keeping jurors dependent on their (selective) memories will only fuel trial trickery, cause avoidable disagreements over the substance of the evidence during deliberations, and while it may be appealing to attorneys relying on trial fireworks, is hardly conducive to accurate fact-finding. This would eliminate one of the variables that some studies have noted – that jurors do not remember the instructions correctly.<sup>717</sup> After all, no professional judge is expected to render a verdict without having the trial transcripts or applicable law on hand so why should lay fact-finders do without these memory aids?

Accuracy of fact-finding can also be augmented by engaging the deliberate system instead of relying on the automatic decisions. As we saw earlier, this can be done through the use of verdict forms or checklists and by simply requiring a written opinion of professional fact-finders. Written opinion detailing the fact-finder's justifications for their findings is in use in Estonia, in Chile and in Germany. Although activating the deliberate system and helpful in checking for logical fallacies and inconsistencies, having written reasons may have undesirable side-effects. When appellate courts are allowed to overturn the fact-finding by trial courts, there is a possibility of unjustified reversal when actually proper and accurate reasoning is misrepresented and distorted by the trial judge's poor writing. The second problem with all-out opinion writing is painfully obvious in light of pressures put on court systems – opinion writing takes a lot of time and thus means slowing the courts down or demanding extra resources that may not be available. Nevertheless, appellate abuses can be curbed by appropriately framed legal standards and reasoned opinions would cause solo judges to stop and think as well as help hold them accountable. Some scholars have suggested that juries, too, should issue reasoned verdicts and in some jurisdictions this suggestion has also been implemented as we observed earlier. Reasoned jury verdicts may transform the jury's role in ways that are not desirable. Recognizing the potentially wide and far-reaching implications, I will not expound on reasoned jury verdicts here.<sup>718</sup>

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<sup>717</sup> Horan, note 624, at 92.

<sup>718</sup> Some jurisdictions have decided that they will not just “have their cake but eat it as well” by combining lay and professional fact-finders into mixed tribunals. Having a judge lead the deliberations of the lay fact-finders has proved to defeat the idea of lay participation – lay decision makers tend to align themselves with the professional judge's opinions even if they outnumber the judge. Gerhard Casper & Hans Zeisel, *Lay*

In short, the standard of proof does not work as a legal standard that can be enforced through appellate proceedings but it does its work by creating the right emotional backdrop thereby calibrating the fact-finder's automatic system. My recommendation to enhance the accuracy of fact-finding is then composed of four previously discussed points:

1. Where procedural design allows for exhortation, re-formulate or expand the standard of proof so that it evokes the right attitude in the fact-finder. Under the current regime, this might start by formulating an explication of the standard phrase so the instruction would be more understandable. As long as it is clear that the standard of proof statement is not a legal standard but an instruction guiding the fact-finding, the explication may even include a numeric value.
2. Courtroom ritual may be important. When using exhortations, the ritual may substantially enhance the impact of the instructions – but this needs further research. Where the trial is by a judge only, the judge should be required to prepare a written reasoned opinion.
3. Lay fact-finders should receive written instructions, trial transcripts or recordings and verdict forms and/or texts of the applicable law.
4. Instructions to lay fact-finders about applicable law should be given in the beginning of the trial.

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*Judges in the German Criminal Courts*, 1 J. Legal. Stud. 135 (1972). Casper and Zeisel's study shows that in only a small percentage of cases where the lay judges and the professional judge initially disagreed about the guilt, did the lay judges actually end up holding on to their own position in the final vote and would usually surrender to the judge's suggestions and arguments. Similar findings, especially that the presiding judge would employ different techniques to isolate and then talk the dissenting lay judge into agreeing with him, were reported in Stefan Machura, *Interaction between Lay Assessors and Professional Judges in German Mixed Courts*, 72 Int'l Rev. of Penal L. 451, 463-464 (2001).

## CONCLUSIONS

Can a German court trust a judgment from the United States or a witness statement given at a hearing in Estonia? This is the kind of practical question we need to answer in the shrinking world today. As interactions between judicial systems of different jurisdictions are becoming more commonplace, effective cooperation can mean the difference between success and failure in taking down international or transnational criminals, not to mention saving massive amounts of resources. For example, instead of flying a witness in from another country to testify at a trial, would it not be much more sensible to have the witness testify in the country where he is currently located via a videoconference or have the local authorities perform the witness examination and send a record of it over to where the statement is needed? A quick look at the relevant legislation in different jurisdictions reveals a mind-boggling diversity even in the simplest of things and it is this diversity that raises doubts over whether close cooperation might ever be possible. Cooperating jurisdictions would either have to trust that their divergent evidentiary methods yield results of comparable quality or agree upon a common way of doing things. The purpose of this thesis was to demonstrate that it is possible to unify criminal evidence law to the point of developing a common set of rules that can be applied across jurisdictions. To illustrate and inspire this quest, I chose six different jurisdictions to serve as my sample jurisdictions: England and Wales, the United States, Estonia, Russia, Chile and Germany. They all have at least one central common goal, I found – accurate fact-finding, and they rely on the same tool - the human mind. In a sense, this thesis is a probe – I cannot possibly hope to cover the entire law of criminal evidence here and have, therefore, limited my inquiry to three topics of evidence law that are of central importance, subject to scholarly discussions and easy to track: evidence of prior convictions, hearsay evidence and standard of proof. While in the first chapter of my thesis, I dealt with various general issues, the three subsequent chapters were each devoted to one of the chosen topics.

### *Differences, similarities and common goals: Chapter One*

We first started by a disambiguation: whereas criminal procedure is a broader subject and in many jurisdictions encompasses criminal evidence law as well, our main focus is evidence law – the rules that govern the collection, presentation and evaluation of

information with the objective of resolving the dispute over past events. The distinction, as we observed, is useful for analytical purposes.

Much has been written about the differences between jurisdictions and what could explain or justify them. Mainstream comparative criminal procedure scholarship uses the single axis of adversarial versus inquisitorial procedure. Damaška who has been credited with authoring this model envisioned a two axes framework but he, too, soon reduced the four corners system to a simpler framework comprising two extreme ideal-types: inquisitorial and adversarial criminal procedure with the corresponding typical fact-finder profile, evidentiary regulation, allocation of procedural initiative etc.

In some way probably a useful analytical tool, the dichotomy, once conceived as a descriptive instrument, has by now lost much of its descriptive power when we look at actual jurisdictions. Among my six sample jurisdictions, we saw that traditionally non-adversarial Russia now hands their judges the dossier yet accords the procedural initiative to the parties, has a form of plea bargaining and has bifurcated trials when jury is involved. Germany's trial judges have the lead role but the jurisdiction is now also embracing plea-bargaining; traditionally adversarial England has liberalized regulations on hearsay as well as character evidence yet maintaining procedural initiative on the parties. These examples would in the traditional dichotomous world be highly unlikely but in the real world are becoming increasingly commonplace. Moreover, originally devised as a descriptive and explanatory tool, the distinction between inquisitorial and adversarial procedure is sometimes misused by attributing normative significance to it. This kind of focus on differences and incompatibilities tends to not foster trust or understanding that is essential for successful cooperation.

Clinging stubbornly to the dichotomous model also means disregarding the instances of convergence – introducing some form of plea bargaining or at least accepting guilty pleas as basis for convictions seems to be one of the trends for example; we examined a recent work by Jackson and Summers who argue that another consensus is emerging around defence rights not just in Europe but all over the world. Looking at my survey of jurisdictions, it seems that today designing a criminal procedure to fit the needs of changing societies while taking advantage of the new technologies might actually be very much like a Lego with fairly malleable pieces: even though, for example, the concept of guilty plea as basis for conviction is gaining ground, it always has a local twist or “flavour” to it.



We then proceeded to examine a third approach to criminal evidence law that springs from the fact that criminal trial is fundamentally a communicative affair and it is the operations of human mind that the evidence law attempts to control. This being so, some scholars have argued, it only makes sense to examine criminal evidence law from the vantage point of psychology – for optimal results, one must consider how human mind is hard-wired. One of such scholars is Dan Simon who has written about the criminal evidence law in the United States, particularly about how one could improve the system by paying better attention to the cognitive abilities and needs of the people involved. Simon’s arguments are predicated on the assumption that the main purpose of criminal trials is accurate fact-finding and his main point is that criminal evidence law should be devised in a way that helps the fact-finders reach accurate decisions.

I posit that this same approach is valid for all jurisdictions of the world. It is exactly the human fact-finders and their mental operations that criminal trials rely on in all jurisdictions – and from my reading of current understanding of human psychology, save for some cultural idiosyncrasies, human minds work very similarly around the globe. My hypothesis is that accurate fact-finding also occupies a central place as a purpose of criminal procedure.

There is hardly a jurisdiction in the world that does not consider “finding the truth” its purpose. True, there are also other purposes that criminal procedure is expected to serve and in the first chapter I briefly touched upon them. In a philosophical sense, it is far from settled what truth is or whether it is possible for humans to “find it.” From the moral perspective, realist ontology and epistemology is the least problematic combination. However, I concluded after a review of several theories of truth that a moderately sceptical take on the truth is more honest: whereas denying objective reality would jeopardize the legitimacy of criminal law, denying the inherent subjectivity of the fact-finders and the constraints placed on the truth-finding enterprise by procedural law would be simply hypocritical. In all my sample jurisdictions, as accurate as possible account of what happened in the past is an essential component of this truth. This accuracy of fact-determinations is a central goal of the procedure and no rational Western criminal justice system can afford to argue that it does not matter who gets punished or what for. Not only would this be morally unacceptable and utterly illegitimate use of state power but also dysfunctional if the substantive criminal law is to reduce crime. Both reformation and

isolation would be without effect if applied to the wrong person. I therefore concluded that accurate fact-finding is, indeed, the common focal point for all jurisdictions.

Human mind as the tool and accurate fact-finding as the intended outcome constitute the common ground bringing together different jurisdictions and thus constituting the basis for my study of evidence law. Granted, some of the regulation may pursue other, sometimes contrary and competing objectives. As was discussed especially in the fourth chapter of my thesis, most if not all contemporary jurisdictions also subscribe to a principle of “free proof.” The basic philosophy underlying the free proof principle is simple: life is too unpredictable and multi-faceted for any kind of *a priori* significance to be attached to any one piece of information. For this reason, the fact-finder should be presented with all possible information and should be free to assess the evidence in each case without any preconceived restrictions. The rules of evidence restrict the freedom of proof. As the argument goes, in general, more evidence is better, but there are situations where this unfettered freedom will produce inaccurate or otherwise undesirable results because the human mind is not able to adequately process certain types of information. It is exactly the cognitive needs and abilities of the fact-finder that, therefore, must dictate the proper scope and operation of the rules of evidence: restricting the fact-finder in situations where they are capable of handling the evidence in pursuit of accurate fact-finding would turn the rules of evidence into a hindrance. Conversely, where it is known that the human mind commits errors in processing the incoming information, rules are needed that would prevent the errors as much as possible by either keeping out the contamination or guiding the fact-finder to appropriately handle the information.

In the first chapter I also turned my attention to the mechanisms through which evidence law functions. Evidence law works through two types of controls that I refer to as input controls and reasoning controls. The former determine what evidence the fact-finder gets (either by excluding some information or causing some information to be presented) and the latter prescribes how the evidence is to be evaluated (for example, by setting forth that in order to establish a fact, testimony of at least two eyewitnesses is necessary). Sometimes what in evidence law looks like an input control turns into a reasoning control because of the way procedure is designed. An example of this, as we saw earlier are the exclusionary rules in bench trial setting where the lone judge is expected to filter out some of the evidence before proceeding to ascertaining facts of the case. This intricate link between the rules of evidence and procedural design (including the fact-finder profile) is why I have for the most part kept the two analytically apart but there is no denying of course – in order for

the criminal process as a whole to do what it is supposed to, procedure and evidence must be in sync lest one defeat the efforts of the other.

The main objective of this work might as well be re-stated as a search for the best arrangement for fact-finding – if one were able to scientifically demonstrate the superiority of one fact-finding arrangement over another, it would be hard to argue against its adoption. Or even more – if there was scientific proof that a particular fact-finding arrangement consistently contributes to factually inaccurate decisions, the legislators would have hard time convincingly arguing in favour of retaining it even in the face of other auxiliary goals they would like to pursue through criminal procedure and evidence regulation. If the law is to accomplish its objective, it must conform to the realities of life without resorting to wishful perceptions about things it cannot change. It is therefore imperative to closely examine how the human mind is hard-wired to work in order to devise a working set of rules of evidence.

I approached the issue of “universal rules of evidence” through the study of six jurisdictions and three common traceable rubrics of evidence law. Apart from being adherents of rational (as opposed to irrational) approach to fact-finding, they present a number of differences, most notably in procedural design and fact-finder profile. My reason for selecting these jurisdictions was to not only demonstrate the diversity but also to examine how different evidentiary regulation would map onto differences in procedural design and fact-finder profile. As set out in chapters 2 through 4 of this thesis – links between evidentiary regulation and fact-finder profile today are often much weaker than traditional comparative evidence law scholarship would have us believe. Similarly, psychological studies surveyed in chapters 2 and 3 appear to debunk another widely held myth as if professional judges were the superior quality fact-finders immune to emotional appeal and free from biases and prejudices. Judges, studies indicate, are for the most part susceptible to the same cognitive fallacies as the rest of the population.

Having found that the procedural design and fact-finder profile are only loosely connected in my sample jurisdictions, I then proceeded to examine the feasibility of the universal evidence law through the study of three specific rubrics – the results will be summarized next.

## *Evidence of prior convictions: Chapter Two*

The problem with character evidence and prior convictions more specifically is nearly universally recognized: while past conduct is somewhat probative of future behaviour, the danger is that the fact-finder may overvalue it and convict defendants based not on the evidence specifically pertaining to their current charge but on their criminal past. The difference lies in the degree of trust jurisdictions place on their fact-finders. In this regard, my survey of my six sample jurisdictions showed the United States as the most distrustful while Estonia came out as the most liberal. Judging the immediate past based on the more distant past is by no means an exact science. As earlier explained in greater detail, psychologists know today that there is no universal “criminal character” nor is behaviour purely a function of the situation: people tend to behave similarly in similar situations. The key to understanding how probative a past event is of the charge at hand lies in proper identification of the parameters that make up the “situation” for that person. One must also recognize that a single occurrence is not necessarily representative of a pattern and has low predictive power. There is another strand of research pertaining to the issue of prior convictions and this deals with recidivism studies – some offences, studies demonstrate, are more likely to be repeated than others. Recidivism studies are certainly worth taking notice of but should be treated with caution lest people be convicted solely because their criminal record includes one of the “high recidivism offences.”

This all said, child molestation and sexual offence convictions deserve special attention. While not on the list of high recidivism crimes in any jurisdiction, a prior conviction of this type of crime has been demonstrated to inflame jurors to the degree that rational evidence evaluation is stalled and conviction becomes much more likely even if the charges are not sex-related in any way.

Another common problem area exposed by psychological studies is a situation where evidence of prior convictions is supposed to be used only to undermine a defendant’s credibility. Research here indicates a disturbing tendency: prior convictions tend not to affect credibility assessments but are looked at as evidence of propensity to commit the crime he is charged with regardless of what the jury instructions or statutory language require.

Evidence law deals with the dangers associated with prior convictions both by using reasoning controls and input controls. Whether these controls are effective, warrants closer examination. Especially interesting is the phenomenon of presumed prior convictions as described by Laudan and Allen – even if all information about prior record is carefully screened out, jurors have been observed to have assumed the existence of prior convictions anyway – based on defence trial tactics, researchers hypothesize. More than others, this assumption hurts the defendants who have no prior record but nevertheless choose not to testify – a choice well known to be made to keep a prior record from being revealed. When prior convictions have been accidentally revealed, evidence law often includes a reasoning control – either a directive in the rules that the prior record should not be used to prove propensity to commit crimes or a similar instruction by the judge to the jurors. Reasoning controls are not problem-free: the instruction itself sometimes draws more attention to the evidence to be disregarded than it otherwise would have received; in many cases the studies report that limiting or curative instructions are simply not followed. Even though less than numerous, studies conducted on judges demonstrate a similar inability to deliberately disregard inadmissible evidence.

The solution I suggested in chapter 2 lies in a two-pronged input control: evidence of prior convictions that have no relevance to the charge should be weeded out so that the fact-finder will never see them. Others that go to similar offences should be accompanied by sufficient detail to help the fact-finder determine whether they in fact give rise to heightened probability that the person has re-offended. In addition, there seems to be a need for some education for the fact-finders so they could appreciate the balance of situation and character in determining possible patterns of human behaviour. Admissibility of prior convictions that satisfy the criteria of relevance by similarity should not be conditioned on the defendant testifying – providing the fact-finder with this information is not more or less helpful depending on whether the defendant uses his constitutional right to silence. While in a bifurcated tribunal setting this framework could be easily implemented, a unitary tribunal such as a lone judge or a mixed panel would need to have a separate judge much like a *juez de garantia* in Chile, tasked with deciding the admissibility of prior convictions. Since the procedure in most jurisdictions already includes some form of pretrial conference for trial planning purposes, having that conference held before a different judge should not pose a particular problem. Where pretrial investigation results in the compilation of a case file that is normally handed to the trial court in its entirety, screening would have to result in the removal of the irrelevant but prejudicial material from the dossier.

### ***Hearsay: Chapter Three***

In the third chapter of this thesis, I examined the regulation of hearsay evidence. Not all jurisdictions conceptualize hearsay the same way. Some view hearsay as evidence of lower reliability and regulate its admissibility. Others treat it as a weight problem and trust the “free evaluation of proof” principle allows the fact-finder sort things out. Many jurisdictions treat written out-of-court statements differently from oral out-of-court statements and police reports separately from other written out-of-court statements. This all said, the four dangers associated with accepting second-hand testimony as listed by Ed Morgan – lack of memory, poor perception, insincerity and ambiguity of language – are well known in all my sample jurisdictions.

Psychological studies I reviewed confirm that the four hearsay dangers are very real and the aspiration to get as close to the primary source of information should not be taken lightly or the information that reaches the fact-finder may be incomplete and distorted. My sample jurisdictions offer several ways for handling this issue. Some jurisdictions prefer input controls – unreliable hearsay is excluded so that it never reaches fact-finders. Others trust their fact-finders to be able to translate the lower reliability of second-hand testimony into weight assessment and thus do not deem it necessary to exclude hearsay statements – often pointing out that more evidence is better. There is an agreement that not all hearsay is equally unreliable. How to draw the line between sufficiently reliable and unreliable hearsay is again a question that presents various options for regulatory approach: some jurisdictions leave it to the discretion of the fact-finder or the gate-keeper. Others have created an elaborate maze of categorical rules (sometimes, ironically accompanied by a very wide discretion to admit so the rest of the rules become close to redundant).

Psychological research has approached the hearsay issue at many different angles. First, as mentioned before, there are the four hearsay dangers that relate to the basics of human information processing – perception and encoding, remembering and recalling and expression. Knowledge about the mechanism of human information processing helps us understand what exactly are the vulnerable spots in the information processing chain and how one should go about minimizing the dangers – and what does not really work. Some of the categorical exceptions to the hearsay rule where they exist do not make much sense in light of psychology and most of them target one or two danger factors while leaving the others completely unchecked. At the same time, testifying in open court under cross-

examination is also no guarantee of reliability – several studies have shown that even trained professional law (enforcement) personnel are generally inept when it comes to lie detection based on observation of witness demeanour. Extra trust invested in written hearsay in some jurisdictions may also be misplaced: the document cannot be more sincere, linguistically clear or perceptive than its author was – the only strength lies in the memory factor.

Psychologists have also attempted to solve the other side of the equation: the ability of fact-finders to take the lower reliability of hearsay statements into account when weighing evidence. This line of research has demonstrated that fact-finders are able to discount the value of hearsay evidence. This side of the equation may, however, prove unsolvable – there is no formula to calculate the factor by which the value of hearsay evidence should be discounted – it can hardly be a matter of categories as the actual reliability of hearsay evidence and its corresponding weight is different in each individual case. Possibly it is also dependent on the patterns of information evaluation prevalent in the community.

My analysis in chapter 3 led me to conclude that although hearsay statements suffer from lower reliability, excluding them by pre-set categories or in bulk is not the best way to facilitate accurate fact-finding. Still, unlimited admissibility would also pose problems, especially where the fact-finder is not getting enough information about the reliability of the statement. Thus, I propose that evidence law should take the middle ground here: all hearsay should be admissible where the declarant is unavailable or does not and cannot reasonably be expected to remember the information in question. Naturally, proponent should first make a bona fide effort to produce an eyewitness with knowledge as admitting hearsay is clearly an inferior option.

This liberal regulation should be complemented with the requirement that whenever hearsay is presented, it must be accompanied by the “foundation facts” – information about the declarant and the circumstances of making the statement. In case hearsay is introduced because the declarant claims to have forgotten everything, he would still have to testify to lay foundation for admitting his out-of-court statement. This takes care of confrontation issues as well as removes the temptation to present written memoranda instead of eyewitnesses on the pretext that they do not remember anything. How much weight the statement then ultimately carries is for the fact-finder to decide but it will be an informed decision. Hearsay statements for which the foundation facts are not available should not be admitted if they can be screened out beforehand. Reasoning controls, such as directions to

disregard are not very effective, especially if not accompanied by a sensible explanation. The lack of foundation may be just the kind of explanation needed to help the fact-finder adequately evaluate unreliable hearsay. This approach, slightly modified from Eleanor Swift's proposal, would suit for all jurisdictions regardless of fact-finder profile or procedural design as it does not depend on having a gate-keeper (although would benefit from having one).

### ***Standard of proof: Chapter Four***

Finally, in chapter 4, I looked at attempts to ensure the accuracy of the result of criminal trials through defining the quantum of evidence needed for a guilty verdict. Whereas prior convictions and hearsay statements are issues pertaining to information of particular substance or genesis, standard of proof is at work towards the end of the process.

Criminal procedure features the presumption of innocence – not just a very basic declaration but in modern law a fundamental right that necessitates another control measure – the burden of proof that in criminal cases for the most part rests with the prosecution. The standard of proof is the weight of the burden of proof – it describes the quantum of evidence necessary to overcome the presumption of innocence. But how would one measure the quantum of evidence and then describe it when there is no universally accepted measuring unit for evidentiary strength?

Some jurisdictions have attempted to coin a specific phrase to denote the quantum of proof necessary for a valid conviction. Some of my sample jurisdictions require that the fact-finder should prepare a written judgment detailing his reasoning from the evidence. Is there a link between having an articulated standard and not asking for reasons as Damaška once wrote? While this would be a neat and logical connection, reality is different. Even those jurisdictions that require written reasons for findings of fact often use a standard of proof phrase, if not found in the statutory law then developed and adopted by courts. These phrases are surprisingly similar across all jurisdictions – with “beyond reasonable doubt” standing out as a recurring theme. Still, the phrases, however formulated, suffer from the same malady: how exactly would a fact-finder know when the required degree of evidentiary support has been achieved? And can one appeal a lower court judgment based on the argument that in light of the applicable standard of proof, evidence was insufficient? In jurisdictions with written reasoned judgments, standard of proof tends to develop into a set of judicially created reasoning canons and weight-and-sufficiency rules. The ‘beyond



reasonable doubt' there becomes more of a question of whether the fact-finder is able to write a judgment that follows the expectations for judicial reasoning.

Alternatively, in jurisdictions where no written reasoned judgment must be prepared, the standard of proof becomes more of an exhortation rather than a legal standard. This exhortation should impress upon the fact-finder the gravity of their duty and the need to exercise care and caution in order to avoid mistakes. The point at which deference to fact-finder will no longer protect the judgment from being reversed on the facts is set at a lower level (i.e. the trial record must be manifestly devoid of inculpatory evidence if the appellate court is to reverse the trial court's verdict). But one should not underestimate the potential of exhortations in jurisdictions with written reasoned judgments either: written reasons may not reflect the actual mental operations that result in the judgment: the writer may be skillful but insincere.

Chapter 4 then examined whether it is possible to conceptualize standard of proof through a probability of guilt assessment. Arguments have been wielded for and against, sometimes mixing the probability of guilt up with the degree of confidence the fact finder has in his decision. On a theoretical level, probability of guilt, say, 90 or 95 per cent raises the question of how this figure has been arrived at and how one should justify that there is a ten per cent chance that the person convicted did not actually commit the crime. In that regard, talking about confidence rating is at least conceptually more acceptable.

Studies in psychology of fact-finding have a few things to say about how fact-finding works. First, while the Wigmorean charts about inferential reasoning and Bayes' theorem about integrating relative probability figures are certainly attractive in their neatness and methodicality, this is not how people actually go about finding facts. Fact-finding, psychological research shows, is a process of building coherent stories around the evidence and based on the fact-finder's own world knowledge and emotions. This also means that fact-finding (at least in the legal setting) is inevitably subjective - different people may well assess evidence and different stories built around the evidence differently because of their personal background. For the same reason, attempting to articulate the maximum level of doubt a fact-finder may harbour while still legally allowed to convict will not help standardize the decision making process. Appeals predicated upon the claim that the standard of proof has not been met are in this sense nothing but calls for the appellate tribunal to substitute the lower court's judgment with that of their own.

We also observed that standards of proof viewed as confidence standards have their own problem – they are based on the assumption that there is a correlation between the fact-finder’s confidence in the decision and the likelihood that the decision is actually correct. This, too, is not supported by scientific findings or even logic – one criminal jury apparently consulted an Ouija board to reach their verdict which then was confident (beyond reasonable doubt) but resting on a completely improper basis.

The psychological studies we reviewed show that fact-finders start their attempts to make sense of the evidence as soon as the evidence is presented – and will not wait until all evidence is in. The process of story creation is a bidirectional one: while evidence that is being presented keeps shaping possible stories in the fact-finder’s mind, the stories as they are forming also influence how and what new information is assimilated. Studies show that people unconsciously strive for coherence and in order to achieve that they not only amend their versions of what happened as new evidence comes in but they also filter and interpret the new information to maximize this coherence. This processing for the most part happens automatically – most information is processed by the automatic system which offers quick intuitive judgments and processing ease (coupled with a number of well-documented reasoning fallacies resultant from biases and heuristics). Engaging the deliberate system may successfully counteract some of these dangerous mental shortcuts.

Research indicates that while judges seem to be assumed to have almost a superpower to use only their deliberate system and switch off all emotions, this assumption has no scientific basis. Judges, too, engage in automatic snap decision making and are vulnerable to emotions.

Research does, however, confirm that different standard of proof phrases convey different meanings – “preponderance of the evidence” in fact-finders’ minds actually evokes a lower standard than “beyond reasonable doubt.” Even the same standard, coupled with different explanation of its meaning may evoke different levels of threshold confidence. This is a very important finding as it demonstrates that exhortations work – by instructing fact-finders to convict only when “sure that the defendant is guilty”, it is actually possible to cause fact-finders to proceed with greater caution. The mechanism through which the standard of proof exhortation works is hypothesized to be based on somatic markers. The standard of proof instruction affects the automatic system – it creates an emotion that in turn affects the attitude of the fact-finder and sets the minimum by which the fact-finder must find the guilt story more believable than the competing story of innocence in order to

be confident enough to convict. It is possible that some of the effect of the exhortations is due to the ceremonial aspect of court procedure. This would explain why some studies show that professional judges convict more easily than lay juries: to judges the courtroom setting and court procedure has lost its ceremonial force and has become “business as usual” – not to mention that at a bench trial, the judge receives no instructions or exhortations.

Based on the empirical evidence, I argued in Chapter 4 that the standard of proof is not really a rule of evidence at all – at least not an enforceable legal standard on which a decision or its subsequent review could be based. Nevertheless, it is an important procedural tool that controls the fact-finding process – not at a conscious level but non-consciously by calibrating the automatic system. Its value is even greater where fact-finding is entrusted to lay fact-finders who receive the exhortation in the ceremonial setting of the courtroom. How a perfect standard of proof instruction reads, however, is not only a political question about how stringent it should be but requires additional empirical research to fine-tune it to evoke the desired threshold of confidence. Further research is also necessary about the proper ceremony and atmosphere surrounding it.

Professional judges and bench trials pose a greater difficulty – the courtroom ritual and ceremony may have lost its effect over time (a hypothesis certainly worthy of study in the future) and with the judge being the sole arbiter of both law and fact as well as the person directing the course of the trial, exhortation has no logical place in bench trials. Here a written reasoned judgment may be the best possible solution to ensure that the decision to convict has not been made too lightly (and that the standard has not been raised so high that it is impossible to meet).

Knowing the natural tendency of humans to employ the automatic system with all its built-in fallacies, one should also introduce measures, procedural or evidentiary, to encourage the use of the deliberate system. For professional judges, checklists, sufficient time and continuing education has been suggested in addition to reasoned judgments but as far as jurors go, regulation in many jurisdictions urgently needs an overhaul. Since jurors start actively constructing stories as soon as the trial begins and evidence starts pouring in, the instructions about law should be given at the beginning and not at the end of the trial. Not only that – jurors should have both the text of the applicable law as well as the trial record available to them – there is no reason why the law or the evidence should be liable to loss and distortion due to the fading memory of jurors. On the other hand, knowing the legal

standard from the very beginning, jurors would be able to better pay attention to the legally relevant facts and recognize attempts by the trial counsel to confuse the issues.

### *Conclusion from the conclusions*

What about the feasibility of universal rules of evidence then? The universal commitment to accurate fact-finding and the human mind as the universal fact-finding tool would certainly lend hope that there can be rules of evidence that would work across jurisdictions. This hope is even further strengthened by the coming together of the understanding of fundamental procedural human rights in the progressive democratic world. We have also seen that contrary to popular belief, professional and lay fact-finders are not very different in regards to their cognitive abilities so this is one more oft-cited prohibitive difference debunked – fact-finder profile is a political rather than an instrumental choice. Granted, depending on whether the choice is to use a unitary or a bifurcated tribunal, the options for designing a working set of rules of evidence may be slightly different – if there is no gatekeeper, exclusionary input controls become ineffective and turn into often non-working reasoning controls – and sometimes exclusionary input controls are necessary. Hence my first general recommendation (and I am only echoing here that which has been said before by others) – regardless of what the choice for the fact-finder profile, procedure must provide for a separate gatekeeper.

What complicates the answer, however, is the following two factors. First, there is the issue of cross-cultural differences in cognitive needs and abilities. In order to achieve accurate fact-finding, the drafters of rules of evidence must be mindful of possible cultural quirks and include additional controls or appropriate procedural measures. The way to understand where these differences lie and where additional controls are needed is through empirical research. Perhaps the irrational reaction to child molestation is one of those differences owing its existence to the value system of the West. Drawing on the studies about cross-cultural differences I cited in Chapter 1, one might assume, for example, that in China, fact-finders might be less susceptible to evidence of prior convictions simply because there situation is viewed as a more prominent determinant of human behaviour than the person and his character.

Possibly at least just as significant is the second factor: accurate fact-finding, while universally held in high esteem as the goal of criminal proceedings, is by no means the only one animating rule-making. There are several other auxiliary or even competing

objectives that criminal proceedings pursue – including defence rights that are not motivated by instrumental concerns, broader policy goals and political agendas, and limits on available resources. It is these goals and considerations that even in the face of empirical research into the cognitively optimal arrangement for fact-finding are responsible for rules that are not only wildly different across jurisdictions but are also in contradiction to what empirical evidence suggests is the best fact-finding arrangement. Either this or a much lazier reason – tradition (including popular beliefs that have been scientifically disproved like the dying declarations exception to the hearsay rule). While competing policy objectives can hardly stand where they demonstrably harm the goal of achieving accurate verdicts, tradition has proved much more resilient and resistant to science and argument. From a feasibility point of view and apart from cross-cultural differences, tradition is probably the toughest obstacle to any attempts to actually devise universal rules of evidence. Clinging to tradition dismisses scientific evidence with ease and comes complete with devices like the normative inquisitorial-adversarial dichotomy that serve to limit the options. Seeing the reign of tradition slowly retreating in criminal procedure and evidence law makes me hopeful that soon time will be ripe to more seriously consider the scientific foundation of criminal rules of evidence everywhere and thus take a step towards (more) universal criminal evidence law.

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