THE LAW OF EVIDENCE AND THE PROBLEM OF RISK-DISTRIBUTION

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This thesis is submitted to the University of London for the degree of Ph.D.
The judicial determination of disputed facts is conducted typically in conditions of uncertainty and inevitably involves risks of error. Although it is one of the main objectives of the law of evidence to provide for the distribution of the risk of error between the parties in a justifiable way, this has been only partially attained.

The orthodox perception of the law of evidence is that the law engages in a very limited interference with the process of fact-finding, otherwise leaving this process to be conducted in accordance with common-sense reasoning. However, the common-sense reasoning employed in drawing factual inferences from evidence cannot inform decisions concerning the allocation of the risk of error. Such decisions have to be rooted in moral principles. Some legal rules do ordain the allocation of the risk of error, but these are few, disparate and qualified (by many exceptions). These rules leave unregulated a very wide range of situations where issues of risk-allocation can arise. Where the legal rules do not allocate the risk of error, judges are not free to place it where they choose. Judicial choices of risk-distribution must conform with legal principles. These principles have to be articulated and refined.
By contrast to the orthodox perception, modern evidence scholarship attempts to fashion a process of decision-making which is free of rigid legal rules and which is informed by probability and inductivist logic of one kind or another. This approach is, however, confined to epistemological aspects of proof and offers no general moral criteria for the distribution of the risk of error.

In judicial fact-finding, risk-distribution ought to be guided by those moral principles which provide the best justification for the existing legal arrangements and thus reflect the legal system's risk-related preferences. Laying down the legal reasons for distributing the risk of error, these principles confer rights on those involved in adjudication. Thus, English law has to be interpreted as containing the principles of equality and utility, which should apply in civil trials; and the principle of protecting the innocent which, together with those of equality and utility, should apply in criminal ones. According to the principle of equality, risks of error should be treated as equal for all persons involved in adjudication. The principle of utility requires the decision-makers to distribute the risks in a way which augments the number of correct decisions in the long run of cases; and the principle of protecting the innocent prohibits them from exposing the accused to any risk of mistaken conviction.
When these principles are in conflict, they have to be balanced, having regard to the substantive rights at stake. The existing evidentiary rules ought to be seen and applied as a species of these three principles.
TO THE MEMORY OF SARAH KIPNIS
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"The thought that there is a kind of value which is, unlike others, accessible to all rational agents, offers little encouragement if that kind of value is merely a last resort, the doss-house of the spirit. Rather, it must have a claim on one's most fundamental concerns as a rational agent, and in one's recognition of that one is supposed to grasp, not only morality's immunity to luck, but one's own partial immunity to luck through morality."

Bernard Williams, Moral Luck, 21 (Cambridge UP - 1981)
INTRODUCTION

In recent years, adjudication and legal reasoning have been at the centre of jurisprudential gaze. Scholars express diverging views both about the actual judicial processes and about what they should be. Most of these scholars seem to be sharing several basic assumptions. First, as Dworkin observes, "It matters how judges decide cases". What lurks behind this truism is a general unease about the ways in which judges make important decisions. This feeling is the product of a widespread disbelief in judicial ability to resolve controversies exclusively by rules, without resort to politics or morality. There is also some dissatisfaction with certain judicial practices. The jurisprudence of rules has gradually been replaced by the jurisprudence of reasons which is shaped by contested ideas of legal objectivity and rationality and moulded by varying degrees of scepticism about each of those two. Dworkin's idea of principles as full-fledged legal norms that bind judges rendering their discretion "weak" was perhaps the most important, albeit debatable, development in this field.

Second, most participants in this polemical jurisprudence operate at high levels of abstraction and generality which usually makes their works inaccessible.

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1 R.Dworkin, Law's Empire, 1 (1986).
to practitioners of law. At the applied level, the significance of many of the views expressed within these polemics remains somewhat unclear. These views may often be safely ignored by legal practitioners in the conduct of ordinary legal work. Nonetheless, the general assumption that abstraction and generality are most appropriate for theorizing about law and adjudication remains intact. Jurisprudence has thus become divorced from more specialized inquiries into concrete legal subjects such as contracts, torts or criminal law. By contrast, specialized inquiries are addressed primarily to practitioners and have adopted a highly particularistic "no-nonsense" approach, concentrating on legal rules and precedents rather than on more general patterns of legal reasoning in the areas of their investigations. The scarcity of middle-order theories, mediating between the general principles of legal reasoning and particular legal subjects, can thus be appreciated.\(^2\)

Lastly, contemporary jurisprudence is almost exclusively concentrated on reasoning about substantive law. However, no one can sensibly deny that it matters very much how judges and jurors make their decisions about disputed facts. It is thus difficult to avoid the

\(^2\) See W. Twining, Academic Law and Legal Philosophy: The Significance of Herbert Hart, (1980) 95 L.Q.R. 557. It would not be appropriate here to list the exceptions which qualify this general observation. Some of them are referred to in this work.
impression that most contributors to the current jurisprudential debates tend to agree with Dworkin that contested issues of fact are important but "straightforward enough". This vision exemplifies once again the extent to which jurisprudence has separated itself from everyday practices and routine legal concerns. Questions like "Did the man at the lathe really drop a wrench on his fellow worker's foot?" are, contrary to what was assumed by Dworkin, not susceptible to straightforward solutions, certainly not in all cases where "the man at the lathe" denies the allegations. These and other questions of fact that arise in adjudication have to be answered in a legally justifiable way, and one of the main objectives of legal theory is thus to articulate the criteria for validating truth-certifying procedures and forms of reasoning about facts followed by the courts.

This work is about the law of evidence and the foregoing observations help in charting its boundaries. In the law of evidence, as in many other branches of law, middle-order theory, integrating some of the more general ideas concerning legal reasoning within a particular framework of legal decision-making, is still in its inchoate

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3 Dworkin, supra n.1, at p.3.
4 Dworkin, id.
5 To accept all this, one does not have to endorse the more radical views of Jerome Frank which appeared in his Courts on Trial (1949).
stage. Traditional expository works on evidence are focused exclusively on evidentiary rules (admitting that they are both exceptional and subject to many exceptions) and on judicial decisions which explain and apply these rules. The process of proof clearly involves more than just rules, but when one glances at this "more than", a possible "rules plus" substitution of the orthodoxy, the task facing him looks more than daunting. Epistemology, logic, linguistics and psychology of fact-finding are sufficient to discourage; to those one should add probability theory and political morality, and there is more to come. Fragmentation and division of labour seem therefore to be inevitable.

I am not a philosopher, nor a psychologist, statistician or logician. I am a lawyer. From this perspective, the legal justification of judicial fact-finding processes appears to me to be an appropriate subject for study. Judges and other triers of fact cannot settle factual controversies as they wish. Their procedures of examining evidence and their reasoning about facts ought to be legally justified, and in order to be justified, these procedures and reasoning have to satisfy certain

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7 See W. Twining, Rethinking Evidence, chs. 2; 6 and pp. 361-68 (1990).

legal criteria. These justifying criteria might well require a broader inter-disciplinary understanding, but they will remain peculiarly legal. Law is practical. Legal reasoning is a species of practical reasoning. It looks for justifiable reasons for legal action. Science, by contrast, aims at acquisition of knowledge for its own sake and is used in various frameworks of practical decision-making, serving their specific purposes. Many of those purposes are non-scientific. They often involve choices of value. This is especially true about law. In particular, in the law of evidence, problems of due process and decisional choices under uncertainty are value-laden. In dealing with these and many other issues, science can only be facilitative. Lawyers insisting on peculiarly legal justification seem therefore to be right. This justification is the essence of the rule of law.

Hence, criminal, civil and other curial and extra-curial findings of fact ought to be justified by legal criteria in order to be legitimate. An attempt to itemize these criteria in Anglo-American jurisdictions reveals further complexities. Rectitude of decision, for example, is necessary for a correct application of the substantive law, but in many cases, this value is subordinated to

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10 See Twining, supra n.7, ch.3, esp. at pp.71-82.
the need to save preponderant costs and to avoid inefficiencies such as delay and vexation.\textsuperscript{11}\textsuperscript{11} Hence, procedural efficiency is one of the legally significant criteria.\textsuperscript{12}\textsuperscript{12} The legality of official practices of gathering information which, in order to be enhanced, may prevent admission of illegally obtained evidence is also among these criteria.\textsuperscript{13}\textsuperscript{13} These criteria also include "process values" such as fairness, dignity and participation which are impregnated into the process of fact-finding independently of their effect on the accuracy of outcomes. Maintenance of such values for their own sake is something to which people are entitled within the official processes by which their affairs and lives can be affected.\textsuperscript{14}\textsuperscript{14} There is, in addition, a moral dimension in judicial finding of facts. Legal reasoning inevitably involves selection and processing of raw data and its transformation into broader categories which, at the end of the inferential chain, give rise to different rights and duties. This process of reasoning is usually not value-free and involves moral judgement. In order to be legitimate, such judgements have to meet the criteria

\textsuperscript{11} Twining, id.


\textsuperscript{13} See, e.g., A. Zuckerman, Illegally Obtained Evidence: Discretion as a Guardian of Legitimacy, [1987] Curr. Leg. Prob. 55; Dennis, supra n.9.

of "moral legitimacy" furnished by the legal system from within. Lastly, judicial decisions about contested facts are by and large made in conditions of uncertainty and thus inevitably involve risks of error. Legal decision-makers are not allowed to deal with these risks as they wish. These risks have to be distributed between the parties in a justifiable way. Therefore, legal criteria for risk-distribution must also be articulated. The complexity generated by this plurality of values and objectives is further aggravated by the entangled web of their mutual relationships. Hence, even from a lawyer's perspective, the agenda is enormous, calling once again for a division of labour.

This work is devoted to the problem of risk-distribution in the law of evidence. It starts with a simple observation that risks of error are unavoidable in legal fact-finding and one of the important objectives of judicial decisions is to allocate these risks between the parties in a legally justifiable fashion. The criteria for distributing these risks have thus to be discerned from the law itself. What are these criteria and what should they be?

Traditional expository works on the Anglo-American law of evidence (the contribution of which is outlined at

the outset of part one) describe this law as consisting of a small number of rules that regulate a limited range of issues. Among these issues are admissibility of evidence, burdens and standards of proof, corroboration, presumptions, compellability, competence and examination of witnesses, immunities, prevention of prejudice and so on. Beyond these evidentiary rules, the evaluation and examination of evidence by the triers of fact is said to be free of legal constraints and conducted according to ordinary common-sense reasoning. This position needs to be questioned. The distribution of the risks of error cannot be justified solely by common sense; it has to be founded on legal grounds. Some of those grounds can be found in the evidentiary rules themselves. These rules, however, are rare, disparate and qualified by exceptions, whereas risk-distributive decisions are taken in a multitude and variety of forensic situations that are often not covered by the rules. The orthodox belief that standards and burdens of persuasion provide solutions for all risk-distributive problems is unwarranted. It is unwarranted because the existing standards are too vague and open-textured, thus requiring interpretation that has to be nurtured by some wider ideas concerning risk-distribution. This belief is also unwarranted because, in many cases, a decision as to whether the specified standard has been satisfied by the evidence itself assumes a risk-distributive character. Such decisions are and ought to be made
having regard to many forensic contingencies; in particular: the procedures of examining evidence that have been undertaken, their fairness to all concerned and the pertinent substantive law.\textsuperscript{16}

Hence, evidentiary rules fall short of providing a full-fledged regulatory framework for risk-distribution. At the same time, triers of fact are not free to distribute the risks of error by invoking their whims or some other unarticulated intuitions. Their decisions must be legal and justifiable as such. The orthodox dichotomy of rules and free proof is therefore inadequate. It is inadequate neither as a normative justificatory framework nor, it would seem, for descriptive purposes. It should, in my view, be abandoned, and in its stead some general legal principles of risk-distribution ought to be articulated.

Later, it is explained why the arguments criticising the law of evidence as a disorganized conglomeration of both exceptional and exceptionalized rules (some of which are merely "paper rules") appear to be so powerful. Each one of the existing rule-sceptical arguments owes its appeal to the orthodox posture. I therefore tentatively develop a working hypothesis, abandoning the vision of the law of evidence as consisting merely of its rules and substituting it by the model of principles and rules as

off-shoots of principles. Within this hypothetically constructed model, legal principles and rules operate in concert, regulating the distribution of various risks of error. This model can be sustained against each of the rule-sceptical arguments. It is therefore concluded that these arguments hold so long as the orthodox vision of the law of evidence is the only one available. The "anti-nomian" thesis supporting the regime of "free proof" and calling for abolition of nearly all evidentiary rules is flawed. Distribution of the risks of error, as one of the constantly present ingredients of judicial fact-finding, has to be subject to extensive legal regulation by rules and principles.

Part two, in which this hypothetical model is discussed, also traces the foundations of what was described in part one as traditionalist shortcomings. It appears that they emanate from a particular positivist conception of the law, which views "law" as a "plain fact", as an empirically identifiable set of propositions contained in its explicit rules, moulded by a strong empiricist position concerning acquisition of knowledge. It is argued that neither legal positivism nor epistemological empiricism can justify a neglect of the risk-distributive dimension of judicial reasoning and of the idea of principles that should structure that dimension. Moral principles commit no trespass into the logical space of empiricism, for it has no say when the facts
run out. Nor are they bound to be inconsistent with legal positivism when, for example, they are discernible from legal materials in a way which follows the existing interpretive conventions. Moreover, the basic assumptions of legal positivism are not beyond questioning.

This part also examines the debates conducted within the new genre of evidence scholarship. Modern scholarship of evidence endeavours to fashion a framework for decision-making which, being free of rigid legal constraints, is structured either by mathematical probability or by non-mathematical inductivist logic. It is argued that these approaches, being confined to epistemological aspects of proof, fail to offer the general moral criteria for the distribution of the risks of error. Legal reasoning, as has already been said, aims at justifying reasons for action. Epistemic rationality of probability is, of itself, not sufficient for furnishing these reasons. Judicial decision-making in conditions of uncertainty ought to be subordinated to the risk-related preferences of the law. The primacy of risk-distributive principles builds up a hierarchically ordered framework within which any choice between any methods of reasoning (either mathematical or inductivist) is derivative rather than independent. Both mathematical and inductivist methods can thus be used in different forensic settings, depending on the principles of risk-
distribution relevant to the particular dispute. The uncompromising territorial rivalry between these two schools of thought which preoccupies the modern evidence scholarship is therefore spurious.

It is also observed in this part that what is at work in orthodox (and to some extent in modern) theorizing about judicial fact-finding is the suppression of the moral by the epistemological. This suppression is evidenced by the maintenance of those two: the dichotomy of rules and free proof and the dichotomy of auxiliary or "intrinsic" and extra-probative or "extrinsic" policies that explain different evidentiary rules. These dichotomies suppress or marginalize the presence of moral factors in judicial determination of facts. The former dichotomy does so by insulating evidentiary rules from the process of factual reasoning, thus treating them as exceptional cases where a normative interference into this process is justified; and the latter one categorizes these already exceptional cases by singling out the tiny number of extra-probative rules as the only norms which "contaminate" this process with morals. The same is also true about the grand seductive Either/Or posited in regard to mathematical or inductivist methods by modern evidence scholarship.¹⁷ It is suggested to abandon all these dichotomies and binary oppositions.

¹⁷ This observation is subject to a few exceptions, as illustrated later in this work.
Part three moves from criticism to reconstruction. It is argued that the law of evidence ought to determine the permissibility of judicial inferences and procedures of examining evidence from the risk-distributive point of view. From this point of view, it is not merely with the question "What happened?" that judges and other triers of fact are to be concerned. They are also to be concerned with the question "How should the litigants be treated, given that risks of error are inevitable?" Unlike the former empirical question, this latter question is a legal one. When lawyers disagree about this question, they disagree about risk-distributive reasons which support their clients as a matter of law. Since evidentiary rules alone cannot provide these reasons, it ought to be asked what exactly are these reasons? Where should they come from? Are they something that has to be taken into account merely "as a matter of prudence"? Have these reasons to be considered by the triers of fact as a matter of law? Are they to be considered as ones among many other factors or, perhaps, they have a status of principles from which the judge or other decision-maker has no discretion to depart except for good reasons?\(^{18}\) Are they "legal" in any relevant sense, and do they confer rights on the parties in dispute, or, perhaps, they come into play as a kind of

\(^{18}\) See Galligan, supra n.8, at pp.256-57.
"second-order" justification, which becomes pertinent when the explicit law runs out?19

This leads to another arguably insurmountable problem of "persistent questions",20 for any answer to the question "What is the law of evidence?" entails a response to the question "What is law?". Middle-order theory of evidence cannot attempt to settle the philosophical controversy surrounding this latter question. It has to start from a "working hypothesis" regarding the general nature of law and legal reasoning, plausibly to defend it, and to work out its principles of fact-finding from within. This strategy imposes limitations on such a theory, but we are bound to accept them for reasons of manageability if not for more substantive reasons. In his introduction to a symposium about Kelsen, William Twining made the following remarks:

"Consider a society in which, together with what is called substantive law, there is also highly developed and detailed body of legal rules about evidence. A Kelsenian legal scientist could, consistent with his method, present as legal knowledge these rules in a textbook entitled, The Law of Evidence. Consider now another society where 'free proof' obtains. Now, it appears, there is nothing about which a Kelsenian legal scientist could write his textbook. He is reduced to stating that there is no law of evidence just as Horrebow, writing on Iceland, and, having entitled a chapter 'concerning snakes', could state only, 'There are no snakes to be met with throughout the whole island.' But in such a society the practices of decision-makers as regards evidence, their

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attitudes to 'the probable and the provable' and their conception of what counts as a good reason for belief in a proposition of fact would not disappear and a legal scholar could justifiably be heard to say that such matters were both interesting in themselves and useful to those whose business it was to argue for and secure decisions in the tribunals of such a society. To call the study of such questions 'sociology' is very odd. That the Kelsenian legal scientist folds his tent and steals off into the night in such circumstances is condemnation indeed.21

These remarks raise many puzzling questions. The question whether a Kelsenian legal scientist really deserves this condemnation and whether one is bound to look at the law from this particular standpoint are both interesting and important. Middle-order theory of evidence, which starts with some working hypothesis about the nature of law, is, however, not suited for conducting a full-blown inquiry into such questions. It has to start with some plausible conception in regard to the general nature of law and legal reasoning, leaving at least some of the unresolved controversies surrounding this and other conceptions to the more general studies of jurisprudence.

The perspective adopted in this work and delineated in part three can be described as a "modified Dworkinian". This work endorses a conventionalist interpretation of legal materials with a view to deduce from them the moral principles that justify the settled law, to claim

that such principles can speak authoritatively within the law and that they ought to be applied by the decision-maker when the explicit rules of law run out. Like legal rules, these principles can confer various rights, but unlike rules, they do not apply in an "all-or-nothing" fashion and can be balanced against each other. These principles are adopted because they reflect the authoritative reasons that stand behind the law, the reasons which ought to be regarded as "pre-emptive". They are adopted as a matter of convention and not as a matter of some independent political or moral commitment to the law's integrity, and it is mainly in this respect that the approach advocated in this work differs from that of Dworkin.

Part three defends and exemplifies this approach and its limitations. This approach is interpretive and normative rather than descriptive. Working out its principles from within the existing law rather than developing them from some legally independent moral perspective, this approach enables an interpreter to make morally detached statements about legal principles. It can thus be viewed as seeking to maintain the inner rationality of the law measured by its moral coherence. By doing so, it builds, within the law, a bridge between "is" and "ought", and
it is submitted in this work that this approach is not inherently inconsistent with legal positivism.\textsuperscript{22}

What can be said from this perspective about evidentiary principles of risk-distribution? Part four examines this question in relation to English law. Facing the absence of explicit rules, a modified Dworkinian lawyer ought to ask himself the following question: What are the general moral principles reflecting the risk-related preferences of the legal system that can be learnt from the existing legal materials? From this perspective, English law has to be interpreted as containing, first, the principle of equality and that of utility which should apply in civil trials; and, second, the principle of protecting the innocent which, along with those of equality and utility, should apply in criminal ones. According to the principle of equality, risks of error have to be treated as equal for all litigants. The principle of utility requires decision-makers to allocate such risks in a way that augments the number of correct decisions in the long run of cases, while the principle of protecting the innocent prohibits them from exposing the innocent to a risk of wrongful conviction.

All these principles confer rights, and when they are in conflict, they ought to be balanced against each other.

These principles should govern judicial determination of facts in conditions of uncertainty, various procedures of examining evidence for forensic purposes and also the interpretation and application of evidentiary rules. The existing rules of evidence should be treated as species of the above-mentioned principles. This approach is exemplified by case-law and evidentiary rules. Finally, a preliminary exploration of its pertinency to fact-finding in administrative matters concludes this work.
PART ONE

WHAT IS THE LAW OF EVIDENCE?

CHAPTER ONE

EVIDENTIARY RULE-SCEPTICISM

1. INTRODUCTION
Should the process of judicial fact-finding be regulated by legal norms, and if yes, by what kind of norms and to what extent? As Bentham observed, "The field of evidence is no other than the field of knowledge",¹ and law seems to have no priority over knowledge. Facts and events to which substantive laws are meant to apply are determined by ordinary reasoning, which includes observation, logic and general experience; in other words, by common-sense. Questions like "What happened?" cannot be answered by the law.

To be sure, different values and objectives other than ascertainment of the truth may be protected and pursued by the law in a variety of ways which affect the process of fact-finding. Thus, a legal system concerned with procedural due process may maintain certain values because they are important as such, irrespective of

their effect on the substantive accuracy of the outcomes arrived at in different trials. Integrity of the legal process, timely resolution of conflicts, finality of decisions, judicial impartiality, the appearance of justice and the people's right to participate in trials which affect their lives are among these intrinsic values. Recognition of these values may impose different restrictions on admission, examination and evaluation of evidence, irrespective of its concrete probative force.

A legal system may, in addition, be willing to protect confidentiality, privacy or state security by allowing that probative information be kept in secret without being considered by the court. It may also be concerned with protecting an individual from being oppressively treated by the police and with disciplining the police force. Accordingly, it can provide that evidence obtained by illegal means has to be excluded notwithstanding that it may be probative. A legal system may also limit the general duty to testify by conferring on certain people, and among them individuals accused of crimes, the right not to co-operate with authorities. It

may encourage a peaceful settlement of civil disputes by securing that no information which was exchanged between the parties during their negotiations be admitted at the trial.

These and other extra-probative matters can properly be subjected to legal regulation. All of them, however, are plainly exceptional. Qualifying the primary objective of legal fact-finding - rectitude of decision - by a number of extraneous values, these matters have no bearing upon the internal structure of judicial proof.

The question presented at the outset is concerned with this internal structure. Is it true that "What happened?" is the only issue that occupies, or ought to occupy, judges and juries when they are not bothered by any of the extraneous matters? This question should, in my view, be answered in the negative. Judicial reasoning about disputed facts is conducted typically in conditions of uncertainty and thus inevitably involves risks of error.\(^3\) Such risks have to be allocated between the parties in a legally justifiable way. The problem of risk-allocation is thus not concerned with the empirical question "What happened?". It presents the essentially normative question "How should the parties in dispute be treated under uncertainty?". The answer to this question

\(^3\) By "risks of error" I mean the possibility of erroneous judgment resulting in a deprivation of any of the legal rights belonging to one of the parties.
of treatment has to be provided by the law. It cannot be found within the area of legally unstructured knowledge.

In this chapter, I shall outline the traditional view of the law of evidence and the critique against evidentiary rules. It will be argued that both the traditional rule-oriented approach and various sceptical views concerning evidentiary rules marginalize the question of treatment, and it is the issues raised by this question that should be subject to legal regulation. The existing theoretical support of free proof and all other ramifications of the evidentiary rule-scepticism rest upon this marginalization. This marginalization seems, however, to be unwarranted. Given that disputed facts must typically be determined under uncertainty, and that risks of error are inevitable, the question of treatment arising within the risk-distributive dimension of judicial reasoning is and bound to be pervasive. Who should carry the risks of error in connection with various procedures of examining evidence and judicial reasoning about contested facts?

No answer to this question can justifiably be given by judges and juries exercising an unstructured discretion in the regime of free proof. Evidentiary rules, which are rare, disparate and scattered, also cannot provide a justifiable answer to this question in all instances. It is therefore suggested that legal regulation of judicial fact-finding should go beyond rules and free proof.
Judges and other triers of facts cannot deal with risks of error as they wish. Their risk-distributive choices ought to rely upon moral and political principles that have to be discerned from the legal system. These principles should be regarded as part of the law of evidence.

Part one of this work is primarily concerned with the initial identification of this and related issues. It will be followed by the discussion of the reasons which seemingly led to the neglect of these issues and by the more detailed criticism of this neglect. Subsequently, the English law of evidence will be re-examined and a legal framework consisting of the risk-distributive principles which reflect this body of law will be constructed.

This work is concentrated on adjudication taking place within the already existing legal framework, not with law-making. Its inquiry into the relevant principles of risk-distribution will thus be interpretive rather than independently prescriptive. These principles will not be worked out from the "original position" or from various "ideal types" generalising the goals and values of legal processes, such as "Due Process" and "Crime Control" or

5 See Packer, supra n.2.
"Conflict-Resolution" and "Policy-Implementation". They will be discerned from the existing legal materials.

2. TRADITIONAL EXPOSITION OF THE LAW

Traditional expository works on the Anglo-American law of evidence draw a very sceptical picture of their subject-matter. These works discuss in great detail a relatively small number of evidentiary rules and their numerous exceptions. They reveal that evidentiary rules themselves are quite exceptional and that apart from them, judicial fact-finding, depending on concrete weight of evidence, is not regulated by the law. Hence, no serious attempt to work out an internally coherent and comprehensive framework of evidentiary rights, duties and powers of discretion can be found in these works.

These works offer no clear criteria which are followed or should be followed by judges and jurors in making


their decisions about facts. Their writers overtly admit that criteria for making such decisions, depending on varying circumstances of particular cases, are far from being fully represented by scattered evidentiary rules. They assume that judicial fact-finding largely rests on ordinary common sense, experience, logic and intuition, and that none of those is or should be subject to formal legal regulation. According to them, the only thing the law can do is to lay down a small number of rules to be applied residually, when these extra-legal tools of reasoning fall short, or as a matter of exception, when a social need to pursue an objective other than rectitude of decision arises. Most of these writers accept that this system of free proof lightly constrained by a few evidentiary rules, which, in turn, are relaxed by different exceptions, is unsatisfactory. Many of them question both utility and logic of many evidentiary rules.® The vast majority of them thus


"... ask any able and candid judge of some experience how far he goes by the books in ruling on questions on evidence. His answer will confirm what Mr. Choate once said to me in speaking of my father's Treatise on Evidence, then recently published. He said, 'Tell your father it is a good book, but it is a pity he did not publish it while there was still such a thing in existence as the law of evidence'."

appear to be either self-confessed or tacit evidentiary rule-sceptics, differing from each other merely in the extent of their scepticism.\(^9\)

To explain this phenomenon of evidentiary rule-scepticism (which must not be understood as confined only to the feelings of legal theorists), a brief guided tour of the traditionalist exposition of the English law of evidence can be illustrative. This tour has to be started with some of the most important issues of judicial fact-finding, the questions of materiality, relevancy and cogency of evidence. These issues are not regulated by evidentiary rules. Thus, any dispute about materiality of evidence is settled solely by reference to the substantive law that has to be applied to the case at hand\(^{10}\). Relevancy of evidence and its probative

\(^9\) Cross (supra n.7, p.3, and supra n.8) held the view that exclusionary rules may be useful in trials by jury and magistrates rather than by professional judges. The similarities between Bentham (a radical rule-antagonist) and Wigmore (a pragmatic expositor of evidentiary rules) are remarkable in this context. See W.Twining, Theories of Evidence: Bentham & Wigmore, 116-17 (1985).

force are widely conceived as matters of logic, common sense, intuition and general experience.\(^\text{11}\) Civil and criminal burdens and standards of proof are both flexible and diverse. They deal with the sufficiency of evidence in an open-textured fashion, saying very little about the required amounts of proof. These amounts are vaguely described as "preponderance of evidence", proof "on the balance of probabilities", or, in criminal cases, "beyond any reasonable doubt". In some cases, the third standard akin to the American "clear and convincing evidence" is also invoked.\(^\text{12}\) The decision as

\(^\text{11}\) See J.F. Stephen, The Indian Evidence Act (1872); Wigmore, supra n.7, vol.1A, (P.Tillers rev., 1983), par.37 (written by P.Tillers); Montrose, supra n.10; F.James, Relevancy, Probability and the Law, (1941) 29 Cal.L.R. 689; H.Trautman, Logical or Legal Relevancy - A Conflict in Theory, (1952) 5 Vand.L.R. 385; E.Morgan, Basic Problems of Evidence 183 (1961); Cross, supra n.7, pp.50ff; See also K.Burgess-Jackson, An Epistemic Approach to Legal Relevance, (1986) 18 St Mary's L.J. 463. To paraphrase O.W.Holmes, the notion of relevancy is a prophesy:

"The reason why a lawyer does not mention that his client wore a white hat when he made a contract ... is that he foresees that the public force will act in the same way whatever his client had upon his head".


But see W.O.Weyerauch, Law as Mask - Legal Ritual and Relevance, (1978) 66 Cal.L.R. 699 (the principle of relevancy tends to mask and unduly objectify important choices of value by suppressing emotions and reducing expressions of humanity to formally constrained patterns of reasoning).


The "variability thesis" has been criticised by
to what does or does not satisfy these standards is left to the triers of facts. Burdens of proof are, in fact, confined to the rare situations of factual "non liquet" and are therefore better understood as residual rules distributing between the parties the risks of non-persuasion. The same is true about various rebuttable presumptions - praesumptio facti and praesumptio juris tantum - which, involving different degrees of discretion, fulfill exactly the same residual function;


13 See, e.g., McBaine, id., Zuckerman, id., and at pp.134-40.


whilst any irrefutable praesumptio juris et de jure is simply an ill-drafted rule of the substantive law.\textsuperscript{15}

Another important rule is that of judicial notice. This rule aims at determining the "notorious" and other facts capable of being "judicially noticed", i.e., postulated by the court without being proved. The definition of the general features characterising such facts is purposefully unclear and open-ended.\textsuperscript{16} Furthermore, the rule of judicial notice is almost totally separated from one of the central and perhaps most problematic issues of inferential reasoning in adjudication - the problem of background generalisations. This problem of the stock of knowledge existing below the surface of overt


One of the remarkable examples of praesumptio juris et de jure is an irrebuttable presumption that a boy under the age of fourteen is incapable of committing rape, sodomy or any other crime of which sexual intercourse is an ingredient. See J.C.Smith & B.Hogan, Criminal Law, 6th ed., 438 (1988). However, when a boy under fourteen rapes a woman, acting as an "innocent agent" of an adult person, the latter might be guilty of rape. Cf. R v Cogan & Leak [1975] 2 All ER 1059. The law therefore does not really say that the rape "... did not happen at all", as Smith & Hogan (id.) seem to suggest. This offence had been perpetrated, but its young perpetrator is exempted as a matter of excuse.

\textsuperscript{16} The test provided by this rule is based on "serious disputability". According to it, seriously disputable facts cannot be judicially noticed. They have to be proved by evidence to the satisfaction of the court. See Cross, supra n.7, 63ff; Zuckerman, supra n.7, ch.6.
reasoning and contest was simply left untouched by the law. As a result, many generalisations, and not always the uncontestable ones, are invoked by the triers of facts without being formally proved or judicially noticed.  

To be sure, other evidentiary rules are no more regulative. Take, for example, the rule regarding potentially prejudicial evidence. This rule is both discretionary and vague. Ex hypothesi, it deals with relevant evidence, since irrelevant evidence is inadmissible independently of this rule. According to it, when the prejudicial effect of a piece of evidence outweighs its probative value, that evidence ought to be excluded. This raises several questions. A comparison between the prejudicial effect and the probative value ought to be made by the judge, and it is not altogether

17 As J.B.Thayer wrote, "In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved." A Preliminary Treatise on Evidence 279 (1898). See also E.Morgan, Some Problems of Proof under Anglo-American System of Litigation, 36ff (1956); Zuckerman, supra n.7, at pp.79-84; Cross, supra n.7, p.72; J.McNaughton, Judicial Notice - Excerpts Relating to the Morgan-Wigmore Controversy, (1961) 14 Vand.L.R. 779.


clear how exactly it can be made. First, how can the "true probative value" be properly evaluated at the beginning of a trial, before all the relevant evidence is admitted and considered? Second, if the rule really aims at excluding tangibly relevant evidence, how can such evidence be singled out as having a preponderantly prejudicial effect? On what basis should this preponderance be established? More fundamentally, once the true probative value of a piece of evidence is ascertained by the judge, how can it be "outweighed" by its prejudicial effect, which, ex hypothesi, is also known to the judge who can direct the jury accordingly? Should the judge apply his subjective intuition as to the probability of his directions not being followed by the jury owing to some imminent irrationality of the latter? And why should the judge regard the jury as being possibly irrational and, indeed, less rational than he is? In other words, what exactly are these prejudices that can effectively be counteracted only by judges, but not by ordinary reasoners without legal training and experience? The rule against prejudice contains no guidance for dealing with these problems.19

The rules which exclude as hearsay various statements given out of court and render inadmissible opinion

evidence and evidence about disposition and character
are also vaguely defined and leave the judges with many
leeway. These rules are qualified by numerous
exceptions which apply in a fairly discretionary
fashion. Thus, the rule against hearsay may either be
statement-oriented or declarant-oriented.\textsuperscript{20} The former
type renders inadmissible an out-of-court statement
aimed at proving the truth of its contents; the latter
excludes any statement made out of court when its
probative value is dependent on its maker's observation,
perception, memory, narration or sincerity. English
courts have preferred the statement-oriented
definition.\textsuperscript{21} This definition allows the court to admit
any fact of its making, provided that this fact is relevant

\textsuperscript{20} These two conceptions of hearsay are highlighted
in E. Morgan, Hearsay Dangers and the Application of
Hearsay Concept, (1948) 62 Harv.L.R. 177; Cross, supra
n.7, 457-59; McCormick, supra n.7, at pp.726-29;
M. Graham, Stickperson Hearsay: A Simplified Approach to
Understanding the Rule Against Hearsay, (1982)
Un.Ill.L.R. 887; R. Park, McCormick on Evidence and the
Concept of Hearsay: A Critical Analysis Followed by
Suggestions to Law Teachers, (1980) 65 Minn.L.R. 423;
O. G. Wellborn III, The Definition of Hearsay in the
L.Q.R. 385; S. Guest, Hearsay Revisited, [1988]
Curr.Leg.Prob. 33; R. Friedman, Route Analysis of
Credibility and Hearsay, (1987) 96 Yale L.J. 667;
R. Park, A Subject Matter Approach to Hearsay Reform,
Rule, (1987-88) 75 Cal.L.R. 495; Zuckerman, supra n.7,
ch.11.

\textsuperscript{21} See Subramaniam v DPP [1956] 1 WLR 965; Cross,
Guest and Zuckerman, id. This has not always been so:
see Baron Parke's definition in Wright v Doe d Tatham
(1837) 7 Ad & El 313.
per se. Hence, previous inconsistent statements of witnesses testifying in court are admissible as evidence about credibility of their makers,\^{}22\^{}; hearsay statements might also be admitted as part of the memory-refreshing procedures\^{}23\^{}; and false statements made out of court can be adduced if they contain lies relevant to the trial\^{}24\^{}. Inferences drawn from any such statement and their effect on the facts in issue typically involve all the dangers which the witness-oriented definition of the rule against hearsay is aimed to avoid. For it would be strikingly unrealistic to assume that a statement which affects its maker's credibility as a witness would have no effect on a substantive issue; that it can prove lies without highlighting their opposite; or that it is capable of refreshing the witness's memory, without affecting the proof of its contents.\^{}25\^{}

The exceptions to the rule against hearsay narrow its scope even more than its already flexible definition. The exception dealing with different business records

\section*{Footnotes}

\^{}22\^{} Cross, supra n.7, pp.278ff.

\^{}23\^{} Cross, supra n.7, pp.248ff; Zuckerman, supra n.7, pp.88-92; 187-92; Criminal Justice Act 1988, s.24(4)(b)(iii).

\^{}24\^{} For example, a false support of the accused's alibi given by his wife in her statement to the police may be admitted to prove a fabrication of that alibi by the accused. See Park, supra n.20, in 65 Minn.L.R. at p.426 (criticising by using this example the statement-oriented approach to hearsay).

\^{}25\^{} Zuckerman, supra n.7, pp.187-92.
and other documentary exceptions listed in the Civil Evidence Act 1968 have radically diminished the scope of this rule in civil trials. Many other exceptions, and especially that of "res gestae", have done the same, and most of these exceptions also apply in criminal trials. The Criminal Justice Act 1988 had recently introduced a number of new and far-reaching exceptions, rendering admissible several kinds of documentary

26 Keane, supra n.7, ch.11; Cross, supra n.7, at pp.481ff.

27 See Zuckerman’s account, supra n.7, ch.11.

The development of the exception of "res gestae" is remarkable. Despite the "no-further-exceptions" ruling of Myers v. DPP (1964) 2 All ER 881, the recent decision in R v Andrews [1987] 1 All ER 513 has broadened the scope of this exception. The facts of Andrews relevant for the admission of the statement in question were indistinguishable from those of R v Bedingfield (1879) 14 Cox CC 341, where a similar statement had been found inadmissible. Despite all this, the statement disputed in Andrews was held admissible. Ratten v R (1971) 3 All ER 801 is not entirely consistent with Bedingfield as well. More than seventy years ago E.R.Thayer (supra n.8, 365) had observed that

"... if all else fail, there is always a refuge of the res gestae. The real use of this phrase for generations is to conceal beneath its convenient confusion of thought a desired result for which articulate reasons were lacking."

Cf., however, the court’s approach to the third party’s admission of the guilt relied upon by the accused with a view to establish his own innocence. In R v Blastland (1985) 2 All ER 1095, such admissions had been held inadmissible. In commenting on this case, Diane Birch wrote that -

"...it is hard to avoid the conclusion that the courts fiddle the concepts of hearsay and relevance to admit only evidence which it is considered desirable to admit".

Owing to the requirement that in order to be admissible, a statement has to be made and produced in a document, these new exceptions are disadvantageous to criminal defendants. Since the latter have no legal power of compelling witnesses to give their statements to them or their counsel in a documentary form, they would scarcely enjoy this new expansion of freedom of proof. The opportunities of obtaining such statements are monopolised de facto, if not de jure, by the crime-investigating authorities. Being unable to adduce oral statements owing to the rule against hearsay, individuals accused of crimes would be dependent on collection of documentary evidence by their adversaries. In this forensically unbalanced situation, one might expect the judicial "quid pro quo", a more liberal application of other exceptions to the hearsay rule enabling the accused to rely in his defence on more statements given out of court.  

28 See ss.23-28 of the Act. These provisions are discussed in more detail in chapter 9.

29 Cf., however, R v Blastland [1985] 2 All ER 1095 and Sparks v R [1964] 1 All ER 727. Under article 6(3)(d) of the European Convention of Human Rights and Fundamental Freedoms, the defendant is entitled to examine witnesses on his behalf under the same conditions as witnesses against him. This provision has been interpreted as imposing upon the states the duty to maintain the "principle of equal arms" in criminal proceedings. See, e.g., Unterpertinger v Austria [1986] 110 ECHR/J&D 5, and my discussion of this provision in chapter 9.
Another exception of the 1988 Act renders admissible a statement given to a police officer or other crime-investigating authority by somebody who at the time of the criminal trial "does not give oral evidence through fear or because he is kept out of the way". The rationale behind this exception is apparent. Prosecution witnesses are often subjected to threats or violence by some "invisible hand" and abstain from testifying in court after having incriminated the accused in their written statements to the police. At one of the stages of enacting this exception, this suspicion had presumably motivated the decision to leave out the precondition of a statement's admissibility imposing upon the prosecution the onus of proving the "means of the procurement of a person accused or on behalf of such an accused person". As a result, this exception had been widely defined and can easily be misused. Its application also involves a tacit suggestion to the triers of facts that the "invisible hand", causing the

30 s.23(3)(b) of the Act.


32 See s.21(3)(b) of the Criminal Justice Bill (No.70) and the Commons Amendments to that Bill of 29.6.1988.
witness's fear or disappearance, belongs to or is otherwise connected with the accused. This implied imputation, plainly prejudicial to the accused, is, in addition, undisprovable, as the real cause of the witness's fear or disappearance is not one of the facts in issue. This exception to the hearsay rule is flawed in some other respects, and to avoid a potential injustice of this and other exceptions, the new Act conferred on the courts both inclusionary and exclusionary discretion. The bizarre structure of both exceptional and exceptionalized rules had thus been reinforced by the new legislation.

The rule excluding opinion evidence is based upon a very shaky distinction between "fact" and "opinion".


34 ss. 25, 26 of the Act. The judgment delivered in R v Acton Justices, Ex parte McMullen and others; R v Tower Bridge Justices, Ex parte Lawlor, The Times, 10.5.1990 (CA), supports the view that the main emphasis will now be put on these sections. As was mentioned by Watkins LJ, "... Parliament had thereby set loose one or two unruly horses which the courts would have to be vigilant to control".

35 Cross (supra n.7, at p.437) wrote that -

"Although the distinction between fact and inference is clear enough up to a point, there are borderline cases."

However, Cross's example shows that the distinction is not at all clear from the analytical point of view. According to him, "The statement that a car was being driven on the left side of the road is plainly one of fact." id. It is evident that "car", "was driven", "left", "side" and "road" are inferences from a certain
Insofar as human testimony is concerned, it is most difficult, if not impossible, sharply to distinguish between authentic reports and conclusions, "naked" primary facts and the subsequent inferences, observations and interpretations. Even if it were theoretically possible to draw all those distinctions, they would hardly be useful for the purposes of trial because ordinary human beings - the invaluable sources of information - do not testify in a way that eliminates their inferences, interpretations and conclusions from observation rather than brute facts. E. Anscombe, On Brute Facts, (1958) 18 Analysis 69; W. Cook, 'Facts' and 'Statements of Fact', (1936) 4 U. Chi. L. R. 233.

Lempert and Saltzburg (supra n. 7, at p. 166) seem therefore to be right in saying that what is at work here is not the analytical distinction between real facts and opinion. Rather,

"In the case of lay witnesses, disputes over the admissibility of opinion are ... disputes about when a preference for concrete description should preclude more conclusory testimony".


36 "A constant observer of the trial of cases, examining the testimony for the purpose of ascertaining how many opinions are received and how many rejected, will find ten of the former as often as he finds one of the latter; and if he is very critical, he will find the ratio much greater than that. Opinions are constantly given. A case can hardly be tried without them. Their number is so vast, and their use so habitual, that they are not noticed as opinions distinguished from other evidence."

State v. Pike, 49 NH 399, 423 (1870), cited by Lempert & Saltzburg, supra n. 7, at p. 43. See also Zuckerman, supra n. 7, ch. 5.
the naked facts they allegedly have observed. The rule excluding opinion evidence is therefore better understood as a flexible standard of "probative hierarchy" that has to be maintained between different holders of knowledge and authority - ordinary witnesses, experts, the judge and the jury. Any person holding relevant and reliable knowledge is perfectly competent to testify about it, and it may well include professional and non-professional opinions, provided that they are founded. In other words, the best available witness is and should always be preferred. However, in different matters depending on legal decisions or moral judgments judges and jurors always possess an exclusive authority.

For example, an eye-witness may express his opinion that one of the persons taking part in an identification parade possesses the essential features of the person he observed at the scene of the crime. Despite its opinion elements, this testimony would surely be admissible

37 This view is supported by rule 701 of the Federal Rules of Evidence which seems to be similar to the present position of the law in England:

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue".

See also Zuckerman, id; and s.3(2) of the Civil Evidence Act 1972.
because it simply means that the witness identified the suspect at the lineup. Evidently, a mere restatement of this testimony is incapable of eliminating the elements of opinion. Another witness, say a medical expert, can testify that for some reason our witness's faculty of perception through the response of his brain to the action of light on his eyes is defective. Such evidence would also be admitted; it would, probably, be held inadmissible if given by a non-expert, but even this would not be true in every case. For example, there would hardly be any doubt about admission of the testimony of our witness's wife, asserting before the court that this witness is blind or short-sighted. Our medical expert cannot admissibly testify that since our witness's sight is defective, this witness had probably lied by saying that he is sure about his identifying testimony. This conclusion can only be arrived at by the court. The wife of our eye-witness can, however, testify that her husband is a pathological liar, and her testimony would, by contrast, probably be admitted. It would neither be admitted nor relied on, if, for example, she expressed her opinion that her husband had lied now in his testimony before the court. Again, such

conclusion can properly be arrived at only by the court without recourse to somebody else's views.

These non-controversial examples suggest that the opinion rule is not based upon the soft distinction between "fact" and "opinion", but rather upon flexible hierarchical standards of knowledge and authority. Considering its declared subject-matter, the opinion rule is hardly a rule of exclusion, for it excludes a really tiny amount of relevant opinions. To borrow from P.McNamara, the rule against opinion is a common-sense "rule of use".39

Despite their allegedly "grotesque" structure,40 the rules regulating admission and uses of evidence concerning disposition and character of the accused are, in fact, a mere concretisation of the general principle


"The opinion rule scarcely deserves longer the name of rule, having now established itself on a basis of mere convenience and reason without any strain on our judicial machinery."


of relevancy. Everybody would agree that proof of guilt inevitably involves an imputation on the character of the accused, and that relevant evidence capable of proving his guilt and thus exposing his bad character cannot, for this reason alone, be subject to exclusion. Thus, evidence about his previous offensive conduct strikingly similar to the act in issue would be admissible to establish his identity as one who committed the act in issue as well.41 Evidence about the accused's conduct which is not strikingly similar to the act in issue, and thus incapable of demonstrating a "system", can be admitted either to establish his mens rea or to disprove some of his defences, such as "mistake of fact", "necessity" or "duress".42 As was clarified by Lord Hailsham in Boardman,

"what is not to be admitted is a chain of reasoning and not necessarily a state of facts. ... If there is some other relevant, probative purpose than the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning from the judge that the jury must eschew the forbidden reasoning."43

Evidence about disposition and character should only be excluded when it is obviously irrelevant or strikingly prejudicial,44 and as was mentioned above, both

41 Cross, supra n.7, at pp.379ff.
42 id.
43 Boardman v DPP [1974] 3 All ER 887, 907.
44 Cross, supra n.7, at pp.337ff; Pattenden, supra n.18; and see the unpublished decision of the Court of Appeal in R v Brazil (19.4.1985, available via LEXIS).
"relevancy" and "prejudice" are not legally structured meanings. They depend on judicial intuitions, common sense and logic. Their application involves a substantial discretion. An exception to the principle of relevancy can be found in a permission granted to any person accused of a crime to put his character in issue and thus ask the jurors to consider his moral virtues.45 In such cases, the accused can be subject to cross-examination on his character and his moral hazards may well be exposed as a counterweight to both his virtues and credibility as a witness.46 He might be facing the same tactics if he invokes either an explicit or implicit imputation on the character of one of the witnesses for the prosecution,47 or implicates his co-accused in a way which goes beyond simple forensic


46 Zuckerman, id.

47 In R v Preston (1909) 1 KB 568, 575, this rule has not been held to be so wide. It has been decided that an imputation which incidentally follows from confronting the evidence given by a witness must be distinguished from an imputation on his conduct outside this evidence. It is only the latter kind of imputations that was held to justify a cross-examination of the accused about his character. However, in a more recent case R v Britzman [1983] 1 All ER 369, the judges have declined to apply this distinction. See Zuckerman, supra n.7, pp.257; 264-279.

Interestingly, s.(1)(f)(ii), referring to "witnesses" in plural, implies, perhaps, that it is only when the general strategy of the accused is to stigmatize those testifying against him, that he can, in return, be exposed to cross-examination about his previous misdeeds.
inconvenience.\(^48\) Under section 1(f)(i) of the Criminal Evidence Act 1898, the accused can be questioned about his other crimes and misdeeds when a proof that he had committed them has a direct bearing on the current charges. This interpretation of the section had been introduced judicially to avoid the state of affairs in which the general prohibition of examining the accused's character, qualifying section 1(e) of the Act in which the general principle which allows cross-examination on all relevant matters is restated, is itself being qualified by the same principle of relevancy.\(^49\) An "indirectly relevant cross-examination" about character had therefore been prohibited, thus assuming all the difficulties and discretions involved in distinguishing between directly and indirectly relevant evidence. These difficulties and discretions have been added to the already existing ones which are involved in distinguishing between direct incriminations and bare inconvenience, in identifying "imputations" against "character" and in separating evidence that goes only to the accused's credibility as a witness from evidence directly affecting his conviction.\(^50\) For the already familiar with the structure of the law of evidence it would hardly be a surprise to discover that all these

\(^{48}\) S.1(f)(iii) of the 1898 Act, as interpreted in Murdoch v Taylor [1965] 1 All ER 406.

\(^{49}\) Jones v DPP [1962] 1 All ER 569.

\(^{50}\) See generally Zuckerman, supra n.7, ch.13.
arrangements are qualified by the residual but pervasive discretion to prohibit the prosecution from examining the defendant about his character and misdeeds and exclude any other prejudicial evidence. The exceptional and exceptionalized rules of evidence, taking the judge and the juror back and forth to and from the realm of free proof, seem thus to disappear and reappear almost everywhere.

The rules of testimonial competence rely most heavily on judicial intuitions and discretion, as illustrated by cases of infants and mentally disordered persons. There are, admittedly, a few clear and rigid rules, stipulating that accused persons and their spouses cannot be compelled to testify for the prosecution. The right of silence and the privilege of spouses rest on exceptional extraneous policies not related to the

51 Cross, supra n.7, at pp.371-72; Pattenden, supra n.18.

52 Cross, supra n.7, at pp.192-93.


54 See s.80 of the Police and Criminal Evidence Act 1984 and Cross, supra n.7, at pp.197-98. For C.Tapper's critique of the rule see id., at pp.199ff. See also Zuckerman, supra n.7, at pp.289-92.
central core of the law of evidence. Another exceptional group of extraneous rules deal with privileged information. In deciding whether the information claimed to be disclosed should be kept in secret as privileged, judges often exercise their discretion. The extent of this discretion varies from case to case and there is no need to discuss it here.

55 See, e.g., Galligan's privacy-protecting rationalization of the right of silence and other sources mentioned supra, nn.53-54.

56 Such as the privilege against self-incrimination, legal professional privilege and different privileges grounded on the existence of a public interest to withhold the information. See Cross, supra n.7, ch.12.

57 (a) The privilege against self-incrimination is often regarded as non-discretionary. However, to grant it to either a party or a witness, the judge must first apprehend a real danger of incrimination, having regard to "the ordinary operation of law in the ordinary course of things". Cross, supra n.7, at p.385. This requirement might well soften the rigidity of the privilege. For statutory inroads made into this privilege see I.Dennis, Reconstructing the Law of Criminal Evidence, [1989] Curr.Leg.Prob. 21, 41-42, fn.87,88.

(b) The legal professional privilege is relatively rigid. Subject to criminal cases in which the information is required to establish innocence (R v Barton [1972] 2 All ER 1192; R v Ataou [1988] 2 All ER 321), or is held with a view of furthering a criminal purpose (ss.9, 10 of the Police and Criminal Evidence Act 1984; Francis & Francis v Central Criminal Court [1988] 3 All ER 775), the courts seem to have no discretion to order a witness or a party to disclose their information. See Zuckerman, Evidence - Annual Review, (1988) All ER 135; Cross, supra n.7, pp.388ff.

(c) The immunities arising from public interest appear to be dependent in most cases on judicial discretion, when the court has to balance in each case the concrete interests involved. Cross, supra n.7, at pp.411-425; R.Cross, Discretion and the Law of Evidence: When it Comes to Forensic Crunch, (1979) 30 N.I.L.Q. 289; s.10 of the Contempt of Court Act 1981.
The important rules regulating the admissibility of confessions are motivated not only by the desire to establish the truth, but also to protect the suspect from being mistreated by the police or any other crime-investigating authority. Therefore, according to one of them, a confession obtained by oppression is inadmissible disregarding its probative value. Another rule provides that if

"... a confession made by an accused person ... [was obtained] ... in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession ...", it should not be admitted. This rule is based on a hypothetical test which has to reflect the general standards of interrogation. It authorises the court to pass an evaluative judgment on whether the methods adopted by the police might have an adverse effect on the reliability of confessions in general. Once an impropriety of any of such methods is recorded, and a causal link between it and the defendant's confession is established, the probative value of that confession would not be relevant for its admissibility.

58 ss.76, 82 of the Police and Criminal Evidence Act 1984; see Zuckerman, supra n.7, at pp.322-39.
59 s.76(2)(a) of the Act; see Zuckerman, id.
60 s.76(2)(b) of the Act; Zuckerman, id.
61 This view is debatable. For different interpretations of section 76(2)(b) of the Act see Zuckerman id., Cross, supra n.7, at pp.549-51.
clear that the rules concerning confessions, however important they may be, are designed to solve one particular set of problems and have little impact on the process of legal proof as a whole.

The rule authorising the court to exclude evidence on the grounds of "fairness" is exceptional. The exclusionary discretion granted by this rule has usually been exercised by the courts in relation to evidence obtained by the police by violating one of the rights of the accused. Arguably, this discretion had always existed in the law, but the fact remains that prior to the enactment of this rule in the Police and Criminal Evidence Act 1984, it had never led to exclusion of probative and non-prejudicial evidence merely because it was illegally obtained.

62 See s.78 of the Act, and, e.g., R v Mason [1987] 3 All ER 481; R v Samuel [1988] 2 All ER 135, helpfully discussed in Zuckerman, supra, n.7, ch.16. This section has also been used in some cases in which none of the accused's rights has been violated by the police. See R v O'Loughlin [1988] 3 All ER 431; R v O'Connor (1987) 85 Cr.App.Rep. 298 and the explanation given by I.Dennis, Reconstructing the Law of Criminal Evidence, [1989] Curr.Leg.Prob. 21, 33-34; 35ff.

63 s.78 of the Act.

64 For previous position of the law see R v Sang [1979] 2 All ER 1222. See, however, an exceptional case R v Payne [1963] 1 All ER 848. As was mentioned in Cross, supra n.7, at p.433:

"... when courts uttered dicta asserting the existence of a wide exclusionary discretion they very rarely found occasion to apply it to the facts before them."

M.Gelowitz, Section 78 of the Police and Criminal
Alongside a small number of corroboration warning requirements, there are a few relatively rigid rules of corroboration. Some of those rules are outdated; all of them are exceptional and subject to continuous abrogation. They apply in a few cases, requiring that the accused should not be convicted on the basis of certain kinds of uncorroborated testimony. The nature of proof capable of satisfying the standards of corroboration varies from case to case. Generally, these standards are not very rigid and most of them are not at variance with ordinary common-sense. Thus, lies of the

Evidence Act 1984: Middle Ground or No Man's Land?, (1990) 106 L.Q.R. 327 is similarly sceptical about the future of this new provision.

65 The "corroboration warning" requirements apply in the following cases:
(a) cases in which the conviction of the accused is based upon a testimony of his accomplice;
(b) cases involving sexual offences;
(c) civil claims against estates of deceased persons;
(d) cases involving identification of the accused, in which a decision to warn the jury depends on judicial discretion.
Cross, supra n.7, pp.214-25. The mandatory requirement of warning in relation to the unsworn evidence of a child had been abrogated by section 34(2) of the Criminal Justice Act 1988. For other details see Keane, supra n.7, ch.7.


67 For an updated account see Keane, supra n.7, at pp.140-43.
accused can, in principle, corroborate; any other evidence providing an external support to one of the material parts of the testimony which incriminates the accused is also capable of corroborating. Furthermore, there is no need to corroborate every part of the incriminating testimony.\(^6\)

One can continue this list by adding to it a few other rules of evidence, such as the "parol evidence rule" which applies in civil cases.\(^6\) This is not necessary for our present discussion.

Leaving the exceptional extra-probative rules aside, it is clear that none of the evidentiary rules can be invoked to deny that the law of evidence is a law of discretions. For very wide powers of discretion are exercised in various evidentiary matters by both judges and other triers of facts, playing a crucial role in the process of adjudication. The existing mandatory precepts are rare, marginal, disparate and by and large vague and indeterminate. Moreover, these precepts do not normally apply in fact-finding processes conducted by

\(^{68}\) Dennis, supra n.66; J.Heydon, Can Lies Corroborate?, (1973) 89 L.Q.R. 552; Zuckerman, supra n.7, ch.10.

administrative tribunals and public officials. Nor are they applied in different pre-trial decisions, such as a decision to arrest a suspect, to search his house or to charge him with an offence. The proceedings before extra-curial tribunals are governed by the general principles of "fairness" and "natural justice", and the rules of admissibility and sufficiency of evidence had been held not to be part of those principles. The decisions made by the police and the prosecuting authorities are normally arrived at by considering the cogency of any piece of relevant evidence, having regard to the seriousness of the offence, the chances of detecting and convicting the offender, and the public interest involved. Decisions made by various officials and tribunals deal with many important matters, such as


73 supra n.71.
employment, education and welfare, equality and
discrimination, disciplinary offences, immigration, tax, and town and country planning.
If the formal rules of evidence are seriously believed to contribute to judicial fact-finding, one should ask why is it that this belief had not been extended to administrative tribunals and officials? As the importance of the matters dealt with by many extra-curial tribunals and administrative officials cannot be doubted, it is the utility of evidentiary rules that ought to be questioned.

3. RULE-SCEPTICISM
Not surprisingly, the existing network of rare, incomprehensive and disparate rules of evidence is described by most theorists of evidence in a very

75 id., at p.248.
77 Garner & Jones, supra n.74, at pp.262-64.
78 id., at pp.255-258.
79 id; for the list of tribunals supervised by the Council of Tribunals see id., at pp.269-272.
80 Davis, supra n.70, passim.
sceptical way.81 This constantly growing rule-
scepticism is based on three interrelated lines of 
structural, functional and cognitivist arguments of both 
descriptive and prescriptive kind. These three lines of 
argument reflect different types of dissatisfaction with 
evidentiary rules.

The first type of rule-scepticism is structural and 
descriptive. It emphasises the existing structural 
disparity and rareness of evidentiary rules. It has 
lucidly been expressed by J.D. Heydon in the following 
words:

"The rules of evidence state what matters may be 
considered in proving facts and, to some extent, 
what weight they have. They are largely ununified 
and scattered, existing for disparate and sometimes 
conflicting reasons: they are mixture of 
astonishing judicial achievements and sterile, 
inconvenient disasters. There is a law of contract, 
and perhaps to some extent a law of tort, but only 
a group of laws of evidence."82

The second type of scepticism is functional. It 
emphasises the indeterminacy of the rules of evidence 
and the almost unrestricted discretion involved in their

81 W. Twining, Rethinking Evidence, ch. 6 (1990). Twining's critique is primarily addressed against the 
exaggerated importance that has traditionally been 
attributed to the study of those rules, as distinguished 
from the process of proof and other issues related to 
processing of information in forensic contexts. His 
presentation of other rule-sceptical arguments is 
expository.

82 J. Heydon, Evidence: Cases and Materials 2d ed., 
application. It also stresses the non-observance of many of the rules in practice. As W.L. Twining wrote,

"In one of our classics of literature, Alice in Wonderland, one of the characters is the Cheshire Cat who keeps appearing and disappearing and fading away, so that sometimes one could see the whole body, sometimes only a head, sometimes only a vague outline and sometimes nothing at all, so that Alice was never sure whether or not he was there or, indeed, whether he existed at all. In practice, our rules of evidence appear to be rather like that".  

The third type of evidentiary rule-scepticism is cognitivist and its message is prescriptive. Its main thrust is to abolish all mandatory precepts in the law of evidence. As the field of evidence "is no other than the field of knowledge" 84 over which law can claim no priority, artificial commands of the law can only deflect the process of judicial fact-finding from attaining its primary objective - rectitude of decision.

This type of scepticism is not concerned with the structural or functional weakness of the existing rules of evidence. It is concerned with their disutility. Bearing a cognitivist character, it is epitomized by the "anti-nomian" thesis of Bentham and its modern elaborations. Bentham vigorously opposed the rules of evidence constraining the will of the triers of facts. He argued that all such rules should be replaced by non-

83 Twining, supra n.81, at p.197. This, however, does not imply that the discretion of all adjudicators is unstructured - see id, at pp.211-12.

84 Bentham, supra n.1.
mandatory instructions addressed to their understanding, ones that could guide the triers of facts and, when necessary, be appropriated by them to suit the needs of constantly changing forensic situations. His thesis rested on strong empiricist views about acquisition of knowledge and on his utilitarian ethics.\textsuperscript{85} It is these two commitments that laid down the foundations of his theory. According to it, the main goal of judicial fact-finding is truth-maximisation. This objective can be qualified only by the need to avoid the most harmful errors and preponderant expense, delay and vexation.\textsuperscript{86}

These ideas had become very influential within the scholarship of evidence despite the fact that neither utilitarian ethics nor the empirical foundations of knowledge have been universally accepted in philosophical circles.\textsuperscript{87} Some of these ideas have been


\textsuperscript{87} For critique of utilitarian ethics see J.Rawls, A Theory of Justice (1972); B.Williams, A Critique of Utilitarianism, in J.Smart & B.Williams, Utilitarianism: For and Against, 77 (1973); R.Nozick, Anarchy, State and Utopia (1974); R.Dworkin, Rights as Trumps, in J.Waldron, Theories of Rights, 153 (1984).

The merits of utilitarian and non-utilitarian approaches are presented, giving a qualified support to utilitarianism, by H.L.A.Hart, Between Utility and
adopted in the United States by theorists like C.F.Chamberlayne, and more recently by K.C.Davis and J.Weinstein. However, unlike Bentham and Chamberlayne, neither Davis nor Weinstein have subscribed to an uncompromised form of utilitarianism. The latter two confined their arguments against evidentiary rules to the cognitivist line of critique. Expressing their faith in judicial intuitions, they have argued that in matters of fact trial judges have to exercise their judgement and be constrained only by the general standards of proof. However, none of them has ever contended that different rules and privileges resting on extra-probative considerations of policy should also be abolished.

This cognitivist critique of evidentiary rules has recently been supported by a British philosopher of Rights, (1979) Colum.L.R. 828.

For critique of foundationalism see R.Bernstein, Beyond Objectivism and Relativism (1983); Philosophical Profiles (1986).


Weinstein, id., Davis (1980), supra n.70, par.16:10.
science, L.J.Cohen, who put forward his thesis of free
evaluation of evidence. He justified a presumption in
favour of free proof by the epistemological principle of
"universal cognitive competence". According to Cohen,
those rules of evidence which clash with the modern
belief in intellectual self-confidence have no apparent
justification. At the end of his article, Cohen
concludes that there is -

"... no general need to write rules of proof into
the law, nor to define a corresponding level of
intellectual qualification for triers of fact. We
need only a reasonable layman, not a logician or
statistician, to determine what is beyond
reasonable doubt."\(^{90}\)

There is also another type of evidentiary rule-
scepticism,\(^{91}\) but, on examination, it cannot be viewed
as genuinely rule-sceptical. This type is based on what
can be described as an "argument from exaggerated
importance". Evidentiary rules are, according to this
argument, neither weak or meaningless nor invariably
unhelpful and disruptive. They are, however, far from
playing the central role in judicial fact-finding.
Besides rules, this process is (and has to be) regulated
by the general standards of reasoning and by the
principles of legal propriety. It must thus not be seen
as unstructured. An example of this kind of approach can
be found in Zuckerman's recent book on the law of

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\(^{90}\) L.J.Cohen, Freedom of Proof, in W.Twining, Facts

\(^{91}\) See Twining, supra n.81, at pp.199-203.
criminal evidence. Adrian Zuckerman criticises the narrow rule-oriented vision of this body of law. His analysis is focused on different discretions existing in evidentiary matters and their relations to the basic objectives of criminal justice. These objectives are, first, the establishment of the truth needed to bring criminals to justice; second, the protection of the innocent from wrongful conviction; and, lastly, the maintenance of the standards of propriety in the criminal process as a whole. One of the important insights of his work is that some of the evidentiary rules allow judges to escape from their responsibility in attaining these objectives by taking refuge behind rules. In this respect, the rule-oriented vision of the law of evidence may be harmful indeed.

Those who supplement evidentiary rules by standards, guidelines and principles have to be pressed to reveal the exact status of the latter. Are they "legal" in any relevant sense? Do they form part of the law of evidence? These questions should, in my view, be answered in the positive in a legal system where, for example, all such standards, guidelines and principles are followed by the courts and where the decisions of

92 Supra n.7. For recent support of freedom of proof in civil trials see J. Jacob, The Fabric of English Civil Justice, 266 (1987).

trial courts not complying with them may be overturned by the appellate court. They have to be so regarded even when they are merely instructive, referring to factors that have to be taken into account as a matter of prudence, let alone when they lay down more rigid principles from which judges can depart only for good reasons. Hence, when the "argument from exaggerated importance" is being pursued without invoking the structural, or functional or cognitivist critique of evidentiary rules, it would clearly be an error to treat it as rule-sceptical. For to be sceptical about rules in this way would be similar to being sceptical about cars merely because they are not the only means of transportation. Moreover, as will be revealed later in this work, evidentiary rules can supply important pre-interpretive data from which more general principles of reasoning ought to be discerned. I shall therefore concentrate on the three general types of rule-sceptical arguments which have been presented above.

None of those arguments has been adequately confronted by any of the supporters of evidentiary rules. Thus, Michael and Adler contended in their influential essay that their analysis of judicial fact-finding is capable of justifying a system of rules. They have shown that


judicial proof "can never be free from the restrictions imposed upon it by rules of reason" and argued that evidentiary rules that fit the existing conventions of reasoning and logic cannot be regarded as unjustifiable.96 This defence of the rules is at its very best most problematic. Michael and Adler admitted that exclusionary rules are disparate and, additionally, over-emphasised "both in discussions of, and in instruction in, the law of evidence".97 They have, in fact, agreed with the rule-sceptical arguments of both structural and functional kind and limited their defence of the rules to the cognitivist realm.98 Hence, as was mentioned by P.Tillers, the rationality of evidentiary rules asserted by them rests on the assumption that we have no criteria beyond logic for assessing the judgments of fact, and inasmuch as our rules appear to be logical, they cannot be criticised.99 Evidently, if we are to subscribe to this view, we would also have to accept that any system of evidence is as good as any other so long as it observes certain logical niceties. As P.Tillers commented on this, in that case, "it is

96 id., at p.1235.

97 id., at p.1235n.11. See also H.Smith, Components of Proof in Legal Proceedings, (1942) 51 Yale L.J. 537.

98 id., at p.1235: "We deny only that proof can be free from the rule of reason and that supporting conventions can be avoided."

better not to be logical."100 Moreover, the very idea that a system of free proof compromised by scattered, though not manifestly irrational, exceptions is as good as a system of total freedom of proof is most doubtful. Assuming that such systems are not pursuing radically incommensurable objectives, one can insist that a clear advantage of the existing few rules be demonstrated. For any evidentiary constraint is a price that has to be paid and justified.

To survive against scepticism, a system of evidentiary rules has to be sustained against all sceptical arguments, both expository and normative. Its supporters have thus to face all the problems of rareness, disparity, indeterminacy, cognitive unsupportedness and actual non-observance of evidentiary rules. Although some of those rules can be justified ad hoc, their exceptional character and discretionary design prevent them from being a sound response to scepticism.

Theories calling for abolition of the remaining evidentiary rules do not fall very short from practice. Most Anglo-American systems of evidence are constantly undergoing a transition from mandatory rules to instructive standards and guidelines concerning

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100 id., at p.1029.
proof. The main focus of legal attention is gradually being shifted from the admissibility of evidence to its weight. Most Continental legal systems are already based on free evaluation of evidence in so far as rules of evidence are concerned. Reflecting different cultural and political backgrounds and pursuing different ends in adjudication, Continental systems are strikingly homogeneous in their almost unqualified rejection of evidentiary rules. However, judicial proof in these systems is not really "free". Continental

101 A comparison between six different editions (1958-85) of Cross On Evidence is illustrative of that transition. See, e.g., the preface to the 6th edition of Cross written by Colin Tapper. In America, the widely adopted Federal Rules of Evidence provide a flexible framework of guidelines and standards. See Lempert & Saltzburg, supra n.7, and Mengler supra n.88. Long ago, it has been observed by the court that -

"People were formerly frightened out of their wits about admitting evidence lest juries should go wrong. In modern times we admit evidence and discuss its weight."

R v Birmingham Overseers (1861) 1 B & S 763, 767, cited by Cross, supra n.7, at p.1.

102 The Criminal Justice Act 1988, parts 2 & 3, is the latest example of that shift in England.


However, a number of extraneous rules authorising the courts to exclude illegally obtained evidence, have been introduced in some Continental jurisdictions. See C.Bradley, The Exclusionary Rule in Germany, (1983) 96 Harv.L.R. 1032; M.Pakter, Exclusionary Rule in France, Germany and Italy, (1985) 9 Hastings Int. & Comp. L.R. 1.
triers of facts have to give detailed reasons for their decisions and their findings are subject to rigorous appellate review.\footnote{M.Damaska, The Faces of Justice and State Authority, 55 (1986).} At that stage, both logic and evidentiary support of their decisions are carefully scrutinized and must pass the muster.\footnote{However, as was mentioned by Damaska (id., at p.49, fn.3), "... there are limits on effective supervision of fact-finding by lower officials: subordinates learn how to justify their decisions in ways that can 'withstand' review by their superiors".} It is worth noting here that what is considered by Continental proceduralists as a real "freedom of proof" is not a mere absence of evidentiary rules, but rather the Anglo-American appellate tradition of non-interference.\footnote{This was clarified in a conversation between W.Twining and Italian proceduralists. See W.Twining, Adjudication between Freedom and Rules: Freedom of Proof at Common Law, (unpublished paper; delivered at the conference "La formazione del convincimento: il giudice fra libertà e regola", Trento, October 1988). See also Twining, supra n.81, ch.6.} The policy of stabilising the findings of fact of the trial courts is by and large not recognised in Continental countries.\footnote{As was mentioned by Damaska, in Continental procedural systems the structure of authority tends to be "hierarchical"; the Anglo-American structure of procedure fits the "coordinate" type of authority. Supra n.104, passim.}
orthodox view of the law of evidence which identifies this body of law with its rules. But does this view present the best picture of the law? Are the critical arguments supporting free evaluation of evidence reflective of what the law of evidence ought to be? These questions will be discussed in the next chapter.
CHAPTER TWO

BEYOND RULES AND FREE PROOF

1. GENERAL OBSERVATIONS

What really is the law of evidence? Does it owe its existence to the small number of evidentiary rules? Are its contents exhausted by the unnecessarily tangled and unsystematic network of rules and their exceptions? Do the assumptions on which the rule-sceptical arguments are based really capture the whole range of choices and values to be determined and protected by the law of evidence? Can this law be explained and reshaped as a coherent normative entity structuring the existing discretions in various matters of fact? Should these discretions be structured and constrained by general legal principles? What are these principles?

In other words, can the law of evidence be understood as or translated into a coherent legal framework of principles, rules and rights? In addition, should this framework be extended beyond the orthodox paradigm of contested trial and applied to different extra-curial decisions as well?

Before developing these difficult questions further, it is important to single out two highly generalised but nevertheless representative assumptions about proof of
facts in the Anglo-American systems of adjudication. First, triers of facts are and should be held accountable for their decisions. They do not and should not decide arbitrarily even the hardest questions of fact. Their decisions, whatever they are, should always be justifiable.

Second, most facts contested in trials are not susceptible to direct observation. Typically, but not in every case, these facts belong to the past. Most of them are judicially reconstructed on the basis of incomplete evidence, fallible accounts of witnesses, fuzzy generalisations, uncertain inferences, and seemingly subjective intuitions of the judges and other triers of facts. 108 This process of judicial reconstruction takes

108 The problem of factual uncertainty in adjudication is widely acknowledged within the evidence scholarship. This problem is, however, approached from different perspectives:


(b) An "atomistic" and purely factual analysis of evidence has been advanced by J. H. Wigmore in The Science of Judicial Proof, 3d ed., 1937, and, of course, in the


(f) The problem of uncertainty is dealt with in similar terms by some of the European proceduralists: P.O.Ekelöf, Free Evaluation of Evidence, (1964) 8
place under serious limitations of time and resources, and thus, in Wigmore’s words,

"... may lead to special rules of the art, as distinguished from the science, - just as an architect who cannot find limestone available in his region and must use granite ... will find his construction-style modified thereby".109

In short, most cases are adjudicated in conditions of uncertainty, and it should be added, following H.M.Hart and J.McNaughton110 and J.Weinstein111, that these conditions, along with other limitations and


(g) The Soviet theory of evidence and proof is quite exceptional. Being based on extremely optimistic metaphysical assumptions, it claims that the actual truth, and nothing less than that, should be the only valid ground of legal decisions. Any rule justifying a deviation from the actual truth, e.g., the judgments based upon what is merely probable and given despite the existing doubts, is to be rejected. The Soviet theory views such a rule as a tool of flexibility aimed at adjusting the legal order for the benefit of the dominant class. See R.S.Belkin et al., Teoria Dokazatelstv v Sovietskom Ugolovnom Processe, 2d ed., 90-112 (1973) (in Russian). The perestroyka (restructuring) has not affected so far this part of the Soviet ideology of legal evidence and procedure. K.Marks, Misli Vsluch ob Ugolovnom Sudoproizvodstve, (1988) 2 Sovietskoye Pravo (ESSR) 109 (in Russian) (Claiming to accelerate the perestroyka of the criminal process and analyse facts in a more rigorous way to arrive at the actual truth). Cf. T.Kiraly, Criminal Procedure: Truth and Probability (1979).


111 Weinstein, supra n.8.
constraints, are intrinsic to judicial resolution of factual controversies. Furthermore, as Weinstein has mentioned,

"Even were it theoretically possible to ascertain truth with a fair degree of certainty, it is doubtful whether the judicial system and rules of evidence would be designed to do so. Trials in our judicial system are intended to do more than merely determine what happened. Adjudication is a practical enterprise serving a variety of functions. Among the goals - in addition to truth finding - ... are economizing of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system, and tranquilizing disputants."  

What is at work in adjudication can now be restated. We pursue by means of adjudication an important part of our socially shared objectives. Perfect procedures for attaining them (akin to that constructed in Rawls's cake-dividing example) are not at our disposal. Being aware that our procedures are not perfect, we nevertheless want our objectives to be effectively pursued. As an orderly society, we thus have and are willing to assume certain risks of error in adjudication. As individuals, however, we want to immunize ourselves from certain risks. This assumption


113 Supra n.8, at p.241; and see also P.B.Carter, Do Courts Decide According to the Evidence?, (1987) 22 Univ.Brit.Colum.L.R. 351.

114 supra n.4, at p.85.

115 id., see also Nozick, supra n.87, at pp.96ff.
of some of the risks of error and the preferences given to certain kinds of risk over others reflect our willingness to be protected both by and from our judicial system. We therefore confer on our adjudicators wide powers of fact-determination because we do not know a better way of pursuing our objectives. We require, however, that any exercise of any of such powers be justified by certain criteria which have to be found within the law. For it is our legal risk-related preferences that we want to enforce, not those of the judges and other triers of facts. Legal justification is thus most essential for judicial fact-finding which involves risks of error.

The criteria for justifying judicial determinations of fact under uncertainty should structure the whole of the risk-distributive dimension of judicial reasoning. Such criteria cannot be provided by scattered evidentiary rules. Nor can they be found in ordinary common-sense reasoning. They can only be found in the more general principles of the legal system which reflect the morality of that system and its risk-related preferences. Legal principles allocating the risks of error should therefore play an important role in the process of judicial (or other official) fact-finding. An attempt at singling out these principles will be undertaken in the following chapters. Although I shall concentrate primarily on adjudicative matters, it must
be borne in mind that the following observations also apply, mutatis mutandis, to many administrative decisions. Some general remarks about administrative fact-finding will be made in chapter ten.

2. THE RISK-DISTRIBUTIVE DIMENSION OF JUDICIAL REASONING

When an imperfect "judicial truth"\textsuperscript{116} is arrived at in conditions of uncertainty and substitutes the "real" truth, the former truth has to be legally justified. In order to justify it, the risks of error have to be distributed between the parties according to the relevant legal criteria. Choices of risk-distribution made by the judges and other triers of facts are wide-ranging and pervasive. They take place at different stages of judicial reasoning and are also involved in various procedures of examining evidence and in decisions regarding these procedures. They affect the substantive rights of the parties in dispute. Hence, these rights should also be taken into account in making risk-distributive choices. Due to their range and pervasiveness, decisions and procedures involving these choices cannot be regulated by the narrow and holey network of evidentiary rules. They should be informed by

the more general risk-distributive principles of the law. I shall now explain this in greater detail.

Adjudicative decisions about probabilities of disputed facts often entail, either explicitly or implicitly, decisions as to how to distribute the risks of error between the parties. Triers of facts distribute these risks by assigning "weight" to the evidence which was presented to them at the trial. The exact weight or probative value of that evidence are, typically, uncertain, and it seems to be clear that in such situations, the words "weight" and "probative value" are merely metaphorical expressions. What they signify is the impact of the evidence on the mind of the judge or other trier of facts, viz. the degree of his subjective persuasion. The intensity of his persuasion is often affected, and is bound to be affected, by various risk-distributive factors. His decision assumes therefore a risk-distributive character and ought to be justified as such.

Why does this happen, and why so often? First, in conditions of uncertainty existing in trials there is no possibility of making an objectively correct judgment about the probabilities involved. As has already been mentioned, triers of facts do not have enough evidence,  

117 See, e.g., McBaine, supra n.12, and the works referred to in relation to the probability debate, supra n.108(e).
the time available to them is scarce and the procedures of examining evidence are not perfect. Moreover, there seem to be no generally accepted criteria as to what constitutes, under uncertainty, an objectively correct assessment of probability,\textsuperscript{118} and at any rate, judicial evaluations of probability are bound to be subjective in most cases. These evaluations can neither be frequentist nor otherwise "objective". To contend, for example, that litigated events are repeatedly occurring, mutually exclusive or equally likely would clearly be unrealistic,\textsuperscript{119} and it is only under these conditions that the probability of these events can be determined with mathematical precision. To be sure, subjective estimates can also obey the usual rules of probability calculus so long as the reasoner's risk-related preferences are structured by a few plausible postulates of "rational choice".\textsuperscript{120} This generally important point is, however, of no help here, for it is the precalculated evaluations of probability that ought to be justified. To put it in other words, "uncertainty-as-risk" is our secondary concern. Our primary concern is

\textsuperscript{118} For discussion of diverging views on this subject see Cohen, supra n.108(e), chap.1; D.Shum, Probability and the Process of Discovery, Proof and Choice, (1986) 66 B.U.L.R. 825.


\textsuperscript{120} Kaye, id., Kaplan, supra n.108(e); H.Raiffa, The Art and Science of Negotiation, 33ff (1982).
"uncertainty-as-ignorance"¹²¹ and the risks existing in adjudication as a result of this kind of uncertainty.¹²²

The first two points that I have made, one about the need of justification, and another about the risk-distributive dimension, cannot plausibly be denied. An attempt can be made to confront these points by a theory which assumes that triers of fact can establish the probabilities of disputed allegations in all cases. Such an attempt is implausible. Even the most optimistic version of "universal cognitive competence" has never gone that far.¹²³ I shall therefore not dwell on any theory which unwarrantedly makes the assumption of judicial "always-know-how". However, my third point that evidentiary rules fall short of regulating all risk-distributive choices which take place in adjudication should still be defended against another theory. This theory can be described as a "slot-machine" theory of burdens and standards of proof. According to it, the existing standards and burdens of proof can govern all choices of risk-distribution. In hard cases, where the probability of the relevant facts cannot be determined,


¹²³ Cf. Cohen, supra n.90.
the party carrying the burden of proof should simply lose his case.

As has already been mentioned, burdens of standards of proof do not instruct judges and jurors as to how to evaluate the probability of contested facts. They merely tell them what to do when this probability cannot adequately be determined and which party has to come forward with evidence or lose the case when his allegations and their negations are equally probable. They also tell the court that any reasonable doubt as to any fact necessary to prove a commission of a criminal offence must generally result in an acquittal. This requirement is similarly silent in relation to the "reasonableness" of the existing doubts. In Lord Denning's view, although -

"... by our law a higher standard of proof is required in criminal cases than in civil cases, ... this is subject to qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As ... many great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear'. So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter."\(^{124}\)

The metaphysics of the "preponderance of the evidence" standard have been criticised as "cabballistic" by

McCormick\textsuperscript{125}, and it appears that a similar view has recently motivated the House of Lords to mention that -

"The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate to what is at stake."\textsuperscript{126}

In the same vein, a prominent Australian judge has remarked long ago that -

"... reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."\textsuperscript{127}

The interrelationship between evaluation of evidence in instances of uncertainty and the existing burdens and standards of proof requires a closer look. As was mentioned above, evidentiary rules which impose on one of the parties the risk of non-persuasion are residual

\textsuperscript{125} McCormick, supra n.7, at p.958. See also H.N.Morse, Evidentiary Lexicology, (1954) 59 Dick.L.R. 86.

\textsuperscript{126} Khawaja v Secretary of State [1983] 1 All ER 765, 784; Lord Scarman has even mentioned that "... the choice between the two standards is ... largely a matter of words" (id., at p.783). A critical discussion of this and related cases can be found in R.Pattenden, The Risk of Non-Persuasion in Civil Trials: The Case Against a Floating Standard of Proof, (1988) 7 Civil Justice Quart. 220. See also Keane (supra n.7, at p.47), who mentions that "... it is unclear from the authorities precisely how many types of burden of proof, in law, there are, and what each signifies."

\textsuperscript{127} Briginshaw v Briginshaw (1938) 60 C.L.R. 336, 362 (Dixon, J.).
rules of the last resort. Their generic statements as to the required levels of persuasion do not lay down any criteria as to the legal reasoning that should precede and indeed justify the resulting persuasion or non-persuasion. These holistic statements embrace many complex decisions arrived at on the basis of factual and non-factual considerations and are thus reminiscent of what was described by G. Fletcher as "flat" frameworks of reasoning, and by J. Frank as "gestalt". Judicial reasoning which precedes the ultimate decision cannot therefore be justified solely by the standards and burdens of proof. When this reasoning involves risk of error and affects its allocation between the litigants, it can be justified only by the concrete principles of risk-distribution, and the same is true about different procedures of examining evidence and other forensic contingencies of particular disputes.

128 G. Fletcher, The Right and the Reasonable, (1985) 98 Harv.L.R. 949. Fletcher maintains that juridical reliance on "reasonableness" and the corresponding "flat" legal thinking are characteristic of a relatively pluralist culture. They enable a complex web of normative considerations to be voiced in a single standard. By contrast, an atomistic reasoning which is based on the concept of "right" is an expression of a relatively monistic culture. Fletcher exemplifies his arguments by various defences and exculpations recognised by the criminal law and primarily by the distinction between "excuses" and "justifications". The main thrust of his thesis seems to have a strong bearing on the issue of standards of proof.

129 J. Frank, Courts on Trial, 165-85 (1949).

130 Consider, e.g., the following question: Can a civil suit be established by naked statistical evidence? None of the views expressed by American judges about this question can be justified solely by the legal
The "slot-machine" theory gains some support from the pronouncement made by Earl of Halsbury LC in Winans v Attorney-General:131

"I must admit that ... the conclusion I have come to is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof."

However, a "non-liquet" decision of this kind should also be justified.132 Judges cannot take refuge in the rules of burden of proof without first justifying their reasoning which necessitates this last resort. For this reasoning itself might involve risk of error and its allocation between the litigants. In other words, a judicial decision that no conclusion as to the probability of the factual allegations made by the parties is warranted must also be warranted.133 The opinions delivered by the law lords in the case of Winans readily provide an example.


133 As Ehrenzweig rightly mentioned, "a judicial power to speak non liquet factum would to easily lend itself to abuse." Ehrenzweig (1977), supra n.14, p.86.
William Louis Winans, a wealthy man who was born in the United States and came to England in 1859, where he lived until his death in 1897, left a considerable estate and a will concerning its distribution and other arrangements. A considerable amount of his money and property was situated in England. He, however, came to England merely for health reasons, following the advice of his doctors. He considered himself as "entirely American", frequently expressing his wish to return to Baltimore of which he always spoke as his "home". His wish, however, has never been fulfilled. The Attorney-General argued that since Mr Winans was at his death domiciled in England, legacy duty ought to be paid by his estate, and the question under consideration was—Had Mr Winans formed a fixed and settled purpose to settle in England?

Lord Lindley's view of this case was different from the solution adopted by Earl of Halsbury LC. On his view, the burden of proof had fully been discharged by the Crown. Although Mr Winans was a proud American citizen, due to his illness, he gave up any serious hope to return to the United States. The "hard" fact that Mr Winans lived in England for so long speaks for itself.

Earl of Halsbury was joined in his ultimate decision against the Attorney-General by Lord Macnaghten. However, Lord Macnaghten's reasons were entirely
different. Starting with the praesumptio facti in favour of the domicil of birth, he concluded that Mr Winans's hope of returning to America had been held by him up to the very last and that the burden of proof had not been discharged by the Crown.

Each one of those opinions is supported by the facts. At the same time, each of them involved risk of error. In situations like this, an answer to the question "Which opinion is the right one?" cannot be provided by the standards and burdens of proof, for the very question is asked about different decisions each of which can be accommodated within the existing framework of standards and burdens. Is any of those decisions as good as any other? If it is, a recourse to the burden of proof as a last resort might, perhaps, be justified, but it ought first to be established that all those decisions are equally supported by the law. As each of them involved risk of error, no adequate legal support to any of them can be found without first resolving the problem of risk-distribution.  

134 This point can also be exemplified by Lewis J's decision in Daniels and Daniels v R.White & Sons Ltd, and Tarbard [1938] 4 All ER 258 (KB), who held that the plaintiffs, who suffered injuries as a result of drinking a lemonade containing acid, have not discharged the burden of proof in regard to their allegations against the lemonade-makers. Against the "hard proof" in the form of contaminated bottle, the lemonade-makers produced evidence about precautions taken at their factory in cleaning and checking the bottles which were subsequently filled with lemonade. Since a decision that this hard proof satisfied the standard was at least equally plausible, a decision allocating the risk of
In other words, judges and other triers of facts have to consider many risk-related factors outside the framework of standards and burdens prior to their decision to step on the path of "non liquet". Legal criteria for dealing with these factors have thus to be found outside this framework. When one adds to these factors different procedures of examining evidence, which affect the distribution of various risks of error, and decisions made by the judges as to the propriety of these procedures, the inaptitude of the "slot-machine" theory becomes apparent.135

Furthermore, the law determining substantive rights may also indicate, either expressly or impliedly, the preferable from the legal point of view distribution of the risks of error. Legal propositions dealing with substantive rights and duties can usually be understood as ordaining "if F (= the material facts), then D(for P); if not F, then D(for D)". These propositions may be supplemented by presumptive norms determining what should be done in conditions of uncertainty, when

error within the given framework of standards and burdens was inescapable. Cf. Hill v J Crow (Cases) Ltd [1978] 1 All ER 812.

135 It is notable that judges are overtly reluctant to dispose of civil cases by using the residual burdens of proof. See, e.g., Morris v. London Iron and Steel Co., [1987] 2 All ER 496 (CA); Fincham v. Anchor Insulation Co., The Times, 16.6.1989 (QB).
neither F nor not-F can be established. They may, however, also imply what the judges should do in such situations. The question whether they imply this or not is a matter of concrete interpretation. These implied risk-related preferences should also be accounted for prior to disposing of the case in accordance with the general burden of proof.

If the "slot-machine" theory were correct, the application of the existing standards and burdens of proof would have led in a great deal of cases to the counter-intuitively defendant-biased results. To apply these standards in a way which ensures that the probabilities of disputed events are established as a matter of pure fact, without any recourse to morality, is to overuse, and thus misuse, the residual burdens of persuasion. For if triers of facts were to submit all their fuzzy inferences, rough generalisations and other

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136 Zuckerman, supra n.7, at pp.110ff.

137 See, e.g., Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd. [1941] 2 All ER 165 and Coldman v Hill [1919] 1 KB 443. It has been held in both cases that when a defendant seeking to discharge himself from his contractual duty relies on frustration, he must preponderantly establish the facts which support this defence. At the same time, it has been held in Constantine that when it is alleged that the frustrating event had occurred as a result of the defendant's fault, it is the plaintiff who should carry the risks of error. In Coldman, however, the opposite conclusion was reached in relation to the contract of bailment. This difference can only be justified if the parties' expectations which ought to be protected by the substantive law of contract are taken into account. See my discussion of these cases in ch.8, and the following discussion of Rhesa, infra nn.140-43; 159-60 and the adjacent text.
approximations to a rigorous scrutiny not entailing any risk of error, many facts would have been held not proven. This pseudo-scientific approach would have significantly deflected the course of justice, but, fortunately, judges and juries should not and are not accustomed to reason in such a self-defeating way.\textsuperscript{138} When they decide under uncertainty, they seem to allocate the risks of error on moral grounds and not merely on the basis of factual probability of disputed events.\textsuperscript{139} These moral grounds have to be articulated.

Hence, when lawyers disagree about the reasons that can properly be endorsed by the court in making its risk-distributive choices, their disagreement is legal and normative rather than empirical. These lawyers do not disagree empirically about "What happened?" They disagree about the risk-distributive treatment to which their clients are entitled as a matter of law. These disagreements and their resolutions will now be exemplified by two recent cases.

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\textsuperscript{138} See Weinstein, supra n.8, at pp.241-42.
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\textsuperscript{139} Cf. A.Zuckerman, Law, Fact or Justice?, (1986) 66 B.U.L.R. 487; B.Shapiro, 'To a Moral Certainty': Theories of Knowledge and Anglo-American Juries 1600-1850, (1986) 38 Hast. L.J. 153. As Zuckerman has recently written in regard to criminal cases, "[the] ... element of subjectivity leaves room for flexibility, but ... the clearer the jury's understanding of the moral, as well as legal, duty owed to the accused the less scope there will be for variation in the standard." (supra n.7, p.136)
\end{flushright}
3. RISK-DISTRIBUTIVE REASONING EXEMPLIFIED

I shall start with the recent case of Rhesa Shipping Co.\(^{140}\) In this case, the plaintiffs' ship was insured with the defendants as underwriters against perils of the seas and negligence of the crew. Subsequently, the ship sank in the Mediterranean with most of the evidence capable of proving both her seaworthiness and the concrete cause of her loss. It has been proved that the ship sank as the result of water entering through a large hole on her port side and the resulting flooding. However, many explanations as to the cause of the ship's loss were ruled out by the trial judge as improbable. The plaintiffs contended that at least one of the insured risks had occurred, but plainly failed at proving the negligence of the crew. Their further contention that the proximate cause of the ship's loss was a collision with a submerged submarine was found by the judge to be very unlikely. The judge had, however, also ruled out the wear and tear explanation of the loss which was advanced by the defendants, holding that this explanation is even less probable than the plaintiffs' theory of submerged submarine. He concluded that being left with these two competing theories of the case, he has to decide in favour of the plaintiffs by adopting

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their theory. Despite the fact that this theory was ill-supported by the evidence, it is still more probable than the theory offered by the defendants.

This judgment has been upheld by the Court of Appeal, but subsequently reversed by the House of Lords. The House of Lords held that having established the improbability of the plaintiffs' version, the trial judge should have decided that the plaintiffs failed at discharging the burden of proof. This holding of the law lords is well-founded, for a version offered by the plaintiff, in order to prevail, has to be more probable than any other account of the events. A mere comparison between the competing versions advanced by the parties is not always capable of satisfying the preponderance of the evidence requirement. When the allegations of both parties are implausible, no positive finding can be justified and the case should be disposed of by using the residual burden of proof.

The case and the judgment are, however, not as simple as it might appear. The ship was insured against "perils of the seas" and it should be clear that there was no exhaustive list of all possible perils. For this reason, the parties used the generic expression "perils of the seas" in the policy of insurance. Undeniably, the ship sank because there was a large hole in her port side and the flooding had occurred. No hole was detected before
that accident. The crew had not been negligent. There was no substantial wear and tear; there was no submarine nor any other visible cause of collision. The ship's port side had nevertheless been damaged during her navigation and she had sunk.

Having regard to all those facts, is it more probable than not that the accident had been caused by some unknown peril of the seas? This question seems to me to be relevant, for an unknown peril of the seas is still one of those "perils" covered by the insurance policy. The House of Lords has, however, decided that the above-mentioned question is immaterial. In what seems to be the crucial part of the judgment it was held that -

"The shipowners could not, in my view, rely on a ritual incantation of the generic expression 'perils of the seas', but were bound, if they were to discharge successfully the burden of proof ... to condescend to particularity in the matter." 141

This requirement imposes a plainly extra-factual precondition for discharging the burden. The mere fact that it is more likely than not that some unknown peril of the seas had caused the damage would not satisfy the requisite standard of proof. This precondition is not indisputable. Thus, it can be argued that the requirement of condescending to particularity is not suitable for cases of insurance against total loss. In such cases, most of the evidence is usually destroyed

141 id., at p.716.
together with the insured asset and its destruction is or should antecedently be expected by both parties to the contract of insurance. The plaintiff is thus to be allowed to prove his case on the balance of probabilities without being required to produce specific evidence about the exact cause of his damage. Arguably, risks of error in civil trials should be distributed equally between the parties, and any precondition for discharging the ordinary civil burden imposes upon one of them an extra risk and thus generates inequality.\textsuperscript{142} The requirement laid down by the House of Lords can, however, be supported by a policy of "spoliation"\textsuperscript{143} which encourages litigants to produce specific evidence, enabling their adversaries to defend themselves against concrete allegations.

Be that as it may, when lawyers disagree about such matters, they do not disagree empirically about the true answer to the question "What happened?" They disagree as to whether the evidence brought before the court can justifiably be held to satisfy the requisite standard of proof, i.e., whether a particular decision to this


effect, which involves risks of error, can justifiably be reached by the court. Disagreements of that kind are legal or normative, and risk-distributive choices in settling them cannot be avoided. One of such choices has been made by the House of Lords in Rhesa, and it is a separate question whether it can or cannot be justified.

In another recent case, R v. Court\textsuperscript{144}, a man charged with indecent assault had admitted striking a girl outside her shorts on her buttocks. He had also admitted that the girl has given no consent for spanking her, but, denying the indecency of this act, pleaded guilty of common assault. Despite the objection raised on behalf of the accused, his statement to the police saying that he had spanked the girl out of "buttock fetish" was admitted by the trial judge. The accused did not testify and was found by the jury guilty as charged. His conviction was upheld by the Court of Appeal and by the majority judgment of the House of Lords. The opinions delivered by the law lords as to whether the disputed statement was admissible will now be discussed.

Indecent assault is an assault considered as indecent by "right-minded" people, and these people are represented by the jury.\textsuperscript{145} Right-minded people may, however, well disagree as to whether or not a certain assault was in

\textsuperscript{144} R v Court [1988] 2 WLR 1071.

\textsuperscript{145} id., at pp.1081; 1087; 1089.
fact indecent, and the contemporary moral standards applied by the jury in respect of decency may not be shared by everyone.\textsuperscript{146} One thing is clearly undeniable: an assault must not be considered as indecent merely because it has been triggered by a sexual motive. The act of assault has to be indecent per se - nullum crimen sine actu. In the present case, the accused had committed an assault which was capable of being indecent. This case was a hard case of "indecency", and a presence or absence of sexual overtones could shift the decision in either direction.\textsuperscript{147} But again, such sexual overtones are to be found in the very act committed by the accused and not in his mind or peculiar sexual gratification.

Evidence about motive is plainly relevant to prove both act and intention of the motivated person. To be sure, the statement of the accused in Court was relevant, and it pays to emphasise once again that it was its capability of proving the external element of indecency that was questioned both by the Court of Appeal and the House of Lords. The Court of Appeal decided that this statement had properly been admitted, for the jury was entitled to evaluate the nature of the accused’s actions by reference to his fixed purpose. According to the

\textsuperscript{146} G.Williams, What is an Indecent Assault?, (1987) 137 N.L.J. 870.

\textsuperscript{147} Court, supra n.144, at p.1084.
Court of Appeal, the accused's secret motive was likely to affect his way of holding, restraining and striking the girl.\textsuperscript{148} Lord Ackner's judgment, representing the majority opinion of the House of Lords, was less clear. Lord Ackner mentioned that if, as was decided by the Court of Appeal, no specific intent is necessary for committing a crime of indecent assault, the accused's statement should have been excluded as irrelevant.\textsuperscript{149} He held, however, that the Court of Appeal was wrong in regard to the mens rea of indecent assault, and that indecent intention is a necessary constituent of that crime. Accordingly, the statement was in fact relevant to prove the nature of the accused's intention.\textsuperscript{150} At the same time, Lord Ackner added that concealing such a statement from the jury would generally be an "affront to common sense", because the jury would be deprived of the answer to the question crucial for evaluating the conduct of the accused - Why did he behave like that?\textsuperscript{151} Furthermore, in Lord Ackner's opinion,

"... evidence ... of the accused's explanation for assaulting the victim, whether or not it reveals an indecent motive, is admissible both to support or negative that the assault was an indecent one and was so intended by the accused."\textsuperscript{152}

\textsuperscript{148} R v Court [1987] QB 156, 164-165 (CA).
\textsuperscript{149} Court, supra n.144, at p.1084.
\textsuperscript{150} id., at pp.1084-1085.
\textsuperscript{151} id., at p.1085.
\textsuperscript{152} id.
Lord Goff's dissenting opinion was that indecent intent is not an ingredient of the offence. Moreover, evidence of the accused's motive is, in his view, relevant to prove that the circumstances of the assault were not in fact indecent, but not vice versa. He therefore concluded that the statement given by the accused has been wrongly admitted and his conviction, which had probably been affected by that statement, ought to be quashed.153

The opinions expressed by the judges of appeal and the law lords have one thing in common. Insofar as the statement of the accused is concerned, the real issue was the distribution of the risks of error. It cannot be disputed that an indecent intent is incapable of rendering an objectively common assault indecent, and that evidence about the accused's motive is probative of both his act and intention. It has therefore to be asked why is it that the admissibility of the statement given by the accused in Court was regarded by the courts as presenting a problem? It seems that it was so regarded because it could motivate an unwarranted chain of inferences, namely, the jury could have decided that the accused is guilty of indecent assault merely because he sought it to be indecent.154

153 id., at pp.1085ff.

154 I think that this is the best reading of this difficult case, for the House of Lords could not have made a mistake pointed out by Professor Glanville
Both the Court of Appeal and the House of Lords have indicated that if the accused's external conduct could not be objectively indecent, his statement about his motive should be excluded as immaterial. The assault committed by the accused has, however, been regarded as capable of being indecent. The majority of the law lords have therefore at least tacitly assumed that in such a case, the risks of error accompanying the disputed statement can justifiably be imposed upon the accused. The Court of Appeal has done it expressly by saying that the accused -

"... may well explain that his secret motive in fact had no effect upon his actions".\(^\text{155}\)

Moreover, the Court held that an indecent motive may properly be regarded by the jury as having in fact affected the way in which the act of assault had been performed.\(^\text{156}\) This inference clearly involves risks of error and as such cannot be justified solely on empirical grounds.

\(^\text{155}\) Supra n.148.

\(^\text{156}\) Id.

Williams, i.e., to mix the internal element of indecent assault with the actus reus of that crime. See Williams, supra n.146. Professor Williams's criticism of the Court of Appeal was expressly adopted by the House of Lords at p.1084. My view is similar to that of G.J.Bennett & B.Hogan, Criminal Law - Annual Review, (1987) 79, 80, who wrote that when "... the conduct [of the accused] is ambivalent, it seems that evidence of motive may be admitted".
Hence, neither the question about the admissibility of the accused's statement nor the judicial answers to this question can be regarded as empirical, as ones which are concerned merely with "What happened?". The judges in Court were encountering a risk-distributive dilemma which could not be resolved by the requisite standard of proof. This dilemma arose at one of the early stages of the trial in relation to a particular piece of evidence which was potentially probative. An attempt could be made to resolve it by using the rule which authorises the judge to exclude probative evidence which is preponderantly prejudicial. However, it was not possible empirically to determine whether the accused's statement is preponderantly prejudicial. The judicial opinions delivered in this case show that there was no empirical way of balancing the probative value of this statement against its prejudicial effect. Any such balancing involved risks of error. An attempt to use the rule against preponderantly prejudicial evidence would thus have brought the judges back to their risk-distributive dilemma.

4. THE LAW OF EVIDENCE BEYOND ITS RULES
It must now be clear that judicial reasoning about disputed facts has both empirical and risk-distributive aspects. Reasoning about "What happened?" which entails no risk-distributive functions has to be justified
epistemically. Reasoning which entails choices of risk-distribution should satisfy legal criteria which reflect the legal system's risk-related preferences. These criteria are bound to rest on the legal system's political morality. Reasoning about facts in contested trials frequently involves both empirical and risk-distributive elements. The justifiability of this kind of reasoning should rest on both epistemological and moral criteria. It should, however, be borne in mind that the distinction between empirical and moral justifiability of reasoning under uncertainty may not always be clear. As Hilary Putnam observed,

"truth is not the bottom line: truth itself gets its life from our criteria of rational acceptability, and these are what we must look at if we wish to discover the values which are really implicit in science." 158

It should also be clear that the existing evidentiary rules fall short of regulating the whole range of risk-distributive choices taking place in judicial fact-finding. These rules are rare, disparate, open-textured and qualified by numerous exceptions. By contrast, in view of a protean variety of forensic situations and other contingencies, choices of risk-distribution taking


place in adjudication are wide-ranging and pervasive. At the same time, judges and other triers of facts are not free to deal with risks of error as they choose. Their choices of risk-distribution must always be justifiable, and if they cannot always be justified by evidentiary rules, it should be asked what are and what should be the more general legal principles which can justify such choices. A theory of legal evidence must therefore attempt to discern from the legal system its principles of risk-distribution, and if such principles can be found, they should be regarded as part of the law of evidence.

The decision delivered in Rhesa illustrates the need to structure the risk-distributive dimension of judicial reasoning by such principles. Let us assume that the principle of equality in risk-distribution should apply in civil trials, requiring that risks of error be treated as equal for both parties. According to this principle, when it is more likely than not that the insured vessel had sunk as a result of an unknown peril of the seas, and everything else is equal, the plaintiffs are apparently entitled to recover from the insurance company. The same principle, however, should protect the defendants from bearing an extra risk in confronting the plaintiffs' evidence about unspecified facts. As we already know, the final decision was in the defendants' favour.
This decision is, however, open to criticism. In making a balance between the conflicting principle-based reasons, the expectations of the parties to the concrete insurance contract should be taken into account. The possibility of the evidence being destructed is typically contemplated by the parties to the contract of insurance against "total loss". They could stipulate that despite the loss of evidence it is only a proof of some specific peril of the seas that would count. They could, conversely, alleviate the burden of proof to protect the insured rather than his insurers. As they have done none of those, and there is nothing in the law that specifically provides for the risk-allocation in such cases, none of these special considerations should be taken into account by the judges.\footnote{159} Moreover, the plaintiffs have produced all the evidence at their disposal and, in performing their uberrima fides duties, have presumably disclosed to the defendants all other relevant information, including the necessary details about the ship's condition.\footnote{160} There was therefore no

\footnote{159} Arguably, the modern law of insurance aims at spreading the costs of accidents over the large number of people. From this standpoint, in adjudicating disputes concerning insurance, judges must aim at maximising the overall amount of correct decisions in the long run of cases. This once again supports the view that unspecified perils of the seas should be allowed by the courts to be established on the balance of probabilities.

\footnote{160} For the exact scope of those duties see J. Birds, Modern Insurance Law, 2d ed., chap. 6 (1988).
overriding reason to protect the underwriters by imposing on the insured an onerous burden of proving the specific nature of the peril. The principle of equality could thus only support the view that the plaintiffs have to be allowed to establish an uncertain peril of the seas as a preponderantly probable cause of their damage.

The case of Court presented a rather more complex problem. The principle of protecting the innocent from erroneous conviction supported the exclusion of the accused's statement. Lord Goff's minority opinion clearly illustrates this point. This statement, however, had a substantial probative value, and the accused was not really innocent. He had committed a criminal assault which was indecently motivated. He was thus guilty at the very least of common assault and attempted indecent assault.\(^{161}\) Hence, the only question was whether he accomplished his plan so that his conduct went beyond its inchoate stages. An admission of his statement of motive exposed him to the risk of being convicted not because his act was indecent but because he assaulted the girl in a way which he contemplated to be indecent. An exclusion of this statement as a piece of material information was however inconsistent with the principle

\(^{161}\) This would be so even if we assume that what he attempted to do was impossible as a matter of fact. See s.1(2) of the Criminal Attempts Act 1981; R v Shivpuri [1986] 2 All ER 334.
requiring judges to promote rectitude of decisions, one that can be described as a principle of utility. It can be argued that in criminal trials, the principle of protecting the innocent should trump utility. This argument has a very strong appeal indeed, but in our case, the accused was not really innocent, and this could perhaps support the final risk-distributive balance in favour of utility. Be that as it may, any decision ought to be supported by the relevant legal principles of risk-distribution.

The principles of risk-distribution should therefore be discerned from legal materials and apply in cases involving risks of error. Unlike rules, they should affect judicial decisions without being applied in an unyielding "all-or-nothing" fashion. They may well compete with each other, and in such cases they would have to be balanced by the court. One single principle may not be sufficient for determining the outcome of particular cases, but each of such principles has its weight which should always be accounted for by judges and other triers of facts. These principles confer various rights. They structure the judicial

162 The jury, of course, should be directed that the mere fact that one's assault was contemplated to be indecent is not sufficient for establishing the actus reus of indecent assault.

discretion by appealing to the moral values and objectives of the legal system which have to be pursued, or at least accounted for, in allocating the risks of error in adjudication. Equality between the parties, rectitude of decisions and procedural fairness are amongst these values and objectives. The relationships existing between the principles which protect these values and objectives and the risks of error linked with the substantive rights signify that the law of evidence should not be understood as a trans-substantive law.\textsuperscript{165} Finally, these principles defy the idea of "free proof".

A temptation of making a strong descriptive claim in relation to risk-distributive principles will presently

\textsuperscript{164} The verb to "structure" is borrowed from K.C.Davis, Discretionary Justice, ch.4 (1969).

be resisted. I shall refrain from such an enterprise and concentrate instead on the following interpretive question: What are the principles of risk-distribution that can properly be deduced from the explicit legal materials comprised by the English legal system? An attempt will thus be made to identify the general principles of the law which can justify different risk-related reasons that may be adopted by the courts in various instances of uncertainty.

The idea of structuring the process of proof by risk-distributive principles will therefore be concentrated on the justification of judicial findings of fact rather than on psychological questions of judicial persuasion and other things which actually happen in courtrooms. In this respect, I will be dealing with a normative question. Nonetheless, the principles of risk-distribution dealt with in this work will not be worked out from a tabula rasa. They will be deduced from the legal materials forming the actual legal system. They can therefore be regarded as part of the law, if the law were viewed from the interpretive perspective which I suggest to endorse.

166 One of the lessons that should be learnt from Kelsen is that to speak about legal norms, prescriptive in their character, in empirical terms is a dangerous, if not impossible, enterprise. See H.Kelsen, A Pure Theory of Law and Analytical Jurisprudence, (1941) 55 Harv.L.R. 44; H.Kelsen, On the Pure Theory of Law, (1966) 1 Israel L.R. 1; H.Kelsen, A Pure Theory of Law (1967).
This idea of structuring the risk-distributive dimension by moral principles might face two possible objections. It is possible to argue that society has to be more confident in regard to judicial capability of correctly determining the probabilities of disputed facts, and that the requirement of rigorous justification ignores or underestimates the existence of judicial "tacit knowledge". The answer to this argument is relatively straightforward. If the idea of "tacit knowledge" tends to persuade us that judges or other authorised officials possess, like experts, a superior cognitive competence, it should be rejected for political reasons if not because it is simply unwarranted. This attempt to immunize judges and other officials from open public criticism entails the possibility of people's lives being dominated by the expertise of authorities. If it is accepted that judges and other officials do not have an exclusive cognitive superpower, the idea of

167 M. Polanyi, The Tacit Dimension, 6 (1967). A translation of this form of "holism" into the process of judicial fact-finding has been pioneered by Tillers, supra n.108(a); see esp. at p.1082. For introduction of this idea into the field of legal interpretation see S. Fish, Fish v. Fiss, (1984) 36 Stan.L.R. 1325, 1331-32.

"tacit knowledge" would have only a limited effect on the subject-matter of this work. It would merely remind us that not all patterns of human rationality can adequately be represented by justificatory linguistics. Besides this, it would have no effect on the need to articulate the legal principles of risk-distribution and to apply them in situations of uncertainty.

The second objection to the idea of principles might be raised by questioning its allegedly sceptical and relativist implications. My arguments have been based on the existence of uncertainties of fact which are not even susceptible to probabilistic assessment, and, arguably, this vision of adjudication inevitably leads us to subjectivism and relativism. Furthermore, we would not be rescued from the darkness with which those two envelop us by endeavouring to objectify judicial fact-finding by the principles of risk-distribution. As has already been admitted, these principles vary from case to case. They are also very general and compete with each other. They are therefore incapable of generating readily available and stable results.

This objection posits a philosophically seductive dilemma, a grand Either/Or: according to it, we have either to subscribe to the strong foundationalist view of judicial cognitive competence or face the forces of subjectivism and relativism that envelop us with
intellectual and moral chaos. This dilemma, labelled by R.Bernstein as "Cartesian Anxiety", is often claimed to be pervasive in both legal and non-legal discourses. But, as Bernstein demonstrates, this dilemma does not exhaust, as it is pretended to do, the logical and moral space of human activities and understandings.172 His and other philosophers' message

170 id., at pp.16ff.


For general discussion see A.Altman, Legal Realism, Critical Legal Studies and Dworkin, (1986) 15 Phil. & Pub. Aff. 205.

172 Bernstein, supra n.169.
is to exorcise this "Cartesian Anxiety", i.e., to banish it from legal and other intellectual discourses. Our recognition of the fallibility, incompleteness and other contingencies of human knowledge must, according to this message, advance, rather than negate, our understanding of judicial processes. As J. Williams wrote,

"this message has at once reassuring and frightening implications, for it highlights our responsibilities for the certainties we choose." 173

The lack of fixed foundations on which our knowledge and morals can safely rest cannot dispose of the duty to employ in judicial processes the best possible arguments and forms of reasoning. It would be a mistake to infer from the absence of fixed foundations that "everything goes". This inference, after all, is unwarranted as a matter of simple logic.

The idea of risk-distributive principles takes no position in the disagreement about fixed foundations of knowledge. 174 At the same time, it rejects both subjectivism and relativism insofar as they suggest that no criteria for valid legal reasoning can be worked out without such foundations. This approach, which might

173 Williams, supra n.171, at p.496.

perhaps not satisfy some "disappointed perfectionists", \(^{175}\) regards legal reasoning as a species of practical reasoning, as one which aims to determine the currently best reasons for action in conditions of imperfect knowledge. In the context of judicial fact-finding, this approach refuses to accept the idea of Either/Or: either to postulate the existence of judicial omnicompetence or to endorse an extreme subjectivist stance. From this perspective, both an unjustifiable cognitive optimism and inexorable relativism are synonyms of legal arbitrariness and injustice.

Judges and juries have to make their decisions under uncertainty. Their reasoning in such cases cannot be purely factual. They have to rely on risk-distributive principles. Without these principles their reasoning would not be justifiable. To paraphrase C.Pierce, the idea of principles insists that this reasoning -

"... should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected."\(^{176}\)

\(^{175}\) This expression is borrowed from H.L.A.Hart, The Concept of Law, 135 (1961) and (in regard to judicial fact-finding) from Twining, supra n.171, at p.144.

\(^{176}\) C.Pierce, Collected Papers, 5.264, cited and discussed by Bernstein, supra n.169, pp.224ff.
PART TWO

PRINCIPLES, RULES AND EVIDENCE SCHOLARSHIP

CHAPTER THREE

THE TRADITIONALIST SHORTCOMINGS

1. INTRODUCTION

As has been made clear in part one, the problem of risk-distribution, the issue of justification of judicial fact-finding and the idea of structuring judicial decision-making in instances of uncertainty by the principles of political morality have never been articulated by the critics of evidentiary rules and by their expositors and synthesizers. Most of the theorists which belong to the dominant tradition of evidence scholarship have focused on the rules of evidence, discussing the instrumental capacities and deontological merits of those rules. In giving their descriptive accounts and normative evaluations of various systems of judicial evidence, these theorists

These problems are not the only ones that have been neglected. The logic and psychology of proof, probability theory, forensic science and study of fact-finding institutions and their methods have been neglected as well. See W. Twining, Rethinking Evidence, chs. 2, 3, 5, 10 (1990). It ought to be mentioned that the relatively recent works of R. Lempert & S. Saltzburg, A Modern Approach to Evidence, 2d ed., (1982) and A. Zuckerman, The Principles of Criminal Evidence (1989) have been written from non-traditionalist perspectives and discuss some of the problems that have been neglected by the orthodox writers.
have identified the scope of the law of evidence with its rules. Such exposition and analysis of the law of evidence can hardly be adequate. Judicial fact-finding is one of the most important parts of the process of adjudication and no account of this process would ever be accomplished without laying down a solid justificatory framework within which legal reasoning about not always certain facts could take place. The problems of distribution of the risks of error, the need of justification and the corresponding idea of invoking moral and political principles to justify risk-distributive choices should not be neglected. Since risk-distributive choices (explicit and implicit) permeate judicial decision-making in conditions of factual uncertainty, it is important to know which principles are to be applied in making those choices. Given that all the evidence relevant to the trial has been admitted, what, apart from the lax standards and burdens of proof and scattered evidentiary rules, should structure the risk-distributive discretion?

Two interrelated factors can probably explain the traditionalist neglect of those problems. First, most of the orthodox theorists of evidence like Thayer, Wigmore, McCormick and Cross were almost unqualified legal positivists.² Holding strong positivist views, they have not considered the idea that the modern law of

² W.Twining, Rethinking Evidence, ch.3 (1990).
evidence cannot be fully exhausted by both exceptional and exceptionalized rules, and thus left untouched the remaining spectrum of judicial discretion. Subject to the rules concerning standards of proof and burdens of persuasion, no criteria as to what constitutes, in conditions of uncertainty, a legally valid determination of facts have been laid down in their writing. Even Wigmore, the only one who had thoroughly and rigorously analysed the problem of cogency of judicial fact-finding, approached this problem solely by means of logic, psychology and general experience without regard to the moral process of risk-distribution and its normative regulation. In his previously disregarded and now gradually revitalized work The Science of Judicial Proof, he had ruled out the possibility of regulating

3 This can be learned from the distinction between "law" and "fact" sharply drawn by most of these scholars and also from the fact that legal aspects of evidentiary "weight" have not been articulated by any of them. R.Cross, On Evidence, 6th ed., 49-59 (1985) is a representative example of devoting only 10 pages (out of 641) to these central questions of judicial fact-finding. (The problem of weight has been separately addressed in this book only at p.59). Despite the admitted fact that the "... tendency of the modern law is in favour of a broad basis of admissibility" (id.), the question of weight has been eliminated from the discussion of the law of evidence:

"The former (i.e., the admissibility of evidence, A.S.) is a matter of law ... the weight of evidence, on the other hand, is a question of fact" (id.).


5 W.Twining, Theories of Evidence, supra n.119ff, esp. at pp.179-186; W.Twining, Rethinking Evidence, chs. 8 & 9 (1989); T.Anderson & W.Twining, Analysis of Evidence (tent.ed., 1987); P.Tillers, Mapping
the process of fact-finding by non-cognitive legal norms (subject to the necessary evil - the rules of standard and burden of proof). According to Wigmore, the legally appropriate standards of cogency in fact-determination would be satisfied so long as judicial reasoning complies with the axioms of logic and general experience. For this reasoning to be justifiable it should only be epistemologically sound.  

Wigmorean approach, requiring decision-makers rigorously to chart all the evidentiary data, the inferences derived from those data, and the supporting generalisations, qualifies to a certain extent the framework of free evaluation of evidence. Thus, according to this approach, the process of judicial proof can never be free of constraints imposed by the standards of sound reasoning and these standards might well be regarded as part of the law of evidence. There would, however, still be a substantial lacuna, and a purely factual chart-based reasoning would be facing endless circularity or regress, if the non-factual (viz. Inferential Domains, (1986) 66 B.U.L.R. 883; P.Tillers & D.Shum, Charting New Territory in Judicial Proof: Beyond Wigmore, (1988) 9 Cardozo L.R. 907; D.Shum & P.Tillers, Marshalling Evidence Throughout the Process of Fact-Investigation: A Simulation (unpublished manuscript, George Mason University - 1989). Cf. A.Moore, Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions, (1987) 34 UCLA L.R. 611.

6 Supra n.4, passim.

7 W.Twining, Rethinking Evidence, ch.6 (1990).
moral or political) criteria of risk-distribution remain unidentified. Without these criteria no inference made in conditions of uncertainty can ever be justifiable. Wigmore's chart can thus only be facilitative and cannot be claimed to validate reasons for judicial choices.

Another factor capable of providing some explanation of the traditionalist neglect is the acceptance of the empiricist claims about the foundations of knowledge by many theorists of evidence. As was observed by B. Shapiro, most of the treatises on the Anglo-American law of evidence have been influenced by epistemological traditions prevalent at their times, and empiricism is, in this respect, no exception. The traditional scholarship of evidence is hallmarked by its belief that judges and other triers of facts are capable of adequately assessing evidence through analysis and observation in virtually any case of uncertainty, and this belief is characteristic of the empirical philosophy. This ontological and epistemological optimism might have undermined the importance of risk-distributive decisions, their justificatory structure and the significance of moral principles which should


9 W. Twining, Rethinking Evidence, ch.3 (1990).
form this structure. For if judges and other triers of facts are capable of arriving at objectively correct judgments of probability in virtually all cases, the role of moral ingredients in their reasoning about facts can rightly be undermined. On this view, uncertainty is identified with the known amount of risk and not with ignorance. Occupying most of the logical space of judicial reasoning, the notion of uncertainty as risk minimises the domain of uncertainty as ignorance and thus alleviates the resolution of many risk-distributive dilemmas. Within this framework, problems of risk-distribution are reduced to the homogeneously determinate situations easily regulated by the existing standards and burdens of proof and there are almost no hard cases of fact unsusceptible to this fairly standard solution. The evidence produced at trial on behalf of the parties may be as problematic as it can ever get to be: triers of facts, sharing the general cognitive competence,\textsuperscript{10} will assess the factual probabilities of the parties' contentions and reach their judgments by applying, if necessary, the residual probative burdens.

\textsuperscript{10} This notion is described in L.J. Cohen, Freedom of Proof, in W. Twining, Facts in Law, (1983) 16 ARSP 1.
2. THE TRADITIONALIST ASSUMPTIONS

It is evident that what is at work in the traditional scholarship of evidence is the suppression of essentially moral reasoning by purely epistemological methods of fact-finding. This suppression of the moral by the epistemological is epitomized by the orthodox perception of the law of evidence as maintaining two dichotomies: the dichotomy of rigid evidentiary rules and freedom of proof and the dichotomy of probative and extra-probative legal rules. Both dichotomies are questionable. The dichotomy of evidentiary rules and free proof, sharply differentiating between "law" and "fact", maintains that what takes place in the forum of judicial proof is an ordinary common-sense reasoning slightly interrupted by a few "legal noises". (Critics of evidentiary rules, whose views have been presented in part one, have demonstrated that many of those "legal noises" are insignificant and in fact do not constrain the process of fact-finding.) As the rules of evidence apply in an all-or-nothing fashion and are both exceptional and subject to exceptions, very little room is left for normative interference with what is contended to be a purely factual reasoning. On this view, moral (viz. risk-distributive and other) problems involved in judicial fact-finding are marginal. A further marginalization of the moral aspects of judicial fact-finding is attempted to be achieved by maintaining an additional dichotomy, the dichotomy of intrinsically
probative and extrinsically extra-probative reasons which justify different evidentiary rules. Those rules which are justified on probative grounds are asserted to reflect the common wisdom and general experience and thus be naturally integrated in processes of fact-finding. This move, leading to the isolation of the extra-probative reasons, minimises again the role of morality in judicial fact-determination. The traditional differentiation between "probative" and "extra-probative" rules of evidence will be discussed later in this chapter. Suffice it to say, that as a result of this sharp differentiation moral reasons are claimed to affect the process of fact-finding only in a few cases covered by a tiny proportion of the already exceptional rules of evidence.\(^{11}\)

As was mentioned above, this view of the process of fact-finding tends to neglect both range and moral significance of non-factual reasoning affecting this

\(^{11}\) By isolating evidentiary rules from the process of proof, Wigmore, the greatest traditionalist expositor, asserted that the former cannot be extracted from epistemological considerations of fact-finding. See Wigmore, supra n.4, par.1. As was mentioned above in ch.1, there are, in Tillers's words, "deviant theories" of proof (P.Tillers, Modern Theories of Relevancy, in Wigmore, supra n.2, vol.1A, pp.1018-1019) which make an attempt to justify the process of judicial proof by its maintaining "ritual values", "political contest" etc., and are thus opposed to the rationalist tradition. See W.Twining, Rethinking Evidence, ch.3 (1990).

It must now be evident that what was neglected by both deviant and traditionalist extremes is a comprehensive account of the risk-distributive morality of judicial proof.
process. What is at work in this process is not merely the understanding of "What happened?" structured by epistemic criteria, but also the elucidation of valid reasons for decision capable of answering the essentially moral question "How those involved in a litigation ought to be treated?" When neither a full knowledge nor determinate probabilities of "What happened" are available, this moral question becomes crucial for justifying all inferential steps in judicial fact-finding. Risk-distributive decisions made by the triers of facts should be justifiable. They can comprehensively be justified only by general moral principles rather than by over-inclusive or under-inclusive legal rules that apply in an "all-or-nothing" fashion. Therefore, the framework of wide moral principles seems to be more appropriate for regulating the risk-distributive dimension of judicial reasoning in variable forensic situations.

However, an orthodox theorist of evidence motivated by positivist and empiricist views might still argue that his account of legal norms regulating the process of proof is accurate and exhaustive. This argument is plainly descriptive and has no normative appeal. It cannot diminish the normative force of the idea that decisions made under uncertainty should be justified by moral principles of risk-distribution. This idea can seriously be challenged only by demonstrating that
judicial fact-finding can be probabilistically determinate without recourse to morality\textsuperscript{12} and thus easily susceptible to regulation by the existing standards and burdens of proof. To speak both normatively and descriptively, an orthodox scholar has to endorse this position. My main concern here is the problem of justification, i.e., a normative framework within which judicial reasoning bearing a risk-distributive character is to take place. Nonetheless, it is submitted that the orthodox account is unsound also for expository purposes because it falls short of describing what is at work in judicial reasoning in instances of uncertainty and hardly gives a full list of legal imperatives regulating that reasoning. This observation, being supported by what has already been said, must now be defended at the more general level against the arguments from legal positivism and philosophical empiricism. Can the model of risk-distributive principles, as a justificatory framework of judicial reasoning about facts, be sustained against those arguments?

In my view, such a model can be sustained against both positivism and empiricism. There is no real conflict between the positivist conception of law and a legal

\textsuperscript{12} They should be determinate in terms of either Pascalian or Baconian probability. For this distinction and its juridical significance see L.J.Cohen, The Probable and the Provable (1977).
recognition of some moral and political principles and there is no genuine clash between strong empiricist views and a morally or politically based regulation of judicial fact-finding. Furthermore, both legal positivism and epistemological empiricism may well be questioned at more general levels.

2.1 THE POSITIVIST OBJECTION

There is nothing inherent in legal positivism to negate ab initio the law's recognition of moral and political principles which are not rules. The positivist criteria for understanding the nature of law are empirical and the question is would it be a distortion of, e.g., the Hartian "rule of recognition" if such principles be tested and recognised as a matter of social fact?¹³ This question has to be answered in the negative. Admittedly, the idea of legally recognising principles which appeal to political morality and the transformation of such principles from the non-legal into the juridical are rather problematic from the positivist point of view. Moral principles such as the principle that like cases are to be always treated alike are being claimed to apply as a matter of law's integrity and thus

incorporate some non-factual criteria of moral likeness. By contrast, on the positivist view, morals are kept outside the law unless they are shown to be incorporated in it in some empirically testable way from the internal point of view, and the contents of law ought thus to be identified as part of the current social practices. Rules marked by such practices as "legal" are not all-encompassing, and positivists, not claiming these rules to be all-encompassing, are apparently bound to admit that when these rules run out the judges are left with discretion which is very strong indeed.

This "hard" version of legal positivism is, however, not the only plausible one. The transformation of the moral into the legal can and should be examined against concrete social practices and this might well give rise to the possibility of identifying some moral principles as part of the law. Furthermore, legal positivism is

14 R.Dworkin, Taking Rights Seriously (1977); Law's Empire (1986).
not claimed to provide a full-fledged theory of adjudication (one might add here that Bentham's theory was an exception). Nor is it contended to have laid down, once and for all, an exhaustive list of the truth-conditions for propositions of law or an exclusively valid conception of legal interpretation, justification and other normative matters. As a general social theory, positivism aims to be sociologically descriptive, viz. to identify at the general level the salient features of law as distinguished from non-legal social phenomena. It does not aim at describing specific methods applied within particular legal systems to identify and interpret the sources of law. It advises

sometimes refer in their decisions to principles, but refuses to treat them as part of the "law". See J.Raz, Legal Principles and the Limits of Law, in M.Cohen, Ronald Dworkin & Contemporary Jurisprudence, 73 (1984); Authority, Law, and Morality, (1985) 68 The Monist 293; Dworkin: A New Link in the Chain, (1986) 74 Cal.L.R. 1103. Cf. with Hart's distinction (The Concept of Law, 246-47 [1972]) between "permissive" sources of law which provide cogent reasons for discretionary decisions and "mandatory" sources. See also H.L.A.Hart, Essays in Jurisprudence and Philosophy, 6-7 (1983).

18 Hart wrote in the Preface to his Concept of Law (1961) that his aim is to further the understanding of "law, coercion, and morality as different but related social phenomena" and that this book and the thesis contained in it may thus be regarded as an essay in descriptive sociology. His enterprise was different from constructing a theory of adjudication, the domain of Taking Rights Seriously and Law's Empire. See also Burton, supra n.17; Gavison, supra n.17; D.Lyons, Reconstructing Legal Theory, (1987) 16 Phil. & Pub. Affairs 379; H.L.A.Hart, Comment, in R.Gavison, Issues in Contemporary Legal Philosophy, 35 (1987). Dworkin seems to have made the same distinction in his article Legal Theory and the Problem of Sense, in R. Gavison, Issues in Contemporary Legal Philosophy, 9, at pp.19-20 (1987).
those who are willing to identify the sources of a particular law and related to it social practice to proceed hermeneutically, and its hermeneutics that come within the "rule of recognition" appear to be open-minded. Advocating hermeneutical openness rather than hermetic closure, it admits of any kind of interpretive practice, provided that it is valid from the internal point of view adopted within the given community. It exhibits no inherent aversion to the notion of principles as part of the "implied law".

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19 Cf. N.McCormick, H.L.A. Hart, ch.3 (1981). The "rule of recognition" is significant both epistemically and semantically. It constitutes the definition of law and the test by which what passes for "law" in a particular society can be determined. See Coleman, supra n.13; C.Silver, Negative Positivism and the Hard Facts of Life, (1985) 68 The Monist 345. At its epistemic level, the rule of recognition adopts an internal standpoint and without attempting to lay down the truth-conditions for all propositions of law in all societies, simply refers to concrete communitarian practices to be grasped from within. H.L.A. Hart, The Concept of Law, ch.6; Lyons, supra n.13. Coleman (supra n.13, at p.35) views Hart's theory differently. See also I.Duncanson, Hermeneutics and Persistent Questions in Hart's Jurisprudence, [1986-87] Juridical Review 113.

20 There is a disagreement as to what is meant by sources of law in this particular context. Following Raz, a distinction can be drawn between an explicit and empirically identifiable source-based law and the interpretive "incorporation thesis" that allows more transformation of the non-legal into the juridical and still differs from the morally based model of law-as-integrity advanced by Dworkin. See Raz, supra n.17, in 68 The Monist 293; and Soper, Sartorius, Coleman and Lyons, supra n.13; D.Lyons, Moral Aspects of Legal Theory, in M.Cohen, Ronald Dworkin & Contemporary Jurisprudence, 49, 58-68 (1984). For a more recent discussion see K.Kress, The Interpretive Turn, (1987) 97 Ethics 834.
Therefore, legal positivism as such provides no justification to the traditionalist neglect of risk-distributive principles and it would be an outright distortion to deny the significance of moral principles by employing the "rule of recognition" as if it were a rule of exclusion. The only plausible argument that could be put forward against moral principles is that as a matter of fact they play no role in a particular legal system. This argument has yet to be established. More importantly, the mere fact that no risk-distributive principles have explicitly appeared as justificatory reasons in courts' decisions delivered within a legal system must not necessarily lead us to the conclusion that such principles do not exist. Legal norms are not existentially dependent upon their application by the judiciary. They are reflective of what ought to be done according to the best interpretation of the law and it is possible that the best interpretation not always be adopted in practice. Judicial decisions can therefore neither be regarded as always reflecting the best interpretation of the law nor as being exhaustive of all the interpretive possibilities that can legally be sound and adopted in future cases. A disagreement about legal principles can thus be theoretical-interpretive and is not always purely empirical.

These arguments about positivism and principles can now helpfully be restated. Legal positivism has traditionally been associated with three major theses. First, true propositions of law can only be descriptive. Second, there is no necessary connection between law and morality. Lastly, identification of law and its contents does not require resort to any moral argument. Suppose that in a legal system under examination judges apply not only rules, but also the more general reasons or principles standing behind those rules and that this is a conventional way of reasoning adopted by the local community of interpreters. These principles apply when the rules run out. Can we make a descriptive statement about the ways of resolving future disputes by these principles? Knowing about the practices adopted by our interpretive community, we can make such a statement. It would inevitably involve evaluation and judgement, but it would still be a statement about existing legal practices. It would be a complex descriptive statement about the particular way of identifying and applying the law which, in this particular system, requires evaluation. This evaluation would not be unstructured because it has to be made within the framework of existing interpretive conventions.

The same is true about differentiation between law and morals. It is clear that only legally relevant principles of morality can be allowed to enter into adjudication. Moral principles can become legally relevant only when they justify the settled law. As such, they acquire the status of pre-emptive reasons. They acquire this status not because they are intrinsically good, but because they, and not any other morally possible reason, have this special link with legal authority. Lastly, it is true that principles require moral reasoning, but this recourse to morality takes place within the framework of the law so that unlike ordinary moral reasoning, any statement of legal principles has to be detached. It would be an interpretive statement about existing legal practices.

Only an extremely "hard" version of positivism, insisting that any legal proposition must be purely descriptive and made without any kind of recourse to morality, can present an objection to the idea of principles. Before presenting its objection, it has first to examine its own credentials against the background of existing interpretive practices, but, as I have said, this is not the only version of positivism nor the most plausible one.

Therefore, if the Anglo-American systems of judicial evidence are in fact plausibly open to interpretation
that gives rise to moral principles concerning the distribution of the risks of error, the traditional vision of those systems would be proved to be flawed. Once the existence of the risk-distributive dimension of judicial reasoning is appreciated, a positivist (or other) approach to the law would not justify the omission to interpret it in a way which structures that dimension by moral principles standing behind the law. At the very least, this omission makes the traditional view normatively inadequate. If some kind of positivism has prevented the orthodox scholars of evidence from transcending the dichotomy of evidentiary rules and unstructured discretion, it is this kind of positivism, not the idea of risk-distributive principles, that has to be rejected.

It is worth mentioning that legal recognition of those principles would not necessitate the Dworkinian move towards law's integrity that goes beyond interpretive conventions. Dworkin's approach to legal interpretation appeals at the first stage to the sources of law and only after revealing them as preinterpretive data, to the notions of integrity and coherence, which allegedly make the best of those data by working out the morally and politically soundest justification of the communal use of coercive force.23 This two-stage approach examines the fitness of each proposition of law in the

light of explicit legal arrangements. After eliminating those propositions which do not fit, it singles out the interpretive option which reflects the best moral justification of the settled law. This approach applies to hard (or "pivotal") cases when the source-based materials are insufficient or ambiguous. Positivism, by contrast, may recognise as "legal" only those principles which represent the reasons conventionally regarded as standing behind the law. On this account, which has no recourse to integrity and must not necessarily be reflective of any comprehensive theory of morals and politics, the principles are recognised as part of the law because they are linked to the legal authority and constitute the preemptive reasons for action. The principles of political morality discernible from explicit legal materials might, on this view, well coincide with those that maintain integrity of the law and are thus morally appealing. The principles are, however, not chosen merely because they have a moral appeal. For what matters here is the authority of the law rather than its moral integrity.

Dworkin is most sceptical of this view, describing it as a "soft conventionalism", an "underdeveloped form of law as integrity". According to him, conventionalism can

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24 This idea, which draws on the writings of Joseph Raz, but recognises the legality of moral principles, will be developed in part three.

25 id., at pp.127-128.
neither predictably account for the outcomes of hard cases of law nor provide a comprehensive framework for social coordination. However, hard cases are not paradigmatic of ordinary legal reasoning and must, therefore, not be regarded as capable of tangibly affecting social coordination. Only a tiny proportion of those cases may be so regarded. What does seem to have an effect on social behaviour is a conventional meaning of moral principles, i.e., their shared understandings by those who shape real communitarian practices. Those who shape these practices, including

26 id., at pp.147-150; 156-157; 186-190.

27 Dworkin (id., at p.41) describes hard cases as "pivotal" to distinguish them from penumbral or borderline cases. It can, however, hardly be disputed that "pivotal" cases such as Brown v. Board of Education (and other cases discussed by Dworkin in chap. 1) rarely occur in everyday practice. See F.Schauer, Easy Cases, (1985) 58 S.Cal.L.R. 399; and L.Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, (1987) 54 U.Chi.L.R. 462, 471-72.

28 See G.Postema, "Protestant" Interpretation and Social Practices, (1987) 6 Law & Philosophy 283, and esp. at pp.310-315; G.Postema, Coordination and Convention at the Foundations of Law, (1982) 11 Jo.Leg.Stud. 165; K.Greenawalt, The Rule of Recognition and the Constitution, (1987) 85 Mich.L.R. 621. See also Coleman, supra n.13, at pp.41-46. Within this framework, "... officials recognize, and are committed by their actions and arguments to recognize, that their joint acceptance of criteria of validity must be linked to more general moral-political concerns. Only in this way can their appeal to those criteria, and the practice on which they rest, provide the right sort of justification for their exercise of power in particular cases. But they also realize that an essential part of the case to be made for the criteria rests on the fact that they jointly accept the criteria, or could come to accept them after reflection and participation in a forum in which reasoned and principled arguments
judges and jurors, are not and should not be moral philosophers or unrealistically assume the infallibility of Hercules, the ideal judge employed by Dworkin.29 Recognising the possibility of morally wrongful practices (which, if the notion of moral integrity is to govern the law, could even be augmented30), they might apprehend the need to maintain a system which allocates in some agreeable way the risks of morally wrongful decisions.31 One of the ways of allocating those risks is to rely on decisions made by a legitimate authority and regard the background morality of the reasons are exchanged amongst equals. That is, officials recognize that the law they identify and administer is a collective product, and the process of determining its main outlines is essentially collective and public process. Thus, the participant theoretical interpretations of the foundational rules of the system are subject, on this view, to two constraints: the constraint of conviction of the moral legitimacy of the criteria (or compliance with them) and the constraint of seeking general consensus for one's account of the criteria and the basis of their authority".


30 Raz, supra n.17, in 74 Cal.L.R. 1103.

supporting these decisions as pre-emptive. This framework of resolving legal disputes draws heavily upon the (frequently compromised) reasons endorsed by the legitimate authority.\textsuperscript{32}

There is no need to enter here into all the details of "polemical jurisprudence"\textsuperscript{33} persistently maintained by different antagonists and protagonists of conventionalism, pragmatism, natural law, the idea of law as integrity and all other metaphysics or politics of law. Some of those details will be discussed in part

\textsuperscript{32} This way of articulating morally relevant principles is consistent with positivism because its test of "moral relevancy" or, in Dworkinian terms, the dimension of "fit", is source-based. See, e.g., Burton, supra n.17, K.Kress, supra n.20. Cf. R.Alexy, A Theory of Legal Argumentation, (English trans., 1989), pp.8-9:

"It is sometimes suggested in the literature that the value-judgments required for legal decision-making should be understood as moral evaluations. Thus Kriele writes:'With this, the last veil has fallen: every exercise of jurisdiction is guided by considerations of social morality'. ... In order to solve these problems, one would have to elucidate concepts such as ... 'moral reason', etc. Such elucidation can, however, be avoided for the present since the discussion does not depend on the strong thesis that the prerequisite value-judgements are always to be conceived as moral judgments, but rather on the much weaker claim that they are always morally relevant. ... It is ... the presupposition of the thesis to be justified below: the thesis that legal decision-making ought (ought from a legal point of view) to be guided by morally sound value-judgments of a legally relevant kind." (see also id., fn.32)

three where a conventionalist framework of adjudication which, in my view, is capable of being accommodated within the positivist understanding of law will be worked out and defended. What has been said above suffices to demonstrate the traditionalist neglect of principles and the lack of sound positivist support for this neglect. One might well not fully accept both normative\textsuperscript{34} and descriptive\textsuperscript{35} claims of Dworkin's theory

\textsuperscript{34} Consider the following "conventionalist" critique of Dworkin's theory brought forward by Postema:

"The interpretive attitude as Dworkin describes it assumes that the point or purpose of a practice can be stated independently of the rules and activities that make up the practice. The rationale for this seems to be that if the abstract purpose of the practice can command allegiance independently of the particulars of the practice, than it can provide a basis for the normative demands of the practice and for its systematic and critical re-ordering. But this assumption of logical independence is true of few (if any) genuine social practices. ... such abstract ideals may have no life outside the particular techniques or disciplines which provide the concepts, shape the perceptions and inform the commitments of those who pursue them". Postema, supra n.28, in 6 Law & Philosophy, at p.305.

The constructive tenets of conventionalism will be discussed in due course. See also K.Greenawalt, Policy, Rights and Judicial Decision, (1977) 11 Ga.L.R. 991; P.Soper, supra n.13, at pp.12-16; A.Altman, Legal Realism, Critical Legal Studies and Dworkin, (1986) 15 Phil. & Public Affairs 205 (arguing, inter alia, that the soundest theory of law advocated by Dworkin has not yet been shown as capable of exerting "an effective practical constraint on judges who hold conflicting ideological views" - at p.234). For different critique advanced by a critical legal scholar see A.Hutchinson, Indiana Dworkin and Law's Empire, (1987) 96 Yale L.J. 637.

\textsuperscript{35} Dworkin's original claim that judges characteristically decide "hard" cases by appealing to the principles of political morality that provide the best justification of the settled law has been
of adjudication; the main thrust of his theory that the process of adjudication is to be a forum of principles and structured discretion can hardly be challenged. In the Anglo-American systems of law, many judges seem to decide cases in a principle-based way. The falsity of their pretences or, in Dworkin's words, the "as-if" model of legal rights and duties,36 have not yet been vigorously claimed to be descriptive in Taking Rights Seriously (1977). Law's Empire (1986) is better understood as an interpretive justificatory theory of judicial decision-making in the Anglo-American legal systems but is still claimed to be both descriptive and normative. For arguments against its descriptive claims brought forward by judges see A.Barak, Judicial Discretion (1989); R.Posner, supra n.29. See also W.Twining, Legislating Interstitially, Times' Literary Supp. 30.3.1984.

An empirical theory of moral development which has been advanced by Lawrence Kohlberg distinguishes between three levels of people's moral development: preconventional, conventional and postconventional. Moral attitudes at the postconventional level are characterised by the contractual-legalistic stage and at the highest level by a principle-orientated conscience. It was found that the vast majority of moral reasoners have never transcended the conventional level. L.Kohlberg, Education for Justice, in T.Sizer, Moral Education, 71-72 (1970). Kohlberg's findings cast doubts on both descriptiveness of Dworkin's model and its alleged impact upon social coordination. One can readily admit that some judges in some cases decide in a principle-based fashion and that to decide in that way is to make the best possible decision. This might not be sufficient for establishing the descriptiveness of Dworkin's theory: what needs to be demonstrated is its routine and systematic application. It seems that Dworkin's theory is one about criteria for decisions and that it has some although not an all-encompassing descriptive support.

36 R.Dworkin, Law's Empire, 35-43; 154-155 (1986). This, in Dworkin's words, "finger-crossed" view of adjudication that shows judges as "well-meaning liars" is implausible indeed (id., p.41). But when judges argue and pragmatically decide about law in hard (or penumbral or, in Dworkin's terms, "pivotal") cases, they must not be viewed as "simpletons" (as he suggests, id.) even if they, in fact, exercise a strong discretion and
established. If the traditionalist neglect has been motivated by legal positivism, Dworkin is at least partly right in criticising positivists for their neglect of the role to be played by moral principles in adjudication.\textsuperscript{\text{37}}

2.2 THE EMPIRICIST OBJECTION

The empiricist objection to risk-distributive principles seems to me to be misplaced. Neither the possibility of knowledge nor the idea of general cognitive competence\textsuperscript{\text{38}} still use the rhetoric of "law". Positivists claim that the existence of such discretion has to be openly acknowledged and although Dworkin's sample cases do not exhibit that, there are cases in which it had in fact been acknowledged. See Barak, Judicial Discretion (1989) and P. Atiyah, Judges and Policy (1980) 15 Israel L.R. 346. A well-known example taken from the American law of evidence in tort cases, Sindell v. Abbot Laboratories 607 P.2d 924 (1980) testifies in favour of the positivist account of openly admitted discretion and policy-based decision.

\textsuperscript{37} Hart seems to have admitted to have underestimated the role of principles, but maintains that they can be accommodated within a positivist account of law. H.L.A. Hart, Essays in Jurisprudence and Philosophy, 6-7 (1983). Presently, studies of particular legal subjects based on moral and political principles have become influential. See, e.g., C. Fried, Contract as Promise (1981); D. Galligan, Discretionary Powers: A Legal Study of Official Discretion (1986); G. Fletcher, Re-thinking Criminal Law (1978). Fletcher's jurisprudential views differ from those of Dworkin (see, e.g., The Right and the Reasonable, (1985) 98 Harv. L.R. 949), and the same seems to be true about Galligan (see id., at pp.14-20).

\textsuperscript{38} See Cohen, supra n.8, at p.12. Cohen acknowledges that no intellectual authority can escape uncertainty which restricts the use of the "general cognitive competence" but not its generality. id., at p.15.
have ever been asserted to approach omniscience. Needless to say, those ideas, relying upon the human faculties of analysis and observation as sufficient for making factual judgments, have not yet been universally accepted. Both analysis and observation might, for example, be theory-laden and not value-free, and the fact that they validate an account of the reality by ultimately relying on self-justifying assumptions gives some support to this view.\textsuperscript{39} There is, however, no need to discuss the metaphysics of empiricist ideas,\textsuperscript{40} for


\textsuperscript{40} Our primary concern is the contribution of empiricism as a foundationalist account of knowledge and its justifications to the judicial, i.e., regulative framework of epistemic appraisal. For distinction between regulative and non-regulative schemes of epistemic appraisal see A. Goldman, Epistemology and Cognition, 25 (1986). It is clear that in judicial decision-making rational conflicts typically arise in instances of factual uncertainty. In such situations, formation of beliefs and judgments of fact which correspond to the empirically formed judicial beliefs may well be epistemologically permissible but not necessitated. The conflicts arising within a possible "epistemological discretion" would thus require solutions that account for the relevant moral standards as well. See, e.g., P. Moser, Empirical Justification, 211 (1985). In such situations, epistemic notions of "warranted", "justified" or "permissible" belief are bound to be reduced, when they are to be used as reasons for action, to essentially moral concepts of justifiability. According to empiricist and other foundationalist programmes, a proposition rationally claimed to be true has to be inferentially justified or, at the end of all inferential chains, self-warranted. To avoid the notorious problem of either infinite regress or circularity, different conceptions of ultimate or non-inferential justifiability have been suggested. The main of those are reliabilism, coherentism, contextualism and intuitionism (See Moser, id., Goldman, id., chs. 4 & 5; G. Pappas & M. Swain, Essays on Knowledge and Justification, 30-40 (1978); W. Alston, Concepts of
these ideas have no effect on the issue of risk-distributive principles. Such principles could only be enrooted in the terrain of politics and morality of law, not in a theory of knowledge. Their goal is to maintain a morally appropriate decision-making in instances of uncertainty, viz. in the non-ideal conditions of contested trial. Granted that in ideal conditions observation and analysis could generate adequately determinate levels of factual certainty, the existence of such conditions in forensic matters, viz. the availability of sufficient amounts of reliable evidence, cannot be postulated. The invocation of the generic legal notions which, attempting to fix different standards and burdens of persuasion, ends up in the state of self-confessed indeterminacy, supports the view that no forensically ideal conditions should be assumed as given. Empiricism, as a method of cognizance, cannot make good the deficiencies and indeterminacies of facts in varying forensic matters so as to eliminate the risks of error. Only an extremely optimistic assumption about

Epistemic Justification, (1985) 68 The Monist 57). As has been admitted by Cohen (supra n.8, at p.15), none of those conceptions builds up "... incorrigible premisses on which the edifice of ... knowledge can be shown to rest". In forensic reasoning, inferential chains are typically shorter than in scientific inquiries and the factual patterns of judgments are at least partly holistic. For stronger versions of "holism" see chap.2. In the context of trial, epistemic justifications are therefore bound to be incomplete and ought to be always supplemented by and even reduced to political or moral concepts of justifiability. Cf. R.Firth, Are Epistemic Concepts Reducible to Ethical Concepts?, in A.Goldman & J.Kim, Values and Morals, 215ff (1978).
fact-finding processes can treat the morality of risk-distribution as redundant. The dangers involved in radically segregating epistemological criteria from the moral ones suggest that those who care about justifiability of fact-finding in law are to insist upon the demonstrability of such an optimistic claim. As such a claim in regard to empirical methods is non-demonstrable and not adequate for justificatory purposes, risk-distributive principles commit no trespass into the logical space of empiricism and as such are not redundant.

The traditionalist approach to the law of evidence has thus very shaky foundations. Its tacit or explicit assumption that what is at work in the process of proof is exhausted by evidentiary rules and common-sense reasoning could be justifiable only if standards and burdens of proof were capable of solving all the problems of risk-distribution in instances of uncertainty as ignorance. As has been explained in part one, this "slot-machine" vision is not supported by practice nor sustainable in theory. For had it been true, a large number of meritorious plaintiffs would have been denied their remedies, and an unbearable

42 See supra chap.2.
43 id.
number of guilty persons would have been acquitted. An attempt to explain and justify the practice of making decisions in accordance with the standards and burdens of proof by saying that triers of facts evaluate evidence holistically, employing the so-called "tacit knowledge", has also been dealt with. Such an attempt is just another example of suppressing the moral dimension of judicial fact-determination by spurious epistemics. By stressing the immanent rationality of judicial fact-finding, by segregating it from the intelligibility of its justification and by marginalizing the significance of the latter, it allows to too many unarticulated judicial intuitions to escape moral (and factual) scrutiny.

A traditionalist scholar of evidence may well subscribe to one of the extreme forms of objectivism or subjectivism in regard to the probabilities involved in the process of judicial fact-finding. In both cases, he would be facing the problems of risk-allocation and justification and should be aware of their significance for the entire process of adjudication taking place in a political milieu of the rule of law. As none of the two extremes offers an adequate solution to those problems, he would have to be prepared to admit that their

44 id.
45 See I.Hacking, The Emergence of Probability, chs.10; 15 & 19 (1975); P.Tillers, Modern Theories of Relevancy, in 1A Wigmore On Evidence, par.37.6.
solution has to be sought elsewhere, beyond objectivism and subjectivism.46 A possible solution of those problems can be found in Bentham's "subjectivism with a difference", i.e., in his utilitarian support of subjective assessments of probabilities.47 However, one who subscribes to this kind of epistemology is bound overtly to display his commitment to the principle-based approach to judicial proof. In that case, the essentially moral issue of risk-distribution and the problem of selecting and applying risk-distributive principles would be open to thorough discussion, and my immediate probandum would thus be established. The Benthamite principle of utility is surely one of those principles that might affect the distribution of the risks of error but by no means the only one.48

Having clarified the nature of the traditionalist shortcomings, I shall now discuss their impact on the widely shared understanding of evidentiary rules. I

46 For philosophical grounds supporting this position see R.Bernstein, Beyond Objectivism and Relativism (1983). See also R.Bernstein, Philosophical Profiles, ch.1 (1986).


shall propose a reappraisal of the rules of evidence which, it is believed, would require some revision of the strong rule-sceptical positions. My thesis is that none of those positions would be sustainable against the principle-based framework of risk-distribution and that evidentiary rules can be understood as forming part of that framework.

3. THE PRINCIPLES OF RISK-DISTRIBUTION AND THE RULES OF EVIDENCE: RULE-SCEPTICISM REVISITED

The traditionalist neglect of moral principles has also affected the contemporary understanding of evidentiary rules. For if the law of evidence is explainable in a way that exhibits a coherent moral approach to risk-distribution, and a coherent set of moral principles reflecting this approach can be worked out, the rules of evidence are to be highlighted in an entirely different way. If those rules are reflected by moral principles, they are to be understood as important, though non-exhaustive, examples of these principles. At least some of those rules might also be important as primary sources, the preinterpretive materials from which the more general principles of risk-distribution could be discerned. Such materials can also be found in judicial decisions which have been made without being affected by the rules, but in the present context, the interrelations between various evidentiary rules and
risk-distributive principles are more important. As has already been demonstrated, evidentiary rules are not constitutive of the full-fledged normative structure of the law of evidence and are, by and large, either under-inclusive or over-inclusive. Without establishing their connections to principles and vice versa, the law of evidence could never be seen as a unified, non-scattered, and immanently intelligible normative entity.

The interconnections between risk-distributive principles and the rules of evidence are most essential for coming to grips with the rationality of the law of evidence, if this rationality can ever be claimed to exist. The assumption that the rules of evidence are scattered and isolated islands in the ocean of freedom of proof undermines the rationality of the rules, and if, contrary to what is traditionally asserted, this assumption is not necessitated by the law, the rules-sceptical arguments may not be as persuasive as they appear to be. An attempt to redesign the currently dominant evidentiary doctrine in the light of risk-distributive principles is therefore called for and will be undertaken in parts three and four. At the present stage, the general structure of the new evidentiary doctrine is to be examined. Given that the orthodox doctrine can be restructured, accommodating the

principles of risk-distribution, would this new evidentiary doctrine be sustainable against rulescepticism? Can the model of rules as species of risk-distributive principles be sustained against structural, functional and cognitivist critiques levelled against evidentiary rules in isolation from these principles?

In my opinion, this model of rules and principles is sustainable. Its comprehensiveness would immunize it from the critique against both marginal character and structural disparity of the rules. The principle-based framework of risk-distribution postulated by that model would be flexible but no more marginal and disparate. The model of "rules-as-principles" could also be defended against the arguments from the indeterminacy, discretionary character and non-observance of evidentiary rules. The arguments emphasising the indeterminacy and discretionary character of the rules cannot be advanced in their present form against the model of structured discretion. They may still be modified and addressed against the immanent rationality of the model of principles, but in that case they would lose most of their present strength and thus look like an exaggerated realist or neorealist objection. This model would be only moderately, not

50 For discussion of this line of critique see W.Twining, Rethinking Evidence, ch.6 (1990).
51 id.
radically, indeterminate and its moderate indeterminacy would not end up in erasing its legitimacy.\textsuperscript{52}

To be sustained in this new, and, insofar as many of the realists are concerned, exegetically dubious form,\textsuperscript{53} the arguments against indeterminacy and discretion would have to show that their flawed and contradictory account of principles and rules is the only one available.\textsuperscript{54} In other words, they would have to demonstrate that within the model of principles everything goes and this model, 


\textsuperscript{53} Broadly speaking, the realist movement maintains one, or more than one, of the following positions: (a) Law has to be understood instrumentally, by reference to its social purposes and policies. This conviction is today shared by and absorbed into the mainstream legal scholarship; (b) Legal rules, principles and doctrines, forming part of legal machinery, are to be understood behaviouristically in the light of what various participants in the legal process and especially legal officials that apply legal rules, principles and doctrines actually do; (c) Legal understanding must not be too abstract and remote from the particular patterns of disputed cases-"general propositions do not decide concrete cases"; (d) Legal rules, principles, concepts and doctrines are radically indeterminate and their application is therefore arbitrary; (e) In its application by judges and other officials law is bound to collapse into politics and the process of adjudication is thus no different from open-ended political disputes. Subject to the notable exception F.Cohen, Transcendental Nonsense and the Functional Approach, (1935) 35 Col.L.R. 809, most members of the realist movement have argued for propositions (a) and (b); some of them have additionally subscribed to (c), but very few of them have accepted (d) and/or (e). See W.Twining, Karl Llewellyn and the Realist Movement (1973) and Talk about Realism, (1985) 60 N.Y.U.L.R. 329.

\textsuperscript{54} See R.Dworkin, Law's Empire, 271-274 (1986).
at its best, is incapable of structuring different discretions to be exercised by judges and other triers of facts. This critique has to be examined in relation to concrete models of adjudication and it is notable that its radically sceptical philosophy of law have almost never been adopted by the critics of evidentiary rules. This philosophy is at the very least controversial, for it draws an unwarranted conclusion of irrationality and arbitrariness from the mere fact that adjudicative matters are often very complex.

The argument from non-observance of many of the rules would also lose its critical strength. Within the new model of evidentiary rules-as-principles some of those rules may not be observed as a matter of discretion. Those rules must not apply any further in an all-or-nothing fashion and may, when appropriate, be balanced against each other and other principles. If the risk-distributive discretion is properly exercised, no deviating non-observance can be recorded to have occurred. When, for example, a non-observance of evidentiary rules results from the parties' stipulation, it is the conflict-solving principles of risk-


56 This sceptical philosophy will be discussed in part three in which a principle-based model of adjudication will be outlined and defended. For adequate responses to it see J.Stick, Can Nihilism be Pragmatic?, (1986) 100 Harv. L.R. 332; and Kress, supra n.52 (the former article is especially illuminating).
distribution, rather than the deviation from the rules, that could possibly explain it. 57

The cognitivist rule-scepticism would appear to be misplaced in so far as a morally-based distribution of the risks of error is concerned. Once the original targets of this kind of scepticism are substituted by moral and political principles, its ammunition would be no more adequate. The cognitivist rule-scepticism might still obtain against those rules which cannot be justified by moral principles. However, to demonstrate that some of the evidentiary rules, on their best interpretation, are normatively disconnected from moral principles, one would, at the very least, have to make an important interpretive shift and leave the orthodox terrain on which the debates about those rules are currently taking place.

To provide some concrete flavour to this discussion, I shall now outline and criticise the central tenets of the debates about the well-known rule against hearsay. These debates about one of the corner-stones of the Anglo-American law of evidence and procedure are paradigmatic of the orthodox understanding of the rules. The two constructive goals of my critique are:

(1) to demonstrate the possibility of understanding the rules as a species of risk-distributive principles; and

(2) to cast serious doubts on the traditional dichotomy of "extrinsic" and "intrinsic" rules, which, as I have said, unduly suppresses the moral dimension of judicial reasoning about uncertain facts.

The rule against hearsay is most suitable for both purposes.

The rule against hearsay is traditionally justified by using the sharp Wigmorean distinction between the "probative" or intrinsic and the "extra-probative" or extrinsic evidentiary policies, the distinction that has now become classic.\(^5^8\) It is argued in favour of the exclusion of hearsay that in many cases, and especially in criminal ones, the risk of erroneous persuasion

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\(^5^8\) Wigmore himself (n.59) was reluctant to justify this rule in extrinsic terms. On his view, the rationale of the rule - the denial of cross-examination - rightly implies that no credibility is to be attached to the evidence that cannot be verified in this way. Given that there is enough room for exceptions, the hearsay rule is justified on the grounds of probative policy. As he wrote elsewhere:

"... the hearsay rule, in truth, is not only the pride of the Anglo-American system of evidence; it is even the triumph of harmony between the data of science and the empiric trial rules."

generated by the statements given out of court without being subjected to cross-examination outweighs the probative value of those statements.\textsuperscript{59} It is also argued that an unqualified admission of hearsay violates one of the non-instrumental "process values" of the Anglo-American legal systems,\textsuperscript{60} the right to cross-examination.\textsuperscript{61}


\textsuperscript{60} According to this idea, moral and political virtues like fairness, equality and participation ought to be impregnated into legal procedure independently of their effects on the accuracy of outcomes. Result-oriented efficiency is not to be regarded as the sole determinant of procedural goodness, and different procedural arrangements (e.g., the right to cross-examination as part of the right to participate in the process) must be justified not merely instrumentally-as ones that augment the accuracy of substantive judgments - but also deontologically, i.e., as conferring rights to which people are entitled within the official process by which their lives are affected. See R.Summers, Evaluating and Improving Legal Process-A Plea for 'Process Values', (1974) 60 Corn. L.R. 1; R.Dworkin, A Matter of Principle, 72 (1986); L.Tribe, American Constitutional Law, 503-504 (1978). See also M.Bayles, Principles for Legal Procedure, (1986) 5 Law & Philosophy 33; and Principles of Law, 18-75 (1987).

These traditional justifications are, however, inadequate and the distinction they are based upon is too sharp and general. First, it is doubtful that the right to cross-examination can be justified in non-instrumental terms. Thus, in the ideal world of perfect knowledge and omniscient triers of facts a non-instrumental right to cross-examination would hardly be considered as rational. And if this is correct, the conclusion should be that this right is a result of some imperfections of human knowledge and thus reflects not only the alleged meritoriousness of human ethics. Second, if it could really have been ascertained that the prejudicial effect of most statements not subjected to cross-examination outweighs their probative values, the "official" instrumental justification of the rule excluding those statements would appear to be fatally flawed. For if in dealing with such statements we are capable of ascertaining their real probative force, we cannot be at the same time consistently misled by their prejudicial effects. And if it is our triers of facts that are at fault, as they are cognitively inferior in


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the sense that they do not possess the same knowledge we
do, this appears to be fatal to the entire system and
surely cannot be limited to the few matters embraced by
a tiny number of evidentiary rules. To make a strong
case for this selective distrust, one needs empirical
data which show that systematic cognitive failures and
irrationalities occur in a chosen area of decision-
making. However, it seems now to be undisputable that
hearsay can be credible in many cases, shattering the
grounds of the allegations about its "intrinsic
weakness". The mere fact that the rule against hearsay
is not rigid, not always observed and surrounded by

62 W.Twining, Theories of Evidence: Bentham &
Wigmore, 71-72 (1985). Identification evidence is an
example of such failures - see R. v. Turnbull [1977] QB
224 (CA); Scott v. The Queen [1989] 2 WLR 924 (PC); Reid
at al v. The Queen, Times Law Report 15.8.89 (PC);
S.Gross, Loss of Innocence: Eyewitness Identification

63 See, e.g., G.Williams, The New Proposals in
Relation to Double Hearsay and Records, [1973] Crim.L.R.
139; Zuckerman, supra n.1, ch.11.

64 This expression of Chief Justice Marshall
appears in the notoriously unjust decision Mima Queen &
Child (petitioners for freedom) v. Hepburn, 11 U.S. (7
Cranch) 291 (1813). In that case, the exclusion of
hearsay had prevented the plaintiffs, black people in
servitude, from being released. See R.Cover, For James
Wm. Moore: Some Reflections on a Reading of the Rules,
(1975) 84 Yale L.J. 718, 725-726.

65 Zuckerman, supra n.1, ch.11; D.Birch, Hearsay
Logic and Hearsay Fiddles: Blastland Revisited, in
P.Smith, Criminal Law: Essays in Honour of J.C.Smith, 24
(1987); W.Twining, Rethinking Evidence, ch.6 (1989). The
relative non-observance of this rule has been recorded
long ago by E.Thayer, Observations on the Law of
many exceptions casts doubts on an attempt to rationalise this rule empirically.

The arguments critical of the rule against hearsay seem thus to be persuasive. They are derived from the more general arguments forming both structural and cognitivist rule-scepticism. What, however, is remarkable here, is that neither the critics of this rule nor its defenders have ever gone beyond the traditional set of assumptions about its rationale. But should one subscribe to those traditional assumptions and adopt the sharp distinction between the "intrinsic" and "extrinsic" evidentiary policies? As Bentham revealed long ago, it is both mischievous and meaningless to postulate in advance an intrinsic weakness of specific classes of evidence. His view might be qualified by empirical findings in relation to certain types of evidence (e.g., eyewitness identification), but the very idea of "intrinsic policy" would still appear to be intrinsically weak. Moreover, granted that to rely on hearsay is indeed dangerous, it must still be asked which party should

66 Zuckerman, id.

67 See supra, part 1.


69 See supra n.62.
carry the risk of error? To answer this and related questions, an "intrinsic" probative policy has to be supplemented by a coherent moral approach to risk-distribution. As this issue of risk-distribution is hardly avoidable, the "intrinsic" debates about the rule against hearsay ought to be transcended.

The idea of "process values" to be protected by the "extrinsic" rules of evidence is also incomplete. A rule of evidence which would not be able to survive in a world of perfect knowledge is not merely extrinsic. What brings such a rule into existence is the real world of imperfect knowledge and, it must therefore be reflective of existing risk-distributive preferences rather than of outcome-independent ethics. Admittedly, there are few evidentiary rules which, not being reflective of risk-distributive morality, could survive even in the ideal world of perfect knowledge.70 Such rules, e.g., the rule excluding illegally obtained evidence, might be viewed as genuinely "extrinsic" subject to the fact that some of them are aimed at ensuring that proper standards of fact-finding are kept outside the court and thus reinforce a plainly "intrinsic" policy.71 The rules of

70 Such as the right of silence, various privileges, and the rule excluding illegally obtained evidence.

71 To think that exclusion of evidence due to improprieties in obtaining it is always "extrinsic" is to maintain the orthodox court-centredness. The law must be understood as dealing with the standards of fact-determination to be applied to pre-trial, trial and
admissibility of confessions given to the police are therefore to be considered as "intrinsic" rather than extra-probative.\textsuperscript{72}

Following these clarifications, the right to cross-examination cannot be regarded as "extrinsic" and "non-instrumental", for it cannot survive in the ideal world of perfect knowledge. It must also not be considered as "intrinsic" because it has no constant effect on the purely factual trustworthiness of statements given out of court. The only question that must still be addressed at the more general level is as follows: Should a denial of the right to cross-examination constantly affect the risk-distributive choices made by adjudicators? This question relates to the mixture of "intrinsic" and "extrinsic" problems of factual uncertainty and risk-distribution. Stressing the interdependence of "intrinsic" and "extrinsic" issues in the law of evidence, it casts serious doubts on the orthodox dichotomy of probative and extra-probative rules and the segregation of judicial fact-finding from morality.

This view that "intrinsic" and "extrinsic" evidentiary policies are by and large mutually dependent and intertwined is epitomized by the risk-distributive

\textsuperscript{72} A detailed discussion of these rules appears in part four.
approach to hearsay. In making their decisions in conditions of uncertainty, judges (and other triers of facts) have to allocate amongst the parties the risks of error involved, inter alia, in their reasoning on the basis of hearsay. This risk-distributive function cannot be structured or justified solely in terms of epistemic reliability of factual findings. To structure and justify this function, the morality of the concrete choices made in performing it has to supplement its epistemology. Following this line of argument, if a party to litigation was not given an equal opportunity to test the evidence supporting his opponent’s case by cross-examination, the imposition of the risks of error upon this party is to be questioned from the moral point of view. It might be argued that if both parties are entitled to equal concern and respect, £1 belonging to the plaintiff must be treated equally to that of the defendant, and, everything else being equal, none of the parties should bear an increased risk of erroneous judgment. In criminal cases, when the risks facing the parties and their powers and opportunities of obtaining evidence are unequal, the defendant-biased risk-distribution has an even stronger moral appeal. It might well be argued that the principle of protecting the innocent would oppose any exclusion of the statements offered by the accused,73 justifying at the same time

73 Like the exclusion which took place in R v Blastland [1985] 2 All ER 1095.
the opposite approach when a similar evidence is offered by the prosecution.\textsuperscript{74}

The critics of the rule against hearsay recognise all the hazards involved in this kind of evidence and what they are opposed to is the overreactive exclusionary policy of this rule.\textsuperscript{75} They appear to be challenging the invariability of both epistemic and ethical attitudes fixed by this rule without denying the very rationality of any of those attitudes. They agree that the values claimed to be protected by the rule against hearsay (rectitude of decisions, risk-avoidance and participation) are important, disagreeing with the relatively fixed outcome of their interaction. They do not accept that hearsay should be excluded to the detriment of those offering it, especially when this evidence is the best one that could possibly be attained. In the world of risk-distributive principles, this objection can be pursued in two different ways. The critics of the rule against hearsay may argue that an attempt to fix in advance the set of principles to be applied and the results of their interaction cannot be

\textsuperscript{74} The Criminal Justice Act 1988 did exactly the opposite to this, rendering admissible a wide range of documentary statements given out of court. An accused person, possessing no legal power of obtaining written statements from his potential witnesses, and being unable to produce an ordinary testimony, would have to rely upon collection of documentary statements by his adversaries. See infra, part four.

\textsuperscript{75} e.g., Zuckerman, supra n.1, ch.11.
made in regard to an infinite number of variable forensic situations. Like Bentham, they might also argue that according to the principle of utility, judicial fact-finding ought to be free from artificial legal constraints.76

The first objection, which may be called "the argument from pragmatism", would not obtain. Even on its traditional understanding, the rule against hearsay is flexible enough to solve concrete problems in a principle-like fashion.77 At any rate, the argument from pragmatism does not involve a denial of principles and, at its best, must draw on the non-peculiarity of inferences based on hearsay. On this view, such inferences must not be singled out as distinct instances of risk-distribution. However, one relatively constant feature of hearsay, namely the lack of fair and equal opportunity to cross-examine the maker of an out-of-court statement, should always affect the interactions of risk-distributive principles. An inference from hearsay might be made in conditions of uncertainty-as-ignorance and involve the problem of risk-distribution. To solve this problem, the lack of opportunity to cross-examine the maker of a statement should always be taken


into account among other factors that may affect a risk-distributive decision. Within the framework of risk-distributive principles, the rule against hearsay can be interpreted as a rule of use, affecting the judicial decision as to how to distribute the risks of error. When an out-of-court statement is admissible and can be used, the allocation of the risks of error between the parties would ultimately be dependent on the concrete interaction of the relevant principles, and the lack of cross-examination may or may not be decisive. The cases in which hearsay statements are excluded are those in which, from the risk-distributive point of view, the use of such statements is outlawed in the sense that no inference can permissibly be drawn from them.

As has already been mentioned, to invoke the principle of utility in criticising the rule against hearsay is to admit what is aimed to be established in this work, viz. the principle-based model of risk-distribution. A reliance on this principle can also explain why Bentham's "anti-nomian thesis" is now becoming increasingly popular. Unlike the justifications ad hoc of different rules of evidence, this thesis is consistently built upon the first-order principle of utility. According to it, free evaluation of evidence

would augment the number of correct decisions and thus maximise the application of substantive laws, satisfying public expectations and enhancing security. But there are other risk-distributive principles that can compete with utility in various risk-distributive matters. The principle of equality, as one of the possible candidates, may well outweigh utility or lead to a recalculation of utilities in the process of proof.80

Bentham’s principle of utility is even more problematic in the present context. For example, it is not at all clear that the greatest happiness to the greatest number would be achieved by unqualified admission of hearsay (subject to delay, vexation and costs81). Some empirical proof might still be required to establish the alleged augmentation of correct judgments and of the overall happiness as a result of those judgments.82


81 Bentham, supra n.68, at pp.132-37 (his opposition to the hearsay rule); 343ff (cases in which exclusion of evidence would be proper).

82 Bentham had disclaimed all possibility of providing a foundational proof to the principle of utility: An Introduction to the Principles of Morals and
fundamentally, as Dworkin puts it, "utilitarianism owes whatever appeal it has to ... its egalitarian cast", and thus cannot easily rule out equality for the sake of happiness in the aggregate.® If, without any principled distinction between the parties to litigation, one of them, being denied a proper access to the evidence offered by his adversary, carries the risk of error in connection with that evidence, this would be an unequal treatment. And if there is no equality, an overall maximisation of happiness may well be accomplished, but the egalitarian appeal of utilitarianism, if such an appeal can ever be claimed to exist®®, would be undermined.® And if it is argued that utilitarian aims justify an arbitrary distribution of their costs®, this argument would at the very least be followed by a moderate but nonetheless sufficient conclusion: the utilitarian "anti-nomian thesis" is to be seen merely as

Legislation, J.H.Burns & H.L.A. Hart eds., 13-16 (1982); and see the editors' comment at p.xliii. Lack of criteria as to how to determine the relative utilities of "pleasures" and "pains" often leads to miscalculations and an example of such miscalculation can be found in one of the recent (and typical) proposals to abolish the rule against hearsay. See Note, The Theoretical Foundation of the Hearsay Rules, (1980) 93 Harv.L.R. 1786, 1787-1789 and its criticism by A.Stein, Bentham, Wigmore and Freedom of Proof, (1987) 22 Israel L.R. 245, 267-68.

® Dworkin, supra n.48, at p.154.

®® See the dispute between Dworkin and Hart, supra n.48.

®® Dworkin, id.

®® For general discussion of this and related problems see the sources mentioned supra n.48.

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a plausible, but by no means the only possible, approach to judicial proof.®7 An egalitarian model of rights-conferring principles may well compete with this approach.

Furthermore, Bentham's move from the principle of utility to the allegedly "natural" model of free proof borrowed from "domestic tribunals"88 is flawed. This move ignores or underestimates the crucial difference between domestic and non-domestic methods of conflict-resolution. The utility of Bentham's model draws upon its simplicity, but the simplicity achieved by family tribunals is contingent upon family's solidarity and the commensurability, if not total commonality, of the substantive interests at stake. Family's solidarity and common interests are regarded within the internally altruist domestic milieu as values of a higher order than the personal interests advocated by the parties. Hence, the distribution of the risks of error between the parties in dispute becomes relatively uncrucial.®9

In a complex and non-altruistic association like society at large, such common interests do not exist or are too


88 Bentham, supra n.79, at pp.6-7.

remote from the parties in dispute. The stocks of knowledge that have to be used as generalisations in judicial reasoning about facts and affect the scope of uncertainty are not always homogeneously shared. On the contrary, they are often contested and not taken as given in a family-like fashion. Within such a complex and by and large alienated and contentious social framework, the demand for adjudicative objectivity outweighs the solidarity, and thus the problems of risk-distribution and justification become crucially important.\textsuperscript{90} The notion of equality and other rights-orientated ideas become acute and egalitarian goals are set up to trump the aggregate utility. The utilitarian ideal of happiness-maximisation might seem to be natural in a family facing no sharp controversies over the distribution of happiness. It is far from being natural in a society characterised by a plurality of goals, opinions, and forms of life. Bentham's model of procedure cannot therefore adequately satisfy the needs of a complex and pluralist society.\textsuperscript{91}

Evidentiary rules as a species of principles, forming part of a more comprehensive framework of risk-distribution, can therefore be defended. Their defence

\textsuperscript{90} Cf. R.Rorty, Solidarity or Objectivity, in J.Rajhman & C.West, Post-Analytic Philosophy, 3 (1985).

and the construction of a principle-based framework of judicial fact-finding can be made possible by abandoning the orthodox evidentiary doctrine, i.e., by banishing its dichotomy of rules and free proof, and by relaxing its sharp "intrinsic" and "extrinsic" categorisations. Evidentiary rule-scepticism has offered one possible replacement of the orthodoxy: free evaluation of evidence guided by common-sense, psychology, logic and general experience.92 In the present work, the issues of justification, risk-distribution and the corresponding rights of those concerned are suggested to be taken more seriously. These issues raise important problems, casting serious doubts on the alleged comprehensiveness of the free-proof programme93, and it is notable that some of the supporters of free evaluation of evidence abstained from claiming this regime to be comprehensive.94


93 For different understandings of "freedom of proof" see W.Twining, Rethinking Evidence, chs. 3 & 6 (1990).

94 Cohen (supra n.8, at pp.12-13) contends that evidentiary rules that clash with the modern belief in a universal cognitive competence are likely to be unjustified. He admits that extrinsic or non-cognitive rules may well be justifiable, and it seems that risk-distributive principles would, on his account, be considered as "extrinsic".
A construction of the comprehensive framework consisting of risk-distributive principles, rules and rights can, in turn, contribute to the understanding of legal reasoning in conditions of free evaluation of evidence. Risk-distributive principles are necessary in order to justify this reasoning and sustain the immanent rationality of the law of evidence. I shall clarify this point in the following discussion of the "New Evidence Scholarship" which demonstrates that the orthodox theorists of evidence are not the only ones that tend to neglect the principles of risk-distribution.

CHAPTER FOUR

THE NEW GENRE OF EVIDENCE SCHOLARSHIP

1. BACONIANISM v. PASCALIANISM

The "New Evidence Scholarship" has paid so far almost no regard to the moral basis of risk-distribution. This genre of theorizing is focused on the inter-disciplinary aspects of proof in conditions of legally unconstrained evaluation of evidence and has revealed many important insights. The writing within this genre is dominated by the discussions of fact-determination and rational choice in instances of uncertainty.96 The main paths of this genre of theorizing cross a variety of problems related to the two conceptually different forms of reasoning and probability, the inductivist-"Baconian" on the one hand and the mathematical-"Pascalian" on the other.97 In the context of trial, the non-mathematical


inductivist reasoning is claimed by Baconians to be normatively preferable to the mathematical reasoning advocated by Pascalians. The Baconian approach is also contended to be descriptively sound, i.e., to correspond to the actual patterns of reasoning in adjudication. The advocates of Pascalian approach refrain from making such strong descriptive claims, concentrating the main thrust of their approach on the normative and heuristic realms.

of judicial proof. Both sides share their paradigmmatic tastes. They thoroughly discuss the well-known hypothetcal cases of "gatecrashers" and "blue buses", demonstrating and explaining away various paradoxes generated by those cases. They also deal with actual cases, such as the Agent Orange case which was given wide publicity in and outside the U.S.A., and the cases of tort based upon epidemiological data or involving several rich and potentially liable toxicogenic defendants and amongst them one (or more) actual but unidentified tortfeasors.

Cf. Cohen (1977), supra n.97 with Lempert, supra nn.95, 97; and Kaye supra n.97 in 47 U.Chi.L.R. 34. In his article The Role of Evidential Weight in Criminal Proof, (1986) 66 B.U.L.R. 635, Cohen clarified that his theory is concerned with answering the normative question "What is the legally correct way to judge proofs?" rather than the factual one - "What is the way in which proofs are actually judged?".


problems of judicial proof which arise in various cases of racial, sexual (or other) discrimination have also been addressed and attempted to be resolved in Pascalian and Baconian terms.\textsuperscript{101}

Although the mathematical approach to legal fact-finding has been accused of violating the morality of judicial process\textsuperscript{102} and also of weakening the public's acceptability of verdicts,\textsuperscript{103} moral principles that should guide risk-distributive choices have never been articulated by the parties to the Pascalian/Baconian debate. This neglect of risk-distributive principles, characterising both Baconian inductivists and Pascalian mathematicians, has now to be discussed by analyzing their paradigmatic debate about the nature of probability in judicial fact-finding. I shall analyse first a hypothetical "Case of Gatecrashers" and what is contended to be a full refutation of Pascalian approach to judicial evidence. Subsequently, the major responses to this attempted refutation will be dealt with.

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\textsuperscript{101} Finkelstein, supra n.97; R.M.Cohn, On the Use of Statistics in Employment Discrimination Cases, (1980) 55 Ind.L.J. 493.

\textsuperscript{102} Tribe, supra n.97; A.Zuckerman, Law, Fact or Justice, (1986) 66 B.U.L.R. 487.

\textsuperscript{103} Nesson, supra nn.97 and 102. For more recent discussion see Shaviro, supra n.97.
The Case of Gatecrashers is best represented in the words of its constructor, L.J. Cohen:

"Consider, for example, a case in which ... 499 people paid for admission to a rodeo, and that 1000 are counted on the seats, of whom A is one. Suppose no tickets were issued and there can be no testimony as to whether A paid for admission or climbed over the fence. So by any plausible criterion of mathematical probability there is a .501 probability, on the admitted facts, that he did not pay. The mathematicist theory would apparently imply that in such circumstances the rodeo organizers are entitled to judgement against A for the admission-money, since the balance of probability ... would lie in their favour. But it seems manifestly unjust that A should lose his case where there is an agreed mathematical probability of as high as .499 that he in fact paid for admission. Indeed, if the organizers were really entitled to judgement against A, they would presumably be equally entitled to judgement against each person in the same situation as A. So they must conceivably be entitled to recover 1000 admission-money, when it was admitted that 499 had actually been paid. The absurd injustice of this suffices to show that there is something wrong somewhere. But where ?"104

Cohen further argues that what is intrinsically wrong here is the Pascalian calculus of probability. According to him, this way of defining probabilities is inadequate for the purposes of judicial fact-determination.105 As he clarifies, the hypothetical case of gatecrashers exhibits the typical deficiency of the mathematicist approach: its failure to account for the absence of causal links between people's attendance in the rodeo and their non-payment of entry fees.106 The proponents

104 Cohen (1977), supra n.97, at p.75.
105 id., in ch.7.
106 Cohen (1980), supra n.97, at pp.97ff.
of Pascalianism, with one notable exception of Sir Richard Eggleston,\(^{107}\) do not disagree with Cohen that the rodeo organizers should not be entitled to recover the admission-money. They disagree with his views about the inaptitude of all mathematical methods for judicial purposes.\(^{108}\) One of their most convincing responses to Cohen's "charge against Blaise Pascal and his heirs"\(^{109}\) is a solution of the hypothetical proposed by David Kaye. Kaye's response to Cohen draws on the subjective character of probability-assessments in the context of trial. According to him, the probabilities involved are, typically, personalistic and subjective, for it would be unrealistic to assume that the events to be proved in various trials are mutually exclusive, repeatedly occurring or equally likely.\(^{110}\) Despite the subjective character of those probabilities, they can be shown to obey the usual rules of probability calculus so long as the risk-related preferences of decision-makers do not deviate from a few plausible postulates of rational choice.\(^{111}\) Subjective evaluation of probabilities is not as rigid as a frequentist mathematical calculus and

\(^{107}\) Eggleston, supra n.97, at pp.34-49.

\(^{108}\) Kaye, supra n.97, Lempert, supra n.95, Wagner, supra n.97.

\(^{109}\) Schum, supra n.97.


\(^{111}\) id. See also Kaplan, supra n.97; H.Raiffa, The Art and Science of Negotiation, 33ff (1982).
thus can, as a matter of discretion, account for the failure of a party to come forward with context-specific, individualized evidence which goes beyond the background statistics of his factual allegations. The failure of the rodeo organizers to produce an individualized evidence should, as a matter of policy, reduce the probability of their allegations, and in making a decision, rational judges or jurors must draw this "inference from spoliation". According to Kaye, this policy of "spoliation" constitutes a necessary incentive for litigants. The parties must be encouraged to offer more evidence and not to rely solely on the general statistics of their claims. The implementation of this policy would reduce the overall amount of errors and thus augment the number of factually correct decisions.\(^{112}\) In some rare cases, and especially when no evidence apart from "naked statistics" is available, it might be necessary to qualify this policy. Exceptionally, a party must be allowed to prove his case by relying upon a "justifiably naked statistical evidence".\(^{113}\)

\(^{112}\) Kaye, id. See also Lempert, supra n.95; Twining, supra n.97. The policy of spoliation has recently been discussed by L.Solum & S.Marzen, Truth and Uncertainty: Legal Control of the Destruction of Evidence, (1987) 36 Emory L.J. 1085.

2. THE NEGLECT OF MORAL PRINCIPLES

It is convenient to start our discussion with the views expressed by Cohen. Let us assume that there is a general knowledge that most rodeo-spectators tend deliberately to avoid the payment of entry-fees. Let us also assume that the case of gatecrashers arose within the jurisdiction that recognises the principle of equality, i.e., that the risks of error in civil litigation must be equal to both parties. On these assumptions, since everything else is equal, there is a good reason to decide that the rodeo organizers are entitled to recovery. The principle of equality supports the ultimate allocation of the risks of error in their favour because the defendant had produced no credible evidence that marks him as belonging to the minority of fee-paying spectators. There is, however, no reliable generalisation in regard to the fees-related habits of rodeo-spectators. If this is so, the view that there is a 50.1% chance that any randomly picked rodeo-spectator would, in fact, be a gatecrasher would be judicially erroneous irrespective of what position is to be taken in the probability debate between Pascalian and Baconians. This view would be judicially mistaken.

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114 I assume that there are no extraneous reasons that can militate against the use of this hypothetical generalisation in courts. Such reasons may well exist when a generalisation to be used is class-biased or either racially or sexually orientated. See, e.g., S.Estrich, Rape, (1986) 95 Yale L.J. 1087.
because it assumes that any concrete defendant is as likely to be a gatecrasher as any other rodeo-spectator, and this on the facts of the case is unwarranted. There is no evidence to support this view, and the lack of evidentiary support surely does not justify the assumption of the "fatal similarity" between randomly assembled suspects. The mere fact that several people have chosen to visit the same rodeo at the same time can hardly support the view that they are similar in other respects. On the contrary, we positively know that many of them are crucially dissimilar.

What can justify the calculation leading to the 50.1% chance that any randomly chosen spectator is a gatecrasher? What stands as a support for the "fatal similarity" assumption? Are Pascalianists really bound to make it in this particular context? The answer to these questions is that this calculation derives from the "principle of insufficient reason" or the "principle of indifference" which, in fact, convey a more or less similar message: unknown cases are to be treated as if they were equally probable.115 However, none of those principles of the doctrine of chances can be transplanted without adjustments into judicial decision-making under uncertainty. Probability theory aims at acquisition of knowledge for its own sake. Legal

115 J.Keynes, A Treatise on Probability, 41ff (1929).
reasoning is a practical reasoning aiming at justifying reasons for action. Probability theory cannot therefore be allowed to determine its own uses and limits within the law. Validating possible claims of knowledge rather than practical reasons for judicial treatment of those involved in adjudication, any doctrine of chances should be subordinated to the risk-related preferences of the law. Therefore, in order to justify legal decisions in instances of uncertainty, all inferences invoked by the triers of facts need to be warranted from the risk-distributive point of view. Legal justification must in such cases (as elsewhere) not be risk-distributively insufficient or indifferent. Hence, if there is a sound ground for discriminating between two allegedly equal possibilities, no equality can easily be assumed. Legal justification is an anti-thesis of luck.


117 Keynes, supra n. 115. See also F. C. Benenson, Probability, Objectivity, and Evidence, 10-13 (1984).

Admittedly, statisticians often offer calculations of probability based on the "principle of indifference", especially in regard to the large number of samples. This approach, however, must be seen as fragmentary\textsuperscript{119}, i.e., as having no monopoly on every aspect of decision-making.\textsuperscript{120} If one is professionally to advise the rodeo organizers as to how to estimate the losses that may be incurred by non-payment of the entry-fees, he may well apply gross statistics and disregard the lack of information about concrete spectators. But if, by contrast, one is morally or politically committed to non-arbitrariness in adjudication, he must not assume that one thousand rodeo-spectators possess relevantly equal tendencies in relation to their entry-fee. Such equality of tendencies has to be proved, not presupposed as a matter of "indifference". This, of course, is not to say that had all the spectators been proved to be in all respects equally likely to evade the payment of the fees, the rodeo organizers would have been entitled to obtain no less than 1,000 judgments in their favour. To be sure, they are not entitled to recover more than 501 of the entry-fees, and the relevant rules of estoppel and unjust enrichment must prevent an outcome like this. What is sought to be established here is that any


\textsuperscript{120} More caveats about possible misuses of statistics in law can be found in P. Dawid, Appendix, in T. Anderson & W. Twining, Analysis of Evidence, (tentative ed., 1987).
judgment of this kind must be based on and justified by moral or political principles of risk-distribution, not by the "principle of insufficient reason" or the "principle of indifference". The legally justifiable approach to risk, structuring the discretion exercised by judges and other triers of facts, must also dictate the way of charting the battle lines between "Pascalians" on the one hand and "Baconians" on the other. In determining its reasons for action it is the law that "enslaves" scientific knowledge and not vice versa.

Following this line of thought, it is unclear why is it, as Cohen seems to have assumed, that no judgment given on the basis of mathematically calculated probability can ever be consonant with legal principles of risk-distribution. It must also be asked on what basis did Cohen assume that instead of adapting their mathematics to the legal framework of risk-distribution, the proponents of mathematical probability are bound indiscriminately to apply in all contexts of trial the unqualified "principle of indifference"? To establish his case against "misplaced mathematicisation", Cohen has to show that (1) such adaptation is impossible and (2) that it would always be wrong to apply mathematical reasoning in courts. In what follows I shall explain

that Cohen's view that the rodeo organizers have, according to the Pascalian approach, established their allegation on the "balance of probabilities" disregards the pervasiveness of risk-distributive reasoning and the structuring role of moral and political principles that should govern this kind of reasoning. Alternatively, his view tends, quite unwarrantedly, to treat this disregard of structuring morality as a necessary component of all Pascalian approaches to adjudication.122

In order adequately to deal with risk-distributive problems in the context of trial, one has to be fully aware of the hierarchical structure of the evidentiary doctrine which regulates the permissibility of factually uncertain inferences within the legal system. One must first articulate the legal system's epistemology and


"There are indefinitely many ... ways in which a statistical probability may enter into a juridical proof, whether in criminal or in civil cases. But in every normal case ... its level of significance for the outcome has to be assessed in the light of other evidence by a mode of assessment which, at least on the face of things, need not itself have anything to do with mathematical probability. ... [T]his mode of assessment - this calibration of relevance or of the exclusion of reasons for doubt - is precisely the mode of assessment that determines inductive probability."

In adjudication, this "calibration of relevance or of the exclusion of reasons for doubt" can never be justified without recourse to moral principles of risk-distribution.
morals in relation to: (1) the justification of judicial findings of facts; (2) the problem of risk-distribution under uncertainty; and (3) the distinction between "uncertainty as risk" on the one hand and "uncertainty as ignorance" on the other. As has already been made clear, the need of justification is widely acknowledged for and can hardly be challenged.\textsuperscript{123} Fixed measures of certainty or "uncertainty as risk" capable of being justified and regulated by a few standards and burdens of proof are rare birds in complex forensic situations.\textsuperscript{124} Hence, risk-distributive principles as a framework that regulates the permissibility of factual inferences in conditions of "uncertainty as ignorance" must be placed at the top of the evidentiary doctrine's hierarchy. The right question from this perspective is not whether the Pascalian methods of defining probability are judicially more rational than the Baconian ones. The right question to ask is whether a particular inference which takes place under uncertainty in a concrete forensic situation is legally justifiable from the risk-distributive point of view. To accept all this, one does not have to adopt once and for all either

\textsuperscript{123} This is true with regard to the currently dominant Rationalist Tradition. An extremely holistic vision of judicial fact-finding may well find the need of articulated justification unnecessary and even mischievously "atomistic". A moderate type of "holism" (not necessarily incompatible with "atomism") would, perhaps, support the idea of fully articulated justification. See W. Twining, Rethinking Evidence, chs. 3 & 7 (1990).

\textsuperscript{124} See supra chap. 2.
mathematical or inductivist methods. Epistemological methods of fact-finding, whatever they are, must, in practical matters, be subordinated to the purposes of the enterprise, and, in juridical context, to the political morality that supports or dictates concrete risk-related preferences. This hierarchical structure of the evidentiary doctrine would always require that one’s inductivist and mathematical methods be consonant with and, when appropriate, adjusted to the morality of such preferences.

If this hierarchical structure is accepted, and if it is agreeable that the principles of risk-distribution should precede any choice of methods, there would be no reason to exclude in advance the possibility of applying statistics within the framework of those principles. As to the different paradoxes and anomalies that, according to Cohen, exemplify the symptoms of forensic fragility of Pascalianism, they appear to be the outcome of non-calibrated statistics preceded by the artificial, from the standpoint of practical reason, separation of scientific methods from moral principles. This point, which in its own way (but yet again, consonantly with the orthodox view of the law of evidence) suppresses moral reasoning by epistemological methods, requires more explanation.
One of Cohen's objections against Pascalian approaches is related to the relatively high probability, e.g. 0.4999, that may support the defendant's case. Cohen argues that it would be anomalously unjust if despite this relatively high probability the defendant were held liable. He may well be right in arguing so and perhaps he is wrong: in both cases the relevant glory or blame are to be assigned to the relevant risk-distributive principles but not to Pascalianism. Thus, the principle of risk-distributive equality might suggest that the plaintiff should win even on the probability of 0.5001. It may also be suggested, following Ronald Allen's proposals,¹²⁵ that in such cases the plaintiffs will recover 50.01% of their claims. After all, a compromise based on the "expected utility" does not appear to be intrinsically wrong¹²⁶ and might even be preferable to the "winner-takes-all" approach. One of the parties must always bear the risk of error, and it is not altogether clear what principles of risk-distribution are incorporated in the inductivist-Baconian framework advocated by Cohen.¹²⁷ For example, if he and other

¹²⁵ Allen, supra n.122.

¹²⁶ N.Orloff & J.Stedinger, A Framework for Evaluating the Preponderance of Evidence Standard, (1983) 131 U.Pa.L.R. 1159 (the "all-or-nothing" approach based on the P>0.5 rule is not always adequate, for it underestimates the problem of large mistakes). See also Allen, id; Kaye, supra n.113; Rosenberg, supra n.100.

¹²⁷ Cohen seems in this respect simply to rely on burdens of proof. See Cohen (1977), supra n.97, chs.18-19.
Baconians agree that the parties in dispute have to be treated with equal concern and respect\(^{128}\) and £1 of the plaintiff is as valuable as £1 of the defendant, what line of argumentation can deny that if the probability of the plaintiff’s case is 0.5001, he should be allowed to recover at least 50.01% of his claim!? And it is worth reiterating that what is meant in this context by the probability of 0.5001 is the probability which, unlike that in the case of gatecrashers, should not be based on a fictitious and evidentially unsupported assumption that all 1,000 spectators at the rodeo are equal in all relevant respects. In other words, what must be required is a principle-based probability, one which is justifiable by risk-distributive principles as a valid reason for action.\(^{129}\)


\(^{129}\) A justifiable statistical approach to legal fact-finding can be illustrated by the recent case of R v Abadom [1983] 1 All ER 364. In that case, a credible expert witness testified that there was a very high probability that the glass samples which were found on the defendant’s shoes had come from the window which was broken during the armed robbery. The expert relied on the Home Office’s statistics of the refractive index of broken glass. Evidently, the alleged features of the rarely found samples of glass were in that case relevantly similar for the purposes of probability calculus. The features of all the rodeo-spectators in Cohen’s hypothetical case cannot be so established and this demonstrates among other things the complexity that may be involved in statistical sampling of human behaviour for legal purposes. Cf. Summers v. Tice 199 P.2d 1 (1948); Thompson, supra n.97, ch.12.
What principle-based arguments can support a decision in favour of the rodeo organizers in the case of gatecrashers? The only available argument that can support their claim is that the systematic practice of holding liable all 1,000 spectators would produce more correct results than the incorrect ones. In other words, the decisional practice can be justified in general by the principle of utility, and although a particular decision falling within this practice may not be justifiable in its own terms, it would not be regarded as arbitrary. It would be justified by the practice.\(^1\) This approach appears to be most doubtful here, for many important factors that might refute, support, or modify the rule-utilitarian practice argued for by the rodeo organizers are unknown.\(^3\) And if no utility could reasonably be expected to be gained, the non-utilitarian principles of risk-distribution, e.g. the principle of equality, might prevail. This, of course, is not to say that no rule-utilitarian practice would ever be

\(^{130}\) To justify such a practice, one has to consider not only

"... the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants".


\(^{131}\) See W.Twining, Rethinking Evidence, ch.11 (1990); supra n.97.
justified in judicial proof. Such a practice may well be justified when it augments the overall utility and when other competing principles, e.g., the principle of equality, have a lesser weight. But in the present case, when the utility of the practice argued for is highly uncertain or doubtful, this practice cannot be adopted and the assumption of "fatal similarity" of the rodeo-spectators is thus to be regarded as arbitrary. Why should this assumption be attributed to the Pascalian approach which, as a method, does not exhibit risk-distributive preferences of its own and must even be subordinated to the principles of risk-distribution which operate in the legal system? I see no compelling reason for that.

In his recently delivered lecture Cohen has elaborated on some of his arguments. According to him,

\[132\] Cf. R.Dworkin, Taking Rights Seriously, 90-100 (1977). Dworkin's idea of legal principles is based on the distinction between individual rights and collective goals. Accordingly, it is stipulated that the principle of utility cannot be called a "principle", as distinguished from what Dworkin describes as a "policy". There are, however, no compelling reasons to exclude collective utility from the balancing framework. If one regards society as a sum of individuals, the principle of utility might well be treated as rights-conferring as any other. Unqualified utilitarians would not adopt the Dworkinian framework, but this framework can still be used (with appropriate modifications) by moderate deontologists that would, in some cases, allow utility to outbalance private rights. See N.MacCormick, Legal Reasoning and Legal Theory, 259-264 (1978).

the choice between Baconian and Pascalian methods of reasoning can properly be made by using the Rawlsean "veil of ignorance"\(^{134}\) as an intellectual tool. He contends that rational decision-makers blinkered by the "veil of ignorance" in a way that conceals the contaminating factors that might affect their impartiality would choose the Baconian method and decline to follow the Pascalian one. What, in Cohen's view, would dictate that choice is the unbearable risk of being picked at random as a member of some statistically significant group.\(^{135}\) No rational person would assume the risk of being held liable for somebody else's deeds just because he shares some features with a certain group of people.

I assume that the choice in Cohen's discussion was not suggested to be made in an ideal errorless world. It must also be assumed that his decision-makers are risk-averse.\(^{136}\) Given all this, the choice of Baconian method would not take his decision-makers very far. If they are (as they have to consider themselves behind the "veil of ignorance") equally likely to face the risks of error in

\(^{134}\) id. See J.Rawls, Theory of Justice, 136-142 (1972).

\(^{135}\) id.

\(^{136}\) In the "original position" constructed by Rawls no one knows the specific contingencies of "his psychology such as his aversion to risk or liability to optimism or pessimism". Rawls, supra n.134, at pp. 136-137. The risk-aversion in the text is assumed to be one of the average degree.
adjudication, they would have to articulate at the first stage of their deliberations their basic risk-distributive preferences and only subsequently choose the appropriate methods of reasoning in the light of those preferences. Thus, a risk-averse person might well prefer a statistically based distribution of the risks, for he has to consider not only the possibility of him being picked at random but also his future position as a plaintiff. He may well prefer that the risks of error be proportionally distributed on the basis of "expected utility". He also may and even should require that the calculation of probabilities for the purposes of trial be made in a principle-based fashion, i.e. without assuming as given the equality of samples. None of these

137 supra n.126. The "maximin" rule of Rawls may well lead to this conclusion if the problem of large mistakes is taken into account. For this rule see Rawls, supra n.134, pp.152-157.

In his article (supra n.98, in (1986) 66 B.U.L.R. 635) Cohen clarified that he is not talking about any issue that goes beyond the epistemics of proof. He has explicitly mentioned (at p.642) that the issues he discusses raise "... familiar problems about the evaluation of epistemic functions by reference to non-epistemic criteria". Cohen has launched the discussion of these problems only in his unpublished paper (supra n.133) and has not considered non-Rawlsian decision-procedures for selection of the fundamental principles of morality. For such procedures and their dependence upon substantive claims and interests that have to be considered see J. Fishkin, Beyond Subjective Morality, 94-111 (1984). More importantly, Rawls's principles postulate ideal conditions of their application and his model is hardly suitable for solving the problems of "partial compliance" resulting from further uncertainties in enforcement. See Fishkin, id., 131-132. Hence, the application of these principles outside the problem of justice carefully restricted by Rawls would leave room for a less determinate balancing of competing considerations. See also B. Williams, Rawls and Pascal's Wager, in Moral Luck, 94 (1981).
choices would be irrational. Hence, the problem of selecting the proper methods of probabilistic reasoning (and the corresponding "difficulty about criteria"\textsuperscript{138}) can and should be resolved by determining first the principles of risk-distribution. To be sure, many problems need to be resolved in articulating those principles. But once these problems are resolved, the choice between different probabilistic methods would be alleviated. For when this choice is subordinate to the principles of risk-distribution, many of the controversies between Pascalian and Baconian evaporate. Both methods can serve the complex goals of decision-making under uncertainty and, when necessary, be qualified and modified.

The "difficulty about conjunction" posited by Cohen\textsuperscript{139} can be resolved in the same way. As he rightly asserts, in civil cases consisting of numerous issues each issue has to be proved on the balance of probabilities. If a given case consists of, e.g., two independent issues A and B, and both $P(A)$ and $P(B) > 0.5$, the plaintiff should win.\textsuperscript{140} However, following the multiplication rule, the overall "Pascalian" probability of that case is $P(A) \times P(B)$. Hence, even when both $P(A)$ and $P(B)$ are, for instance, as high as 0.7, the plaintiff cannot

\textsuperscript{138} Cohen (1977), supra n.97, ch.9.
\textsuperscript{139} id., ch.5.
\textsuperscript{140} id., at pp.58-61.
be held to have preponderantly established his case on the balance of probabilities. Following the Pascalian methods, the overall probability of his case would only be 0.49 and this outcome is manifestly unjust. By contrast, within the Baconian framework, different findings of facts may be probabilistically incommensurable and therefore unsusceptible to multiplication.\textsuperscript{141}

But why should the multiplication rule be universally followed by Pascalians? This rule is based on the frequency of events\textsuperscript{142} and what can be attained by applying it in ideal conditions is at the very most utility - the preponderant number of correct decisions. The principle of utility must not always be the guiding principle of judicial fact-finding. Moreover, the events contested at trials are by and large unique and as such not reducible to determinate quantities. By and large, such events are not repeatedly occurring, equally likely and mutually exclusive. Hence, a merely hypothetical augmentation of correct decisions which underlies the multiplication rule cannot be based on any firm principle of practical reasoning. This rule is therefore

\textsuperscript{141} id., at pp.265-267.

\textsuperscript{142} Wagner, supra n.97. See also Cullison, supra n.97, at pp.545-563; P.David, The Difficulty About Conjunction, (1987) 36 The Statistician, 91.
inadequate for the purposes of most trials.\textsuperscript{143} However, when utility is both legally justifiable and can reasonably be achieved, this rule might still obtain.

The predetermination of risk-distributive principles would solve all other difficulties mentioned by Cohen in a similar way and there is no need to reiterate this way\textsuperscript{144}. In order to establish his case against implementation of mathematical methods in legal fact-finding, Cohen has to demonstrate that Baconian inductivism would always be preferable to those methods in deciding on facts under uncertainty. In other words, what needs to be established is that the non-mathematical inductivism is capable of naturally accommodating the principles of risk-distribution, yet all other possible forms of probabilistic reasoning\textsuperscript{145}

\textsuperscript{143} This would also be true when the probabilities involved are personalistic and subjective. Philip Dawid (op. cit., n.142) argues that by properly using prior odds in calculating posterior probabilities Bayesian statisticians can adjust their methods for forensic purposes. The main difficulty (and, it must be said, the notorious one insofar as contested civil, and especially criminal, trials are concerned) is, of course, that of establishing the prior odds (Jaffe, supra n.97; Cohen (1977), supra n.97, at pp.107-13). The hypothetical case of gatecrashers in which equal likelihood of each of the spectators to have avoided the payment for admission has been artificially assumed, exemplifies this difficulty.

\textsuperscript{144} These difficulties appear in Cohen (1977), supra n.97, part ii; for their resolution grounded on extraneous policy see Twining, supra n.97.

\textsuperscript{145} These forms and their relationship to adjudication can be found in Tillers, supra n.97; D.Shum, Probability and the Processes of Discovery, Proof and Choice, (1986) 66 B.U.L.R. 825.
are unsuitable for this purpose. This task is twofold: to undertake it, it has to be shown that mathematical reasoning can fit none of the approaches to risk-distribution justifiable by legal principles and that it can never be adjusted to fit at least one of the legally justifiable approaches to the risks of error. This task, which seems to me to be formidable, has never been undertaken by Cohen or other Baconians.

What appears to have been undermined by both Baconians and their opponents to the "probability debate" is the pervasiveness of the risk-distributive dimension of judicial reasoning and the need to subordinate any debate about methods to the moral principles that should structure this dimension. These ideas of subordination and structuring postulate a hierarchy within the evidentiary doctrine and the primacy of risk-distributive principles. Once these ideas are adopted, the "probability debate" must accordingly be shifted down to one of the subordinate levels of the hierarchy and soften its robust polemics which are akin to the "and-not" jurisprudence criticised by Llewellyn.146 If both Baconian and Pascalian ideas and methods can be accommodated together under the common roof of risk-distributive principles, a great deal of those polemics

must be seen as spurious.\textsuperscript{147} What currently maintains these polemics in their sharply uncompromised form is the presumption in favour of normatively unstructured reasoning, viz. the freedom of proof.

This last observation is especially remarkable in so far as Cohen is concerned. His epistemological views are very optimistic.\textsuperscript{148} He seems to believe that the present rules of burden and standard of proof can solve, and in fact solve, the problems of reasoning under uncertainty.\textsuperscript{149} He argues that a normative interference with the process of fact-finding can be justified only when its character is extrinsic,\textsuperscript{150} viz. when it does not clash with the idea of "universal cognitive competence". His standpoint is best represented by the following passage:

"The inductivist analysis, however, has no difficulty at all here. It presupposes only that when a juryman takes up his office his mind is already adult and stocked with a vast number of commonplace generalizations about human acts, attitudes, intentions, etc., about the more

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\textsuperscript{147} Cf. Twining, supra n.97; and see Tillers, supra n.97, p.1074: 
"... Cohen does not seem to sufficiently appreciate the degree of adaptability of a formal theory such as the traditional mathematical theory of probability".
\textsuperscript{148} See Cohen, supra n.8. Tillers (supra n.97, p.1078, fn.6) holds the same opinion about Cohen's epistemology.
\textsuperscript{149} This can be learned from Cohen's application of Baconian probability to burdens proof: Cohen (1977), supra n.97, ch.18 and see also Cohen, supra n.8.
\textsuperscript{150} id., n.8.
\end{flushright}
This combination of the universal cognitive competence and the rules of burden of proof deflates the risk-distributive part of judicial reasoning and undermines the function of political and moral principles. As has already been shown, this combination can hardly maintain a full-fledged justificatory framework. 152

3. THE MYTH OF "INDIVIDUALIZED" EVIDENCE

I now turn to David Kaye's response to Cohen, i.e., the argument that the policy of "spoliation" solves the difficulties of naked statistics. It must now be clear that the Pascalian approach can be sustained without

151 Cohen (1977), supra n.97, at pp.274-75.

152 See supra chap.2.
recourse to the policy of "spoliation". But how can this policy, and especially its sharp distinction between "individualized" and "non-individualized" evidence, be justified? I shall start with the latter distinction.

No categorisation of evidence can be made in abstracto. Following Bentham, one has to be most suspicious in relation to any attempt at categorising classes of evidence for the purposes of trial and other legal processes. As there are no extra-probative reasons to support the distinction between individualized evidence and naked statistics, this distinction has to be rationally related to some proof-evaluating processes. In other words, what has to be shown is that individualized evidence is, generally, probatively better than the non-individualized one. But issues like this, to borrow from Montrose, cannot be dealt with "in the air" because they are always dependent on the concrete probanda.153 Furthermore, it is well-known that evaluation of evidence involves, in virtually all cases, many auxiliary facts154 and generalisations155. Auxiliary facts are importantly attached to almost every


155 Ekelof, id., n.152, at pp.9-12; Anderson & Twining, supra n.5, at pp.258-269; Cohen (1977), supra n.97, at pp.273-276.
piece of evidence. For example, a witness's statement makes an implicit reference to his observation, recollection and additional credibility-factors, and the evidentiary value of these factors is always dependent on different auxiliary facts, such as the capacity of this witness's memory and his faculties of perception.\textsuperscript{156} The evidential impact of auxiliary facts is founded on the people's general experience, i.e., on available generalisations.\textsuperscript{157} Hence, the determination of evidentiary value of a particular piece of evidence, viz. its inferential contribution, must heavily draw on a deindividualized probabilistic judgement about the generalisations involved.\textsuperscript{158} In other words, the process of proof is inevitably deindividualized.

A possible absence of information about particulars may imply in some cases that no available generalisation can

\textsuperscript{156} Ekelôf, supra n.154.

\textsuperscript{157} id. See also P. Ekelôf, Free Evaluation of Evidence, (1964) 8 Scandinavian Studies in Law 47; and cf. with Cohen's theory of inductive support (supra n.97, ch.18).

\textsuperscript{158} See M. Saks, R. Kidd, Human Information Processing and Adjudication: Trial by Heuristics, (1980) 15 Law & Society Rev. 123, 151, 153. Tribe (supra n.97, p.1330, fn.2) had admitted that -

"... all factual evidence is ultimately 'statistical', and that all legal proof ultimately 'probabilistic', in the epistemological sense that no conclusion can be drawn from empirical data without some step of inductive inference".

For discussion of the relationship between general and concrete (or "individualized") propositions see A. Ayer, Metaphysics and Common Sense, 194-200 (1973).
inferentially be connected to the case at hand. But surely not every absence of information would imply this. Hence, what is crucial here is the availability of justifiable generalisations rather than a lack of "individualized" pieces of evidence, and such generalisations can only be justified by risk-distributive principles. What matters here is not the classification of different pieces of evidence, but the permissibility of inferences from the risk-distributive point of view. Therefore, the distinction between individualized and non-individualized pieces of evidence is unhelpful. This distinction is also most dubious. For example, in establishing paternity, "individualized" testimonies about sexual intercourse are no less problematic for risk-distributive purposes than, say, the evidence based upon a nakedly statistical comparison of blood cells. Both types of evidence would always require the triers of facts to embark on deindividualized reasoning and rely on some generalisations.  

All generalisations (or at the very least the non-

trivial ones) are nakedly statistical and fuzzy. To justify their adequacy for judicial reasoning, their probabilistic appraisal would thus not be sufficient. For such an appraisal is not self-justifying and to avoid its inferential regress or circularity it has either to rest upon some ultimate truth or be grounded upon practical reasoning, having regard to the risks of error involved. Assuming that the foundationalist option can be philosophically sound (and this, of course, cannot be taken as given), this option would still be inappropriate for justificatory purposes. The foundationalist truth-conditions are rigid and thus can hardly be satisfied in contested trials taking place in conditions of uncertainty. Practical reasoning, in turn, must account for the possibility of error and thus would always have recourse to risk-distributive principles.

160 See e.g., Tillers, supra n.97, 1078 and passim; Anderson & Twining, supra n.5, at pp.258-269.

161 i.e., to be dependent on one of the extremes characterising the "Cartesian Anxiety". Bernstein (1983), supra n.46, 16.

162 i.e., to be concerned with answering the question "Is this particular inference justifiable as a reason for action in regard to this particular litigant?" A possible legal framework for answering such questions will be developed in the subsequent chapters. Cf. J.Ladd, The Place of Practical Reason in Judicial Decision, (1967) VII NOMOS 126.

The "friends of individualized evidence"\textsuperscript{164} have recently gained an interesting support from an influential moral philosopher.\textsuperscript{165} Judith Jarvis Thompson argues that the opposition to the nakedly statistical findings of facts rests on solid moral grounds. In her view, justifiably to hold a person criminally responsible or impose on him a civil liability, judges or juries must have good reasons to believe (at the specified levels of persuasion) that the events constitutive of their judgments had actually occurred. For if it was just luck for those decision-makers that what they declared true was actually true, their decision is not supported by good reasons and cannot thus be justified. According to her, good evidentiary reasons are those which are causally connected with the [putative] fact that the defendant is responsible, i.e., the fact which, if true, guarantees his responsibility. Hence, to require an individualized evidence of guilt or other legal liability "... is just to be requiring a guarantee".\textsuperscript{166} She draws on what is regarded as a classical account of knowledge which says that a person knows that a particular proposition is true if and only if three conditions are met: (1) this proposition is actually true; (2) the person believes that it is true;

\textsuperscript{164} This expression belongs to J.J.Thompson, supra n.97, at p.242.

\textsuperscript{165} Thompson, id., chs.12 & 13.

\textsuperscript{166} id., at p.245.
(3) he has a good reason (not just luck) to believe that it is true.\footnote{167} Correspondingly,

"... what is at work in the friends of individualized evidence is precisely the feeling that just imposition of liability requires that this stronger requirement be met. They believe, as they say, that "mathematical chances" or "quantitative probability" is not by itself enough; on my view of them, that is because they feel, rightly, that if a jury declares a defendant guilty on the ground of nonindividualized evidence alone, then it is just luck for the jury if what it declares true is true. ... What would make it not be just luck for the jury if what it declares true is true? A guarantee."\footnote{168}

Thompson admits that it might be correct that we can have no more confidence in the truth of a \[causal\] hypothesis than we can have in the probabilistic generalisations which ultimately support it. This, however, must not trouble the friends of individualized, as distinguished from statistical, evidence. For, as she writes,

"One can, after all, be more or less sure of having the kind of guarantee ... for just imposition of liability. That our assurance of having a guarantee of the appropriate kind rests (ultimately) on statistical data seems to me to be something he [the friend of individualized evidence] can in consistency agree to. ... it is an ungenerous diagnosis of what is at work in the friends of individualized evidence to take them to think it of value because of thinking it uniquely highly probabilifying. What interests them is something else."\footnote{169}

\footnote{167} \textit{id.}, at pp.234-242.  
\footnote{168} \textit{id.}, at pp.244-245.  
\footnote{169} \textit{id.}, at p.250.
Therefore, rather than being epistemological, this guarantee is a moral one. For it-

"... matters to us not just that a defendant not suffer a penalty unjustly, but also that the penalty not be imposed on him unjustly."170

Thompson does not seem to deny that virtually any decision about uncertain facts involves luck and that most decisions in disputed trials have to be made under uncertainty. Nor does she appear to deny the importance of moral acceptability of these decisions. Conversely, the main thrust of her arguments is moral. But she does not explain what kind of "guarantee" (moral or other) can be attained by insisting that triers of facts be persuaded about the actual occurrence of events rather than of sheer chances of their occurrence.171 Given that any such judgment would ultimately be probabilistic and, as admitted by Thompson, that individualized evidence is not always more probative than the non-individualized one, what justifies such judgments in a way distinctive from what she calls "luck"? An unstructured subjective belief of the trier of facts would not be justifiable in such a way unless, for some unarticulated reason, it is held to be epistemically self-warranted and, in the light of the "individualized evidence" which has been adduced, reflective of what had actually happened. This

170 id., at p.243. A similar point was explicated at the more general level by R.Dworkin, A Matter of Principle, chap.3 (1986).

171 Cf. Nesson, supra n.97.
unarticulated possibility is plainly inadequate for justificatory purposes\textsuperscript{172} and to attribute it to Thompson is to misinterpret her views. She argues that individualized evidence is morally rather than epistemologically distinctive.\textsuperscript{173} To hold a defendant liable, something more than naked statistical evidence must mark his pockets as open for the plaintiff.\textsuperscript{174} Given that judicial decision-making, taking place under uncertainty, must be subsumed to the moral principles of risk-distribution, Thompson's position would not always be justifiable. As these principles may be very complex, and the principle of utility, demanding the augmentation of the overall amount of correct decisions, might be one of them, it is impossible to say in advance that to decide on the basis of naked statistics would always be wrong. What Thompson calls luck is hardly avoidable, and one of the goals of the law of evidence is to set out an appropriate framework for regulating this luck. She is correct in singling out the moral aspects of reasoning about uncertain facts, but her vision of adjudication, not representing the whole range of difficult choices taking place in this complex process, appears to be

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172 See, e.g., Brook, supra n.97, Kaye, supra n.97, Allen, supra n.100.
173 See supra n.97, passim, and id., ch.12.
174 id., passim, esp. ch.12.
\end{flushright}
rather simplistic and defendant-biased.\(^{175}\) Thus, if a statistically based calculus of chances (i.e., a luck) can never be a good reason for holding defendants liable, would a denial of statistically based claims as such constitute more than a sheer luck with respect to the plaintiffs? An attempt to answer to this query by referring to burdens and standards of persuasion amounts to begging the question. For the question is whether the existing standards and burdens can be satisfied statistically and if they cannot be so satisfied, what are the reasons that prevent them from being satisfied? Given that risk-distribution ought, in principle, to be equal for both plaintiffs and defendants, it is at the very least uncertain that all "non-individualized" claims must be rejected. The fate of those and other claims must be determined by concrete risk-distributive principles.

These principles may justify a risk-distributive inference based on the idea of "spoliation" articulated by Kaye. Thus, they may justify a decision to draw adverse inferences from the silence of the accused during his trial or interrogation or from any attempt to conceal or destroy a relevant piece of evidence.\(^{176}\)

\(^{175}\) Thompson herself had expressed her uneasiness about her views on this subject (id., passim, esp. in ch.12, at pp.219-22).

\(^{176}\) R.Cross, An Attempt to Update the Law of Evidence, (1974) 9 Israel L.R. 1, 4-9; Solum & S.Marzen, supra n.112.
attempt to conceal an obviously relevant piece of evidence can possibly demonstrate the awareness of the party concealing it of the fact that this evidence is unfavourable to his case.\textsuperscript{177} A successful attempt to conceal or destroy a piece of evidence can be regarded as an infringement of the other party's right to equal and fair access to the sources of proof and affect the distribution of the risks of error.\textsuperscript{178} What seems to be fairly clear is that in both cases the "spoliation" is approached in a principle-based fashion and that it cannot be justified by using the doubtful distinction between "individualized" and "non-individualized" evidence. Kaye himself asserts that in some cases non-individualized (i.e., naked statistical) evidence can justifiably be used as a ground for decision and his conception of justifiability is a principle-based one.\textsuperscript{179} But no reliance upon such evidence can be wrong per se, and no inference can be used at trial without being justified. Statistical methods can be inappropriate for judicial reasoning not because there is something intrinsically wrong in using mathematics in courtrooms. This reasoning may be inadequate because, similarly to a purified non-mathematical inductivism, it

\textsuperscript{177} id., see also Lempert, supra n.95.

\textsuperscript{178} Assuming, of course, that the principle of equality is one of the operating principles of the legal system.

\textsuperscript{179} E.g., in cases of mass toxic exposure involving multiple causation it seems to be based on the principle of utility. See Kaye, supra n.113.
is incomplete. And it can never be complete if it is left unstructured by the concrete principles of risk-distribution.180

The claim brought by the rodeo-organizers in Cohen’s hypothetical case must not succeed not as a result of the "non-individualized" evidence that supports it. This claim should fail simply because no justifiable generalisation can support the allegation that any randomly chosen defendant is as likely to be a gatecrasher as any other spectator. This is so not because there is something wrong with non-individualized methods of proof. The main reason is that no evidence was offered to support the relevant similarity of all 1,000 spectators, and as the risks of error should not be imposed on anyone of them arbitrarily, no such similarity can be assumed. But arbitrariness is different from non-individualized methods of proof, for it is the former, but by no means the latter, that can never be justifiable.181

Richard Eggleston has returned in his recent article to the case of gatecrashers, arguing that:


181 Lempert, supra n.95; Brook, supra n.97. Thompson (supra n.97), supporting the "friends of individualized evidence", had, in fact, expressed a similar view (see esp. id., ch.12).
"Before we could accept the proposition that any spectator at the rodeo is as likely to be a gatecrasher as any other, which is an essential condition for the conclusion that A, chosen at random, is more likely than not to be a gatecrasher, we would need to be satisfied that there is in fact no evidence available as to the size of the hole in the fence (if any), how many of the spectators were small boys, and so on." 182

He reiterated his previously expressed opinion that if no other evidence is available in that case, there would be no apparent injustice in holding the defendant liable. For, as he observes in his book,

"Is it more unjust that 499 paying patrons should have to pay again, or that 501 patrons should escape paying altogether? Is it better to deprive the proprietor of 501 admission charges, or to give him 499 to which he is not entitled?" 183

These questions are difficult indeed. The law has to answer them by articulating its risk-distributive principles. In English law, there is no authority to support the view that the standards and burdens of proof should vary in accordance with what might be regarded as an optimal distribution of errors over a large number of cases. 184 Conversely, the recent decision of the law


183 Eggleston, supra n.97, at p.41.

lords in Rhesa\textsuperscript{185} suggests that the overall distribution of mistakes would probably be regarded as irrelevant. The House of Lords had ruled out the possibility that "perils of the seas" be established as a cause of action against underwriters without proving the concrete nature of the peril that had damaged the insured vessel.\textsuperscript{186} And if unknown perils of the seas can never be relied on to establish claims arising from marine insurance policies, we are to conclude that the overall distribution of the risks of error in connection with such claims was clearly regarded by the House as irrelevant. This judgment is, of course, open to criticism,\textsuperscript{187} but it tends to support the view of Glanville Williams about the current position of the law.\textsuperscript{188}

Discussing the case of gatecrashers, Professor Williams agreed with Cohen that the organizers' claim should fail. His reasons were, however, different:

"The true reason why the proof fails in the gatecrasher case ... is that it does not

\textsuperscript{185} Rhesa Shipping Co SA v. Edmunds and another, The Popi M [1985] 2 All ER 712.

\textsuperscript{186} It has been held that -

"The shipowners could not, in my view, rely on a ritual incantation of the generic expression 'perils of the seas', but were bound, if they were to discharge successfully the burden of proof ... to condescend to particularity in the matter". id., at p.716.

\textsuperscript{187} See supra chap.2.

\textsuperscript{188} Williams, supra n.97.
sufficiently mark out the defendant from others."\footnote{189}

Later, he went on to admit:

"No doubt, we are illogical in this. ... Our sense of justice requires evidence to be given singling out the defendant from other culprits. This requirement ... must be taken as a rule of law relating to proof, distinct from the general rule governing quantum of proof."\footnote{190}

But why is "the sense of justice" referred to by Glanville Williams so illogical? It is illogical because, being claimed to apply in all cases, it cannot be justified in a principled way. It cannot be justified in that way due to its unqualified reluctance towards any kind of nakedly statistical evidence. Contrary to the principle-based approach to risk-distribution, and disregarding the most powerful criticism of Jeremy Bentham, this sense of justice still attempts to draw sharp distinctions between different classes of evidence. This approach cannot be sustained and any justificatory framework that incorporates it is bound to be incoherent.

\footnote{189 id., at p.305.}
\footnote{190 id.}
PART THREE

RECONSTRUCTING THE LAW OF EVIDENCE:
PRINCIPLES AND RIGHTS

CHAPTER FIVE

FROM CRITICISM TO RECONSTRUCTION

1. INTRODUCTION

In the previous chapters I have criticised some basic assumptions of both traditionalist and modern theorists of judicial evidence, arguing that their assumptions concerning normative regulation of legal fact-finding are mistaken insofar as they are claimed to be comprehensive. These assumptions either underestimate or neglect the pervasiveness of the risk-distributive dimension of judicial reasoning about facts. Consequently, this important dimension of reasoning has been left unstructured and I have suggested that it should be regulated by moral principles of risk-distribution that can and should be deduced from the explicit legal materials which build up the legal system. I have also subjected to criticism the binary oppositions between "intrinsic" and "extrinsic" rules of evidence and between "Baconian" and "Pascalian" modes of reasoning which permeate the current vision of judicial proof. The dichotomous structure of evidentiary rules
and free evaluation of evidence which characterises the received wisdom has been subjected to a similar criticism which emphasises the primacy of risk-distributive principles. The primacy of risk-distributive principles subordinates all kinds of rules and forms of reasoning under uncertainty to the risk-related preferences which have to be found within the law. Within this hierarchically ordered evidentiary doctrine, the above-mentioned oppositions and dichotomies cannot be maintained. This way of regulating risk-distributive decisions defies the very idea of free evaluation of evidence. The principles of risk-distribution which regulate such decisions, emphasising the interdependence of epistemological and moral aspects of judicial proof, also denounce the sharp division of evidentiary rules into "intrinsic" and "extrinsic". Similarly, the primacy of these principles rejects the grand seductive "either/or" posited in relation to Baconian and Pascalian notions of probability. The suitability of these notions for fact-finding purposes is derivative rather than independent and the opposition between the two, which can never be derived from and justified by risk-distributive principles, is spurious and at its very best acontextual. Like any science aiming at acquisition of knowledge for its own sake, no theory of probability can and should ever be allowed to determine its own uses and limits within the law which focuses on justifiable reasons for action from the
internal point of view. For it is the law that marshals scientific knowledge in accordance with its own principles, values and objectives and not vice versa. Hence, within the suggested hierarchical structure of the evidentiary doctrine, both notions of probability can coexist and operate as tools without being mutually exclusive. Both of these notions can thus be regarded as two faces of the "technical know-how" and the applicability of each of them to particular forensic situations would always be dependent upon the "ethical know-how", i.e., on the first principles of political morality which justify the existing legal arrangements.

In this and the subsequent chapters I shall construct a normative framework of risk-distributive principles and the deriving risk-related rights. It must now be clear that a modern law of evidence should govern the permissibility of inferences\(^1\) from the risk-distributive point of view. In the absence of specific legal regulation of all risk-distributive decisions it should be asked what are the general principles that should be applied to these decisions? Where do these principles come from and how do they affect the outcomes of concrete cases? I shall make an attempt to answer these questions at both general and particular levels.

\(^1\) The expression "permissibility of inferences" is borrowed from C.Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, (1979) 92 Harv.L.R. 1187.
Accordingly, this chapter will be devoted to the metatheory of risk-distributive principles and rights. Subsequently, concrete principles and rights, corresponding to this metatheory, will be singled out and examined. Their identification and examination will relate to the English system of judicial evidence.

My thesis is that the principles of risk-distribution are to be derived conventionally from the existing source-based law. This interpretive idea (akin to those articulated in different ways and contexts by Dworkin)

2 Although my general discussion was related so far to both English and American systems of evidence, its conclusions will be illustrated only by the English system. It is believed that the approach advocated in this work is applicable to any legal system belonging to the Common Law family. The differences that exist between English and American procedural justice and between the roles played by the courts in these two countries disallow an attempt of constructing identical frameworks of risk-distributive principles for both two systems. Thus, as was suggested by P. Atiyah and R. Summers, the English trial is, in general, more truth-oriented than the American. See P. Atiyah & R. Summers, Form and Substance in Anglo-American Law, 157-169 (1987). English and American conceptions of judicial role have been distinguished in, e.g., H.L.A. Hart, American Jurisprudence through English Eyes: The Nightmare and the Noble Dream, in H.L.A. Hart, Essays in Jurisprudence and Philosophy, 123 (1983). For a superb comparative study of procedural systems see M. Damaska, The Faces of Justice and State Authority (1986). For an earlier but no less important study see M. Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, (1973) 121 U.Pa.L.R. 506.

An examination of the English legal system is sufficient in order to demonstrate the approach advocated in this work.

and Bentham\(^4\) endorses conventionalism. It has an appeal to the shared understanding of legal materials, and by using an internal standpoint, it works within the epistemological territory occupied by the existing "interpretive community"\(^5\). It thus involves a -

"... form of conceptual practice that combines ... the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively within this tradition, to elaborate it from within in a way that it

\(^4\) Bentham wrote, that

"Let the laws be accompanied by justificatory reasons. ... [They] ... would serve as a kind of guide in those cases in which the law was unknown: it would be possible ... by knowing the principles of the legislator, to place oneself by imagination in his situation; to divine or conjecture his will in the same manner as we conjecture what would be the determination of a reasonable being with whom we had long lived, and with whose maxims we were well acquainted. ... There are truths which is necessary to prove; not for their own sakes, because they are acknowledged, but that an opening may be made for the reception of other truths which depend upon them. It is necessary to demonstrate certain palpable truths, in order that others, which may depend upon them, may be adopted. It is in this manner we provide for the reception of first principles, which, once received, prepare the way for admission of all other truths".


meant, at least ultimately, to affect the application of state power".6

This interpretive practice is both inductive and deductive and includes analytical and synthetical stages. In our context, it makes an attempt at discerning principle-based attitudes to the risks of error from the institutionally defined legal materials which belong to a given collective tradition. These

6 R.M.Unger, The Critical Legal Studies Movement, (1983) 96 Harv.L.R. 561, 565. Unger's internal critique of this approach will be dealt with later in this chapter. This approach has been criticised by R.Posner in his recent article Conventionalism: The Key to Law as an Autonomous Discipline?, (1988) 38 U.Toronto L.J. 333. He criticises both the anti-reductionist thesis, namely the view that law has its own immanent rationality irreducible to any other discipline such as ethics or politics or economics, and the lack of secure foundations for conventionalism. As to the former, he seems to have mistaken an interpretive search for legally pre-emptive reasons for action for closure and narrow-mindedness that characterise Holmes's "black letter" man. None of the scholars he described as conventionalists argues that extralegal knowledge is irrelevant for their interpretive enterprises. Conversely, extra-legal knowledge is most essential to all of them for identifying and coming to grips with legal phenomena, but their theses, if I understood them correctly, are about meanings rather than skills. A cognizance of X (e.g. a poem or a statute) by using as tools A, B and C (e.g. morals, economics and linguistics) would not reduce X to A, B or C. X would structure its understanding by a reasoner using A, B and C. R.Dworkin, Law's Empire, ch.2 (1986); Weinrib, supra n.5. The foundationalist critique of legal conventionalism raises the familiar sceptical argument—the "Cartesian Anxiety". One has to wonder what could be the reasons for not applying the foundationalist standards of rationality to the economic approach to law and legal reasoning advocated by Posner. (See below nn.26; 123) S.Burton, Judge Posner's Jurisprudence of Scepticism, (1988) 87 Mich.L.R. 710, 722-23, suggested a plausible clue: this might be a [political] attempt "to clear the decks" for a new law based upon wealth-maximisation.

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attitudes to the risks of error combine a conventionalist framework of legal principles which are claimed to be applied to the situations not covered by the explicit law. This approach emphasises practice and context. The validity of the principles of risk-distribution rests upon the agreement of those that participate within a practice rather than from "out there". To be a valid part of conventionalist justificatory structure, these principles have to comply with a threshold requirement of fit. They have to fit the existing preinterpretive data, viz. the institutional materials and practices. These materials bear an authoritative character. Representing the authority of the law, they are justified by and thus imply a number of general risk-related reasons which ex lege have to be regarded as preemptive. This preemptiveness eliminates all other reasons as irrelevant and accordingly distinguishes between risk-distributive reasoning in adjudication and an open-ended political argumentation. Hence, to justify a decision involving a distribution of the risks of error, one of the principles that fits the institutionally defined legal materials should either be the only one applicable or prevail due to its overriding weight. The relative weights of competing principles of risk-

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distribution are to be determined by the process of balancing. This process of balancing can be very complex, especially when there is no master principle of a higher order to settle the conflicting ones.\(^9\) Finally, the principles of risk-distribution should be regarded as rights-conferring.\(^10\)

This briefly delineated argument sets out three basic elements of the metatheory of risk-distribution in legal fact-finding. These elements are:

1. a conventionalist identification and understanding of risk-distributive principles;
2. the authoritative character and objectivity of these principles; and
3. the idea of legal rights deriving from these principles.

All these elements are based on interpretation from an

\(^9\) To solve this problem and choose between the competing principles that "fit", Dworkin invokes the notions of political morality, integrity and an omnipotent hypothetical judge named Hercules. See R.Dworkin, Law's Empire, chs.7-10 (1986). I shall support a conventionalist mode of balancing without claiming that the problems of competition can always be solved. See Hart, supra n.2; H.L.A.Hart, Essays in Jurisprudence and Philosophy, 6-7 (1983). Cf. J.Harris, Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules and Humdrum, (1989) 52 M.L.R. 42.

internal point of view. They will now be explained separately and in greater detail.

2. A METATHEORY OF RISK-DISTRIBUTION

2.1 A CONVENTIONALIST INTERPRETATION

A willingness to work within a given tradition that characterises an internal point of view is a practical interpretive choice. It does not make a foundationalist claim of discovering the ultimate Archimedean point, the solid edifice on which human knowledge can safely rest. A conventionalist denies the existence of sharp contrast between reason and tradition or reason and authority: he claims the reason to operate within the tradition. He is guided by the belief in the criteria elaborated within the tradition for assessing the quality of reasoning. This belief is not generated from some ahistorical or transcendental perspective from which we can evaluate competing arguments. Being aware of contingency of his internalist assessments, a conventionalist makes an

11 This approach can be accommodated within the positivist "rule of recognition". As H.L.A.Hart has mentioned, this rule introduces "... a 'hermeneutic' method which involves portraying rule-governed behaviour as it appears to [the] participants, who see it as conforming or failing to conform to certain shared standards". Hart, supra n.9, at p.13. Even Austin could not have denied that the principles commanded by the sovereign are legally binding. See J.Raz, Legal Principles and the Limits of Law, in M.Cohen, Ronald Dworkin & Contemporary Jurisprudence, 73, at p.75 (1984).
appeal to "... the standards and practices that have been hammered out in the course of history".\textsuperscript{12} He endorses "... the concept of truth that ... amounts to what can be argumentatively validated by the community of interpreters who open themselves to what tradition 'says to us'\textsuperscript{13}, i.e., the best arguments that can be elaborated within a given culture. In the legal context, the criteria for evaluating competing claims and selecting the best arguments are furnished by the general principles that can be grasped from the institutionally defined materials. The latter materials contain the network of past political decisions, and the principles that have been worked out from within to "speak authoritatively" are justified due to their connection with these decisions. Hence, the nature of a conventionalist system of justice is political and not metaphysical\textsuperscript{14}. A conventionalist admits that the conception of justice he endorses is not invariably valid from any external point of view. He argues instead that his conception of justice is validated internally through the collective experience of his community.

\textsuperscript{12} R.Bernstein, Beyond Objectivism and Relativism, 154 (1983).

\textsuperscript{13} ibid.

This interpretive standpoint, concentrating on the "hermeneutical situation" and the "historicity" of the interpreter\textsuperscript{15}, leads to a jurisprudentially significant distinction between rationality and justification. Within a Cartesian framework of reasoning, if two arguments about certain phenomena (e.g., the law) contradict each other, either one of them or both are rationally insupportable. A foundationalist conception of rationality -

"... leads us with an apparent and ineluctable necessity to a grand and seductive Either/Or. Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos."\textsuperscript{16}

In a world without universals that does not admit this "Cartesian Anxiety" and moves beyond objectivism and relativism\textsuperscript{17}, there are more than one senses of "rational"\textsuperscript{18}. Judges, operating within a non-Cartesian tradition, must sometimes make a choice between two or more rational arguments. This notoriously difficult choice is alleviated by the internalist conception of justification. From an internal point of view, rival claims of legal rationality are not adjudicated solely

\textsuperscript{15} The notion of interpreter's "hermeneutical situation" and "historicity" are elaborated on by R.Bernstein in his discussion of H.G.Gadamer; see supra n.12, parts 3 & 4.

\textsuperscript{16} Bernstein, supra n.12, at p.18.

\textsuperscript{17} ibid, part 1; pp.115-118.

\textsuperscript{18} ibid, at pp.20ff.
on the basis of their rationalist merits. They are adjudicated on the basis of their justifiability within the predetermined framework of institutional norms, principles and reasons, i.e., within the law. Within this framework, the notion of justification represents the peculiar legal rationality which has been hammered out in the course of history by a given political community. The interpreter's task is thus to expose the inner rationality of the law, the justificatory structure within which all the competing claims of legal "truth" are to be evaluated.

This justificatory structure is not always readily handed down to the interpreter as something simply given. Legal principles are often not explicit and this is true about the principles of risk-distribution. Conventionalist interpretation requires therefore a dialectic, active encounter with the interpreter's legal tradition. This encounter with legal tradition is intrinsically critical and constructive. It involves a practical task of the application of past political decisions to current situations. This practical task of applying the law makes interpretive understanding

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19 E. Weinrib, supra n.5, passim.

essentially hermeneutical in the sense in which Gadamer has used this term\textsuperscript{21}.

Gadamer tells us that -

"The interpreter dealing with a traditional text seeks to apply it to himself. But this does not mean that the text is given for him as something universal, that he understands it as such and only afterwards uses it for particular applications. Rather, the interpreter seeks no more than to understand ... what this piece of tradition says, what constitutes the meaning and importance of the text. In order to understand that, he must not seek to disregard himself and his particular hermeneutical situation. He must relate the text to this situation, if he wants to understand at all."\textsuperscript{22}

According to Gadamer, this critical encounter with tradition and the practical moment of application are integrated in the single process of understanding.\textsuperscript{23}

Within this process,

"... the judge does not simply 'apply' fixed, determinate laws to particular situations. Rather the judge must interpret and appropriate precedents and law to each new, particular situation. It is by virtue of such considered judgment that the meaning of the law and the meaning of the particular case are codetermined."\textsuperscript{24}

By and large, such reasoning and understanding have to deal with variable situations and involve a mediation between the universal and the particular, the past and


\textsuperscript{22} ibid, at p.289.

\textsuperscript{23} For a lucid explication of this theme see R.Bernstein, supra n.12, part 3; R.Bernstein, Philosophical Profiles, ch.3 (1985).

\textsuperscript{24} R.Bernstein, supra n.12, at pp.147-148.
the present. This mediation is an exercise of constrained freedom of judgment. Hence, it always requires moral (or political) deliberation and choice constrained by the conventionalist justificatory structure.25

The moment of application, as a critical encounter with tradition that involves moral deliberation and choice, is the central tenet of the conventionalist idea of interpretation which I suggest to endorse. In the context of legal decision-making in conditions of uncertainty, the principles of risk-distribution, emanating from the institutionally defined legal materials, acquire their meanings at the time of their concrete application by the court. Their meanings are generated by the interpreter's critical encounter with legal materials which reflect past political decisions. These decisions and the legal tradition itself are understood from and applied to the present hermeneutical situation, "here and now". This "practical reasoning"26


aimed at resolving currently arising problems renounces
"a fallacious either-or: either the judge
determines what shall be law, or the law
determines what the judge shall decide".27

It emphasises a structured character of deliberation and
choice taking place within the framework of
intellectually "disciplining rules".28

By saying that the above-mentioned process of moral
deliberation and choice is "structured", I did not, of
course, mean that this process is validated by rigorous
logical methods. This process, not necessitated by
formal logic, is validated by its acceptability from the
political and moral point of view.29 The acceptability
of verdicts from the moral point of view validates the
principles of risk-distribution that have been applied
under uncertainty to reach these verdicts.30

27 J.Ladd, id., at pp.130ff. See also Hart, supra
n.2.

28 See O.Fiss, Conventionalism, (1985) 58
So.Ca.L.R. 177.

29 Cf. J.Dewey, Logical Method and Law, (1924) 10
Cornell L.Q. 17; M.Cohen, Reason and Law, ch.3 (1950).

30 See C.Nesson, The Evidence or the Event? On
Judicial Proof and the Acceptability of Verdicts, (1985)
98 Harv.L.R. 1357; I.Dennis, Reconstructing the Law of
does not necessitate the further point brought forward
by C.Nesson, namely the claim of interrelationship
between judgments as statements about actual events and
the assimilation of legal norms by the public. This
point has, in my opinion, been justly criticised by
observation obliges me to clarify the methods of ascertaining the internally correct moral point of view and explain how the structured interpretive freedom must operate in concrete cases. For it may not be enough to show that the interpreter's practical reasoning is constrained by the existing "disciplining rules", a conventionalist mode of understanding of the institutionally determined legal materials. Admittedly, even within this framework of thought, two (or more) moral points of view might be in conflict and still regarded as legitimate. There may well be no master principle that can be overriding decisive in such a conflict and the conventionalist approach endorsed in this work admits this. This approach identifies those principles that fit the existing conventions about settled law and unlike the Dworkinian approach, it does not single out a distinct political ideal of integrity. It refrains from doing so because this ideal cannot be chosen as self-warranted to mediate between competing principles. For this ideal to be so accepted, it should correspond to the operating conventions of the existing community of interpreters. Depending on the concrete legal system, it may and may not correspond to these conventions. Hence, it has to be admitted that within a conventionalist framework, a


31 R.Dworkin, Law's Empire, ch.6 (1986).
checkerboard strategy that compromises a single coherent system of justice may be adopted on some occasions. This strategy stands in opposition to an uncompromised integrity of the law.\footnote{ibid.} What counts within a framework of operating conventions is the law, not its integrity, and the authority of legal rules, principles and pre-emptive reasons is a matter of social recognition.\footnote{H.L.A.Hart, The Concept of Law (1961). Hart accepts that his positivist account of the concept of law may well accommodate the principles encompassed by the "rule of recognition". See, e.g., H.L.A.Hart, Essays in Jurisprudence and Philosophy, 6-7 (1983) See also supra n.11 and N.MacCormick, Legal Reasoning and Legal Theory, 257-258 (1978). For critique of Dworkin's thesis of law's integrity see G.Postema, "Protestant" Interpretation and Social Practices, (1987) 6 Law & Philosophy 283, 305; 310-315.}

To single out the principles of risk-distribution and apply them to a concrete case, an interpreter has to ascertain their current significance. He has to do so because his interpretation of the law is, essentially, a practical choice. This choice is affected by the intellectual forestructures and traditionalist "prejudices" of the interpreter. Evidently, these prejudices are constitutive of what the interpreter "knows" and, in fact, enable him to come to grips with his tradition and hermeneutical situation. Emphasising this ontological significance of enabling prejudices, Gadamer has observed their rational experience-based character and positive role in the interpreter's
dialectic encounter with his tradition.34 These prejudices, the framework of experience-based meanings and concepts, enable the interpreter to understand his legal system internally, critically examine it, and by moving back and forth between its separate parts and the whole, discern its ultimate principles.

This description of conventionalism admits that a single right answer to any question of law cannot always be provided. It also accepts the inner circularity of conventionalist interpretation. This inner circularity is epitomized by the constant movement of the interpreter between the parts and the whole of his legal system. As Weinrib wrote,

"The movement is a circle of thought that feeds upon its own unfolding explicitness: from the content of law to the immediate juristic understanding of this content, to the form implicit in this understanding, to the explicit elucidation of the form, to the testing of the content for its adequacy to the now explicit form."35

This circularity is a consequence of the non-foundationalist and self-contained nature of conventional intelligibility.36 It must not be regarded as a deficiency37, for it seems that Weinrib is right in

34 See Bernstein, supra n.12, at pp.126-131.

35 Weinrib, supra n.5, at p.974.

36 ibid. See also G.Postema, Bentham and the Common Law Tradition, pp.19-38 (1986).

observing, following Hegel, Gadamer and other thinkers, that -

"Provided that the circle is inclusive enough, circularity is here, as elsewhere in philosophical explanation, a strength and not a weakness. For if the matter at hand were to be non-circularly explained by some point outside it, the matter's intelligibility would hang on something that was not itself intelligible until it was, in its turn, integrated into a wider unity. Criticism on the grounds of circularity implies the superiority of the defective mode of explanation that leaves outside the range of intelligibility the very starting point upon which the whole enterprise depends".  

In other words, an externalist critique of the inner circularity existing within a conventionalist framework of interpretation is tantamount to either self-referential refutation or unwarranted importation of


38 Weinrib, supra n.5, at pp.974-975; see also Bernstein, supra n.12, at pp.131-139. Michael Moore has recently criticised interpretive approaches to legal reasoning for their being "anti-metaphysical". M. Moore, The Interpretive Turn in Modern Theory: A Turn for The Worse?, (1989) 41 Stan.L.R. 871. Not all approaches to legal reasoning that can be characterised as interpretive tend or are bound to regard metaphysical problems as unimportant. Some of them assert that we can rationally engage in a legal discourse without attempting to resolve once and for all the metaphysics of our knowledge and morals. It is unclear why should an attempt to reach, under uncertainty, the best decision available be regarded as "anti-metaphysical". Thus, the conventionalist approach argued for in this chapter can, remaining rational, suspend its judgment about metaphysics. According to it, what passes for knowledge is the best (albeit contingent) knowledge that we can master.

39 This expression is borrowed from J. Finnis, Scepticism, Self-Refutation and the Good of Truth, in P. Hacker & J. Raz, Law, Morality, and Society, 15 (1977). Some critical legal scholars have expressed their anxiety about this problem: e.g., J. Boyle, The Politics of Reason: Critical Legal Theory and Local Social
standards of rationality into a given tradition. A conventionalist interpretation is based on its circularity. It operates through the "hermeneutical circle" of understanding, and this circle presupposes all the forestructures of the interpreter that enable him to understand. Within this framework,

"... although all claims to truth are fallible and open to criticism, they still require validation - validation that can be realized only through offering the best reasons and arguments that can be given in support of them - reasons and arguments that are themselves embedded in the practices that have been developed in the course of history. We never escape from the obligation of seeking to validate claims to truth through argumentation and opening ourselves to the criticism of others."  

I am not arguing that an externalist critique of conventionalist interpretation is not possible. What is


Bernstein, supra n.12, at pp.135-139.

ibid, at p.168. Richard Bernstein added that what is central to this way of understanding - "is a dialogical model of rationality that stresses the practical communal character of this rationality in which there is a choice, deliberation, interpretation, judicious weighing and application of "universal criteria", and even rational disagreement about which criteria are relevant and most important." id., at p.172.

argued here is that this critique is bound to rest on a
different conception of justice, a conception that
brings its political support from elsewhere. This wide
political issue, bearing on the basic terms of social
life and human association, is beyond the limits of the
present study and will not be examined. This, however,
does not dispose of an internal critique based on human
plurality which, arguably, may threaten to shatter the
conventionalist foundations from within. In a nutshell,
this critique denies the very existence of homogeneous
values and stocks of knowledge capable of validating
moral and factual judgments and makes a strong claim
about legal indeterminacy. The examination of this
critique and some other internally sceptical positions
will be postponed and discussed later in chapter six. At
this stage, conventionalist interpretation as a
framework that can validate the principles of risk-
distribution requires a further explication.

43 The most striking externalist critique of the
present legal, moral and political forms of reasoning
has been advanced by R.M.Unger (supra, n.6). This
critique seems to have been proved to be unconvincing.
See W.Ewald, Unger's Philosophy: A Critical Legal Study,
Legal Studies Movement', in J.Eekelaar & J.Bell, Oxford

44 In the context of judicial evidence, this
critique has been advanced by K.Graham Jr. See his
reviews The Persistence of Progressive Proceduralism,
(1983) 61 Tex.L.R. 929; "There'll Always be an England":
The Instrumental Ideology of Evidence, (1987) 85
The principles of risk-distribution that can be validated within this framework may give rise to the questioning of their objectivity. To be objective, these principles are to be arrived at and operate in a way that will distinguish between them and an open-ended moral or political contest. To distinguish between a system of reasoning in which "everything goes" and a framework of legally constrained arguments, we have to eliminate the irrelevancies. Within that framework, the word "objective" denotes the distinct character of certain principles of risk-distribution and the irrelevancy of the others. The question of objectivity is also linked with the need to make a differentiation between the concept of law on the one hand and politics or morals on the other.45 But before all these questions are addressed, I shall illustrate the method of interpretation outlined above and its conventionalist vein by giving a concrete example. This method will be illustrated by the case of Woolmington in which the

45 See H.L.A.Hart, Positivism and the Separation of Law and Morals, (1957-58) 71 Harv.L.R. 593. The word "differentiation" is used here instead of "separation" because the interconnections between law, morals and politics have never been totally denied. See M.Cohen, Should Legal Thought Abandon Clear Distinctions?, (1941) 36 Ill.L.R. 239; Cf. H.Berman, Toward an Integrative Jurisprudence: Politics, Morality, History, (1988) 76 Cal.L.R. 779. Both Hart (id.) and Dworkin (e.g., in Law's Empire [1986]) point out the connections between law, morals and politics and seem to agree that morality of law is not a necessary condition of its validity. Joseph Raz (a legal positivist) and John Finnis (a moderate supporter of the natural law theory) also seem to agree on this point. See R.Gavison, Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round, (1982) 91 Yale L.J. 1250.
major risk-distributive principle of the English criminal law – the principle of protecting the innocent – was enhanced.

2.2 CONVENTIONALISM EXEMPLIFIED
Woolmington v. D.P.P.\textsuperscript{46} was a hard case, one of those which, in Dworkin’s view, cannot be settled by conventionalist methods of legal interpretation.\textsuperscript{47} However, the decision delivered in this case is an example of legal development within a conventionalist framework. This decision was importantly innovative, but the innovation has taken place in a non-revolutionary past-dependent fashion. No replacement of the old paradigm by the new one\textsuperscript{48} can be detected in this decision. No "paradigm-shift" had emerged and the existing legal doctrine was reformed from within.

The accused, Reginald Woolmington, was charged with murdering his wife who had previously left him. He did not deny the fact that it was he who had shot and killed his wife. However, he told the court that this killing was merely accidental. He explained that at the time of the killing he tried to induce his wife to return to live with him by threatening to shoot himself. He went

\textsuperscript{46} [1935] AC 462.

\textsuperscript{47} R.Dworkin, Law’s Empire, 130-35; 144-45 (1986).

on to show her his gun, brought it across his waist, and, accidentally, the gun somehow went off and his wife was killed. At the end of the trial, Swift J. summed up to the jury in the following way:

"If the Crown satisfy you that this woman died at the prisoner's hands, than he has to show that there are circumstances to be found in the evidence ... which alleviate the crime, so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident."

The accused was found guilty as charged, but his appeal, reaching the House of Lords, was allowed on the ground of the misdirection of the jury. The speech delivered by Viscount Sankey LC is well-known for its enhancing the principle of protecting the innocent:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of ... the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."49

This speech is widely regarded as making a fundamental

49 supra n.46, at pp.481-482.
change in the law of criminal evidence or at least as an insistence on the ignored by the old authorities distinction between the burden of persuasion and the evidential burden. Both interpretations of Woolmington suggest that an important innovation had taken place: the new rule that the accused should not carry the risk of error in defensive issues was established, replacing the old one. Lord Sankey's insistence on the historical connection is regarded as a less strong part of his judgment.

Instead of assuming that the Lord Chancellor's insistence on the historical was a mere veil, a lip-service to the precedent-based legality, I shall suggest a different appraisal of the new ruling that had taken place in Woolmington, namely that the evidentiary doctrine, remaining the same, has been applied in a way which reflects the current conventionalist understanding.


"If Viscount Sankey LC had resisted the poetic urge, held back his felicitous phrases and had not made an historical statement, the substance of his conclusion would have been much less vulnerable and much trouble would have been saved."


52 Zuckerman, supra n.50.
of criminal culpability. In other words, the transformation of the conventionalist understanding of culpability rather than the total replacement of the old doctrine of burden of proof is the essence of Woolmington. What, in fact, was decided by the House of Lords is that to justify a conviction and punishment, all the facts constitutive of the blameworthiness of the defendant's act and the degree of its blameworthiness ought to be proved beyond all reasonable doubt. Correspondingly, facts related to the defences capable of rendering the defendant's act unblameworthy (or less blameworthy) have to be disproved by the prosecution at the same level of proof. Exceptionally, the burden of proving excuses or lenient alleviations of criminal responsibility (such as the defence of insanity and the like) can be imposed upon the accused, for these defences do not remove the blameworthiness of his act. These general principles existed before Woolmington and had remained unchanged. 53 What was, in fact, recognised by this case is, as has already been mentioned, the

53 The House of Lords could not, of course, have affected the parliamentary power to legislate various exceptions that do not follow these principles. See supra n.46, at pp.481-482. Statutory exceptions to the Woolmington rule have been profoundly criticised: G.Williams, The Proof of Guilt, 184-186 (1963); G.Williams, Offences and Defences, (1982) 2 Leg.Stud. 233, 236-238; The Criminal Law Revision Committee, 11th Report (Evidence), Cmdn. 4991 (1972), cl.8 of the draft Bill; par.137-142. Another exception to the principles stated in the text is the defence of duress. This defence is an excuse (see, e.g., R. v. Howe [1987] 1 All ER 771, 782, 788, 790), but despite this fact the burden of disproving it rests on the prosecution (see Cross, supra n.51, at p.111).
change in the nature of the issues to be regarded as constitutive of criminal blameworthiness. The evidentiary doctrine regulating the proof of these issues remained unchanged.

To clarify this point, the historical links between the decision in Woolmington and the old authorities analysed in Blackstone's Commentaries and referred to in this case need to be reexamined. Blackstone wrote that in order to establish that the accused is guilty of an offence, all reasonable doubts must be eliminated. According to him, it is better for ten guilty persons to escape their conviction and go unpunished than for an innocent one to be unjustly condemned. However, in one of the most frequently cited parts of his work, Blackstone asserted that the defensive issues of justification, excuse and alleviation, "... it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury". It is this part


55 id., at p.352. See also A. Zuckerman, The Principles of Criminal Evidence, ch.9 (1989). At the present stage of our discussion, the exact ratio of wrongful acquittals, as opposed to wrongful convictions, is less significant. What is important is the prerequisite requirement of "moral certainty" in all criminal trials. For the history of this requirement see T. Waldman, Origins of the Legal Doctrine of Reasonable Doubt, (1959) 20 Journal of the History of Ideas, 299; B. Shapiro, 'To a Moral Certainty': Theories of Knowledge and Anglo-American Juries 1600-1850, (1986) 38 Hast.L.J. 153.

56 supra n.54, at p.201.
of the law that had been changed by the new ruling of Woolmington.57

Blackstone distinguished between the three kinds of defences that may be available to a person charged with the killing of another: justification, excuse and alleviation. A justifiable killing is one that "... has no share of guilt at all"58. It may either be "commendable", i.e., one which is both required and justified by an "... absolute command of the law", or "permissible", when the law permits to repel the force of attempted capital crime.59 An excusable homicide can be committed either by some misadventure, i.e., accidentally, "... where a man, doing a lawful act, without any intention of hurt, unfortunately kills another", or by "self-preservation", e.g., as a matter of self-defence which has to be distinguished from hindering the perpetration of a capital crime. Blackstone wrote that -

"In these instances of justifiable homicide, you will observe that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation

57 See, e.g., the old case King v. Oneby (1727) 92 ER 465, 470:
"... where a man is killed, the law will not presume that it was upon a sudden quarrel unless it is proved so to be ... for it lies upon the party indicted, to prove the sudden quarrel."

58 Blackstone, supra n.54, at p.177.

59 id., at pp.178-181.
rather than blame. But that is not quite the case in excusable homicide, the very name whereof imports some fault, some error or omission; so trivial however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment."60

In certain cases, an accused charged with murder may, according to Blackstone, be entitled to alleviation leading to conviction of manslaughter. Generally speaking, the difference between the offence of murder and that of manslaughter is that manslaughter "... arises from the sudden heat of the passions", whilst murder is the result of "... the wickedness of the heart".61 Hence, by alleviating the treatment of those accused of homicide who acted in a passionate way and upon provocation, "... the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt."62 In addition, a person killing his fellow man by misadventure, in an accidental and therefore involuntary way, may not be excused if his act was unlawful. But he may not be convicted of murder because in this case, similarly to the case of sudden provocation, the killing of another was not premeditated.63

60 id., at p.182.
61 id., at p.190.
62 id., at p.191.
63 id., at pp.191-193.
The legal approach to blameworthiness that prevailed in the cases of homicide at Blackstone's time can now be summed up. According to this approach, any unjustified killing of a person was said to be blameworthy. Any such killing could still be excused or, in appropriate cases, alleviated, but none of these concessions to human frailty could render the killing of a person unblameworthy. This fact may give us an explanation why the principle of protecting the innocent was not applied when one of the excuses or alleviations was in issue. This principle was a manifestation of the societal readiness to let ten criminals go free in order to secure that an unblameworthy person would not be convicted.64 However, the same amount of wrongfully acquitted or leniently mistreated offenders could not be tolerated where these offenders, after being proved to be blameworthy, relied on either an excuse or alleviation. This approach to the distribution of the risks of error was applied to the cases of homicide referred to by Blackstone who, following Sir Michael Foster, explicated it by saying that "... all homicide is presumed to be malicious."65

64 id., at p.352.

65 id., at p.201. The general principle that the accused should bear the burden of persuasion in all defensive issues is sometimes attributed to Blackstone (e.g., Fletcher, supra n.50, at pp.902-907). However, a contextual appraisal of Blackstone's view does not seem to give a permission for its expansion beyond the cases of homicide. See infra. Cf. R. v. Edwards [1974] 2 All ER 1085.
What is puzzling in Blackstone’s presentation and analysis of the law of criminal evidence is that the presumption of malice in the cases of homicide is an unbending one and was said to be in force even when justificatory facts were sought to be established. The burden of proving the circumstances of justification was borne by the accused and it must be asked why justifications, alleviations and excuses were treated alike. Blackstone answers this question by pointing out the sanctity of human life which, when taken away by somebody, is presumed to be taken away maliciously. But he is not altogether clear about the exact scope of this presumption when he says that -

"... the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law."67

This apparent inconsistency of the law could not be unnoticed by Blackstone and his contradictory statements about the presumption of malice require an explanation.68 The key to this problem can be found in

66 id., at pp.186-187; 201.
67 id., at p.186.
68 R.Bernstein (supra n.12, at pp.31;132) quotes twice an advice on interpretation given by Thomas Kuhn to his students: "When reading the works of important thinker, look first for the apparent absurdities in the text and ask yourself how a sensible person could have written them. When you find an
the nature of what was regarded at Blackstone's time as a justified homicide. First, as was mentioned above, the law may have required an execution of a person by virtue of explicit and absolute command. In this case, the homicide was regarded as commendable and therefore justifiable. Since it was performed ex officio and supported by the judgment of an authorised court, the relevant facts related to this kind of justified killing did not raise any problems of proof. To satisfy the jury that the killing that has taken place was justified by the law, all that had to be produced was an official judgment of the court.

In some cases of homicide the act of killing could be justified by virtue of legal permission rather than command. These cases were a real problem for Blackstone

answer, I continue, when those passages make sense, than you may find that more central passages, ones you previously thought you understood, have changed their meaning." This advice appears in T. Kuhn, The Essential Tension: Selected Studies in Scientific Tradition and Change, p.xii (1977) and is of relevance in the present context.

69 The exact terms of the execution of the adjudged criminal had to be strictly complied with and, for example,

"If an officer beheads one who is adjudged to be hanged, or vice versa, it is murder: for he is merely ministerial, and therefore only justified when he acts under authority and compulsion of the law."

Or:

"... if judgment of death be given by a judge not authorised by lawful commission, and execution is done accordingly, the judge is guilty of murder."

See Blackstone, supra n.54, at pp.178-179.
who wrote that English law considers them to be "without any shadow of blame". 70 Had this been true, why had the risk-distributive principle that allowed ten criminals to go free in order to avoid a wrongful conviction of an innocent person not been applied to these cases!? Why should a justified person carry an increased risk of conviction!?

To answer this query, the exact terms of legally permissible and therefore justifiable homicide need to be restated. It must be clear that a permission to kill was given only when the killing was necessitated by the need to repel the force of some capital crime. In cases of killing by virtue of self-defence which had not been executed as a resistance to one of the capital crimes, a person charged with unlawful killing could only be excused. What could have justified a private application of deadly force by the individual charged with murder was the atrocious character of the crime repelled by him, e.g., rape or murder. 71 A private person, facing a serious crime, had to decide how to resist it and it was his decision that was constitutive of his blameworthiness and the corresponding degree of

70 id., at p.178.

71 id., at pp.180-182. Blackstone held that self-defence is justified by the "primary law of nature" (book III, pp.3-4). On that occasion, he uses the word "excuse" in its colloquial sense and makes it clear that one who defended himself or his property or next of kin is not chargeable.
his guilt. To be justified, that person had to ascertain that he is facing a situation in which a killing of his fellow man is legally permissible. If by killing a man he was not in fact resisting to a capital crime, the homicide had to be regarded as impermissible and blameworthy, i.e., as capable of being merely excused or alleviated but not justified.

The two constitutive elements of this justification, the private defence and the resisted capital crime punishable by death, might explain why the defendant had to prove the facts related to it. The element of private defence was regarded as a mere excuse, and excuses, being considered as incapable of rendering the accused's act unblameworthy, had to be convincingly proved by the accused. The element of capital crime had to be established objectively to ensure that the person who died in the hands of the defendant had in fact forfeited his right to life by acting in a way punishable by death. The right to life was especially valuable by the law\textsuperscript{72} and thus could not be declared to be justifiably forfeited on the basis of doubt. Hence, in the cases of homicide in which a legal loss of the right to life could not be established, the defendant was regarded as blameworthy and could not be fully justified. As Blackstone clarified:

\textsuperscript{72} id., at p.186. For Blackstone's discussion of the right to life see supra n.54, vol. I, at pp.125-130.
"The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their private judgment; by ordaining, that he who slays his neighbour, without an express warrant from the law to do so, shall in no case be absolutely free from guilt."\(^7\)

This analysis of Blackstone has, in addition, to be understood in the light of his scheme of moral gradations to be attributed to human actions. This scheme was based on the idea of free will. Thus, according to Blackstone, only an involuntary act could be morally neutral, i.e., neither blameworthy nor praiseworthy. In contrast, an act which is voluntary (and not merely self-regarding\(^7\)) could either be culpable or subject to commendation. And this is so because "...the concurrence of the will, when it has its choice either to do or to avoid the fact in question", is "... the only thing that renders human actions either praiseworthy or culpable."\(^7\) Hence, a voluntary killing could either be blamed or praised and it was not possible to praise it when it had not been established to be a response to a capital crime.

It can now be concluded that it is the notion of blameworthiness and, in addition, the grave character of

\(^7\) id., at p.187.

\(^7\) It should be mentioned that suicide was not considered by Blackstone as a merely self-regarding act. id., at pp.189-190.

\(^7\) id., at pp.20-21.
the offences of homicide that had determined at Blackstone's time the risk-distributive preferences in criminal cases.\textsuperscript{76} Generally speaking, the blameworthiness of the accused was required to be established beyond all reasonable doubt, whilst excuses and alleviations, not bearing on the issue of blameworthiness had to be proved by the accused.

Having all this in mind, we can now return to the judgment given by the House of Lords in Woolmington. We can observe that there is a connection between this decision and the past, viz. that the justificatory structure of risk-distribution in criminal matters has not been replaced. However, the risk-distributive principles of this structure have been applied to the new situation in such a way that the meaning of these principles was codetermined with the meaning of the case at hand.\textsuperscript{77} In other words, the "golden thread" of the English criminal law which "is always to be seen" is the principle which has required in the past and requires now that all the issues affecting the current blameworthiness of the accused's actions should be

\textsuperscript{76} George Fletcher (supra n.50, at pp.899-907) interprets Blackstone in a different way. He attributes to Blackstone the importation of the "private law style" of adjudication into the criminal law, viz. the idea that the burdens of proof should be allocated on the basis of an unprincipled syntactical distinction between definitional elements of crime and various defences and exculpations. This interpretation seems to me to be unwarranted; see supra n.65 and the following text.

\textsuperscript{77} Cf. Bernstein, supra n.12, at pp.147-148.
proved by the prosecution beyond reasonable doubt. This principle of risk-distribution had to be applied to the current moral situation preceded by the reorientation of the substantive criminal law towards more comprehensive rules of liability. During the course of this historical development, the criminal law has been liberalised and less and less issues have been classified as extrinsic to blameworthiness. Many issues relevant to the question of social tolerableness of certain types conduct, and especially the issues such as mens rea, mistake of fact and self-defence, have become determinative of blameworthiness. A rather more complex framework of moral gradations has emerged, modifying many criminal offences in accordance with varying degrees of their tolerableness.\textsuperscript{78} These profound changes in the moral perception of criminal culpability can explain Viscount Sankey LC's statement that -

"... malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked".\textsuperscript{79}

This statement, though not as celebrated as that about the "golden thread", is one of central importance. It points out the issues which are intrinsic to

\textsuperscript{78} This process is depicted in Fletcher supra n.65 and in Fletcher, Rethinking Criminal Law (1978). See also P.Robinson, Criminal Law Defences: A Systematic Analysis, (1982) 82 Col.L.R. 199; P.Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, (1975) 23 UCLA L.R. 266.

\textsuperscript{79} Woolmington v. D.P.P. [1935] AC 462, 482.
blameworthiness and thus have to be established beyond all reasonable doubt.  

The judgment delivered in Woolmington can therefore be seen as an outcome of critical encounter with past political decisions about the proper distribution of the risks of error in criminal cases. These decisions have been applied to the present situation in a way that reflects a conventionalist understanding of the issues at stake and the corresponding risks of error. At the end, the risks of error, having acquired their contemporary significance, were allocated in accordance with the principles emanating from past political decisions. And it is important to note that the burden of proving "excuses", i.e., the defensive issues extrinsic to the blameworthiness of the accused, was said to continue to be borne by the accused in most cases. Thus, the accused relying on the defence of insanity has to prove it and he must also prove an "exemption, exception, proviso, excuse, or qualification" to a statutory offence. This

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80 This is confirmed by the decisions delivered by the House of Lords after Woolmington. See, e.g., Mancini v. D.P.P. [1942] AC 1 (the defence of provocation in the cases of murder has to be refuted by the prosecution beyond reasonable doubt) and Chan Kau v. The Queen [1955] AC 206 (the same principle applies to self-defence).

81 Later in this work I shall suggest that these words refer to the issues which are extrinsic to blameworthiness, i.e., to "excuses" rather than "justifications".
reassessment of the risks of error in criminal cases and reallocation of these risks in accordance with the preexisting principles illustrate the conventionalist idea of freedom and constraint in judicial decision-making.

3. THE AUTHORITY OF PRINCIPLES AND THE PROBLEM OF OBJECTIVITY

I have argued that the principles of risk-distribution are to be found "from within", by conventionally interpreting the explicit law contained in the institutionally defined legal materials. These materials, being based on political morality, can reveal a framework of principles which reflects the normative attitude of a given society towards the distribution of the risks of error in adjudication. This normative attitude towards risk-distribution can be revealed by taking an internal point of view, one which is shared by the community of interpreters of a given society. When the explicit law is silent about risk-distribution, this attitude has to be understood by taking into account not only the existing adjective provisions, but also the substantive norms which reveal the nature of the risks.

82 The latter rule of the common law was not abrogated by Woolmington and has a statutory counterpart - section 101 of the Magistrates' Courts Act 1980. See R. v. Edwards [1974] 2 All ER 1085; R. v. Hunt [1987] 1 All ER 1. The problems involved in its application will be addressed in due course.
involved. Hence, the risk-distributive principles can speak authoritatively, justifying inferences which are taking place in conditions of uncertainty. The justification for such inferences is supplied by the authoritative character of those principles that best fit the existing law.

The initial selection of risk-distributive principles makes them distinguishable from the arguments that might be admissible in an open-ended political or moral dispute. Moral or political merits are not decisive in singling out the relevant principles of risk-distribution and in eliminating the irrelevant ones.


84 Cf. J. Raz, The Authority of Law, ch.1 (1979); J. Raz, Authority and Justification, (1985) 14 Phil. & Pub. Aff. 3. It appears to me that the principles discernible from a legal system for the purposes of their further application fit the "preemptive thesis" of legal authority advocated by Raz. The principles of a legal system apply in a way that exclude a consideration of other principles. They still need to be weighed by the courts, but the decisions arrived at by the process of weighing are "surrendered" in the sense that the political issues which are considered to be settled by the existing legal principles cannot be reopened.

Raz, however, argues that the principles, in order to be part of the law, have to pass a more rigorous test of "pedigree", and that the morality which justifies and explains the law cannot be seen, for this reason alone, as part of the law. J. Raz, Legal Principles and the Limits of Law, in M. Cohen, Ronald Dworkin & Contemporary Jurisprudence, 73 (1984); Authority, Law and Morality, (1985) 68 The Monist 293; Dworkin: A New Link in the Chain, (1986) 74 Cal. L.R. 1103.
What should make the selected principles relevant is their inchoate juridical significance as justifying ideas of the existing legal order, not their intrinsic goodness. This juridical significance recognised by the community of interpreters supports the distinction between law and morals. The selected principles of risk-distribution are pre-emptive in their capacity as reasons for action: they provide an intermediate level of considerations that can justify judicial decisions without having regard to deeper concerns and exclude an otherwise admissible variety of reasons. The very possibility to extract from the law an intelligible set of principles proves the legal existence of exclusionary reasons that should prevent other principles from being considered by the courts. Raw politics and all other pre-legal concerns of justice and fairness are replaced by the principles which are found within the law. Both exclusion of certain moral principles and preemptiveness of the others rest on the authoritative character of the law.85

Although the principles of risk-distribution that can be formed in such a way are representative of the authority of law, it may still be argued that they would not be sufficiently objective. A complex legal system might be based on no less complex principles which are open-

85 Ibid. For explication of "exclusionary reasons" see J.Raz, Practical Reason and Norms, 35-48 (1975).
textured and therefore inconclusive. Furthermore, such principles may sometimes contradict each other and there may be no master principle to mediate the contradiction. Hence, how can an inconclusive principle be applied without undermining the objectivity of its application? More fundamentally, how should one of the principles be selected to regulate the distribution of the risks of error and what are the criteria for eliminating the others? How do the arguments about risk-distributive matters differ from an open-ended political contest? Legal conventionalism does not offer straightforward solutions to all these problems. The conventionalist approach outlined above deals with the relevancy of principles rather than with their respective weights, and, as was acknowledged at the outset, the weights of principles cannot be determined in advance without regard to concrete situations. This approach recognises the importance of judicial weighing of competing principles, but offers no fixed prescription as to how to weigh them, especially in hard cases. Naturally, this raises a number of questions about the objectivity of both application and balancing of risk-distributive principles.

Before these questions are answered, it has to be made clear that the problems involved in the principles' application and weighing differ qualitatively from the problem of derivability, i.e., from the argument that
the complexity of legal arrangements would make impossible their intelligible translation into determinate set of moral principles. This problem of derivability has to be dealt with from the internal point of view, a standpoint which reflects the understanding of this system by its participants. The main focus of the inquiry would thus be shifted to empirical questions, namely the questions about the existence of shared understandings within the community of interpreters and the extent of these understandings. Hence, the problem of derivability would have to be dealt with at the concrete level of legal discourse. It is most difficult to imagine a legal system which, internally speaking, makes sense to its interpreters and at the same time suffers from the unsolvable problem of derivability, but in the present work there is no need


87 This, of course, is not to say that the argument about complexity that leads to radical indeterminacy can never be articulated and supported by adopting some externalist strategy. As the authoritarian model of legal principles can be criticised politically, the intra-cultural methods of understanding applied by "interpretive communities" can be objected metaphysically: conventionalist practices are experience-based and socially and politically contingent. All this is true, but the contingency of these practices is not a demerit and an externalist critique must thus be constructive in order to succeed. To be constructive, it has to become pragmatic and political and leave its self-refuting (or otherwise unwarranted) metaphysics that support the thesis of radical indeterminacy. See J.Stick, Can Nihilism be Pragmatic?, (1986) 100 Harv.L.R. 332; J.Williams, supra n.42, passim. A good example of constructive political critique can be found in R.Abel, Torts, in D.Kairys, The Politics of Law 185ff (1982).
to prove the impossibility of such a system. The derivability of concrete principles of risk-distribution has to be examined ex concreto. It will be demonstrated in the next part of this work and may now be assumed as given.

It can be argued that despite their authoritative character, the principles of risk-distribution would not be strong enough to avoid the open-endedness of legal argumentation. As has already been admitted, the open-textured principles of risk-distribution, which sometimes contradict each other, will require approximation and balancing. Their applicative approximation and balancing are variable and, arguably, open-ended and therefore non-objective. This lack of conclusiveness and precision is most problematic in the cases of two or more contradictory principles. In such cases the competing principles might be said to be mutually destructive or play a fictitiously objectifying role. They can either prevail by fiat rather than reason or cancel each other out, and by doing so they would inevitably open the way for an unconstrained reasoning and unprincipled judgment.88

The open-textured principles, having a shared core meaning89, do not raise insuperable problems of

88 Cf. Unger, supra n.6, passim.
89 Cf. Hart, supra n.45.
application, and the problem of counter-principles, being worthy of serious attention, should not be exaggerated. Furthermore, from an internal point of view, the problem of open-texture would almost always be parasitic upon the problem of counter-principles, for in the absence of sharply conflicting ideas, an application of one single principle cannot seriously be challenged. It seems, therefore, that the problems involved in the application of a single principle are to be distinguished from the problem of balancing. This distinction has to be made for an additional reason: the judicial activity of approximation is qualitatively different from that of balancing.

Let assume that there is a legal principle requiring the risks of error to be distributed in equal fashion and no counter-principle (such as the principle of utility which requires to maximise the number of substantially correct decisions disregarding the distributive inequality) is applicable to the case at hand.\textsuperscript{90} Let also assume that we know the meaning of the shared concept of equality operating within the legal system and, in addition, that different conceptions of equality can be derived from this shared concept.\textsuperscript{91} The shared

\textsuperscript{90} These two principles present a typical problem of applying the preponderance-of-evidence standard in civil cases. See infra, chap.8.

\textsuperscript{91} Legal literature discussing the distinction between a "concept" and its various "conceptions" is vast. See, e.g., R.Dworkin, A Matter of Principle, 33-
concept of equality requires that the risk of one party's improper loss of £1 is to be considered as neither more nor less harmful than his opponent's loss of the same amount of money. 92 If no counter-principle such as utility is involved, the competing conceptions of equality, reflecting different views as to how to approximate the shared concept of equal distribution of the risks of error, would hardly support two or more radically different outcomes. Since the criteria applied in evaluating the relative merits of varying conceptions are essentially internal, a conventionalist understanding of the legal system would affect not merely the quantity, but also the very nature of conceptual disagreements. The existing conceptions of equality subordinated to their shared core meaning would, therefore, never fall too far from the single centre of normative gravitation. Returning to my example, it is observable that the notion of equality employed in it is not a notion of raw equality, but rather a derivative one. It already incorporates a number of settled issues and reflects them in its form of authoritative directive given to the courts. This directive incorporates a number of pre-emptive

71 (1986).

considerations and lays down an intermediate level of reasoning about equality. For instance, the "deep pocket" considerations, such as the fact that one party is considerably wealthier than his opponent, should not be taken into account for the purposes of risk-distribution. And in the same vein, the fact that one party's loss of £1 has graver consequences than those that can follow from the same loss of his opponent and the potential disadvantages of the people indirectly affected by the judgment are regarded as irrelevant by the notion of equality presented above. These factors may be considered and prevail only when they are supported by another principle capable of outweighing equality.93

Once an internal point of view is adopted, the argument that due to the open-textured character and relative inconclusiveness of its principles, the legal system is non-objective can therefore be raised only by a disappointed perfectionist.94 To establish radical

93 A conventionalist application of one single principle can be problematic only in penumbral cases not presenting a serious challenge to the objectivity of the legal system. Cf. Hart, supra n.45. An imaginary legal system based solely on the principle of utility provides an example which supports this view. J.Bentham, An Introduction to the Principles of Morals and Legislation, esp. ch.2 (J.H.Burns & H.L.A.Hart eds., 1982).

indeterminacy and, consequently, the lack of objectivity of the legal system, its conflicting principles have to be relied on. To this issue I now turn. I shall defend the view that non-objectivity should not be the result of conflicting principles. The arguments advanced to defend this view can also add to the already given response to the scepticism resting on the open-texture of legal principles.

because it is not a micrometer." See Ewald, supra n.43, at p.730.
1. THE STANDARDS OF OBJECTIVITY (or: MORE SCEPTICISM ABOUT SOME SCEPTICISMS)

In what sense can the system based on conflicting principles, and not having a master principle capable of mediating the conflicts, be claimed to be non-objective? To clarify this point, one has to distinguish between different moral positions towards validity of values and the varying degrees of this validity.95 James Fishkin brought forward a number of useful distinctions between different claims of ethical validity and the corresponding moral positions that exhaustively describe all those claims.96 Those claims can be reformulated so as to cover risk-distributive principles as instances of the more general ethical norms. The strongest claim that can be made on behalf of the moral position reflected by a principle of risk-distribution is an absolute one, i.e., that the

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96 Fishkin, id., and esp. in Beyond Subjective Morality, ch.2.
inviolability of the principle in question is not open to reasonable disagreement. According to this absolutist claim, the court is always required to follow the principle in question and would never be justified in overruling it. A less demanding claim is that the principle in question is inviolable in the sense that it would always be wrong to violate it. However, unlike an absolute principle, this principle is not regarded as immune from rational questioning. These two claims emphasise the inviolable character of principles and are thus undeniably objectivist. However, such claims cannot be satisfied in a legal system involving more than one principle and not having a master principle to be applied when the existing principles contradict each other.

A third possible claim about validity of moral principles is even less demanding. According to it, the principles in question

"... are objectively valid, i.e., ... their consistent application to everyone is supported by considerations that anyone should accept, were he to view the problem from what is contended to be the appropriate moral perspective." 97

This claim admits that its principles of morality may, in cases of conflict with other principles, be overridden. This, however, would not undermine their minimal objectivity: once chosen from the appropriate

97 Fishkin, supra n.95, in Beyond Subjective Morality, at p.12.
moral perspective, these principles are regarded as having a priority over anyone's choice of values. The idea of the "appropriate moral perspective" is represented in our context by a conventionalist understanding of the reasons (or principles) that justify the existing legal system and by their authoritative character.98

The remaining claims about validity of moral principles do not have an objective appeal and are thus qualitatively weaker than the previous three. The fourth claim merely contends that the principle of morality supported by it is "universalisable", viz. it has to be applied consistently to everyone to ensure that all the like cases are treated alike. The principles referred to by this claim are not attached any priority over others. They are merely claimed to be applied with consistency and may thus be ab initio subjective. The fifth claim is even weaker. It drops out the claim of universalisable consistency, requiring that what is regarded to be a moral principle must be applied interpersonally, i.e., to others as well as to oneself. Such a principle has no stabilised priority and, in addition, may not be applied to all relevantly similar cases. Thus, a relativist may well apply X's values to Y without being morally obliged to apply Y's values to

98 Fishkin (id.) points out the possibility to formalise this notion by using different moral-decision procedures.
X.99 The sixth claim is the weakest one. According to it, one's values are not applicable but to himself and thus the possibility of making an interpersonal judgment is denied even in its modest non-universalisable sense.

All the possibilities of either full or partial adoption of these six claims can be represented by seven ethical positions in a way that any internally consistent position on these claims would fit one, and only one, of the seven possibilities that follow. Thus, an acceptance of all six claims characterises an absolutist moral position: "... an assertion of rationally unquestionable principles that hold inviolably, with objective validity, with universalisability, and, of course, that apply to others as well as to oneself." A rejection of the absolutist claim followed by the acceptance of the remaining five claims of moral validity would produce a position of rigorism, one that applies objective principles without any exceptions. If we reject both absolutist and rigorist claims but accept the remaining four, we could find ourselves in the third position of minimal objectivism. In this position, moral principles might well be subjected to exceptions and are not beyond reasonable question. However,

100 Further subdivisions of ethical positions are possible, but this possibility would have no effect on Fishkin's argument. id., at pp.11; 15.
101 id., at p.15.
"Lacking some single inviolable principle (or list of inviolable principles in lexical order), we may, nevertheless, lay claim to objective principles that are weak or prima facie, that hold only ceteris paribus and hence are capable of being overridden or traded off, one for another." \(^{102}\)

All other ethical positions that sequentially reject the first three and the remaining claims of moral validity are subjectivist. If, for example, we were to reject the first three claims but accept those remaining, we would find ourselves in the position that can be called a subjective universalism. This position has no claims of objectivity as to its choice between basic moral alternatives; yet the admittedly subjective values which have ultimately been chosen from this position are claimed to be applied consistently, to others as well as to oneself. A rejection of the subjectively universalist and the preceding three claims leads to what may be called a relativist moral position. This position holds that one can be bound by values so long as he, or the group he belongs to, subscribes to them. Despite the denial of moral objectivity and, in addition, of any kind of universalisability, the principles of morality applied from this position in accordance with the respective values of their subjects hold interpersonally. \(^{103}\) A more extreme moral position which restricts the application of moral principles to oneself

\(^{102}\) id., at p.17.

\(^{103}\) id., at pp.18-20.
can be labelled as personalism. This position is followed by amoralism, i.e., by a total denial of all the six claims of moral validity.104

The third moral position is the most important one. According to it, despite the fact that the principles of risk-distribution can compete, be balanced and overridden, they would remain objective. The fact that such principles are chosen from what is regarded as an appropriate moral perspective and are therefore both historically and socially contingent does not detract from their objectivity. There is, however, a commonly shared view or expectation that the truly objective principles must be inviolable and unquestionable, hold with universalisable consistency and be applied to others as well as to oneself. This empirically established expectation is, as was emphasised by Fishkin, one of the major cultural problems (or defects) of the liberal tradition.105 This expectation sets out an unrealistically high standard of moral objectivity and it seems that instead of trying to satisfy this standard one has to consider its utility. There is no

104 id., at pp.20-22.

105 id., chs.3 & 4. Fishkin's observations are based on the empirical study of non-professional moral reasoning. Some of the professionals associated with the Critical Legal Studies movement have developed a similarly absolutist expectation of objectivity in their critique of existing legal practices. For criticism of this unwarranted expectation see J.Stick, supra n.87; J.Williams, supra n.42.
apparent reason to support the view that the principles that may be overridden in the process of their balancing would not constrain the ultimately arbitrary will of the judge, making his discretion unfettered. The discretion to be used in such processes of balancing might indeed be strong\textsuperscript{106}, for the conventionalist approach offers no fixed prescriptions as to how to decide particular cases. However, this approach limits the powers of discretion by surrounding the open area of judgment by the belt of principles, a limited number of preemptive reasons which, on their conventionalist understanding by the community of interpreters, are derived from the explicit law. There may be no right answer to any single question that may arise, but this does not mean that "everything goes", and the equation of this limited amount of uncertainty with non-objectivity and even arbitrariness is therefore wrong.\textsuperscript{107}


\textsuperscript{107} For a detailed study supporting this position in regard to administrative discretions which are usually less structured than the adjudicative ones see D.Galligan, \textit{Discretionary Powers: A Legal Study of Official Discretion} (1986). Cf. B.N. Cardozo, \textit{The Nature of the Judicial Process, 112-114} (1921):

"My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. . . . If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator
2. RISK-DISTRIBUTIVE OBJECTIVITY EXEMPLIFIED

A concrete example may, perhaps, clarify this point better than a generalised discussion of uncertainty in law. As was revealed by the analysis of the case of Woolmington\(^{108}\), the prosecution in criminal trials bears all apprehensible risks of error concerning all the issues that affect the blameworthiness of the defendant's act.\(^{109}\) Issues regarded as extrinsic to blameworthiness, such as those relating to the defence of insanity and the like, are held to be established by the accused on the balance of probabilities.\(^{110}\) The former standard of proof that requires the triers of facts, as a prerequisite of conviction, to be satisfied of the defendant's guilt beyond any reasonable doubt is an expression of the principle of protecting the innocent. An individual must be secured from a wrongful

gets it, from experience and study and reflection; in brief, from life itself. ... The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other."

\(^{108}\) supra, chap.5, par. 2.2.

\(^{109}\) It is a well-established rule that a mere fanciful or, in Zuckerman's words, "imperceptible" doubt does not need to be eliminated by the prosecution. See A. Zuckerman, The Principles of Criminal Evidence, 134-140 (1989). This standard of proof is frequently described as "moral certainty". Shapiro, supra n.55.

\(^{110}\) There are, of course, statutory rules deviating from this principle. It is, however, submitted that this principle must guide the judicial discretion in relation to the risks of error in criminal cases. In the absence of rigid constitution, the legislature, but not the judiciary, is legally free to decide in an unprincipled way. See supra n.53.
conviction even at the expense of the necessitated wrongful acquittals of many dangerous criminals.\textsuperscript{111} The latter standard of proof which requires a mere preponderance of evidence is grounded upon a different principle. Inasmuch as criminal cases are concerned, this standard is aimed to achieve, in the long run, a preponderance of factually correct decisions.\textsuperscript{112} The idea of maximising the number of substantially correct decisions is derived from the principle of utility.\textsuperscript{113}

Hence, when it is not altogether clear whether or not the issue under examination is intrinsic to the

\textsuperscript{111} See Zuckerman, supra n.109, ch.9.

\textsuperscript{112} In civil cases, this standard may also be explained by the principle of equality, the issue to be dealt with in chapter 8. See supra, n.92.

\textsuperscript{113} Cf. R.Winter, The Jury and the Risk of Non-Persuasion, (1971) 5 Law & Society Rev. 335; D.Kaye, The Limits of the Preponderance of Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation, [1982] Amer. Bar Found. Research Journal 487. This approach arises from the rationalist tradition which dominates the law of evidence and procedure. This tradition postulates that rectitude of judicial decision is the main aim of adjective law. See W.Twining, The Rationalist Tradition of Evidence Scholarship, in E.Campbell & L.Waller, Well and Truly Tried, 211 (1982). The core of this attitude is a Benthamite one, as summarised by G.Postema:

"... we are to judge the adequacy of a system of judicial procedure not directly in terms of the Principle of Utility but rather in terms of the system's success (or likely success) in properly executing the substantive law, and only indirectly in terms of the system's utility."

accused's blameworthiness, the principle of utility might well compete with and outweigh the principle of protecting the innocent. This problem of competing principles arises in relation to what is known in England as the "third exception" to the Woolmington rule.\footnote{114} This exception is, undeniably, the most important and problematic one.\footnote{115} According to it, if an accused relies on any exception, exemption, proviso, excuse or qualification to a statutory offence, he must prove any of those on the balance of probabilities.\footnote{116} But how do we know that a particular defence is an "exception", "exemption" and the like? Surely, the syntactical distinction between the definition of the


\footnote{115} The first two exceptions, requiring the accused to prove certain facts on the balance of probabilities, are less important and relatively non-problematic in their application. According to the first exception, if an accused relies on the defence of insanity, he must prove it. See Woolmington v.D.P.P. [1935] AC 462, 481-482; R.Cross, On Evidence, 6th ed., at p.115 (1985). (This defence is rarely relied on by accused persons and when it is raised by the prosecution, the prosecution must prove it beyond all reasonable doubt - see A.Zuckerman, supra n.109, at p.142, n.64 and the accompanying text) The second exception to the Woolmington rule deals with statutes that expressly impose on the accused the burden of persuasion. Such provisions are listed in S.Phipson, The Law of Evidence, 13th ed., 51ff (1982); R.May, Criminal Evidence, 49 (1986); R.Cross, id., at p.116-118; see also section 4(2) of the Financial Services Act 1986 and s.139(4) and (5) of the Criminal Justice Act 1988.

\footnote{116} The sources of this exception are the common law and the Magistrates' Courts Act 1980. It is applicable to both summary proceedings and trials on indictment: R v. Hunt [1987] 1 All E.R. 1, 9-10; 14-15.
offence and an exception to it is untenable. As J.Stone pointed out, there is no difference between a quality of a class as contained in the definition of the class, and a quality of a class as contained in an exception to the class. For "... every qualification of a class can equally be stated without any change of meaning as an exception to the class so qualified." It has therefore to be asked why have the defences covered by the "third exception" been singled out? Why is it that in relation to these and not other defences the risk-distributive principle of utility outweighs the principle of protecting the innocent?

In my opinion, these defences are excuses and not justifications: they are granted to the accused not because his act is considered to be unblameworthy but as a matter of lenience, despite the fact that he had infringed the public interest protected by a criminal norm. Typically, an excuse shifts the focus from the socially harmful act to the personal circumstances of


its actor, whilst a justification is all-encompassing and conveys a general normative message that other people may rely upon in similar cases. In Professor Hart's words, a justified act is an act which "... the law does not condemn, or even welcomes"; an excused act "... is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the


public condemnation and punishment."120 Although the exact characteristics of excuses and justifications are being contested, the core meanings of the two are well-settled.121

A justified defendant (e.g., an individual acting with authority) is no different from an otherwise innocent person. Therefore, he is entitled to be protected from the risks of error as all those who have not been established to have infringed or endangered the public interest protected by the criminal law. The principle of protecting the innocent, to be applied in a coherent fashion, has to protect the accused from possible errors in every issue which is intrinsic to his blameworthiness. By contrast, if one who had infringed the public interest protected by the criminal law is asking to be excused, he should be required to establish the conditions for his being excused on the balance of probabilities. From the point of view of protecting society from the crime, the court’s reaction to harmful

120 H.L.A.Hart, Punishment and Responsibility: Essays in the Philosophy of Law, 13-14 (1968). Professor Hart further clarifies that excuses are to be recognised "... as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law reflects the claims of the individual as such ... and distributes its coercive sanctions in a way that reflects this respect for the individual." Id., at p.49.

behaviour capable of being excused should not convey to the public any message to be relied on as a norm.\textsuperscript{122} If the benefit of doubt is granted to accused persons in relation to excuses, excuses might easily become the norm and thus substantially reduce the level of deterrence.\textsuperscript{123} Excuses, to be relied on, should therefore require a detailed and cogent proof so that the number of erroneous acquittals based solely on them will be kept to the minimum. Since excuses are extrinsic to the blameworthiness of those charged with criminal offences, the innocent-protecting principle cannot be allowed to trump the principle of utility in the cases of excuses. This approach fits the risk-distributive scheme that can be found within the English law of criminal evidence on its conventionalist understanding.\textsuperscript{124}

In some cases, classification of criminal defences can easily be made, allowing a relatively straightforward application of the principle of protecting the innocent and that of utility. Thus, the defences of holding a licence, prescription or authority for doing something which is otherwise prohibited are justifications and not excuses. These defences relate to the general features

\begin{enumerate}
\item\textsuperscript{122} Fletcher, supra n.119, in 47 So.Cal.L.R. 1269.
\item\textsuperscript{123} Cf. R.Posner, An Economic Approach to Legal Procedure and Judicial Administration, (1973) 2 Jo.Leg.Stud. 399, at p.412.
\item\textsuperscript{124} See supra chap.5, par.2.2 and infra chap.9.
\end{enumerate}
of the act, rendering it at least morally neutral and sometimes even socially desirable. Hence, the principle of protecting the innocent should apply to all these defences.\footnote{125} In contrast, the defences like "diminished responsibility" and "infanticide"\footnote{126} or the defences of "no-negligence", qualifying an absolute liability imposed by some criminal offences,\footnote{127} are excuses. Similarly, a defence based on the motive of the accused is an excuse.\footnote{128} Both excuses and justifications may lead either to complete acquittals or to appropriate modification of offences. The moral reasons supporting

\footnote{125} It is therefore submitted that \textit{R v Edwards [1974] 2 All ER 1085} was wrongly decided. Cf. Zuckerman, supra n.114.

\footnote{126} For lenient reasons behind these defences see G.Williams, \textit{Textbook of Criminal Law}, 2d ed., 687; 692-695 (1983).

\footnote{127} See, e.g., sec. 4(2) of the Financial Services Act 1986, Misuse of Drugs Act 1971, sec.28(3)(i); Offices, Shops and Railway Premises Act 1963, sec.67; Trade Descriptions Act 1968, sec.24(3); Food and Drugs Act 1955, sec.3(3); G.Williams, \textit{ibid}, at pp.940ff; 978ff.

an acquittal or offence-modification distinguish between
the excusing and the justifying character of the two.129

But what happens in hard cases of classification? Should
one of the competing principles be arbitrarily chosen to
regulate the risk-distributive decisions that are taking
place in such cases!? This problem of classification
for risk-distributive purposes has recently been faced
by the law lords in the very important case of Hunt.130
The accused was found in possession of a mixture which
contained an unknown quantity of morphine. Possession
of morphine is an offence under the Misuse of Drugs Act
1971. However, possession of not more than 0.2% of
morphine mixed with unprohibited ingredients is not an

129 Following P.Robinson (supra n.119, in 82
Col.L.R. 199), an additional notion of "offence-
modification" may be invoked to adjust the existing
terminology. Justifying reasons capable of modifying
the very nature of criminal conduct do not necessarily
apply in an all-or-nothing fashion, as the colloquial
meaning of the word "justification" would suggest.

130 R v. Hunt [1987] 1 All ER 1. The judgment
delivered in this case has been thoroughly discussed.
For different views of this judgment see J.C.Smith, The
A.Zuckerman, supra n.117, in (1987) 103 L.Q.R. 170;
A.Zuckerman, The Principles of Criminal Evidence,
pp.142-149 (1989); G.Williams, supra n.117; P.Healy,
355; D.Birch, Hunting the Snark: The Elusive Statutory
Exceptions: A Third Knot in the Golden Thread?, [1988]
Crim.L.R. 31; G.Peiris, Continuing Departures from
Woolmington: A South Asian Perspective (1987) 7
Leg.Stud. 279; R.Mahoney, The Presumption of Innocence:
A New Era, (1988) 67 Can. Bar R. 1, at pp.41-49; Stein,
supra n.118.
offence. The House of Lords decided that the defence of possessing a mixture containing 0.2% of morphine or less is not one of the defences to which the third exception to the Woolmington rule has to apply. The burden of proving beyond all reasonable doubt the prohibited amount of the drug was held to be carried by the prosecution. As the latter did not discharge that burden, the conviction of the accused was quashed. The classification of the defence in question was based on the following considerations.131 First, the judicial commitment to the principle of protecting the innocent has once again been emphasised, mentioning that the courts should be very slow in deviating from this basic principle. Second, the ease and convenience of the parties, and especially those of the accused, in proving the relevant facts were treated as very important factors. Finally, the seriousness of the alleged offence is a factor to be also taken into account because it is unlikely that Parliament intended a defendant charged with a serious crime to carry the risk of non-persuasion.132

131 This summary represents the opinions delivered by Lord Griffiths (Lords Keith and Mackay concurring) and by Lord Ackner. Lord Templeman, reaching the same conclusion, had classified the defence raised by the accused on the basis of plainly linguistic interpretation.

132 This last consideration was not referred to in Lord Ackner's opinion.
The consideration based on ease and convenience appears to be plainly inappropriate in the present context, for it imports into the criminal trial the civil policy of ease and convenience. This policy is justifiable in civil cases, because, subject to exceptions, the risks of error in those cases are to be treated as equal in relation to both parties.\(^{133}\) In criminal cases, the risks of error are not equal and the risk of convicting an innocent person is considerably more harmful.\(^{134}\)

Hence, the mere fact that the accused holds better knowledge as to his guilt or innocence is not an adequate reason for deciding that he must bear the risk of non-persuasion. Such an explanation would also be irrational, for the problem of ease and convenience can easily be resolved in a considerably less harmful way by imposing on the accused the evidential burden.\(^{135}\)

\(^{133}\) See supra n.92 and the accompanying text.

\(^{134}\) This generally accepted point is, however, approached in different ways by civil-libertarian and utilitarian scholars. Unlike the former scholars, the latter are prepared to submit this issue to an ordinary cost-benefit analysis. Cf. R.Dworkin, A Matter of Principle, 72ff (1986) with R.Posner, supra n.123. For a general review of this issue see J.Jeffries & P.Stephan, Defences, Presumptions, and the Burden of Proof in Criminal Law, (1979) 88 Yale L.J. 1325. See also Stein, supra n.118.


This distinction between the burden of persuasion and a merely evidential burden (the burden of production of the proofs) was first laid down by J.B.Thayer, The Burdens of Proof, (1890-1) 4 Harv.L.R. 45. It subsequently appeared in J.B.Thayer’s work A
Moreover, the reasons of ease and convenience cannot be used as a basis of differentiation between different defences because this would lead to arbitrariness in allocating the risks of error. These reasons do not tell anything about why the society's risk-related preferences vary in relation to different claims of innocence. They thus contradict the principle of legality by unjustly endangering innocent persons and generate an indefensibly unequal treatment of various accused.\textsuperscript{136}

By laying down a vague directive that the courts have to be "very slow" in imposing the burden of persuasion on the accused,\textsuperscript{137} the House of Lords had opened the way to unprincipled decisions. The inferiority of the defences covered by the third exception to the Woolmington rule must be justifiable in substantive terms\textsuperscript{138}, and thus reflect the distinction between excuses and

\begin{quote}
 Preliminary Treatise on Evidence at Common Law, 355ff (1898).
\end{quote}

\textsuperscript{136} G.Williams, supra n.117, at p.295.

\textsuperscript{137} Cf. the debate between Mirfield and Birch, supra n.130.

\textsuperscript{138} J.C.Smith & B.Hogan, Criminal Law, 6th ed., 178 (1988), argue that "any attempt to categorise defences as justifications and excuses would, in the present state of the law, be premature ..." This is debatable. The classification of defences is not dependent on the concrete contents of positive law: it belongs to analytical jurisprudence and is aimed at clarifying normative choices made within a positive law. In the present context, any distinction to be made between different claims of innocence must be sustainable. Cf. J.Harris, Legal Philosophies, 78 (1980).

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justifications. It must be made clear that if there is no distinction of substance between those and other defences, the directives laid down in Hunt would be of a very limited help. Without a distinction of substance, the courts would never be certain about when to be "very slow" in imposing the risk of non-persuasion on the accused. What the courts will almost always be certain about would be that the accused holds better knowledge as to the facts behind his defence. Hence, if the offence in question is not too serious and everything else is equal, the accused would end up bearing the risk of error. If, by contrast, the inferiority of defences (viz. their excusable rather than justifiable character) can be established by reference to the substantive criminal law, the directives of Hunt, ignoring this distinction, might generate plainly irrational results. As a consequence of these directives, some of the non-inferior defences could be considered for non-substantive and therefore irrelevant reasons as inferior ones, and some of the inferior defences could be adjudicated as if they were non-inferior. Hence, in some cases, the accused would be put at an unjustifiable risk of being wrongfully convicted, and in other cases, an increased risk of wrongful acquittals would be carried by society. The directive related to the seriousness of the offence would, in addition, render the society's risk even graver by increasing the number of wrongfully acquitted criminals who have committed
serious offences. Hence, G.Fletcher's critique that "Neither Woolmington nor its progeny confronted the general significance of moral guilt in burden-of-persuasion cases" still obtains.139

How should the principle-based approach have been applied to the facts of Hunt? The relevant statutory rule had exempted from the prohibition possession of a mixture containing not more than 0.2% of morphine. This exemption relates to the act of possession and not to its actor. It indicates that there is no social harm in possessing a small portion of morphine mixed with unprohibited compounds. If possession of a substance containing any quantity of morphine, however small, were socially harmful, there would be no reason to excuse someone merely because he decided to mix the drug. It is therefore clear that the defence in Hunt must be classified as a justification which is intrinsic to the accused's blameworthiness. Once raised by the accused,

139 Fletcher, supra n.50, at p.919. The recent decision of the Court of Appeal in R v Brightman; R v Allath Construction Ltd, The Times 3.3.1990, in which the directives of Hunt were applied, confirms this observation. In this case, the defendants charged with cutting down of protected trees have been held to carry the burden of persuasion in relation to the defences of "the cutting down, uprooting, topping or lopping of trees which are dying or dead or have become dangerous", or the cutting down etc. "... of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance". At least some of these defences are justifications.

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this defence has to be refuted by the prosecution beyond all reasonable doubt.140

It can still be argued that Hunt was a relatively easy case and that the classification of defences would be most difficult, if not impossible, in the really hard cases. Perhaps this is right. But would the impossibility of making sharp distinctions between defences inevitably lead to the arbitrariness of any decision as to how to distribute the risks of error? Would the correctness of the choice between the principle of protecting the innocent and that of utility be in such cases a matter of sheer luck?141 In my view, the answer to these questions is in the negative. In order to refute the imputation of arbitrariness, it would be sufficient to offer one workable solution to the problem at hand. It is suggested that the principle of protecting the innocent be outweighed by utility if, and only if, the defence raised by the accused cannot be regarded as capable of rendering his act unblameworthy by reasonable men participating in the community of interpreters. In other words, any reasonable ambiguity

140 Following the "peculiar knowledge" rule, the accused is to be required to produce some evidence in support of this kind of defences in order to raise the issue. R.Cross, supra n.51, at pp.110-112; R v Gannon (1988) 87 Cr.App.Rep. 254, 256.

141 Cf. T.Nagel, Moral Luck, in Mortal Questions 24 (1979), and see especially his remarks on epistemology at pp.27 and 36, n.11. See also B.Williams, Moral Luck, ch.2 (1981) and Note, The Luck of the Law: Allusions to Fortuity in Legal Discourse, (1989) 102 Harv.L.R. 1862.
emanating from the complexity of moral situations covered by some criminal defences should be resolved in favour of the accused, classifying his defence as a justification and not as a mere excuse. As a rule of thumb, if the blameworthiness of his act has not been established, his right to equal treatment by the criminal law must prevail and he should be treated in respect of his defence as any other presumptively innocent person.\footnote{Stein, supra n.118. Cf. Fletcher, supra n.50, at p.890; R.Dworkin, A Matter of Principle, 84-85, 92 (1986). It has to be remembered that the third exception to the Woolmington rule (the Magistrates' Courts Act 1980, sec.101 and its common law counterpart) contains a rule of decision directed to the courts (and other relevant officials) and not a rule of conduct addressed to the general public. This makes an adoption of the suggested approach possible: in dealing with a rule of decision, the judge (or other decision-maker) has a greater liberty in exercising his discretionary judgment. This distinction is discussed by M.Dan-Cohen, Decision-Rules and Conduct Rules: On Acoustic Separation in Criminal Law, (1984) 97 Harv.L.R. 625 and M.Kremnitzer, Interpretation in Criminal Law, (1986) 21 Israel L.R. 358, 364-387. The idea of risk-distributive equality will be dealt with in more detail in part four.} This solution admits that some of its outcomes may well ultimately be wrong. It takes into account the possibility of error, and since in criminal adjudication a "non liquet" solution or suspended judgment can hardly be tolerated, the suggested approach provides a workable, albeit non-ideal, framework of justification. Within this framework, the risk of error involved in a morally difficult choice is accounted for and reflected by the
This method of decision-making is neither arbitrary nor otherwise subjective. It constitutes a principled way of solving difficult problems in practical reasoning.

Dworkin argues that his two-dimensional approach, referring to the dimension of "fit" and that of "political morality", can lead at least theoretically to a single right answer even in the cases that involve counter-principles. The risk-distributive framework of principles which was delineated above is based solely upon the notion of "fit". This notion was employed for its having strong links with authoritative legal materials and the principles that can be discerned from these materials. These principles reflect what has already been authoritatively considered and it is their preemptiveness that eliminates the arguments which, in the light of the best justification of legal materials, are irrelevant. In the case of equally balanced principles, the political (or moral) dimension of reasoning would not maintain the necessary link with legal authority. Since, in my view, only legal authority can and should adjudicate between competing principles or interpretations of the law, the dimension of political morality cannot lead to an objectively


correct (or legitimately uncontestable) right answer. It would, however, be totally unwarranted to infer from this that any decision involving counter-principles is bound to be given at random, rendering the system of law irretrievably subjective. For this inference does not only superimpose a non-realistic standard of objectivity on judicial decision-making, but also mistakes the very role to be played by principles in practical reasoning. The ultimate result of principle-based reasoning might well be a mere approximation of perfectionist objectivity, but this is not fatal to the objectivity of the entire system. Principle-based reasoning would, at the very least, be preponderantly objective in the long run of cases.\textsuperscript{145}

It might still be argued that my example is inadequate because it involved a criminal case in which any decision made in conditions of uncertainty in favour of the accused is morally appealing.\textsuperscript{146} In difficult civil  


\textsuperscript{146} Thus, George Fletcher (supra n.50, at pp.919ff and supra n.78, at pp.545ff) and Glanville Williams (supra n.117, at pp.262 and 279-282 - subject to one exception) argue that the accused should not carry the burden of persuasion (as distinguished from the evidential burden) even in relation to excuses. Similarly, a number of American courts have declared unconstitutional some of the provisions defining defences in a compromised way by imposing the persuasive burden on the accused. These rulings appear to be counterproductive: being unable to shift the persuasive burden to the accused, many state legislators found the "alternative" in not allowing the very defence. See Jeffries & Stephan, supra n.134, passim.
cases which involve conflicting principles the problem of making a non-arbitrary decision might still be insoluble. I think that this argument is wrong. If the relevant principles of risk-distribution are equipoised, a workable solution that can be adopted is the preservation of the status quo ante, i.e. a rejection of the plaintiff's claim. This kind of solution is incorporated by the Anglo-American rule of evidence which stipulates that the evidence produced by the plaintiff must preponderate in order to enable the plaintiff to win his case.\textsuperscript{147} As was submitted above, this rule of burden of proof does not instruct the decision-maker as to how to determine the "preponderance of the evidence", the process which goes beyond purely factual issues and should be regulated by moral principles of risk-distribution. But the ideas of preserving the status quo and official non-interference, which are also reflected by this rule, can easily be applied to a situation of equally balanced moral principles. An adoption of this solution as a last resort would not lead to radical subjectivity and arbitrariness.\textsuperscript{148}

To answer the question which principles of risk-distribution have to be applied within a legal system,

\textsuperscript{147} This solution is not pretended to be the ideal one, but is not arbitrary. See Winter, supra n.113.

\textsuperscript{148} See J. Fishkin, Beyond Subjective Morality, pp.129ff (1984); MacCormick, supra n.33, at pp.265-274.
the jural relations existing in fact-finding processes of this system must be set out with maximal precision. A precise description of these relations would reveal the relevant moral and political choices taking place in judicial reasoning under uncertainty. A conceptual framework capable of clarifying these choices is therefore required. Such a framework ought to be built up on the basis of rights. After all, the principles of risk-distribution are rights-conferring, and it is this fact that distinguishes them from policies. Hence, it is worth asking what risk-related rights do people really have in connection with judicial fact-determination? Legal principles and rights are closely linked with each other, and it is this issue that will now be discussed.

3. RISK-DISTRIBUTION AND RIGHTS

Risk-distributive principles which should be found within the law operate within a particular context of concrete jural relations. To understand the jural relations affected by risk-distributive decisions, one has to reduce them to their lowest common denominators. This reductionist approach to jural relations has most

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persuasively been argued for (but not pioneered\textsuperscript{150}) by Wesley Newcomb Hohfeld.\textsuperscript{151} His framework of concepts, describing basic legal interrelationships in the scheme of opposites and correlatives, was designed to expose the reality of moral and political choices located within the law. The concepts he used have actually been

\textsuperscript{150} This analytical approach can be traced to John Austin, Henry Terry and John Salmond who's discussions were affected to a considerable extent by the earlier writings of Jeremy Bentham and John Stuart Mill. See J.Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, [1982] Wis.L.R. 975; J.Hall, Readings in Jurisprudence, 442-537 (1938); J.Dainow, The Science of Law: Hohfeld and Kocourek, (1934) 12 Can. Bar Rev. 265.

\textsuperscript{151} W.N.Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1923). The original articles of Hohfeld were published in (1913) 23 Yale L.J. 16 and (1917) 26 Yale L.J. 710. They bear the title Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. The above-mentioned book edited by Walter Wheeler Cook (hereinafter referred to as "Hohfeld") includes some additional works of Hohfeld.

applied in judicial reasoning to solve many practical problems which arose in everyday legal life. His scheme of interrelationships corresponds to the actual states of legal affairs existing between individuals in contested trials (or outside courtrooms) and had not been made in abstracto.\textsuperscript{152} Hohfeld applied his analysis to substantive law. His analytical framework was destined to be extended so as to cover adjective jural relations as well, but his untimely death prevented the carrying out of the remainder of his project.\textsuperscript{153}

A Hohfeldian approach is essential for conventionalists because its conceptual framework helps to understand the inner rationality of the law. The principles operating within the law do not exist beyond concrete jural relations between particular legal persons and, as was mentioned above, acquire their meaning as rights, duties, powers, privileges, immunities and liabilities through these relations. Normative choices reflected in this framework of concepts are not made from an independent moral or political perspective. Nor do they stem from a priori reasoning of the judges. These choices are authoritative and intracultural. They derive

\begin{quote}
\textsuperscript{152} W.W. Cook, Hohfeld's Contributions to the Science of Law, (1919) 28 Yale L.J. 721 (reprinted in Hohfeld, ibid, at pp.3-21); A. Corbin, Jural Relations and Their Classification, (1920-21) 30 Yale L.J. 226.

\textsuperscript{153} See Hohfeld, supra n.149, at p.64, n.100 (in which some of the ultimately unperformed parts of his project are outlined), and the note added by W.W. Cook.
\end{quote}
from past political decisions which, on their
conventionalist understanding, carry legal significance.
They belong to a particular political culture which
employs certain concepts to signify legal meanings,
communicating the necessary information to both
decision-makers and those actually or potentially
affected by judicial processes. Therefore, within a
culture which employs a right-based legal rhetoric and
attributes significance to the notion of legal rights,
Hohfeld’s analytical tools are both epistemically and
politically indispensable.\(^{154}\)

For example, it is important to know, that a certain
entitlement is a "privilege" rather than "right", viz.
that the individual is protected merely from the claims
aimed at legally restricting his choice, having no
corresponding right legally to compel somebody to behave
in a particular way. The correlative of "privilege" is
"no-right" rather than "duty", and as was shown by

\(^{154}\) For debates on the utility of Hohfeldian
approach see M.Radin, A Re-Statement of Hohfeld, (1938)
51 Harv.L.R. 1141 (a realist’s critique of Hohfeld);
Singer, supra n.149 (a political importance of Hohfeld
from the CLS perspective); Finnis, supra n.151 (a
demonstration of the utility of Hohfeldian approach).

For general significance of analytical
jurisprudence see J.Austin, Lectures on Jurisprudence,
vol.II, at pp.1107-1118 (1869); W.N.Hohfeld, A Vital
School of Jurisprudence and Law, in Hohfeld, supra
n.149, at pp.348-351; H.Kelsen, A Pure Theory of Law
and Analytical Jurisprudence, (1941) 55 Harv.L.R. 44;
H.L.A.Hart, Definition and Theory in Jurisprudence,

For recent reassessment of analytical approach
see W.Twining, Academic Law and Legal Philosophy: The
Hohfeld, there are often very good reasons to allow "privileges" (or "liberties" in the ordinary language) to be unaccompanied by duties. It is therefore a logical error to deduce "claim-rights" from "privileges" and to equate a "no-right" with a "duty". One's privilege may be allowed to be exercised in a way that interferes with a privilege of another, and if both privileges are left uncorroborated by the duties, none of the parties would have a legitimate claim against another. The same analysis applies to "immunity" which, as a correlative of legal "disability" (or "no-power"), has also to be distinguished from the notion of "claim-right". One's immunity implies that he is exempted from an otherwise existing "liability", i.e., that he is free from the legal "power" (or control) of another as regards some legal relation between the two. It does not mean that a legally disabled party should refrain from doing something that in fact compels the holder of the immunity to give it away. For an immunity might not be corroborated by the right and the corresponding duty and there may be good reasons explaining why this should be so. To exemplify this point and demonstrate the significance of Hohfeldian analysis, I shall now return to the field of evidence

155 See Hohfeld, supra n.149, pp.36-50; for an illuminating discussion see Singer, supra n.149.

156 Hohfeld, supra n.149, at pp.38-41.

157 id., at pp.60-63.
and first discuss a recent judgment concerning the remedial side of the "right" of silence.

In R v. Fulling\textsuperscript{158}, the accused, who was suspected of fraud and interrogated by the police, refused to cooperate until she was told that her lover was having an affair with the woman occupying a cell adjacent to that of the accused. According to the accused at her trial, she found the proximity of that woman so unbearable as she made a confession merely with a view to be discharged from the custody. She challenged the admissibility of her confession on the ground of its being obtained by oppression, contrary to the Police and Criminal Evidence Act 1984.\textsuperscript{159} The decision delivered by the Court of Appeal was that the key word "oppression" is to be given its ordinary meaning. This meaning was eventually found in the Oxford English Dictionary and said by the court to reflect a "detestable wickedness", which, granted that the accused told the truth about her interrogation by the police, had not taken place in her case. The conviction of the accused was therefore upheld.

As Zuckerman rightly remarked, "A perfunctory reference to a dictionary entry can hardly provide the police with

\textsuperscript{158} R v. Fulling [1987] 2 All ER 65.

\textsuperscript{159} More specifically, contrary to sections 76(2)(a) and (8) of the Act.
guidelines for the conduct of interrogation."160 The court's substitution of a legal standard by what Bentham would probably have called a "passion-kindling appellative"161 is plainly unsatisfactory. What, however, is more interesting here is the continuation of Zuckerman's critique of the judgment, namely that "... the Court of Appeal does not regard the suspect's privilege against self-incrimination to be very important."162 Was this privilege of Ms Fulling really infringed by the police?

In my view, the answer to this question is in the negative. The "privilege" against self-incrimination or the "right of silence" is an "immunity", i.e., a correlative of the police's disability (or "no-power") legally to compel the accused to explain his or her acts.163 No duties of crime-investigating authorities

160 A. Zuckerman, The Principles of Criminal Evidence, 333 (1989). It seems to be clear that the court has mistaken the theoretical (or normative) disagreement about "oppression" for empirical disagreement. For general discussion see R. Dworkin, Law's Empire, ch.1 (1986).


162 supra n. 158.

163 It has to be mentioned for the sake of accuracy that the accused (and suspect) has a "right of silence", disregarding that his testimony may not necessarily incriminate him. Witnesses have only a "privilege against self-incrimination", having no right to remain silent. The accused's privilege would thus more accurately be described as his legal entitlement not to co-operate with the prosecuting authorities. See G.
can be deduced from this immunity. It is true that some specific duties of the police can be associated with the right of silence. Thus, it is a duty of the police to conduct its interrogations in a way which involves no oppression. The police is also prohibited from extracting a confession in a way that might render it unreliable. To be sure, degrading treatment of and physical assaults upon a suspect are also prohibited, and it is a duty of investigators to refrain from such practices. All these duties are corollaries of the rights of the accused and a violation of any of such rights might lead to exclusion of the evidence obtained as a result of that violation.164 But all those rights

Williams, The Proof of Guilt, 37-38 (1963). These two different rights gave rise to the notorious problems of obtaining real evidence held by a person suspected of a crime. Despite the statement in Cross On Evidence 6th ed., 380, (1985), that the privilege against self-incrimination "extends to the production of documents and things...", no authority has been brought forward to support this proposition. The position of the law in England is thus unclear. See also Zuckerman, supra n.109, ch.15. In the leading American case Schmerber v California 384 US 757 (1966), the Supreme Court had made clear that the protection of the privilege applies only to "communicative" or "testimonial" activities. For especially helpful discussion of this and related issues see P. Arenella, Schmerber and the Privilege against Self-incrimination - A Re-appraisal, [1982] Am.Crim.L.R. 31.

of suspects and accused, such as the right of human
treatment and personal integrity, the right of privacy,
and the right to be protected against the possibility of
wrongful conviction, are not derived from the immunity
from being legally compelled to co-operate with the
police. All that can be deduced from this immunity is
that the police is unable to change unilaterally the
legal state of affairs with regard to the choice of the
suspect as to whether or not to co-operate with his
interrogators. No legal consequences would follow if the
suspect decides to refrain from co-operating. But the
police is not disallowed to act in a way that, without
infringing any of the suspect's rights, might
(psychologically or even physically) cause him to co-
operate and eventually confess.165

Returning to the case of Fulling, it must be asked what
right of the accused had allegedly been infringed by the
police by telling her that the woman occupying a
neighbouring cell is having an affair with her lover?
Arguably, by operating this deception the police had
infringed the accused's right against oppressive
treatment.166 As the standards that should apply to

165 Cf. with N.Zaltzman, The Israeli Approach to
Evidence Obtained in Violation of the Right to Privacy,

166 It could also be argued that the accused's
right to be protected from erroneous conviction had been
infringed as well, but this seems to be unwarranted. The
accused is protected from the risk of wrongful
conviction by the rule requiring the prosecution to
criminal interrogations are not similar to those applicable to commercial negotiation between law-abiding citizens, there is nothing wrong, in my opinion, in a deception or trickery not involving anything that might induce an innocent suspect to admit the commission of an offence. To be sure, some people might reasonably establish his guilt beyond all reasonable doubt. The additional protection granted to the accused by s.76(2)(b) of the Police and Criminal Evidence Act 1984 is based on a hypothetical test. The prosecution must prove that -

"... a confession made by an accused person ... [was not obtained] ... in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession ..."

The aim of this test, which refers to the general standards of interrogation, is to authorise the court to pass an evaluative judgment as to whether the methods adopted by the police have an adverse effect on reliability of confessions. (For discussion of this and related problems see Zuckerman, supra n.109, at pp.334-339) Deceptions, as distinguished from inducements, do not seem to have this general effect.

167 In R v. Mason [1987] 3 All ER 481, the police falsely told the accused and his solicitor that the fingerprints of the accused had been found at the scene of the crime, and following this deception, the accused was advised by his solicitor to make a statement. The Court of Appeal overturned the decision of the trial court to admit the accused's confession, and his conviction was quashed. It was held that the deceit practised upon the solicitor was the vital factor supporting the exclusion of the accused's confession on the grounds of fairness of the proceedings (s.78 of the PACE). This appears to be correct, as the accused has a right to receive a legal advice which is unfettered by false information from the police. However, the court added that the deceit practised upon the accused himself is also reprehensible, and this, with respect, is less convincing. This deceit had not infringed any of the accused's rights and does not appear to be likely to induce an innocent person to admit his guilt. It could possibly induce a guilty person to admit his guilt despite his previous unwillingness to co-operate. As the right of silence of a suspect is an "immunity" and not a "right", there is nothing illegal in this kind of deceit. It may well be thought that this kind of deceit...
disagree with this view. They may argue that trickery is always or almost always reprehensible. But even these reasonable reasoners would be logically disallowed to deduce the right against trickery from the immunity from being legally compelled to co-operate. In order to support their moral conviction, these reasoners would have to bring forward a totally independent set of reasons which, if admitted, can form a ground for a new right. In the same vein, an adverse inference which imposes the risk of error on the accused who remained silent at his trial or interrogation cannot be criticised merely by asserting that it contradicts the immunity from compulsory co-operation. It is now clear that this would again be a logical error.\textsuperscript{168,169}

The analysis of jural relations in Hohfeldian terms must be based upon four important points. First, each Hohfeldian relation concerns only one activity of one person. Thus, a suspect's act of non-cooperation with the police has to be considered alone for the purposes of understanding its legal significance. This act has to be isolated from all other acts taking place during an independent reason supporting the prohibition of such inferences see I. Dennis, Reconstructing the Law of Criminal Evidence, [1989] Curr. Leg. Prob. 21, 40-44.

169 In Lui Mei-lin v. R [1989] 1 All ER 359 the accused made an attempt to cross-examine one of her co-defendants by using his statement given to the police. His statement had previously been found inadmissible as it was obtained by inducements on behalf of the police. The excluded statement differed from his testimony in a number of material respects, and since his testimony implicated the accused, the accused sought to establish that it was false. The Privy Council held that the accused was entitled to use this previously excluded statement to defend herself, but at the same time mentioned that:

"... the trial judge should warn the jury that they must not use the statement in any way as evidence in support of the prosecution's case and that its only relevance is to test the credibility of the evidence which the maker of the statement has given against his co-accused." (id., at pp.362-363)

This can be restated in Hohfeldian terms. The inadmissibility of the statement means that the defendant who made it must not carry any risk of error vis-á-vis the prosecution, viz. no inference as to the facts supporting his guilt can permissibly be drawn from it. This, however, should not affect the risk-distributive rights of his co-accused, namely her immunity from carrying the risks of error stemming from the oral testimony that could not properly be examined. This analysis would remain similar if the law of confessions and the right to cross-examination were justified as being extraneous to the ascertainment of the truth.

170 For the first three points see Finnis, supra n.151.
interrogation. Any act of police interference with the suspect's act of non-cooperation is a separate subject for other Hohfeldian relations between the suspect and the police. Second, a right in Hohfeldian sense can never be a self-regarding right to do (or to omit) something. It is a claim that somebody else do (or omit) something. Thus, the right of silence is not a claim-right in Hohfeldian sense: only if the police were disallowed by the law to do any act that may cause a suspect to talk, the right of silence could have become (an ill-labelled) right. This, however, is not the law. Third, Hohfeld left undetermined the relevance of legal remedies within his scheme of jural relations. This uncrucial point\textsuperscript{171} leads to the problem of principles as distinguished from legal rules. Unlike legal rules that apply in an all-or-nothing way, principles can be traded-off and may not lead to antecedently determinate jural relations\textsuperscript{172}.

Before discussing this fourth point, a further comment has to be made about the importance of the first two for understanding of the immanent rationality of law. Jural relations might be very complex, for they usually consist of more than one activity, more than one person, more than one place, and more than one time. This complexity suggests that we should not expect a simple and unambiguous relationship between the legal rules and the legal outcomes. Instead, we should expect a more nuanced and flexible relationship, in which the legal rules are interpreted and applied in light of the particular circumstances of each case. This, in turn, suggests that the task of legal reasoning is not simply to apply the legal rules to the facts of the case, but to construct a story that explains and justifies the final legal outcome.

\textsuperscript{171} Finnis (supra n.151, at pp.380-382) would, perhaps, disagree with this. But despite some difficulties, a positivist adherence to "ubi remedium ubi jus" (and vice versa) can be used to adjust the concepts describing jural relations.

\textsuperscript{172} Cf. Radin, supra n.151.
and of not entirely clear norms regulating these activities. But at the same time, these relations are confined to those persons and activities which are singled out by the law for their having juridical significance. The law has thus to be viewed as an immanently rational framework of rights, duties, etc., and it is this framework that helps to eliminate the juridical outsiders whose interests are legally irrelevant and to distinguish in that way between principles and policies. Legal principles are right-conferring; policies are not.\textsuperscript{173} Returning to my discussion of the third exception to the principle of protecting the innocent, it has to be made clear that the "principle of utility", viz. the principle that requires the courts to maximise the number of correct decisions in regard to exculpatory or other "excuses", is legally significant because it relates to society's right (in a strong sense) to the enforcement of the criminal law. An application of the same principle to civil cases must, in my view, be confined to insiders, i.e., only to those recognised by the law as having an interest in the immediate case. It would be wrong, for example, to deny a claim for the sake of maximising the number of correct outcomes in cases adjudicated elsewhere or in the future. However, some cases are

\textsuperscript{173} See R. Dworkin, Taking Rights Seriously, 22-28; 90-100 (1977).
"polycentric" rather than "monocentric"\(^\text{174}\), and it makes sense to apply to them the principle of utility. Class actions and, e.g., massive product liability litigations are polycentric, and in such cases it may well make sense to maximise the number of factually correct outcomes instead of doing an individualized justice inter partem. But even in these cases, the principle of utility, being "enslaved" by the law, would differ from its ordinary meaning in a moral discourse. It would have very little to do with the grand project of distributing pleasures, goods or pains in the society at large. (It should be no doubt that it could affect the overall utility, but only if this policy were in fact pursued by the law.) Within the law, this principle affects the distribution of "legal goods" between the relevant holders of rights, and not everyone has to be regarded as having a legally protected interest in the case at hand. The identification of these legal beneficiaries and their respective rights is an interpretive rather than political enterprise. To be sure, the Hohfeldian approach cannot be used as a single interpretive tool in identifying different right-holders and their jural relations. Nor is it aimed at replacing all other methods of legal understanding. But by its insistence on singling out the relevant right-holders this approach

\(^{174}\) For this distinction see L.Fuller, The Forms and Limits of Adjudication, (1978) 92 Harv.L.R. 353.
attributes to the principles operating within the law their distinctly internal meaning.\textsuperscript{175}

The fact that principles do not generate sufficiently determinate results (the fourth general point that has been made above) should not be regarded as capable of detracting from the significance of the scheme of jural relations constructed by Hohfeld. When a single principle is in issue, its application would involve a weak rather than strong judicial discretion\textsuperscript{176}. As was mentioned above, a strong discretion might be existing only in cases which involve competing principles. But even a strong judicial discretion is far from being completely unstructured. Using it, the judge must consider certain factors and has to disregard the others. He has to weigh up the competing principles and finally justify his decision by using pre-emptive reasons. Hence, an individual might have a right, with the consequence of judicial duty, that particular reasons be (or not be) taken into account in decision-making, or be immune from particular uses of judicial powers. In easy cases, the central focus of Hohfeldian attention should be on juridical relations existing

\textsuperscript{175} Cf. with the debate between Hudson & Husak on the one hand and Perry on the other, supra n.151.

\textsuperscript{176} This would be true if a conventionalist approach to the application of law is adopted. The distinction between these two senses of discretion, the "weak" and the "strong" one, appears in R.Dworkin, Taking Rights Seriously, 31-39 (1977).
between the parties and their respective rights, duties, privileges, immunities, etc. In hard cases, a Hohfeldian analysis has to be applied not merely to the relations between the parties and other relevant right-holders, but also to the relationships between the right-holders and the court\(^\text{177}\). On this view, it is not only the rights and duties of the parties involved, but also the legally pre-emptive reasons to which those parties are entitled, that ought to be employed in and justify judicial reasoning. Clarifying the nature of the parties' entitlements to particular reasons, Hohfeldian analysis is essential for determining the outcomes in hard cases.

It must now be clear that this approach would be no less powerful in dissolving many puzzlements concerning risk-distribution, viz. the puzzlements about certain evidentiary rights, duties, powers, privileges and

\(^{177}\) This also responds to different kinds of scepticism in relation to the meaningfulness of legal rights and all other dispositive concepts employed in legal reasoning: e.g., A.Ross, Tu-Tu, (1957) 70 Harv.L.R. 812; M.Tushnet, An Essay on Rights, (1984) 62 Tex.L.R. 1363; M.Perry, Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously, (1984) 62 Tex.L.R. 1405; P.Westen, The Rueful Rhetoric of "Rights", (1986) 33 UCLA L.R. 977. Dispositive concepts and their opposites and correlatives are employed to constrain the otherwise unlimited discretion of the court, i.e., to minimise the number of judicially permissible options. As to the epistemologically external critique, it would not hold once an internal (e.g., a conventionalist) point of view is adopted. The rights-talk can reveal the inner intelligibility of law and jural relations. Cf. R.Dworkin, A Matter of Principle, 119-145.
immunities that operate, or should operate, in the process of risk-distribution in factually hard cases. In my view, it is difficult to imagine a totally rightless process of solving the problems of risk-distribution. Only an uncompromised pursuit of utility can, perhaps, justify such a process, but this single-value approach, which hardly characterises actual systems of law, is overtly objectionable. Judges (and other triers of facts) are to be restricted in their risk-distributive decisions. They have to employ in such decisions a legally justifiable reasoning. This reasoning is to be found within the law, and the parties in dispute should be entitled to this reasoning in terms of rights or, when appropriate, in terms of privileges and immunities.

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179 Professor Ezra R. Thayer (son of the great J.B. Thayer) wrote that "We should keep clearly before our minds that this whole matter of evidence in mainly procedure, and that a claim of rights by the parties in such a field is to be accepted with caution." See E.R. Thayer, Observations on the Law of Evidence, (1915) 13 Mich.L.R. 355, 362. He did not explain why should the issue of procedural rights be approached with a greater caution and left unanswered the question why should evidentiary issues be classified as homogeneously "procedural". He neglected the issue of risk-distribution and made another mistake by saying that "The common law [of evidence] brought this about by giving the judge a body of absolute rules ... if we knock out this prop we are bound to give him a substitute; and no substitute is possible except the right and duty to use a wide discretion. It is an absolute dilemma; and the choice between discretion and fixed rule here is only one instance of the eternal compromise in drawing the line between justice according to law and justice according to the needs of the case." id.
These issues will be concretely examined in part four. Although my arguments will continue to be normative rather than descriptive, the justificatory framework for risk-distributive decisions and its concrete principles will interpretively be derived from and thus correspond to the English law. The principles operating within this framework will not be chosen from the "original position". They, and the corresponding rights, duties, powers, etc, will be discerned from explicit legal materials, following the framework presented in this and the previous chapters. Before turning to the examination of the English law of evidence, I shall respond to the remaining argument from pluralism which may be raised against the suggested conventionalist approach.

4. A PLURALIST CRITIQUE

I have already responded to some sceptical arguments that can be advanced against the suggested approach to risk-distribution and a few words have now to be said about a pluralist critique of it. Evidently, by arguing in favour of derivability of the principles of risk-distribution from legal materials, and by asserting those principles to be capable of being balanced against

180 Again, it has to be clear that what is meant by the term "the law of evidence" is the law of proof, risk-distribution, and other norms regulating various uses of information in litigation. Cf. W.Twining, Rethinking Evidence, ch.11 (1990).
each other, I have (explicitly) assumed a certain degree of commensurability of the values incorporated by the legal system. By supporting a conventionalist approach, I have also assumed as given the existence of sufficiently homogeneous community of interpreters. All these assumptions can be challenged in a way that differs from external criticism of legal rationality and from epistemologically sceptical views, both internal and external, about determinacy of legal discourse. It might be argued that conventionalism does not account for many intercommunal disagreements which are not merely epistemological, but bear a moral or political character. Kenneth Graham Jr., who supports a pluralist approach to the process of proof, writes, for example, that –

"If the United States is viewed as a collection of ethnic groups, none of which has any natural right to intellectual, spiritual or political hegemony, then what we need is not a spurious common culture or a fictional political ancestry but a genuine politics. The task of proceduralists is to find ways in which individuals might form communities that could coexist without resort to any form of imperialism."

To be sure, the existing diversities in moral views and forms of life must be accounted for in the process of legal understanding. The proposed conventionalist

\[181\] See supra n.44. For general discussion of pluralism see C.Taylor, The Diversity of Goods, in A.Sen & B.Williams, Utilitarianism and Beyond, 129-144 (1982).

approach, which advocates a critical encounter with legal tradition, leaves some room for dialectically revising the currently shared ideas. It stands for a hermeneutically open and not for a hermetically closed understanding and is not inherently opposed to pluralist ideas. What is opposed by this approach is the radical open-endedness of the law which, allegedly, is or may be resulted from the incommensurability of diverse values and ideas. Legal arguments must always be reducible to some common basis and what, on reflection, is considered to be the best argument should prevail disregarding its historical contingency. Insoluble value conflicts and diversities may well take place in ethics and politics, but not within the law. Law needs a solid unitary structure to resolve controversies in an orderly fashion.

This view of legal understanding can sustain its right to exist alongside the existing political diversities and the absence of systematic ethics. Law must have an immanent rationality of its own, and its understanding, has, accordingly, to be based on what Thomas Nagel has called a "fragmentation of value", an insulation of practical decision against the influence of infinite political and ethical factors. Nagel has explicitly mentioned law as an example of the fragmentary approach:

"The example I have in mind is the judicial process, which carefully excludes, or tries to exclude, considerations of utility and personal commitment, and limits itself to claims of right. Since the systematic recognition of such claims is very important (and also tends over the long run not to conflict unacceptably with other values), it is worth isolating these factors for special treatment. As a result, legal argument has been one of the areas of real progress in the understanding of a special aspect of practical reason."\textsuperscript{184}

A readiness to account for pluralist views and values should thus sharply be distinguished from giving to these views and values an equally decisive power in legal argumentation. The latter option demands a very high price: its adoption would end up in rendering the law irretrievably indeterminate, hopelessly contradictory and radically subjective, the state of affairs in which all judgments must be suspended.\textsuperscript{185} An insulation of the juridical from raw politics is thus a necessity even in a highly pluralistic society. To reject such an insulation and adopt, in the name of pluralism, an open-ended system of legal reasoning, is to mistake an anti-social indecisiveness for political toleration.

\textsuperscript{184} Ibid, at p.136.

\textsuperscript{185} It is suspected that some of the critical legal scholars are, for (good or bad) political reasons, antecedently determined to arrive at this conclusion. These scholars have, however, failed at demonstrating that their outcome is the only possible one or the best that can be made out of legal materials. See Stick, supra n.40; Williams, supra n.42; Ewald, supra n.43.
The law must speak authoritatively, and to speak authoritatively, it has to lay down a sufficient number of sufficiently inclusive preemptive reasons. By its doing so (bearing in mind the perils of exclusionary overrationalisation which bars as irrelevant all non-preemptive reasons\textsuperscript{186}), it should not be considered as being ideologically suppressive. One may well recognise the existence of a pluralist culture that admits of multitude of values and ideas and at the same time maintains an authoritative legal practice. Such a practice, in Joseph Raz's words,

"... enables people to unite in support of some 'low or medium level' generalizations despite profound disagreements concerning their ultimate foundations which some seek in religion, others in Marxism or in Liberalism, and the like. I am not suggesting that the differences in the foundations do not lead to differences in practice. The point is that an orderly community can exist only if it shares many practices and that in all modern pluralistic societies a great measure of toleration of vastly different outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct."\textsuperscript{187}

Returning to the pluralist submission of Kenneth Graham, one has to be very cautious before admitting the existence of individuals and ethnic groups that form a single society and at the same time hold idiosyncratic, and by and large unshared, views and values. Even in non-monolithic societies there should exist, can exist

\textsuperscript{186} See Nagel, supra n.182, at p.137.

\textsuperscript{187} Raz, supra n.84, in 14 Phil. & Pub. Aff., at p.23.
and in fact exists a sufficient stock of genuinely shared values and knowledge that enables these societies to maintain a rationalist mode of adjudication. If there were no minimally common basis of knowledge and values, no legal system could be maintained without resort to brutal compulsion aimed at obtaining blind obedience. To imagine a radically pluralistic society and say that the task of procedural law operating within this society is to "harmonise the incommensurable" in a way that defies spurious commonalities and resists to any kind of imperialism, is to engage oneself in an unperformable and utopian project. The grand project of cultural and ethical harmonisation should be left to "genuine politics". Meanwhile, in law, like in medicine and other practical matters, many important decisions have to be made and many responsibilities have to be undertaken. People therefore need common criteria to be able to make their decisions in a best possible way, and by subscribing to these legal criteria they do not necessarily abandon their political, moral and religious views. When a legal decision has to be made under factual uncertainty, good reasons have to support the distribution of the risks of error. These good reasons should be found within the law and there is no need to establish them to be incontestably true. It suffices to

188 This was in fact suggested by K. Graham, supra n. 44, in 85 Mich. L. R. 1204, at p. 1206.

189 Cf. K. Graham, id.
show that they are the best ones that contemporary legal understanding of the legal system can currently offer. To use the contingency of this understanding in arguing that "everything goes", that courtrooms are "political theatre", and to charge all those who are opposed to this vision with "imperialism",¹⁹⁰ is to misuse the potentially edifying power of pluralism by enhancing a-

"rather obnoxious form of elitism: entertaining for the uninvolved spectator; fecund in power and money for the powerful; and Hell for ordinary litigants, witnesses and other legal worms."¹⁹¹

¹⁹⁰ K.Graham, op cit., passim.

1. PRELIMINARY OBSERVATIONS

Lawyers may disagree about litigated facts and events in two different senses. They may empirically challenge the allegations of their adversaries, offering a different version of the material events. They may also argue that one or more of those allegations have not been established at the level of proof specified by the law, or, conversely, that the evidence which supports their allegations satisfies the specified standard. This disagreement is confined to the evidence at hand and the probabilistic support it gives to the competing versions of facts. Not referring to empirically ascertainable reality - the "true story" of the conflict - it is grounded on probabilities. Despite this, some of the probability-relations between evidentiary propositions and their background generalisations can interpersonally be verified. Lawyers' disagreements asserting the existence or the non-existence of the relevant
probability-relations in the stock of generally shared knowledge, which has been validated by observation, analysis and experience, should also be treated as empirical.¹ The common knowledge of these probability-relations may well be approximate, not measurable with mathematical exactitude and thus not susceptible to any kind of formal quantification. When the existence of such knowledge is unquestionable, lawyers' disagreements about its applicability to the evidence at hand, and about what, according to it, is more probable than not or was proved beyond reasonable doubt ought to be treated as empirical because they are located within an empirical frame of reference.² In such cases uncertainties would correspond to the relatively determinate and uncontestable measures of risk. By and large, legal conflicts in such cases can be disposed of


² Keynes, id. The fact that the commonly shared knowledge of probability-relations is not susceptible to quantification or not absolutely exact does not detract from its being rationally held. To contend, as some sceptics would, that we do not possess enough knowledge to calculate probabilities is to neglect the relational character of probability estimates. For probability estimates are always related to the evidence at hand, and a new evidence would give us a new probability, not a fuller knowledge of the old one. These estimates are also relative to the principles of reasoning that have been articulated so far. The fact that we cannot always assign a numerical probability to our estimates may well support the position that sometimes there is none. It would be a mistake to hold that this undermines the rationality of human inferences under uncertainty. See id., ch.3 and L. Jonathan Cohen’s account of non-mathematical probability in The Probable and the Provable (1977).
in a relatively non-controversial fashion, following the standards and burdens of proof specified by the law.

In numerous cases, however, the relevant probability-relations are indeterminate in respect of both the meaning and the certainty of knowledge they encompass. In such cases, lawyers' disagreements about "reasonableness" of doubts, "preponderance" of evidence and "balances of probabilities" cannot be resolved empirically.\(^3\) When two or more decisions, pointing in different directions, can reasonably be made in a way that fully satisfies, in terms of their epistemic rationality, the relevant standard of proof, lawyers' disagreements about preferability of one of these decisions cannot be regarded as empirical. Such disagreements are about the best way of allocating the risks of error in conditions of uncertainty. Legal disagreements of this kind are normative or "theoretical".\(^4\) Similarly, even when our knowledge of probability relations is determinate, it is still relative to the evidence at hand and to the procedures which can be employed in examining the cogency of that evidence.

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\(^3\) I assume that when no probability-relations whatsoever can be invoked, the evidence presented is either simply irrelevant to the facts in issue or falls short of satisfying the burdens of production. Such cases can easily be disposed of by using the residual rules regulating these burdens.

\(^4\) Cf. R.Dworkin, Law's Empire, 3-11 (1986). Cf. Perelman & Olbrechts-Tyteca, supra n.1, at pp.65-95 (distinguishing between arguments about the "real" and arguments about the "preferable").
evidence. These evidence and procedures may also be incomplete or indeterminate, and one of the parties may suffer or benefit from such incompleteness or indeterminacy. Outcomes of that kind should be justified from the risk-distributive point of view. Here, the main question would be who should carry the risks of error involved in deciding whether the evidence which supports one (or more) of the disputed allegations satisfies the standard of proof prescribed by the law? Rather than being plainly "factual" or empirical, such disagreements are normative. They refer to the risk-distributive dimension of judicial reasoning about facts and have therefore to be settled by moral rather than epistemological principles. As was argued in the previous chapters, these moral principles ought to be discerned from the institutionally recognised materials which build up the legal system, and to understand them one has to proceed interpretively. For these moral principles to be coherently applied, the whole of the process of adjudication, including pre-trial stages, is to be taken into account.

Two radical strategies can be employed to deny the very existence or the significance of normative disagreements about legal certainties. The first strategy is to draw on an extreme version of "universal cognitive competence", namely on the idea that the existing stock of commonly shared knowledge embraces all, or nearly
all, of the probability-relations needed in forensic matters. The second and a rather more common strategy is to contend that if no empirical solution can be found to settle a disagreement about probability-relations, the conclusion should be that one of the parties had simply failed at discharging the burden of persuasion. Enough has been said in previous chapters to dispel the euphoria of "always-know-how" as both unrealistic and unsatisfactory for justificatory purposes and to show that the understanding of the rules of burden of proof as a "slot-machine" is both descriptively questionable and normatively unsound. The "slot-machine" explanation does not answer the risk-distributive question. It simply begs this question by maintaining that all normative disagreements about probabilities should always be resolved against parties carrying the burden of proof. The rules of burden of proof say which party should lose the case if he fails to persuade the court that the probability of his allegations being true satisfies the requisite standard of proof. None of those rules articulates the conditions under which judges and other triers of facts would be justified in their being persuaded or non-persuaded. These rules do not say anything about the processes of reasoning that should take place and the truth-certifying procedures which have to be undergone before any valid conclusion which accords with them can justifiably be arrived at. And it is these processes and procedures which involve
normative disagreements about certainties and the corresponding problems of risk-distribution. The existing burdens and standards of proof and other evidentiary rules can settle but only a tiny part of these problems and disagreements.

This brief reiteration of what has previously been discussed in more detail is necessary for dealing with the question that needs to be answered at the outset, before attempting to single out the risk-distributive principles discernible from the English law. How are we to identify normative disagreements about evaluation of evidence? Or, in other words, how should such disagreements be distinguished from the empirical ones? Following the position on the grounds of law and legal interpretation which was defended in part three, it is suggested that this distinction should be drawn conventionally. In what follows, I shall substantiate this point.

2. A CONVENTIONALIST DISTINCTION BETWEEN THE "EMPIRICAL" AND THE "NORMATIVE" IN LEGAL FACT-FINDING

One of the well-known debates taking place in the U.S.A. has been devoted to the admissibility of scientific innovations that have not yet gained the approval of the relevant scientific community. This debate has been triggered by the judgment delivered in Frye v. United
States\textsuperscript{5} and its subsequent refinements.\textsuperscript{6} Frye laid down the rigid standard of "standing and scientific recognition" among the relevant scientists as a condition for admissibility of novel scientific findings.\textsuperscript{7} In the last two decades characterised by an increase in both extent and complexity of scientific evidence the general acceptance test has been subjected to academic criticism, judicial disapproval, modifications, qualifications and outright rejections.\textsuperscript{8} It has been argued by many academic writers and held by several courts that general acceptance goes to the weight, not the admissibility of the evidence.\textsuperscript{9} General scientific acceptance can be a condition for scientific evidence obtained by polygraph is generally inadmissible in criminal cases. E.Harnon, Evidence Obtained by Polygraph: An Israeli Perspective, [1982] Crim.L.R. 340.

\textsuperscript{5} Frye v. United States, 293 F. 1013 (1923).


\textsuperscript{7} id., at p.1014. This case dealt with a "systolic blood pressure test" that preceded the modern polygraph. Despite many retreats from Frye, evidence obtained by polygraph is generally inadmissible in criminal cases. E.Harnon, Evidence Obtained by Polygraph: An Israeli Perspective, [1982] Crim.L.R. 340.


\textsuperscript{9} id. This seems to be the position in England subject to the general rule concerning the exclusion of any piece of evidence when its prejudicial effect outweighs its probative value. See Keane, The Modern Law of Evidence, 2d ed., ch.15 (1989); A.Zuckerman, The Principles of Criminal Evidence, 62-71 (1989).
facts being judicially noticed, not a precondition for admission of a controvertible testimony.¹⁰

I shall now defend an unpopular view that the standard laid down in Frye is the right one. Scientific evidence, and especially the novel one, testifies about probability-relations in its sphere of knowledge, not about absolute certainties. As has been mentioned above, a disagreement about probability-relations can be resolved empirically only when it has an empirically identifiable frame of reference, and it has such a frame when the stock of commonly shared and validated by the general experience knowledge contains enough data capable of resolving it in a sufficiently determinate way. A piece of scientific data which was generally approved belongs to the same stock of knowledge with the only difference that non-experts have no direct access to scientific generalisations.¹¹ To establish that a

¹⁰ R.Lempert & S.Saltzburg, A Modern Approach to Evidence, 2d ed., 862 (1982). The editors of McCormick, supra n.6, p.607, suggest that now, in the light of rule 703 of the Federal Rules of Evidence which permits experts to rely upon inadmissible data as long as these data are "... reasonably relied upon by experts in [the] particular field", the "general acceptance" test may be replaced by that of "reasonable reliance". This analogy seems to be questionable.

¹¹ See, generally, R.Eggleston, Generalisations and Experts, in W.Twining, Facts in Law, 16 ARSP 22 (1983). As was mentioned by Hilary Putnam,

"... these judgments [of the scientific community] are, in fact, deferred to by other members of the society. The difference between this case and the cases of institutionalized norms of verification previously referred to [the ordinary inductions
piece of scientific evidence forms part of the stock of general knowledge is to prove that it has been validated by the relevant scientific community. A scientific innovation may well be credible but if it has not been validated by the relevant scientific community it cannot be regarded as part of empirically identifiable knowledge. In a legal context, a disagreement about probability-relations sought to be proved by scientifically novel evidence is thus normative and not an empirical one. Triers of facts attempting to resolve such a disagreement empirically will find the world of science divided and the probability-relations alleged on the basis of the innovation controversial, suspicious or at the very best indeterminate. The based on common sense, A.S.] is the special role of experts and the institutionalized deference to experts that such a case involves; but this is no more than an instance of the division of intellectual labour (not to mention intellectual authority relations) in the society. The judgment that special relativity and quantum electrodynamics are 'the most successful physical theories we have' is one which is made by authorities which the society has appointed and whose authority is recognised by a host of practices and ceremonies, and in that sense institutionalized."


12 I assume, of course, that the only issue here is scientific and that the ordinary testimonial problems arising in relation to the expert have been resolved. It is also taken as given that the innovative evidence is not one that deductively follows from some scientifically basic knowledge which has already been approved.

13 The process of absorbing innovations in the world of science and the intermediate stages leading, in cases of success, to the "paradigm-shift" were depicted
question which arises here is not "Should the courts be 'conservative' or 'progressive' with regard to scientific innovations?", but "How should the new risks of error be distributed between the parties to litigation?" Those who believe that the lack of general approval goes to the weight, not the admissibility, of scientific evidence are bound to explain how the triers of facts are to proceed in order to assign weight to such evidence. For if, at the time such evidence is submitted, it has no empirically ascertainable probative value, and in order to ascertain its value we are to await for or to forecast the success, or failure, or partial success of the ongoing scientific revolution, it would be better overtly to agree that now, for the purposes of currently conducted trials, we are dealing with a normative, not with an empirical question. One of the parties has to carry the risks of error and the existing standards of persuasion cannot help. For it is the compliance with these standards which is being questioned, and so long as novel scientific evidence is concerned, no empirical answer can be given to this question at a currently conducted trial.

Classification of this issue as normative (contrary to what is by and large maintained by most of the orthodox thinkers) is yet not a full answer to the critique of

the admissibility standard which was set out in Frye. The fact that a piece of evidence can convey only radically indeterminate probability-relations is, in itself, not a good reason for excluding it. It is true that such probability-relations cannot be asserted on empirical grounds to comply with the existing standards of proof, but an indeterminacy of that sort is by no means peculiar to scientific innovations. As has been said and illustrated above, it can also be found elsewhere in any "usual" class of non-scientific evidence which, for good reasons of expletive justice, nobody has ever suggested to exclude.

I think, nevertheless, that a good case can be made for exclusion of scientific evidence not complying with the standard of Frye. The indeterminacy of probability-relations evidenced by a not yet adopted scientific innovation is importantly different from a non-scientific indeterminacy of probabilities. The latter can be understood by judges and jurors by virtue of their possessing the commonly shared knowledge. It is

14 Some of the writers (McCormick supra n.10) have suggested to replace this rigid standard by that of "reasonable reliance". Obviously, novel scientific evidence which is not being relied on reasonably (or is unreliable) is non-problematic and to handle it no standard is required. To say that the aforementioned standard should apply to the rest of scientifically novel evidence (which is prima facie reasonably reliable), is to admit that what is being suggested is superfluous. What, in fact, is being proposed is the abolition of Frye, not its replacement by another standard.
this understanding that provides (or should provide) them with an adequate knowledge of the nature of the risks of error involved. Without being aware of the nature of these risks judges and other triers of facts would not be able to allocate them between the parties in a justifiable way. To put it differently, the trier of facts dealing with uncertainties and indeterminacies of probability-relations has to know what exactly is uncertain and indeterminate. In cases of scientifically novel evidence triers of facts do not generally possess this kind of knowledge, and if such evidence is admitted without restrictions, their risk-distributive judgments might be flawed. They might be flawed because the risk-distributive functions of decision-makers are tangibly threatened to be usurped by experts. All this can, of course, be accommodated within the general rule excluding prejudicial evidence and it is one of the objectives of this work to articulate what exactly is being argued and decided within the generic legal frameworks of that kind.

The latter point can be exemplified by the case of Turner.15 The accused charged with murder sought to submit in evidence a report of a psychiatrist. The report was intended to support his defence of provocation, namely, that the girl he spontaneously killed with a hammer by battering her about her head had

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15 R v. Turner [1975] 1 All ER 70.
confessed to him her infidelity at the time he was in prison. She had also revealed to Turner that she was pregnant not by him, as, being in love with the girl, he believed, but, as she told him with a grin, by another man. According to the report, the accused, not suffering from any mental illness, had a personality structure and a mental make-up consistent with his vulnerability, in the light of what the girl had said to him, to be overwhelmed by the anger leading to the "explosive release of blind rage". The psychiatrist was prepared to testify to this effect, but the trial judge decided that his testimony would be inadmissible and this decision was upheld by the Court of Appeal. The Court of Appeal decided that the report was relevant to both the issue of provocation and the accused's credibility as a witness. However,

"If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does. ... Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life. The same reasoning applies to ... the issue of credibility. The jury in this case did not need, and should not have been offered the evidence of a psychiatrist to help them decide whether the appellant's evidence was truthful. ... [T]he advance of science [is] making more and more inroads into the old common law principle

\[16\] id., at pp.72-73.
applicable to opinion evidence; but we are firmly of the opinion that psychiatry has not yet become a satisfactory substitute for the common sense of juries and magistrates on matters within their experience of life."

This reasoning can now be restated as follows. The psychiatrist's testimony was not about empirically uncontestable generalisations about probability-relations within his field of expertise. At its most, this testimony was about highly indeterminate, from the point of view of decision-makers, probability-relations. It could not supply them with sufficiently determinate empirical data that have to be accounted for in assessing the risks of error relevant for their ultimate

\[17\] id., at pp.74-75 (LJ Lawton). The principle laid down in Turner seems to be now firmly established in English law. The apparently different approach of Lowery v. The Queen [1973] 3 All ER 662 (PC) has been distinguished on the grounds of the peculiar relevancy of the psychological evidence which was admitted by the trial judge in Victoria and thus confined to the circumstances of that particular case. See Turner id. DPP v. A & BC Chewing Gum Co Ltd [1967] 2 All ER 504, another case in which psychiatrists were held to be allowed to testify about the effect of obscene battle-cards on the minds of children, was also confined to its specific circumstances, effectively disapproved by the House of Lords (see DPP v. Jordan [1976] 3 All ER 775, 782) and never followed in the subsequent judgments. See A.Keane, The Modern Law of Evidence, 2d ed., 365-367 (1989). As Zuckerman has recently written, the main reasons for this restrictive approach are that -

"Psychiatry ... is far from being a precise and reliable science and its contribution to our understanding of the mind may vary greatly. ... It is doubtful whether psychology is sufficiently advanced to provide a more accurate estimate of social effect than ordinary common sense."

risk-distributive decisions regarding both the credibility of the accused's testimony and the contested issue of provocation. The testimony of the accused and other evidence have not been empirically settled and their evaluation was therefore subject to a normative disagreement. But the indeterminacy of the probability-relations underlying that testimony and the rest of the evidence admitted at this trial formed part of the common knowledge. This indeterminacy and the risks of error involved in it were capable of being estimated by the non-expert decision-makers. In resolving normative disagreements arising in connection with this kind of indeterminacy, the decision-makers can allocate the risks of error in accordance with the legal principles relevant to what is at stake. As was explained above, the opinion rule is better understood as a hierarchical framework of knowledge and authority within which the best judgement is always preferred. Within this framework, an expert witness may reach a better judgement in some empirical matters, but he is never authorised in that capacity to attempt at resolving an essentially normative disagreement. This latter function is exclusively performed by judges and jurors and ought to be performed exclusively by them.

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19 Zuckerman interprets Turner in a different way. He argues that in that case the Court of Appeal has rightly (as he submits) barred an attempt to substitute
My support of the admissibility standard laid down in Frye has to be qualified in two respects. First, a scientific innovation and, additionally, its contribution to the world of affairs might well be relevant per se, e.g., in patent litigation. Second, an urgent administrative action may be motivated by such evidence and would not, for this reason alone, be necessarily objectionable. In some cases parties may stipulate that their current or future disputes about facts be resolved conclusively by scientifically new means; they may also agree that a piece of evidence not yet approved by the relevant scientific community be used in their case. This, of course, would be possible only in civil cases, for in most of those cases, unlike the criminal ones, there would be no good reason to annul risk-distributive stipulations of the parties.20

lay standards by a scientifically controversial opinion. See supra n.17, at pp.64-69. One has, in my view, account for the fact that the Court of Appeal considered the disputed report of the psychiatrist as relevant and logically probative. (Turner, supra n.15, at p.74) The psychiatrist has not made an attempt at persuading the jury about "the proper meaning" of provocation. His opinion consisted of psychiatric facts about the accused and could have affected the factual side of the final decision, i.e., the risk-distributive judgment in relation to the facts in issue. It can also be learnt from the judgment that had this testimony been demonstrated to have a solid scientific basis, it would probably have been admitted. Turner, id., at p.75d-g.

20 This is subject to sec. 13(1)(c) of the Unfair Contract Terms Act 1977 which prevents unreasonable modifications of the rules of evidence and procedure in certain types of contract.
The exceptions to what ought to be the basic principle regulating the admission of novel scientific evidence are less important for our present purposes. What is far more significant is the reasons which have to be employed in distinguishing between empirical and normative disagreements about probability-relations. Forming part of the general interpretive approach set out in part three, these reasons, in order to be preemptive, should be conventional. When, according to the lay and scientific conventions, the probability-relations affecting the litigation are empirically indeterminate, a disagreement about inferences which can justifiably be drawn on the basis of these probability-relations would have to be treated as normative. It would be a disagreement about justifiability of inferences from the risk-distributive rather than empirical point of view. When, conventionally speaking, the disputed probability-relations are empirically indeterminate and all empirically based arguments aimed at resolving the indeterminacy are exhausted, the moral principles of risk-distribution become decisive. And again, a tangible indeterminacy in probability-relations can be detected only when these relations, viewed conventionally and empirically, cannot be said to have satisfied the relevant standards of proof. Such cases are ones of uncertainty-as-ignorance, as distinguished from uncertainty-as-risk. They may result from an incompleteness of the evidence adduced at the trial,
imperfections of the truth-certifying procedures and an indeterminacy of what conventionally passes for knowledge. Decision-making in those cases can only be justified by the risk-distributive principles - the reasons which under the interpretive approach delineated in part three ought to be regarded as preemptive.

What are these risk-distributive principles which should regulate fact-finding processes that involve normative disagreements about probability-relations? This, as I have mentioned, depends on the concrete legal system and its interpretive understanding from the internal point of view. To substantiate this argument by concrete examples, I shall now concentrate on the English legal system and make an attempt at singling out its risk-distributive principles. This attempt will be interpretive, and my subsequent observations concerning the risk-distributive principles will be normative and justificatory, i.e., not descriptive, inasmuch as this expression stands for plain legal facts. Hence, the question which will be answered below is what are the soundest risk-distributive arguments which, in the light of explicit legal materials, can be regarded as embedded in the English legal system? Articulation of these arguments in the form of principles has thus to be regarded as a "given-related ought": given that the institutional legal materials mean what they are

conventionally taken to convey, what are the risk-distributive principles that should be learnt about from these materials? Similarly, I shall not deal with the "real-life" questions about how jurors' minds are affected by conveying to them, in the form of direction or otherwise, the principles of risk-distribution and other legal precepts. My objective is to set out these principles; the problem of forensic techniques that should be employed to implement them in the "real-life" courtroom situations is beyond the reach of this work. These principles can be given as directions to jurors with anticipation that they will comply with such directions. Admittedly, judges as triers of both law and fact are a better forum for implementing these principles in their articulated and reviewable judgments. There is, however, no apparent reason to make out the case that jurors, magistrates, and

administrators are incapable of applying principles in making their decisions.

In what follows, I shall submit that English law can and ought to be interpreted as consisting of the following principles of risk-distribution:

(1) The principle of equality which maintains that similarly situated people should not carry different risks of error;
(2) The principle of utility which requires that the risks of error be distributed in a way that augments, in the long run, the overall amount of factually (and thus substantively) correct decisions;
(3) The principle of protecting the innocent, according to which any risk of error faced by any person charged with a criminal offence ought to be eliminated.

These principles should be applied in resolving various normative disagreements about probability-relations or degrees of certainty in forensic matters, having regard to the total process. They must be distinguished for present purposes from other principles of evidence and procedure which are not risk-distributive.23 The most

23 See, e.g., Sir Jack Jacob's list of procedural principles and its later adaptation for the purposes of criminal litigation. J.Jacob, The Fabric of English Civil Justice, 5ff. (1987) and W.Twining, Rethinking Evidence, ch.6 (1990). See also M.Bayles, Principles of
striking example of such principles is the principle of legality epitomized by the rules that exclude illegally obtained evidence.  

My thesis is that risk-distributive principles should be elicited from legal materials which, taken together, constitute the explicit law of evidence and procedure. These principles may be in the state of conflict with each other, and in such cases their balancing would also be dependent on the substantive law that has to apply to concrete disputes. For it is the substantive law that determines the nature of the risks of error involved in a dispute and much can be learnt from it about different risk-distributive rights, immunities, etc., belonging to different participants in adjudicative processes. I shall therefore deal separately with civil, criminal and administrative processes that involve fact-finding under uncertainty. The sharp civil/criminal distinction hardly needs to be explained. Traditionalist scholars of evidence make no sharp differentiation between different civil and criminal matters, dealing with most of the rules of evidence in a rather unified fashion.  

Law, ch. 2 (1987).


25 The traditionalists have distinguished between these two "curial" matters and the "extra-curial" ones and have done it in a rather formal way. The rules of evidence not applicable to non-curial matters have been used as a key for this distinction.
Zuckerman has recently made a strong case for the separation of these matters and there is no need to reiterate it here.\(^{26}\) The demarcation between criminal and civil matters dealt with by courts and various matters decided on by administrative tribunals and agencies is less obvious. Extra-curial issues such as disciplinary offences may well be even more significant in the gravity of their consequences than some of the criminal offences dealt with by courts. Administrative decisions about welfare rights, licensing, land, taxation and the like deal with entitlements which are by no means less important than those embraced by traditional notions of proprietary and other civil-law rights.\(^{27}\) These decisions are often very complex, involving both adjudication and administration, "social engineering" and conflict-resolution. Because of their complexity, a preliminary investigation into the risk-distributive problems involved in these decisions will be separated from the rest of my discussion.

Risk-distributive principles are internal to the legal system of expletive justice. They reflect the inner rationality of the law of evidence and procedure.\(^{28}\)


\(^{27}\) See C.A. Reich, The New Property, (1963-64) 73 Yale L.J. 733.

Their objective is to provide an answer to the following question: Given all factual uncertainties, what would be the best way to implement the relevant substantive law from the internally legal point of view? In this context, equality and utility acquire an internally legal and fragmentary meaning. They may not always coincide with the broader political ideals of equality and utility.\(^\text{29}\) To maintain equality or utility within an adjective framework of expletive justice would not guarantee, and indeed cannot and must not guarantee, the achievement of these broader ideals. My discussion will therefore be limited to the essentially internal meanings of risk-distributive utilities and equalities.

Lastly, the following discussion of risk-distributive principles, dealing with numerous civil, criminal and administrative matters, will include analyses of some reported judgments. Many of these judgments are authoritative and can thus be viewed as capable of supporting my arguments descriptively. It ought to be clear that these decisions are considered in this work as illustrative only.

CHAPTER EIGHT

RISK-DISTRIBUTION IN CIVIL TRIALS

1. THE PRINCIPLE OF EQUALITY

1.1 THE BASIS OF EQUALITY: BURDENS AND STANDARDS OF PROOF

The existing civil standards and burdens of persuasion, normally requiring plaintiffs preponderantly to establish their factual allegations "on the balance of probabilities", need to be reevaluated and, if necessary, also reinterpreted in the light of normative disagreements about degrees of certainty. Constituting part of the primary sources from which legally recognised reasons determining risk-related dispensations in forensic matters can be discerned, standards and burdens of persuasion are interpretively important. They refer to the rationally ascertainable degrees of empirically approximated probabilities and are based upon clearly moral rationales which justify their risk-distributive solutions. These rationales ought to be clarified and compared with the rest of the law of evidence, and if this reveals similar moral reasons from the risk-distributive point of view, all those reasons would have to be regarded as legally preemptive, forming a more general scheme of risk-
distributive principles. What are these justifying rationales?

Legal literature offers several explanations to the distribution of standards and burdens of proof. Some of those explanations are implausible and need to be eliminated at the outset. To eliminate them, the basic distinction between legal "burdens of persuasion" and evidential "burdens of production", first introduced by James Bradley Thayer, must briefly be explained. Burden of production, or burden of going forward with evidence, needs to be discharged by the relevant party in dispute in order to raise all or some of the issues supporting his case. To raise these issues, the party bearing the burden of production ought to provide prima facie evidence. This rule assists at eliminating non-meritorious lawsuits at the very beginning of the proceedings, saving a great deal of time and other expenses. In some cases, litigants having better access to evidence might be required to bring forward this evidence. Promoting the efficiency of civil litigation, this rule is justifiably corroborated by the risk-distributive sanction. It requires the parties willing to pursue their respective causes to produce all the information that they can reasonably be requested to

30 J.B.Thayer, The Burdens of Proof, (1890-91) 4 Harv.L.R. 45. See also J.B.Thayer, A Preliminary Treatise on Evidence at Common Law, ch.9 (1898).
produce. A failure to do so might result in adverse inferences and even in losing the case.

The rules of burden of production can therefore be classified as "rules of conduct" addressed to actual and prospective litigants, as distinguished from "rules of decision" which structure various discretionary processes of judicial deliberation and choice. 31 In applying the burden of production rules, the court faces a fairly technical task. It has to hypothesize the truth of the evidence adduced by the party carrying this burden and decide whether the conditions for entitlements specified by the substantive law could be satisfied by that evidence. 32 In cases falling under the burden of production rules, the courts would thus have to apply a very weak and highly structured risk-distributive discretion. 33

By contrast, the burden of persuasion rules apply when the burden of production rules have already been fulfilled.


32 This rule ought to be understood in combination with the relevant rules of discovery, leading to what Sir Jack Jacob calls the "open system", i.e., to the more or less full facilitation of the parties' access to relevant evidence and information. Jacob, supra n.23, at pp.92-102.

satisfied and all available evidence was admitted. The court has to evaluate this evidence in accordance with the relevant standards and determine empirically, as long as it can, the probabilities of contested facts. When the probabilities cannot be approximated and justified empirically by reference to generally shared knowledge, the conflict between the parties should be resolved normatively. Here, the court would have a stronger discretion. If the relevant probability-relations are indeterminate so as to allow more than one empirical decision to fall within the zone of formal legitimacy fixed by the existing standards of persuasion, the court would have to ground its risk-distributive choice on moral principles. As was mentioned above, if all such indeterminacies were settled in a "slot-machine" way, by universally deciding against the litigants carrying the burden of persuasion, this would have disrupted the adjudicative process in a defendant-biased way, begging the crucial question about the degree of the indeterminacy and other forensic contingencies that can justify such solutions. Moral judgment is inescapable in hard cases involving disputed facts. Standards and burdens of proof as rules of thumb can therefore hardly relieve the courts from their empirical "... embarrassment which would otherwise condemn [them] to the solution of ... insoluble

34 This notion, in conjunction with the "zone of substantive legitimacy", is employed by A.Barak throughout his book "Judicial Discretion" (1989).
problem[s]."35 These burdens and standards should be given a broader interpretation which accounts for their risk-distributive morality.

It should now become transparent that a party's better access to material evidence cannot justify the imposition of the burden of persuasion on that party. This and other factors of forensic ease and convenience have been mentioned by several writers among the factors affecting the allocation of the risk of non-persuasion.36 However, these considerations of ease and convenience can justify the incidence of the evidential burden of production only. When a party produces all his evidence and, by submitting it, discharges the evidential burden, his forensic advantage evaporates and thus cannot be reused against him by supporting the claim that he, and not his opponent, must carry the risk of non-persuasion. Another explanation that divides factual issues into positive allegations and "negative facts" and distributes the burdens of persuasion in accordance with the maxims like 'omnia praesumuntur pro negante', 'ei incumbit probatio qui dicit; non qui negat', 'reus excipiendo fit actor', etc. is similarly

35 This belief in the rules concerning burdens of proof was expressed in Winans v. Attorney-General [1904] AC 287, 289 (HL).

irrational. The dubious distinction between positive and negative facts can, at its best, justify the allocation of evidential burdens only.37

It has also been suggested that the distribution of legal burdens is justified in some cases by general experience: a party relying on an unlikely event has to prove it.38 Apart from its admittedly non-systematic character, this ad hoc justification simply cannot account for the more or less constant imposition of the burden of persuasion on civil plaintiffs. For example, legal experience can show that litigation costs and attorneys effectively prevent many non-meritorious claims, and that most of civil actions, including those settled out of court, were at least partially sound. Thus, in the majority of personal injury trials which take place in the U.S.A. lawsuits are brought under contingent fee arrangement. The probability of those lawsuits being meritorious is very high, for it is estimated by experienced attorneys who normally have a one-time relationship of no-win-no-fee with their


38 McCormick, supra n.36, at pp.951-52; C.R.Williams, id., at pp.276-77; Friedental & Singer, supra n.36.
clients. Having no client-oriented incentives beyond the outcomes of their immediate litigations, attorneys would normally refuse to pursue factually doubtful claims. 39 Although this knowledge has been validated by experience, it is, of course, not considered to be sufficient for shifting the persuasive burden to the defendants in those cases.

Another ad hoc justification of the incidence of the legal burden is the dislike of certain claims or defences. 40 Insofar as this justification simply supports the invalidation of morally repugnant laws, it is just another example of legal irrationalism. When it suggests to differentiate between particular risk-distributive situations and account for rationally sustainable differences between particular claims, defences and risks, this idea of "moral dislike" needs to be articulated in terms of the relevant principles. In that case it would carry no independent significance.

Hence, only the remaining three rationales are worthy of serious attention. According to the first one, those who seek legally to change the status quo must establish the conditions for changing it through the assistance of


40 Friedental & Singer, supra n.36; McCormick, supra n.36; Stone, supra n.37; James, supra n.36.
the courts of justice and other law-enforcing authorities.\textsuperscript{41} According to the second rationale, the existing standards and burdens of persuasion augment, in the long run, the number of factually correct decisions.\textsuperscript{42} Finally, these burdens and standards can be justified as promoting equal concern and respect of all the parties involved. By treating the value of wrongful losses as the same for both parties, these rules require that utility considerations such as the maximisation of factually correct judgments in the long run of cases be ignored in deciding about risk-distributive matters. What matters, according to this rationale, is that none of the parties be facing greater risks of error than his opponent, and this should be the case even when an uneven allocation of that risks could be justified by the overall utility.\textsuperscript{43}


The status quo rationale needs to be explained in greater detail. Status quo has no intrinsic value besides providing a good reason for insisting that the burden of production be discharged to show that there is an apparent justification for official intervention with private affairs. To say that an official act of interference is justified only when it is supported by preponderant evidential reasons is to invite two further questions. First, what justifies this presumption in favour of non-interference? Second, why is it enough, in order to rebut this presumption, to convince the court that the evidence that supports the plaintiff's case is minimally preponderant? The answer to these questions can possibly be found in what was recently described by M. Damaska as a "reactive" state policy which translates itself into legal procedure.\footnote{M. Damaska, The Faces of Justice and State Authority, 73-80 (1986).} A reactive state provides its citizens with a framework of laissez-faire for pursuing their chosen goals, minimising its interferences to what is necessary for the protection of existing order. It interferes with private affairs only correctively by exercising its reactive powers when the existing social equilibrium has been interrupted. It

\footnote{M. Damaska, The Faces of Justice and State Authority, 73-80 (1986).}
claims neutrality vis-à-vis different forms of life that exist in civil society and allows free interactions between individuals and groups. This ideology translates itself into legal procedure, creating a "conflict-solving" framework of adjudication which is characterised by the most radical adversarial features such as autonomous party control over proceedings, partisan determination of contested issues and presentation of evidence, and neutrality and passivity of judges and jurors, who make their decisions from tabula rasa through bipolar proofs and arguments presented by the litigants. The presumption of non-interference is just a natural ingredient of these conflict-solving proceedings and is justified by the laissez-faire ideology of a reactive state.

Correspondingly,

"... the risk of factually erroneous verdicts cannot be distributed unequally between the litigants on policy grounds - that is, on the basis of some second-order theory of social good. Claiming neutrality in social conflicts, the reactive state cannot adopt even such second-order theories; it refuses to treat one side to a dispute as more valuable and deserving than the other."

It is this "reactive" principle of equality that maintains that a party having preponderantly established his case must win even if the evidence supporting his

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45 id., ch.4.
46 id., at pp.120-21.
47 id.
case is only slightly preponderant in comparison with that of his opponent.48

However, as was stressed by Damaska, a "reactive" regime, as opposed to the "activist" one, and "conflict-solving" procedures, as distinguished from the "policy-implementing" ones, are merely ideal types which do not exist in their purity in the real world of politics and procedures. The real world is one of mixtures and these ideal types are helpful in explaining those mixtures.49

Risk-distributive policies of a complex state must therefore not be regarded as monolithically "conflict-solving" and "reactive". These policies should always be linked to concrete substantive laws which might be very complex and not invariable in their political forestructures. Furthermore, a "conflict-solving" rationality of procedures may be realised not necessarily in an egalitarian fashion, but, for example, through cost-efficient utilitarian practices of disposing of legal disputes. And even when such egalitarian practices are in fact adopted, this might

48 Some tension might be involved in the application of this "reactive" principle of equality, for it apparently requires that the probabilities of disputed facts be ascertained with precision uncharacteristic of "conflict-solving" procedures. As Damaska explains, possible inaccuracies in disposing of a conflict taking place in a conflict-solving procedural milieu are psychologically compensated for by fairness of the proceedings. id., at pp.101-3.

49 id., at pp.8-15; ch.6; and the Afterword at pp.240ff.
not be done as a result of the intrinsically "reactive" politics of the state and its "conflict-solving" forms of adjudication, but simply because the principle of equality (or, mutatis mutandis, the principle of utility if procedural utility is being pursued) is considered to be the best rational way of adjudicating legal disputes. Such rationality, not resulting from an ethical choice between two or more equally plausible options of decision-making, must not necessarily be political. It may be adopted not because it is intrinsically good, but because no better option of making decisions in conditions of uncertainty is available. Thus, when no rational reasons can support an uneven allocation of the risks of error, the equality-based solution may well be viewed as being optimal rather than nakedly political.

For these reasons, one should proceed internally, i.e., to move from the justifications of the procedures under examination to their political features (if detected), rather than to forestructure the understanding of these procedures by externally imposed "ideal types". 50 Therefore, the justification of the civil standards and burdens of proof applied in English law cannot be found in a restricted world of reasons supporting a supposedly

50 This criticism of Damaska's approach appears in A. Stein, A Political Analysis of Procedural Law, (1988) 51 Mod.L.R. 659. I am not arguing that the Weberian approach advanced by M. Damaska is inadequate. My arguments are against the alleged centrality of this approach to our understanding of different legal procedures.
Can the existing rules determining burdens and standards of proof be justified by the principle of utility, viz. by their virtue of maximising in the long run the overall ratio of correct decisions as opposed to the incorrect ones? The real problem concerning the principle of utility arises when this principle’s application may violate the principle of equality. This may happen when two paths of risk-distributive choices lead to opposite results and each of them is justified by one of the competing principles. Properly to deal with this problem, two questions need to be answered. First, is it clear that the existing rules concerning burdens and standards of persuasion have the virtue of maximising utility? Second, what would justify an unequal allocation of the risks of error for the sake of utility from the internally legal point of view? What are the legally preemptive reasons and the utility-based legal rights that can be relied upon to support utilitarian risk-distributions on the pain of inequality?

The answer to the first question is in the negative. Typically, legal disputes are not representative of repeatedly occurring events capable of being measured on a frequentist basis and thus susceptible to a
probabilistically credible calculus of chances. Nor can they be viewed, by analogy, as equiprobable trials that, like a throwing several times in succession of a presumptively "true" die, would produce the expected good results not falling below the level of their specified probability. Adjudicative determinations of facts do not take place in a closed system of reasoning and cannot be grounded on "a priori probability" - the domain of pure mathematics. They are, typically, not "statistical", as they cannot be reduced to a sufficient number of relevantly measurable samples. They are, by and large, "judgments of credibility" possessing many individual and even unique characteristics. Hence, the assertion that the preponderance-of-the-evidence standard generates in the long run of cases a greater number of factually correct decisions is highly speculative. As the distribution of erroneous judgments in cases necessitating recourse to burdens and standards of persuasion cannot reasonably be predicted, the expected utility of these burdens and standards cannot be measured. Moreover, the mere fact that most decisions delivered within the system are correct does

51 For these distinctions and fallacies that may result from overlooking them see A.Ayer, Probability and Evidence, 27ff. (1972).

52 The fact that most decisions are correct does not establish that these results follow from the application of the existing standards and burdens of proof. Not all cases deal with indeterminate degrees of certainty and many of them appear to be established at the levels of probability which are higher than those required by the relevant standards.
not in itself amount to utility-maximisation. The magnitudes of mistakes, determining the overall amount of disutilities, can still be greater than the value of correct decisions. This latter point can be exemplified by a hypothetical case of massive toxic exposure in which the probability of any of the 300 plaintiffs to have contracted, as a result of the exposure, a fatal disease is $\frac{2}{3}$, and no one besides those plaintiffs had been exposed to the hazardous substance.\textsuperscript{53} Let us also assume that the magnitude of damages of the plaintiffs (or their dependants) vary in accordance with both actual and expected income of each one of them. If the court’s role in this case is to maximise the number of correct decisions, it has to allow recovery to all plaintiffs. The result would be that 200 out of the 300 decisions are correct and in 100 cases the defendant would be obliged to compensate the non-deserving plaintiffs. Given that some of these 100 cases were decided in favour of the plaintiffs who, before having contracted the disease, enjoyed a very high income, the magnitude of the wrongly paid compensation would exceed the amount of compensation paid to the deserving plaintiffs and the utility would thus be outweighed by the disutility. To sum up, the utility-based justification has to accommodate the solution of the

problem of large errors,\textsuperscript{54} and as this problem is not taken care of by the existing standards of proof and burdens of persuasion, the justification of these rules has to be sought elsewhere.\textsuperscript{55}

The second question is even more fundamental because it raises a threshold objection to the utilitarian justification of the rules of burden and standard of proof. Why should the allocation of the risks of error between two (or more) actual litigants be affected by utility considerations extrinsic to the legal rights at stake? As our present enterprise is interpretive, the possible answer to this question is to be found within the boundaries of the law. As was suggested in part three, it is helpful for that purpose to reformulate the utilitarian justification of the existing burdens and standards of persuasion in Hohfeldian terms. This would give us the following picture: (1) The risks of error to be carried by P ought to be treated differently from the risks to be carried by his opponent D because an unequal treatment of these risks would maximise the number of correct decisions in future trials between $P(1)$ and $D(1)$, $P(2)$ and $D(2)$, ..., $P(n)$ and $D(n)$; (2) As we cannot say that there are jural relations of some kind (claim-rights and duties, or powers and liabilities, or

\textsuperscript{54} Orloff & Stedinger, id., passim.

\textsuperscript{55} This is subject to what will be argued in due course in relation to "group rights".

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immunities and disabilities or privileges and no-rights) between \( P \) and \( P(1) \) \ldots, \( P(n) \) or \( D(1) \) \ldots, \( D(n) \); and as no particular litigants that would benefit from the utilitarian dispensation of the risks of error can be singled out in advance, we are bound to infer that (3) there must be some jural relations between individual litigants and society at large; (4) These jural relations can only be found in substantive laws establishing substantive rights, for the risks of error that have to be allocated are adjacent to these rights.

If this is correct, the fact that there is only a small number of civil laws in the English legal system which can be interpreted as conferring rights on society at large should seriously limit the possibility of explaining the existing standards and burdens of proof by the principle of utility. The only argument that can support this justification is that in cases involving society's rights the distribution of the risks of error can and should be affected by utility considerations. Such cases are exemplified by those involving the issues like enforceability of illegal or grossly immoral contracts, child care and wardship, safety standards, consumer protection, and so forth. In identifying those cases, not only the nature of the rights at stake, but also the procedural arrangements employed ex lege in each one of them has to be accounted for. When the formal parties to a litigation cease to be the
unfettered masters of the otherwise adversary or, using Damaska’s taxonomy, "conflict-solving" trial proceedings,\(^56\) this may indicate the polycentricity of the substantive issues at stake, namely that society at large might well have some share in the outcome of this particular trial. But cases like these cannot be regarded as characteristic of most civil trials in England and it would therefore be more accurate for interpretive purposes to view them as special instances in which utility considerations are allowed to affect risk-distributive choices.\(^57\)

The idea of formalising the arguments involved in the utilitarian justification of the existing standards and burdens of persuasion in Hohfeldian terms helps to articulate the choices made by those who support this justification. Imposing severe restrictions upon the application of risk-distributive utility, this idea also lays down the framework within which the supporters of the utilitarian justification are bound to argue. Within this framework, the supporters of utility have either to

\(^{56}\) Damaska, supra n.44, ch.4.

\(^{57}\) In A Matter of Principle, ch.3, Dworkin rejects the idea of overriding procedural utility for meta-legal reasons grounded on political morality. Here, the utility is restricted for legal reasons grounded on a conventionalist interpretation of the law, and the possible scope for its application is also identified by way of interpretation. As was argued in part three, this approach displays no commitment to any moral ideal apart from those that can be found within the law and is thus consistent with legal positivism.
argue in favour of some kind of jural relations between litigants that apparently have no such relations and cannot even be known in advance or to resort to the generic notion of societal rights. Both of these options can only be maintained on an ad hoc basis, the first by showing that there are instances in which complex "group rights"\(^{58}\) can be claimed to exist; the second by referring to particular cases where societal rights should affect the resolution of private conflicts.

However, it might still be argued that the very attempt to depict in Hohfeldian terms the utilitarian (and any other) justification of the existing standards and burdens of proof is misleading. For it is only the rules of law, not their background justifications, that, according to this argument, can be explicated by Hohfeldian scheme of jural relations. Clearly, any attempt at justifying any legal rule would inevitably end up in relying on some social good which, being very general in its character, is not susceptible to reductionist and atomistic analysis like that of Hohfeld. I think that this argument tends to neglect the "interpretive sting"\(^{59}\) of the present enterprise. When the law is clear and cannot be said to be reasonably open to more than one interpretation, there would be no need to explicate its justification in a rights-based

\(^{58}\) See supra n.55.

\(^{59}\) Cf. R. Dworkin, Law's Empire, ch.2 (1986).
fashion. But when the law is unsettled, and this seems
to be the case with the risk-distributive meaning of the
existing standards and burdens of proof, its background
morality ought to be set out in terms of rights-
conferring principles rather than policies. So long as
this is performed conventionally, viz. in accordance
with the rules followed by the community of
interpreters,®® the rights that people have, rather than
the social goodness of legal norms, ought to be the
central organizing idea in applying the law. This of
course is not to say that legal policies ought to be
neglected and never be taken into account. Legal
policies must be accounted for in order to understand
the law as their ultimate product, but should not be
pursued for their own sake in a forward-looking way that
decentralizes the idea of rights. Legal interpretation
ought to be rights-orientated and as such can profitably
be articulated in Hohfeldian terms. A supporter of the
utilitarian justification of the rules of standard and
burden of proof must therefore shift the impetus of his
argument from the epistemological rejection of
Hohfeldian scheme to the wholesale rejection of rights-
orientated interpretation. This seems to be his only
way to let himself out from Hohfeldian strait-jacket and
maintain an unconstrained rule-utilitarian approach to
the risks of error. In that case, his argument, having

®® The details of this approach are presented in
part 3.

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no recourse to the notion of rights, would justify any particular decision which corresponds to the rules of standard and burden of proof because these rules tend to augment the overall utility. As these rules are grounded on utility, there would be no need directly to justify by utility any particular decision corresponding to these rules, for any such decision would be justified by virtue of these rules alone.

This position has never been adopted by English courts.\(^{61}\) One of the main reasons for not adopting it interpretively\(^{62}\) is its all-encompassing utilitarianism, accompanied by a highly speculative assumption about the possibility to attain the proclaimed utility in the future. The precariousness of that assumption crucially weakens the rationality of this unyieldingly utilitarian scheme of risk-distribution. A minimal requirement from both absolute and consequentialist moral precepts must be that their allegedly good consequences be attainable in a foreseeable future,\(^{63}\) and the rules of standard and burden of proof cannot be justified in such absolute

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\(^{62}\) There are, of course, independent moral reasons for not adopting a utilitarian scheme of risk-distribution.

terms. On the other hand, an attempt to limit the
application of utility to particular cases would in turn
require separate justifications for singling out these
cases. This would severely constrain the application of
utility, bringing it below the sufficient level of
generality to which any justification of general legal
norms must correspond.

Only the principle of equality, requiring that risks of
error be equally distributed between the litigants can
therefore be considered as a general justification of
the existing civil standards and burdens of persuasion.
This principle demands that in making decisions in
conditions of uncertainty the decision-makers treat the
potential losses of both parties as equally harmful.
This principle is an offshoot of the more general
principle of political morality which requires the state
authorities to treat citizens with equal concern and
respect. Hence, when the probability of one party’s
allegations being true is greater than that of their
possible negation, that party should win because to
decide otherwise would amount to inequality. Similarly,
truth-certifying procedures and forensic opportunities
must also be equal to both parties because their
inequality might end up in a risk-distributive
inequality.
It might be argued that the "winner-takes-all" fashion in which legal disputes are resolved undermines the idea of equality. The plaintiff, having established his case at one of the probability levels which can be stated in numerical terms as $1 \gg p > 0.5$, is entitled to full recovery as if his allegations were established to be absolutely certain. This inequality could be avoided if the courts were authorised to rule that the value of what is at stake be divided between the parties proportionally, in accordance with the probabilities of contested factual accounts.\textsuperscript{64} Similarly, the rule of the last resort, requiring the judge to dismiss the claim when the contradictory accounts of both parties are equiprobable, is apparently not based on equality. Being defendant-biased, this residuary rule also needs to be explained.\textsuperscript{65} To these objections I now turn.

The idea of pro-rated recovery that varies in accordance with the levels of certainty has never been endorsed by English law and, subject to a few exceptions, by other common-law jurisdictions.\textsuperscript{66} The main reason for this is the dislike of the situation in which judgments never

\textsuperscript{64} For this proposal see R. Allen, A Reconceptualization of Civil Trials, (1986) 66 B.U.L.R. 401; Orloff & Steding, supra n.53.

\textsuperscript{65} For attempt to explain this rule in utilitarian terms, namely by the idea to deter frivolous claims, see R. Winter, The Jury and the Risk of Non-Persuasion, (1970-71) 5 Law & Society Rev. 335, 337.

\textsuperscript{66} For possible deviations from this principle see Allen, supra n.64.
reflect and do not aim to correspond with actual events and states of affairs. This intuition is explicable by the current structure of substantive laws which is, and some would say ought to be, characterised by the bivalence of its dispositive concepts like "contract" and "civil liability". These concepts are dispositive in the sense that when one of them holds in a particular situation the judge has a duty to decide the case in a certain way, and when it does not hold, the judge is under the duty to decide the case in the opposite way. In other words, dispositive concepts and their negations are taken to exhaust the range of judicial options in deciding cases. The law assumes that there must be a single right answer to any legal question and hence "the winner takes all". The apportionment of what is at stake, constantly varying in accordance with the degrees of uncertainty, would, given that absolute certainty is unattainable, lead to the total frustration of substantive laws. If this approach is adopted, people would never have unreserved rights and duties and would almost invariably possess unknowably partial rights only. This is not the position of the law in England which values stability and rectitude of decisions as its main objectives.

It can now be understood why none of the all-sweeping approaches to risk-distribution, be it a robust utilitarianism or a probabilistic apportionment of stakes, fits the English law as it stands now. These approaches tend to defeat all other objectives of the legal system, seeking to attain either the utmost equality or total utility in risk-distributive matters. The suggested idea of equality is adjective in its operation. It is aimed to justify the existing standards and burdens of persuasion within the given framework of substantive law and formal adjudication. It rests on the assumption that all adjective controversies are and should be resolved in a way subordinated to the substantive law, i.e. given that "winners take all". It cannot therefore be criticised on the grounds that its equality-based justification falls short of the ideal equality. The only argument that can be put forward against this approach within the law is that there is a better interpretive option. The utility-based justification is the best counter-argument, but, as we have already seen, this argument fails inasmuch as it tends to be all-encompassing.

Similarly, the rule requiring that when the rival contentions are equiprobable the judge ought to decide against the plaintiff does not detract from the non-ideal equality as a justification of the existing standards and burdens. Judicial decisions, one way or
another, must be given and the lines ought to be drawn somewhere. Being residual and line-drawing, the rule which requires to dispose of equiprobable claims against plaintiffs should not play any role in making general interpretive choices.

The justification of the existing probative standards and burdens by risk-distributive equality is interpretively sound and morally attractive not merely because all other options are untenable. It is sound because, being based on principle rather than policy, it fits the rights-oriented fashion in which both lawyers and judges usually reason about disputed cases. It is attractive not merely because equality is a meritorious political ideal, but because it demands that legally preemptive reasons have to exist in order to justify an uneven disposition of the risks of error. Such reasons have to be found within the law, and if they cannot be found, the rights of the parties involved are to be equally respected in all risk-distributive matters.69

1.2 THE PRINCIPLE OF EQUALITY CORROBORATED

Many other important rules of evidence also epitomize the idea of risk-distributive equality. One of those rules, the rule against hearsay, can be justified in civil trials by its facilitating the maintenance of equality between the parties in examining evidence of their opponents. If a party's access to the evidence presented by his opponent and the opportunity to examine it are inferior in comparison with his opponent's opportunity to test the same piece of evidence, an imposition of the risks of error on this party in connection with this evidence would amount to inequality. Another rule aimed at maintaining risk-distributive equality is the parol evidence rule according to which extrinsic testimony is generally inadmissible as evidence to the effect of adding to, modifying or contradicting the terms of a document containing a valid contract or other transaction. Additionally, there are rules of quantum of proof which modify the ordinary standards and burdens for reasons which support the view that these ordinary standards and burdens are based on the idea of risk-distributive equality. These points will now be discussed. 

As was mentioned above in part two, there is no justification for excluding all statements given out of court and tendered to prove the truth of their contents.
Hearsay statements are not universally unreliable. Nor is it possible to predetermine an invariable set of conditions which would render an otherwise unreliable hearsay trustworthy and vice versa. It can hardly be argued that all out-of-court statements tend to be preponderantly prejudicial having a very little probative value. There is no evidence to the effect that triers of facts, dealing in their daily practices and everyday life with various kinds of not always credible evidence, would be at risk of being frequently misled if hearsay statements were freely admitted to prove the truth of their contents. On the traditionalist account, the impossibility to subject the maker of a statement to cross-examination is the soundest justification of the rule against hearsay. As a justification of exclusion this rationale is question-begging. Thus, if it is possible effectively to cross-examine the maker of a statement, that statement ought to be excluded not because it is intrinsically unreliable, but because a more direct evidence, namely the testimony of its maker, is available. Hence, what would be at work here is not a bias against hearsay as such, but the best evidence principle. If the maker of a statement is unavailable for cross-examination, it is not merely the admission of that statement, but also its exclusion, that would involve an imposition of the risk of error on one of the

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parties. Hence, the question is who should carry the risk of error? To say that such risks should invariably be imposed upon a party adducing hearsay because his opponent, being denied cross-examination, ought to be immune from these risks, is to commit the fallacy of petitio principii. It is clear that this cannot be the answer to the question who ought to suffer when the maker of a statement is unavailable as a witness.

I have therefore proposed a possible justification of the hearsay rule which is based on the fact that a party relying upon an out-of-court statement has typically a better access to this evidence and a better opportunity to examine it than that of his opponent. As the main organizing risk-distributive principle in civil cases is that of equality, an unequally accessible evidence, leading to unequal distribution of the risks of error, cannot, generally, be used by the judges and other triers of facts.71 Had the principle of utility been the main organizing principle of the law of civil evidence, destinining the overall augmentation of correct decisions to be the overriding objective of this part of procedural law, it would not be rational to exclude probative evidence on the ground of its unequal accessibility to the parties, lack of cross-examination or for any other reason. The existence of the rule

71 The justification of the hearsay rules in criminal cases will be discussed in chapter nine.
against hearsay supports the view that the way in which the risks of error are distributed inter partem is important and that risk-distributive equality in forensic matters should, subject to exceptions, trump utility.

This justification is, however, merely partial because not every statement given out of court is more accessible to one party than to his opponent. In some cases, the opportunities to examine hearsay are equal to both parties. In such cases the admission of hearsay would not lead to inequality and this, in my opinion, is the common denominator of the major exceptions to the rule against hearsay. This position, which shall now be defended, provides a further interpretive support to the principle of risk-distributive equality. Before defending this position the meaning of forensically unequal access to evidence ought to be clarified. Inequality would result when the opportunities of one litigant to affect the contents of a particular piece of evidence in pursuing his forensic goals are better than those of his opponent. In such cases, to avoid inequality, the party having a better access should be required to facilitate his opponent's opportunities to examine this evidence. Typically, situations like this exist when the disputed evidence is a statement made by a person who was accessible as a witness to one party only.
Prior to the enactment of the Civil Evidence Act in 1968, English law had excessively reacted to such situations. Many statements have been excluded when their makers have not been subject to counter-balancing cross-examination. The justification which was given to this approach that such statements are unreliable and potentially misleading must not be taken at its face value. At the same time, a great deal of suspicious but reasonably examinable by both parties evidence was admitted, leaving to the triers of facts to determine its weight. Moreover, the common denominator of virtually all the common law exceptions to the rule against hearsay, such as public documents, different declarations of deceased persons, statements forming part of the res gestae and a testimony which was given in former proceedings between the same parties, being at that stage subject to cross-examination, is the forensic equality of all the parties affected by that evidence.72

72 These exceptions are discussed in A.Keane, The Modern Law of Evidence, ch.10 (2d ed., 1989). Like many other writers, Keane treats different admissions and statements made by the parties or on their behalf as evidence admissible by virtue of its being one of the exceptions to the rule against hearsay. However, from the perspective of the party opposing that evidence it cannot be seen as inaccessible and not susceptible to cross-examination. A party cannot seriously complain that he was not given an opportunity to cross-examine himself or a person who had made an authorised statement on his behalf. Therefore, such statements should not be included in the definition of hearsay. 4 Wigmore Evidence, par.1048; C.McCormick, On Evidence, (3d ed., 1984) pp.774-775; J.Bentham, A Treatise on Judicial Evidence, 203 (1825).
The exclusion of hearsay had gone too far in rendering inadmissible business records and other statements not prepared by the parties especially for trials with the result that the parties preparing them gain an advantage over their adversaries. Many statements equally unsusceptible to both parties' examination have also been excluded. This was due to the adversarial nature of civil proceedings within which one party to litigation was allowed to take his opponent by surprise, and both parties were presumed to conduct a forensically hostile combat in relation to each other. The absence of cross-examination had been thought to have an adverse effect on the fairness of that combat.

Consonantly with the movement towards a more open system of civil procedure and the extension of the ambit of pre-trial discovery the civil rule against hearsay was effectively substituted by the "best evidence principle". This arrangement is supported by the idea of risk-distributive equality. Parties to civil


74 See the Civil Evidence Act 1968. Subject to ss. 4 and 5 which, under certain conditions, render admissible computerized and other business records, "double-hearsay" is still generally inadmissible. Keane, supra n.72, pp.232-237. The "best evidence principle" is contained in s.8(2)(b) of the Act.
litigation are to be regarded as potentially equal in obtaining evidence and when hearsay is the best evidence that can reasonably be obtained it must be admitted. Litigants that have to rely on hearsay must not, for this reason alone, be exposed to greater risks of error than their opponents. Problems arise, however, when a statement made by a currently unavailable witness was prepared for forensic purposes by one of the litigants. Such statements, both oral and documentary, would now be admissible. This overreaction against the hearsay rule might weaken the risk-distributive equality, but the latter can still be maintained if the advantage gained by one of the parties in preparing a statement for his forensic purposes be constantly taken into account in allocating the risks of error surrounding such statements. This, in my view, would be the best way of applying the Civil Evidence Act in situations like that.

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75 By postulating equality between the parties in respect of their possibilities to obtain and examine evidence, I am far from proposing that their financial abilities having an adverse effect on actual realization of their forensic opportunities ought to be disregarded. Financial obstacles leading to injustice ought to be grappled with by legal aid and other facilities like class-action and contingent fees. The law of evidence cannot make good financial inequalities.

76 ss.2, 10 of the 1968 Act.

77 See Rover International Ltd v. Cannon Film Sales Ltd (No. 2) [1987] 3 All ER 986, 991. The judicial pronouncement that such statements will carry less weight can only be justified by the principle of risk-distributive equality, for real evidentiary weight can never be determined in advance.
The "parol evidence rule" can also be justified in terms of risk-distributive equality. This rule deals with the admissibility of extrinsic evidence adduced to contradict the terms contained in a document. An agreement superseding the previous contract can be proved orally; and similarly, arguments affecting the validity of a written agreement can be established by oral evidence. What can never be allowed to be orally proved is the parties' negotiations taking place before the contract was finally concluded. This rule is usually explained as an offshoot of the principle of relevancy, i.e., that extrinsic evidence about prior negotiations is simply irrelevant and if admitted can add nothing to the resolution of a dispute. This explanation needs elaboration because information about negotiations might well be logically relevant. For example, a testimony that contrary to their written agreement, the parties had stipulated that money to be paid on delivery of certain goods can be delayed when the quality of those


79 Cross, id., at p.616. The extrinsic "business security" rationale for this rule has also been suggested. See R.Lempert & S.Saltzburg, A Modern Approach to Evidence, 1017 (2d ed., 1983). This rationale, however, does not fit the English law under which oral testimony can be used to prove post-contractual events, including modifications of contractual terms previously reduced to writing. But cf. Rabin v. Gerson Berger Association Ltd. [1986] 1 WLR 526, 534.
goods needs to be examined is logically relevant. This testimony is excluded not because it is logically irrelevant, having no bearing on contested facts. It must be excluded because the notion of relevancy employed here is expectational, i.e. contractual, rather than logical. Parties to a written agreement contemplate it to be exhaustive of all their mutual undertakings, and if one of them later reveals that what had been documented is different from what had, in fact, been agreed upon when the terms of the contract were negotiated, this party should carry the risk of error.®® This typical contemplation of the contracting parties is risk-distributive. The "parol evidence rule", reflecting this contemplation, does not lay down an irrebuttable presumption that all written contracts are exhaustive of what has been agreed upon between the parties. For example, a party’s testimonial admission that one of the terms of his agreement with another party differs from what had been reduced to writing will facilitate the success of counter-documentary allegations of his opponent.®¹ To be sure, such

®® For support of this presumption and different grounds for its rebuttal see Treitel, supra n.78, at pp.151ff. For recent statement of the "parol evidence rule" see Rabin v. Gerson Berger Association Ltd. [1986] 1 WLR 526.

®¹ See, e.g., Harris v. Rickett, (1859) 4 H & N 1 (when it is apparent that the parties have not intended the written terms of their contract to be conclusive, oral evidence is admissible). K.W.Wedderburn, Collateral Contracts, [1959] C.L.J. 58ff, and esp. at pp. 61-63, 84 vividly demonstrates that the "parol evidence rule" is a strong, but by no means irrebuttable, presumption of
instances are rare, but it is only their legal impossibility that could accomplish Thayer's idea of transferring the "parol evidence rule" from the law of evidence to the law of contract. By making any proof of non-documentated undertakings which tends to modify a written agreement enormously difficult (but not entirely impossible), this rule imposes the risk of error on the party who seeks to contradict the terms reduced to writing. The intention of the parties to a written agreement to make it exhaustive might not ultimately be realised in their final document, but since its non-realization was typically regarded by them to be unlikely, an onerous burden of proving the non-

written contracts being exhaustive. See also Treitel supra n.78, p.150ff. The case would, of course, be different when the requirement that a contract ought to be in writing is constitutive of that contract's validity (see Treitel, op. cit., at pp.135-136). For history of these rules see J. Salmond, The Superiority of Written Evidence, (1890) 6 L.Q.R. 75. Cf. A.Honorê, The Primacy of Oral Evidence?, in C.Tapper, Crime, Proof and Punishment - Essays in Memory of Sir Rupert Cross, 172 (1981).

See J.B.Thayer, A Preliminary Treatise on Evidence at the Common Law, 390ff (1898). The proposition that the parol evidence rule should apply when a written contract was intended to contain all its terms and should not apply if it was not so intended will turn this rule into a merely circular statement. Treitel, supra, n.78, at p.152. The risk-distributive explanation proposed in the text is therefore more promising. This explanation is based on an additional risk-allocating intention of contracting parties. For further discussion see C. McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, (1932) 41 Yale L.J. 365.

This rule similarly applies to all legal instruments both unilateral and bilateral. Cross, supra n.78, at pp.626-629; Rabin v. Gerson Berger Association Ltd. [1986] 1 WLR 526, 536.
exhaustiveness of that document is imposed on the party contradicting its terms. This imposition of the risks of error is contractual.

This contractual allocation of the risks of error can only be justified by the general legal principle requiring that such risks be treated as equal for both parties. If there was a good reason for treating such risks unequally, this reason would surely be strong enough to disallow unconstrained contractual stipulations of the parties seeking to allocate these risks between themselves in a way which differs from that prescribed by the law. The law could reasonably be expected in that case to specify the risk-allocations which it regards as unamenable to private stipulations. When, for example, the bargaining powers of the parties are not equal, an appropriate interference of the law with their risk-distributive stipulations could reasonably be expected.\(^\text{84}\) This interpretation of the "parol evidence rule" coincides with the more general principle of civil evidence that agreements which reallocate the existing burdens of proof or stipulate that an inadmissible (but logically probative) evidence would be admissible are legally effective.\(^\text{85}\) The "parol evidence rule" can hardly be justified by utility,

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84 See, for example, s.13(1)(c) of the Unfair Contract Terms Act 1977, and par.(a) of Schedule 2 of that Act.

85 Keane supra n.72, at pp.58-59.
namely, by its capability of augmenting the number of correct decisions, resting on the assumption that legal agreements reduced to writing are by and large exhaustive of their terms. Assuming that one can reasonably hold that in most cases written agreements embrace all the terms agreed upon between the parties, the rule that allows a non-party to contradict the agreement by oral evidence inflicts a fatal blow upon the utility-based rationale and the same can be said about the rule concerning the provability of collateral oral undertakings.

When the normal risk-distributive equilibrium between the parties is interrupted, the law strives to equalize the emerging risks by modifying the usual rules of sufficiency of evidence. This occurs when the forensic opportunities available to one of the litigants are restricted in comparison with those of his adversary and when the gravity of the consequences flowing from the judgment makes a possible mistake especially harmful to

86 See Rabin v Gerson Berger Association Ltd [1986] 1 W.L.R. 526; 534; 537, a decision suggesting promotion of certainty to be a possible objective of the rule. This certainty, as explained by Treitel (supra n.78, at p.152), is sometimes promoted "... at the expense of justice", and it is this balance that allegedly accords with the utilitarian justification of the rule. However, the exceptions to this rule, which are numerous and not entirely certain, defy this rationalization.

87 This rule is somewhat unclear. See Cross, supra n.78, at p.623.

88 On this rule see Cross, id., at pp.621-22 and Wedderburn, supra n.81.
one of the parties. Cases belonging to the first category contain, e.g., claims against the estate of a deceased person. In those cases, if the only evidence supporting a claim against the estate is a testimony given by the claimant, an appropriate "corroboration warning" must normally be administered.\textsuperscript{89} In cases involving serious imputations on one of the parties, e.g., a criminal allegation or charges of fraud, the court would normally require the probability of those imputations to be higher than usual.\textsuperscript{90} None of these practices fits the idea of utility. All of them appear to rest on the assumption that one party's disutilities can sometimes trump the overall augmentation of correct judgments.\textsuperscript{91} An attempt at presenting these practices are wealth-maximising is at its best highly speculative. It seems therefore that only the idea of risk-distributive equalization in forensically unbalanced situations is capable of justifying these practices.

\textsuperscript{89} Keane, supra n.72, at p.151.

\textsuperscript{90} Cross, supra n.78, at pp.141-148. For criticism of this approach see R.Pattenden, The Risk of Non-Persuasion in Civil Trials: The Case Against a Floating Standard of Proof, (1988) 7 Civil Justice Quart. 220. In the U.S.A., the standard of "cogent and convincing proof" in committal proceedings has been explained by the court by the inequality of the risks of error faced by the parties. Addington v. Texas, 441 US 418 (1979).

\textsuperscript{91} On utilitarian account, when the standard of proof for plaintiffs (or for defendants) rises above the probability level of 0.51, incorrect judgments may well outnumber the correct ones. D.Kaye, The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation, [1982] Amer. Bar Found. Research J. 487; N.Orloff & J.Stedinger, supra n.53.
Like many other evidentiary rules, these practices are to be viewed as particular instances or offshoots of the principle of risk-distributive equality.

2. THE PRINCIPLE OF UTILITY
Risk-distributive utility has a limited scope for application in the English law of civil evidence. An attempt at maximising the overall amount of correct decisions in the long run of cases can only make sense when it can reasonably be expected to succeed and when there are jural relations of some kind between those who are affected by the utilitarian risk-distribution. There should be no truth-maximisation "in the air". It is only when the relevant substantive law creates "group-rights" or confers rights on society at large, that the distribution of the risks of error related to these rights might be utilitarian. Cases not involving such rights, described above as "monocentric", are not and should not be resolved in a way that accounts for non-existing litigants and their hypothetical risk-distributive interests. It is only the interests of those that can be considered as right-holders in one of the Hohfeldian senses that should affect the allocation of the risks of error.

92 See above, text adjacent to nn.52-69.
In England, civil-law rights, duties and powers belonging to society at large\textsuperscript{93} are usually treated as part of administrative law and dealt with by administrative agencies and tribunals. The principles of risk-distribution in administrative decision-making will be considered below. It has, however, to be noted that civil law can sometimes confer rights, duties and powers on society at large and that in such cases risk-distribution should be aimed at maximising the overall amount of correct decisions. Custodial and other issues of parental rights and duties which involve societal powers to protect minors from, e.g., being sexually abused belong to this category. Thus, for example, evidentiary rules that have been explained above by the idea of risk-distributive equality do not normally apply in such cases. Following the Benthamite model of fact-finding by admitting all relevant evidence, the decision-making procedures in those cases are utilitarian in their relation to the existing risks of error. The nature of the legal conflicts that have to be resolved in such cases requires that the principle of risk-distributive equality between the parties be outweighed by the long run maximisation of factually correct decisions.\textsuperscript{94}

\textsuperscript{93} These rights, duties etc. are distinguished here from the criminal-law rights which might also belong to society.

\textsuperscript{94} For the proposition that strict rules of evidence are inapplicable in such cases see In re H (a Minor) K v. K, Times, 9.6.1989 (CA) and other cases
Strictly speaking, group-rights are not recognised by English law, but there is a room for their recognition within company law, the law of torts and consumer law in relation to product liability. Two following examples are therefore imported from the United States. The potential significance of group-rights along with the existence of the doctrinal possibility of recognising them in English law\textsuperscript{95} make it important to explicate the principles of risk-distribution which should accompany them. I shall discuss first the typical case of mass toxic exposure and later analyse the problem of "lifting the veil" that separates an undercapitalised company from those who run it.

Manufacturers owe duties of care to those that can be affected by their industries. If one of them runs a risk of toxic exposure, by doing so he increases both his wealth and freedom of action at the expense of those that belong to others. It is for this reason that the law requires him to either compensate all those affected by his actions or take part in a scheme within which the costs of accidents are spread amongst the population, referred to in that judgment.

\textsuperscript{95} For the notion of "doctrinal possibility" and its links with the law-making activities of the judges see R. Stevens, \textit{Hedley Byrne v. Heller: Judicial Creativity and Doctrinal Possibility}, (1964) 27 Mod.L.R. 121.
e.g., to take out an insurance policy. Problems arise when a manufacturer generates an epidemiological hazard, i.e., when he increases the probability of contracting diseases within the society at large or within the group of people particularly exposed to the hazard. Given that epidemiological probability falls short of certainty and that the hazard generated by the manufacturer cannot be established to be the sine qua non of the specific disease contracted by one of the plaintiffs, the manufacturer might be exempted in all cases. When more than one manufacturer has taken part in generating the risk and none of them can causally be linked to the particular disease of one of the plaintiffs, all the manufacturers might be let out. The former difficulty is that of "indeterminate plaintiffs"; the latter one is that of "indeterminate defendants."  

One way of resolving these difficulties is to hold that toxicogenic manufacturers owe the duties of care not

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97 Similar problems would arise in connection with product liability, so there is no need to discuss this issue separately.

only to separate individuals that may be affected, but also to society at large or to particular groups of people especially exposed to the hazardous substances. By increasing the epidemiological risk, the manufacturer breaks his duty of care vis-á-vis the society or the exposed group to the extent of his probabilistically measured contribution to the spread of the disease. This contribution must determine the fraction of the damages that the manufacturer would have to pay to the exposed group and the internal distribution of this amount amongst particular individuals ought to be treated as a separate question.99 This amount ought to be distributed on the basis of equality, namely each individual must recover the sum of money that reflects his share as an equal member of the group.100 Such jural relations between the manufacturer and the group which was exposed

99 These latter jural relations would be different from the former ones.

100 Orloff & Stedinger, supra n.53. The approach proposed by these authors has been proposed to operate monocentrically within the jural relations between the toxicogenic manufacturers and the exposed individuals. Consequently, they have argued that none of the individual judgments delivered on the basis of their approach would be correct. Within the polycentric framework of litigation which recognises group-rights, this deficiency would disappear, for the decisions between the manufacturers and the exposed groups of people would not be incorrect: the group would recover the compensation reflecting its group-damage, while the individuals forming this group would divide this sum in accordance with their respective shares. Given the lack of data, this would be the best solution from the point of view that values rectitude of decision above all other procedural ideals. Hence, the approach advocated by Orloff and Stedinger turns to be even more attractive than they have initially thought.
to the toxic hazard are the only ones that can affect the position of the former. As the causal link between the hazard and the individual losses has not been proved, the manufacturer's jural relations with individual members of the group remain dormant. Lacking the vital factual element, these relations would be inoperative in such cases.

The distribution of the risks of error in cases based upon "naked epidemiological (= statistical) evidence" ought to be utilitarian within the jural relations between the manufacturer and the group and be based on equality inasmuch as the internal distribution of the money paid by the manufacturer is concerned. When several manufacturers are involved, each of them would have to contribute to the group-compensation fund correspondingly to his own share in the market. 101 This "Public Law Approach" 102 is justified not only on utilitarian but also on egalitarian grounds. It maximises in the long run of cases the overall number of correct decisions, maintaining the risk-distributive equality between the defendants producing toxic substances and the exposed groups.


When one of the legal rights belonging to society at large is in issue, the overall maximisation of factually correct decisions becomes legitimate, and the same would also apply to group-rights shared by a large number of individuals. In such instances, risk-distributive utility is not being pursued as an objective in its own right or as part of the wholesale rule-utilitarian programme. It is being pursued because what is at stake here is rights which cannot be enforced in a non-utilitarian way which would value all of them as any other right for all risk-distributive purposes. As those rights are no less weighty than any other right, this would be a properly balanced solution.\textsuperscript{103} Furthermore, as no one of the toxicogenic producers can allege that he was not in breach of his obligations to society, no one of them can justifiably complain that he had been picked at random for his being a member of some statistically significant sector. They could justifiably complain so only vis-à-vis particular individuals, not groups, and only to the extent that their contributions to the compensation fund went beyond their shares in the market.\textsuperscript{104}

There is a doctrinal possibility of adopting this approach in the English law of torts. The doctrine of

\textsuperscript{103} Cf. Rosenberg, id.

\textsuperscript{104} i.e., that what they are obliged to pay does not reflect the group-damage they caused.
negligence can accommodate the idea of group-rights in connection with mass toxic exposures. This doctrine has always been viewed by the judges to be open for developments.\textsuperscript{105} The existing standards of persuasion are open to the possibility of accommodating, when appropriate, a utilitarian distribution of the risks of error, leading to pro-rated recovery in cases involving group-rights.

A similar approach should apply to corporate undercapitalisation. Taking as an example one of the notorious American cases, if each of one hundred companies owns one taxi-cab, and all the companies belong to a single owner, an underinsurance of the risks involved in running these companies or inadequate corporate funds to cover these risks may constitute a "thin capitalisation" eventuating in "piercing of the corporate veil" and the attribution of the debts to those standing behind it.\textsuperscript{106} The doctrine of lifting


\textsuperscript{106} See Walkovszky v. Carlton, 223 NE 2d. 6 (1966). I have modified the facts of this case which involved only 10 companies, each one of them running 2 taxi-cabs covered by $10,000 liability insurance per cab. See also Minton v. Canavey 364 P 2d 473 (1961) and an important article R.C.Downs, Piercing the Corporate Veil - Do
the veil by virtue of undercapitalisation aims at protecting the creditors of the company by restricting the privilege of limited liability, i.e. by not allowing the directors and the shareholders, standing behind the veil, to run the risks strikingly disproportional to their company's assets. If such practices were allowed, the costs of the risks undertaken for making private profits would be borne by members of the general public, and this cannot be tolerated.

Hence, the undercapitalisation doctrine is based on a comparison between the expected costs of the externalised risks run by the company with the value of its assets and rights, including insurance policies. It can be accommodated within the scope of "fraud" which led to the lifting of the veil according to the common law\textsuperscript{107} and the relatively new rules of "wrongful trading" laid down by the Insolvency Act 1986, section 214.\textsuperscript{108} It is therefore pertinent to examine the problem of determining undercapitalisation as a matter of fact.

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\textsuperscript{107} Farrar, id., at pp.62-63.

\textsuperscript{108} The latter rules are discussed by Farrar, id., pp.626-27 and R.R.Pennington, Directors' Personal Liability, 191-95 (1987).
The doctrine of limited liability and the veil that separates the company from its shareholders and directors is a privilege in rem of the latter. Those who stand behind the corporate veil have no-duty to pay the debts or to carry out the obligations that belong to the company. This no-duty, or privilege, holds against all the creditors of the company, both actual and potential and voluntary and involuntary. The limitation of this privilege by disallowing corporate undercapitalisation amounts to the duty of directors and "shadow directors"\(^{109}\) to maintain an adequate security-fund (moratorium\(^{110}\)) and thus facilitate the protection of the company's present and future creditors. Accordingly, this duty is owed to the indefinite number of people some of them, not being amongst the company's creditors, may be unknown at the time of the undercapitalisation. These future creditors of the company are primarily protected by the undercapitalisation doctrine, for most of such creditors are involuntary. Not entering into any contract with the company, a person might become one of its creditors as a victim of tort.\(^{111}\) Hence, the right to adequate


\(^{110}\) Pennington, supra n.108, at p.193.

\(^{111}\) Section 214 of the Insolvency Act 1986 and the doctrine of "fraud" make no distinction between voluntary and involuntary creditors. This distinction might, however, affect the required level of the capital that must be maintained in order to protect creditors that have not been defrauded. Voluntary creditors that have been defrauded in entering into transactions with a
capitalisation is a group-right belonging, inter alia, to an unidentifiable in advance number of creditors. This conclusion should affect the distribution of the risks of error in determining the facts relevant to the company's undercapitalisation.

A creditor seeking relief must establish a thin capitalisation of the company on the balance of probabilities.\textsuperscript{112} He would have to prove the company's risk of indebtedness which has to be compared with the net value of the company's assets at all relevant times. To establish the value of that risk, the probability of its materialisation (represented by the frequency of its occurrences) is to be multiplied by the average cost of the losses incurred by undertaking such risks. In other words, statistical evidence must be used to maximise the number of correct decisions. This must be so because group-rights are similar to other rights for all risk-distributive purposes, and the only way to treat them as equal to other rights is to adopt a utilitarian risk-

company are protected by the common law doctrine of "fraud" and s.213 of the Insolvency Act. If they have not been defrauded and made an informed decision to risk their money by investing in a company, no protection seems to be required: volenti non fit injuria. See Lord MacNaghten's speech in Salomon v. A Salomon & Co Ltd [1897] A C 22. It is only the involuntary creditors which, in addition to the victims of torts, must include consumers, that have to be protected by the undercapitalisation doctrine not dependent upon fraud.

\textsuperscript{112} See Farrar, supra n.106, at p.626. Creditors' claims are submitted via the liquidator authorised to petition under s.214 of the Insolvency Act 1986.
distribution, viz. to disregard a possible argument that the general statistics estimating the monetary value of the risks run by the company are irrelevant. Similarly to an increase of the epidemiological risks flowing from a mass toxic exposure, an imposition of undersecured risks on society is a civil wrong in rem. This necessitates risk-distributive utility in fact-finding. 113

3. GENERAL IMPLICATIONS OF THE PRINCIPLE-BASED APPROACH

Having established that risk-distribution in civil trials should be governed by the principle of equality and, in cases involving "group-rights", by the principle of utility, I shall now set out some of the general implications of this approach.

The widest implication of this approach is that risk-distributive equality and, when appropriate, utility ought to be maintained in a rigorous way throughout the whole process. These two principles should be applied to all processes of reasoning under uncertainty and it is on the basis of one of them, or by the outcome of their balancing, that truth-certifying procedures taking place

113 This is not to say that in such cases statistical risks of indebtedness or injury become constitutive facts to which the law directly annexes consequences. It is open for the defendant to refute the allegations by showing that his case does not fall within the class of statistically significant cases. This burden is, for good reasons, an onerous one.
in civil trials have to be validated. This approach, applying to all cases involving normative disagreements about certainties, has a number of important ramifications.

First, the application of the existing standards and burdens of persuasion should always be dependent on the relevant substantive law. Given that the value of wrongful losses ought to be treated as equal to all right-holders which may be affected by the ultimate risk-distributive decision, prior to applying these standards and burdens to concrete cases, the nature of the rights at stake ought to be clarified. When a dispute, not involving any group-rights, is monocentric, the principle of risk-distributive equality is to be allowed to trump utility considerations. In other words, the overall maximisation of the number of correct decisions must in such cases not be taken into account as a risk-distributively relevant factor. It is only in cases which involve group-rights that the principle of risk-distributive utility must be applied. This is so because group-rights have to be treated as equal to all other rights. An example of an unprincipled approach to the civil standard of proof has been supplied by the important case of Rhesa\textsuperscript{114}. In that case, the law lords decided that it is not possible for a party who insured

\textsuperscript{114} Rhesa Shipping Co v. Edmunds et al (The Popi M) [1985] 2 All ER 712 (HL).
his vessel against perils of the seas to recover against his underwriters by proving that some unidentified peril of the seas had caused his vessel's destruction of damage. Given that this cause of the vessel's damage or loss can preponderantly be established, e.g., by eliminating all other potential causes, the insured will still be denied recovery, for, "... to discharge successfully the burden of proof ..., [he must] condescend to particularity in the matter." 115 This pre-condition contradicts the principle of risk-distributive equality and has no procedural justification in the light of the general duties of disclosure and the uberrima fides obligations imposed upon the insured. Alternatively, it can plausibly be assumed that insurance arrangements are aimed to spread the overall costs of accidents within the large community of "risk-runners" via the underwriters. This may lead to the conclusion about the existence of group-rights and the risk-distributive utility that must apply in enforcing such rights in conditions of factual uncertainty. On this assumption, the judgment delivered in Rhesa is doubly wrong. It maintains an inexplicable risk-distributive inequality between the insured on the one hand and the underwriters on the other and does not contribute to maximisation of correct decisions.

115 id., at p.716.
Similarly, when the existing standards and burdens are applied to a dispute arising out of contract, the allocation of the risks of error between the parties has to be in tune with their legitimate contractual interests, i.e., with their interests of expectation, reliance and restitution.\footnote{116} In the present context the first two interests are most important for the allocation of the risks: the parties might well have contractually legitimate expectations and reliance in regard to the ways in which their future disputes are to be resolved under uncertainty. In one of the important cases of the law of contract, Constantine (Joseph) Steamship Line Ltd,\footnote{117} it has been decided that the defence of frustration, to be relied on by a party not complying with his contractual obligations, has to be proved by that party on the balance of probabilities. If it is contended that the contract has been frustrated by fault, this contention ought to be established by the party seeking to defeat the defence of frustration. An attempt at explaining these rules either by relying on the dichotomy of "rules" and "exceptions" or by one of the old maxims like "omnia praesumuntur pro negante" is


\footnote{117} Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd [1941] 2 All ER 165.
doomed to failure.\textsuperscript{118} The judgment delivered in Constantine has thus been explained on the grounds of policy. It has been argued that frustration occurs more often without fault and it is rather more often that contracts are carried out by both parties without being frustrated. Hence, to maximise rectitude of decisions, the burden of proof is to be imposed on the party willing to prove an unlikely event.\textsuperscript{119}

This explanation is inadequate. "Frustration" and "fault" are not facts or events. They are legal conclusions and it is impossible to measure in advance the relative frequencies of different facts or events that stand behind them. More fundamentally, to allocate burdens of proof on such grounds of policy is to maintain that it is justifiable for one of the parties to carry the risks of error for the benefit of other present and future litigants. When there are no jural relations of any kind between the risk-bearing party and other litigants, there is no legal basis for considering such extrinsic preferences.\textsuperscript{120} The decision in

\begin{footnotesize}
\textsuperscript{118} Stone, supra n.37 (These distinctions are merely verbal: any rule can be rewritten by incorporating its exceptions as part of the rule; any negative proposition can be reformulated without changing its meaning in a positive way. Hence, the way of writing down such propositions is a matter of arbitrary choice).

\textsuperscript{119} Stone id., at p.278; R.Cross, On Evidence 6th ed, 114n.9 (1985).

\textsuperscript{120} As was mentioned above, this could only be possible when "group-rights" are in issue.
\end{footnotesize}
Constantine seems to be better explained on the grounds of principles rather than policy, i.e., by the reliance and expectation interests of the parties to that particular contract. Frustrating events were contemplated by the parties to be unlikely. Similarly, when such events do occur, it is contractually regarded as unlikely that their occurrence is self-generated, resulting from one of the parties' default: omnia praesumuntur rite esse acta. For if the parties regarded this as likely, they would probably not have entered into the contract at the first place and the same is true about frustrating events. It is thus typically intended by the parties that the risks of error in establishing frustrating events should be carried by the party invoking them as part of his defence, while the risks involved in establishing fault, another contractually unlikely event, have to be borne by the proponent of this latter allegation. This typical intention does not hold universally and must always be tested in construing concrete agreements.\textsuperscript{121} This

\textsuperscript{121} This view is supported by Coldman v Hill [1919] 1 KB 443 where it was held that a bailee seeking to discharge himself from his responsibility has to prove that the goods which he undertook to safeguard had been stolen (or damaged) without his fault. This holding apparently contradicts that of Constantine, but the cases are clearly different. In contracts of bailment, it is typically contemplated by the parties that the goods deposited in the hands of the bailee are unlikely to be stolen or damaged without his fault. The bailee has therefore to prove the absence of his fault as a contractually unlikely event.

Some support for this view can be found in a number of cases dealing with insurance policies and agreements of carrying goods by sea. Some of them
contractual allocation of the risks of error is based on the principle of risk-distributive equality, for if there was a good reason that could support an unequal distribution of the risks, this reason would not be susceptible to stipulation. Such a reason, if it existed, would, presumably, have been corroborated by a jus cogens rule. If its importance, ex hypothesi, outweighs equality, it cannot be permitted to be contracted out by an agreement between those who, for supposedly well-based reasons, are unequally protected by the law.\textsuperscript{122}

Another ramification of the suggested approach is that its application would require a rigorous Hohfeldian clearly indicate that the incidence of the burden of proof is a matter of construction of contracts. See Cross, supra n.120, at pp.126-127. Uncertainties arise however in the light of cases like Compania Naviera Vascongada v British and Foreign Marine Insurance Company, (1936) 54 Lloyd's List L.R. 35, 50-51; cited with approval in Palamisto General Enterprises SA v. Ocean Marine Insurance Co. [1972] 2 Q.B. 625, 636 (CA). (Scuttling is a crime and when raised as a defence against claims grounded on marine insurance policies, it ought to be proved as a crime. But when the probability of scuttling is equal to that of the loss being fortuitous, the assured's claim should still fail. This is mystifying)

For additional support of the view expressed in the text see A.Zuckerman, Annual Review, (1987) All ER 109-111.

\textsuperscript{122} This analysis shows that the decision delivered in Rhesa (supra n.114) was also contractually wrong. No exhaustive list of "perils of the seas" appeared in the insurance policy relied upon by the plaintiffs. Hence, given that the risks of error are to be allocated between the parties in a roughly equal fashion, it must be clear that an unknown peril of the sea, as one of the possible causes of action, was contractually provable.
analysis of existing jural relations from the risk-distributive point of view. Risk-distributive choices of any kind and their legal justifications ought to be made as clear as they can ever get to be. For example, both parties in dispute are entitled to legal professional privilege. This privilege not to disclose relevant information is an "immunity" in Hohfeldian terms. Being an "immunity", all it means is that a party seeking discovery has "no power" of compelling his opponent or his opponent's attorney, via the court, to disclose a privileged information. It does not mean that the risks of error surrounding this undisclosed information should be borne by the party seeking discovery. Hence, adverse inferences against a privileged party who declines to disclose his privileged information may, when appropriate, be drawn and this would not be inconsistent with his privilege. This party has no immunity against such inferences.

123 See Cross, supra n.123, at pp.388ff.

124 Cf. Mr Justice Hoffmann's decision in Comfort Hotels Ltd v. Wembley Stadium Ltd [1988] 3 All ER 53 that an order requiring the parties to exchange the statements reflecting the testimonies of their prospective witnesses is perfectly consistent with legal professional privilege. This order simply requires the parties to decide at the preliminary stage of proceedings what evidence they will submit at the trial and what evidence is and will be kept in secret as privileged. Legal professional privilege should not be understood as a party's right to take his opponent by surprise by making a last moment decision to adduce a previously secret piece of information.
Third, the residual rules authorising judges to dispose of hard cases of fact in accordance with the burdens of proof must only be applied when the risk-distributive principles are equibalanced and do not point in either direction. Such decisions ought to be rare\textsuperscript{125} and they should be justified by the absence of reasons to interfere with the existing status quo.

Fourth, the adoption of the suggested approach would require appropriate changes in the scope of appellate review. Today, factual findings of the trial courts are scarcely interfered with by the Court of Appeal and too many non-factual matters are treated as if they were purely factual.\textsuperscript{126} Once the existence and range of

\textsuperscript{125} Cf. Morris v London Iron & Steel Co [1987] 2 All ER 496, explaining Baker v Market Harborough Industrial Co-op Society Ltd [1953] 1 WLR 1472 as standing for the proposition that judges are not obliged positively to decide in every case. As was mentioned by the Court of Appeal, such "non-liquet" occasions must be rare.

\textsuperscript{126} For a critical appraisal of this long-standing tradition see A.L. Goodhart, Appeals on Questions of Fact, (1955) 71 L.Q.R. 402. But see Scott v. Martin [1987] 2 All ER 813: The trial court held that the plaintiff had failed to prove that the right of way conferred on him in a conveyance was related not only to the road referred to in that document but also to its verges. The Court of Appeal decided that what was at stake in that case was a question of interpretation of the contract, viz. a question of law. Hence, there was no room to impose the burden of proof on the plaintiff. Zuckerman has, however, rightly remarked that the main question was what exactly has been stipulated between the parties which is a mixed question of fact and law. See his Annual Report in (1987) All ER 110, 111. Any decision to this effect is risk-distributive and should be treated as such by the courts. Cf. Rabin v. Gerson Berger Association Ltd. [1986] 1 W.L.R. 526, 535, a case in which a classification similar to that of Scott v
normative disagreements about certainties and the risk-
distributive dimension of judicial reasoning are fully
appreciated, one of the roles of the Court of Appeal
would be to examine risk-distributive reasoning of the
trial courts. Trial courts have no peculiar advantage in
making risk-distributive decisions, and for the purposes
of appellate review and all other legal matters these
decisions ought to be regarded as matters of "law"
rather than "fact".

Lastly, the existing rules of evidence would have to be
viewed as a species of risk-distributive principles
rather than disparate exceptions to the principle of
free proof. This would have a positive unifying effect
on the interpretation of these rules and their practical
application. More importantly, this would assist in
maintaining rationality and moral harmony in many
evidentiary matters.

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Martin was applied by the Court of Appeal.
1. THE PRINCIPLE OF PROTECTING THE INNOCENT AND THE PRINCIPLE OF UTILITY

In criminal trials, the rights of the accused are confronted with that of society. When no fact-finding problems arise, an innocent person has a right to be acquitted and society is entitled to convict the guilty ones. A confrontation between these rights takes place when some of the facts in issue are uncertain. Such problems require risk-distributive solutions. As a general rule, no person can be convicted of any crime if the facts constitutive of his guilt have not been proved beyond all reasonable doubt. This rule reflects a relatively stable balance struck between the principle of protecting the innocent on the one hand and that of utility on the other. Not any doubt, but only a "reasonable" one, should, under this rule, result in acquittal. If those accused of crimes could properly be convicted only when all possible doubts, including the imperceptibly remote ones, are eliminated, very few

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127 Woolmington v DPP [1935] AC 462, 481-82 (HL)

128 The expression "imperceptible doubt" is borrowed from A. Zuckerman, The Principles of Criminal Evidence, ch. 9 (1989).
convictions, if at all,¹²⁹ would legally be justifiable. The law assumes that absolute certainty is unattainable and strikes a risk-distributive balance.¹³⁰


¹³⁰ Being interpretive rather than independently normative, this discussion focuses on the risk-distributive principles which can be discerned from the legal materials forming the English law of criminal evidence. Some of the independently normative issues related to this discussion are noteworthy. The main objectives of criminal procedure are to minimise the economic costs of wrongful decisions (EC), the direct costs of procedures (DC) and the moral harm involved in wrongful convictions (MH) which differs from the economic costs that represent the "bare harm" only. R. Dworkin, A Matter of Principle, 72ff (1986) and M. Bayles, Principles of Law, ch.2 (1987). (This "multi-value instrumentalism" differs from the "single-value instrumentalism" supported by the economic analysis of law. The latter reduces moral harm to allegedly commensurable economic costs. Arguing that all possible convictions of innocent persons would simply involve greater costs, it suggests to absorb these costs within the calculus of utilities and disutilities.) In addition, certain process values, such as fairness, integrity, participation and finality of decisions, are independent of their effect on the accuracy of outcomes. See R. Summers, Evaluating and Improving Legal Process- A Plea for 'Process Values', (1974) 60 Cornell L.R. 1. Dworkin, (id., p.101) seems to disagree with this procedural deontology.) The final formula, incorporating intrinsic process benefits (PB), would thus be (see Bayles, ibid, at p.30):

MINIMISE THE SUM OF: EC + DC + MH - PB.

This abstract statement of policy should apply, mutatis mutandis, also to civil and administrative law, raising difficult questions about judicial administration and forms of procedure which cannot be discussed in this work. Risk-distributive principles should reflect the system's preferences as to EC and MH, being affected by both DC and PB. MH must, in my view, include the harm of erroneously acquitting guilty criminals which, despite its being incommensurably different from that involved in wrongful convictions, should not be treated as a bare or economic harm only.
In this context, a conceptual substitution of unreasonable doubts by "imperceptible" ones\textsuperscript{131} is important. By maintaining that any perceptible doubt as to the guilt of the accused must lead to his acquittal, the principle of protecting the innocent restricts that of utility. According to the former principle, if the trier of facts knows that there are reasons which support the innocence of the accused, the accused must be acquitted. There is a morally significant difference between a mistaken conviction taking place under general though risky procedures and a deliberately wrongful conviction of someone known to be possibly innocent. In the first case, risky procedures not reaching the feasibly highest level of accuracy have been fixed in advance because they are inexpensive. The existing resources are scarce and instead of devoting most of them to attaining of the maximal accuracy of criminal procedures, they are invested in health, education, highway systems and other socially beneficial amenities. This choice, when it results from a democratic process of making decisions, is fair as long as each person participating in that process is antecedently as likely as any other to enjoy the amenities supported by public fundings and occasionally to share the harm caused by the underfunded criminal procedures. Hence, when a risky legal system works to somebody's disadvantage and an innocent person is occasionally found guilty, this

\textsuperscript{131} Zuckerman, supra n.128, at pp.135-140.
regrettable outcome would not undermine the fairness of that system.\textsuperscript{132} By contrast, if a person known to be possibly innocent is deliberately convicted, this would amount to a fresh political decision to impose on this person a substantially greater risk of harm than is usually imposed on others. This last decision would violate the principles of equality and fairness. Therefore, if a conviction of the accused falls short of moral certainty and the existing doubts are perceptible, this conviction would not be justifiable. In Dworkin’s words:

"These two principles of fair play, taken together, explain why deliberate conviction of someone known to be innocent is worse than a mistaken conviction under general though risky procedures fixed in advance. Framing someone is a case of a fresh political decision that does not treat him as an equal as required by the first principle. It is not (nor can it be) only the application to his case of open public commitments fixed in advance. ... On the contrary, it is the decision to inflict on a particular person special moral harm ... So a deliberate violation of the principle against convicting the innocent involves greater moral harm than an accidental mistaken conviction, because the former violates the equal standing of the victim in the special way condemned by the principle of fair play, as well as sharing in the residual moral harm of the latter."\textsuperscript{133}

In addition,

"... it is morally worse deliberately to convict the innocent ... because the deliberate act

\textsuperscript{132} Dworkin, supra n.130, at pp.84-87.

\textsuperscript{133} id., at p.85. This moral harm, an "injustice factor", is different from the bare harm, viz. the physical harm that someone suffers through punishment. The former is an objective notion, a "moral fact" and a permanently existing injury; the latter varies from person to person and its extent is a function of empirically collected facts. Dworkin, id., at pp.80ff.
Involves a lie and therefore a special insult to the dignity of the person." 134

It should now become clear that the balance between the principle of protecting the innocent and that of utility is achieved by the principle of equality, i.e., that the law of criminal evidence is based on three and not two risk-distributive principles. Without relying on the principle of equality, the differentiation made by the law between accidental and deliberate impositions of the risk of error on the accused would be inexplicable. If this principle did not exist, a cost-efficient society must, to be consistent in its ethics, be indifferent in relation to deliberate and innocent mistakes about guilt. If none of these unpleasant outcomes should escape the net of an ordinary utilitarian calculus, and the right not to be convicted if innocent must not be regarded as a genuine right which trumps utility, there would be no apparent reason for distinguishing between accidental and deliberate risk-impositions upon persons accused of crimes. 135 When, by contrast, a distinct

134 id., at p.84.

135 See Dworkin, id., at pp.81-83. A two-level utilitarian defence of this distinction may still be advanced by arguing that a deliberate framing might cause a greater disutility in the long run of cases. This defence is highly speculative. If a society of "intelligent act-utilitarian officials" considers the possibility of convicting innocent persons only on very special occasions, it is unclear, as Dworkin argues, that they would ". . . do worse for long-term utility than a society that disabled its officials from ever taking that step." id., at p.82.
moral harm is said to be generated by any wrongful conviction and criminal procedures that have been adopted by the society are not as accurate as they could possibly be under ideal conditions, the internal allocation of the risks of error in accordance with some antecedently determined criteria becomes crucially important. The distinction between accidentally erroneous and deliberately risky convictions would thus not be grounded on the differences between the probabilities of error, which might well be identical in both cases, but on the differences in moral criteria that justify such practices. The right to acquittal in the light of perceptible doubts and the lack of it when the risk of mistaken conviction is imperceptible can thus only be based on equality. As there is no room for utility beyond the unknown risks undertaken ex ante, any decision that imposes upon an individual an extra

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136 Embarking on Keynes, supra n.1, chap.3, one might object this by saying that probability estimates are always derived from and contingent upon actual knowledge and we are, therefore, bound to consider any probability of innocence generated by perceptible doubts as higher than that resulting from the imperceptible ones. This observation is epistemically rational, but the justification of mistaken convictions cannot be found in the epistemic rationality of probability estimates dealt with by Keynes. Keynes had rightly observed that any previously unknown information, when it becomes perceptible, would give us a new probability rather than a fuller knowledge of the old one. Hence, we have to take into account the possibility of these revised probabilities to have actualised and to justify the risks of mistaken conviction when they are imposed on accused persons by disregarding this possibility. We have thus to look for moral rather than epistemological differences between "perceptible" and "imperceptible" doubts as grounds for decision.
risk not shared by other people is regarded as morally wrong.

This balance between the principle of protecting the innocent and that of utility is not invariable. Thus, the fact that this balance is struck by equality explains the distinction between substantially different claims of innocence drawn in part three. This distinction between "justifications" and "excuses" should lead to what I have described as the best interpretation of the exception to the Woolmington rule which, reflecting the common law, appears in section 101 of the Magistrates' Courts Act 1980. A "justified" accused is no different from any other innocent person and should therefore not carry an extra risk. A person acting in a way regarded as blameworthy may, for individualized reasons, still be "excused", but this should not equate him with innocent people for all risk-distributive purposes. His right to be acquitted for excusing reasons is different from the right not to be found guilty if innocent. For it is the latter and not the former right that protects a person from being framed and from suffering moral harm, the injustice factor unsusceptible to utilitarian calculus. A violation of the former right might also involve a special kind of moral harm, but this harm is qualitatively different from that caused by framing somebody. This excuse-related harm is different because
when it occurs the accused is not really "framed". He is convicted and punished for what he did despite his entitlement to leniency. As his act is ex hypothesi blameworthy, there would be a moral harm to society if the accused is mistakenly acquitted on the grounds of highly improbable (but not impossible) facts which support his excuse. This harm of society is considered by the law as no less weighty than that which could result from erroneously denying an individual, who committed a blameworthy act, his right to be excused. Therefore, the law requires that excuses be proved by the accused on the balance of probabilities.

By saying "the law requires... etc." I refer to what, normatively speaking, is the best interpretation of the law rather than to its variable applications by the courts. In some statutory rules and judicial decisions the accused was said to carry the burden of proof in regard to justifications.¹³⁷ Such statutory rules can be described as "checkerboard solutions", for they distribute the risks of error in regard to morally identical claims of innocence in an uneven fashion. On the proposed interpretation, excuses can also be viewed

¹³⁷ See, e.g., R v Edwards [1974] 2 All ER 1085 and the list of statutes which appears in R.May, Criminal Evidence, 49 (1986). See also s.139(4) and (5) of the Criminal Justice Act 1988. These provisions require the accused having in a public place a sharply pointed article or an article with a blade to persuade the court that he had it with him for good reason, under authorisation, for use at work, for some religious reason or as part of his national costume.
as evidentially compromised exculpations, for they are treated in a way that differentiates between normal claims of innocence on the one hand and the inferior ones on the other. But unlike the former one, this latter differentiation stands for an external compromise between different schemes of criminal justice which poles apart from the internally compromised "checkerboard" schemes.\textsuperscript{138} As the English law of criminal evidence distinguishes between the burdens of proof applicable to different defences, we are interpretively bound either to adopt the suggested externally compromised and principle-based scheme, which classifies defences in accordance with morally significant standards, or reject these standards and proceed ad hoc on a case-by-case basis. There are, admittedly, some "infelicities of fit"\textsuperscript{139} that have to be counted against the former interpretation. There are statutory rules that without any principle-based justification impose upon the accused the burden of persuasion and there is no escape from these "brute facts of legal history"\textsuperscript{140} which narrow the range of interpretive choices.\textsuperscript{141} The existence of these rules

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\item \textsuperscript{138} This draws on R.Dworkin, Law's Empire, 179 (1986).
\item \textsuperscript{139} Dworkin, id., at p.256.
\item \textsuperscript{140} id., at p.255.
\item \textsuperscript{141} Professor Glanville Williams, The Proof of Guilt, 3d ed, 184 (1963) wrote:
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should not lead an interpreter to a "checkerboard" vision of the law of evidence as internally compromised, devoid of moral integrity, scattered and unprincipled. These rules, when they apply, must be obeyed, but they should not give any support to any further spreading of the unprincipled. The best interpretation of this (and any other) law is that which presents its inner rationality in its best light by assuming, so far as this is possible, that -

"the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks [judges] to enforce these in the fresh cases that come before runs through the web of the English criminal law. Unhappily, Parliament regards the principle with indifference - one might almost say with contempt. The Statute Book contains many offences in which the burden of proving his innocence is cast on the accused."

See, for example, the provisions requiring the defendant to prove that he had a "lawful authority" to have an offensive weapon in a public place (The Prevention of Crime Act 1953, s.1(1) ); that if he lives with a prostitute, he is not living on her earnings as a prostitute (Sexual Offences Act 1956, s.30(2)); that a gift given to him as a public servant has not been given corruptly, i.e., as a bribe (The Prevention of Corruption Act 1916, s.2). In the very odd decision R v Evans-Jones & Jenkins (1923) 17 Cr.App.Rep. 121, the Court of Appeal had approved the direction of the jury on the meaning of the last provision that "... the defendants must show that the payments were not corrupt, and if they [=the juries] had any doubt on that, they must convict." (at p.123) Adrian Keane in his book The Modern Law of Evidence, 2d ed, 61 (1989) is right in saying that the defendant has to establish the lack of corruption on the balance of probabilities, but not accurate in referring to Evans-Jones as a support for that proposition. The authority for that proposition is to be found R v Carr-Briant [1943] KB 607. My reading of Evans-Jones is similar to that of G.Williams, Textbook of Criminal Law, 2d ed, 56 (1983). See also s.139(4) & (5) of the Criminal Justice Act 1988.
them, so that each person's situation is fair and just according to the same standards."

Hence, the internally compromised and unprincipled interpretation of the exceptions to the Woolmington rule should be discarded and the remaining option based on the distinction between excuses and justifications must be adopted.

This distinction should also be adopted at the more general level for all risk-distributive purposes of criminal proceedings as the reasons it is based upon are the only reasons that can legally be regarded as preemptive. There are no other candidates besides the internally compromised approach, an unprincipled rejection of the entire idea of structured risk-distribution.

There are thus three basic principles affecting risk-distribution in criminal trials. First, the general rule that any perceptible doubt as to one of the facts constitutive of criminal culpability must lead to acquittal reflects the balance between the principle of protecting the innocent and that of utility. To maintain the necessary level of rectitude of decisions and the consequent upon it effectiveness of the criminal law, imperceptible doubts should be disregarded. The probabilistic value of an imperceptible doubt may well

\[142\] R.Dworkin, Law's Empire, 243 (1986)
be similar to that of a perceptible one. The former may simply be unknown, and if this ignorance were the only difference between the two, the dramatic difference in the results they lead to would clearly be unsustainable. This, however, is not the only difference between the two. The risks of error resulting from the disregard of all imperceptible doubts have been allocated ex ante and are antecedently shared by all individuals in a roughly equal fashion.\textsuperscript{143} The known and therefore non-accidental risks have not been distributed in advance. Their imposition upon an individual amounts to a fresh political decision which violates his right to equal concern and respect. This principle of equality applies to equals, and the risk-distributive balance struck with its help between utility on the one hand and protection of the innocent on the other should hold only in relation to the issues which affect criminal blameworthiness. Risks of error related to uncertainties of the facts not constitutive of criminal blameworthiness have to be subject to a different balancing. Morally different claims of innocence ought to be treated differently.

The impact of risk-distributive equality on criminal

\textsuperscript{143} I am aware of the problem pointed out by Dworkin that in some cases different classes of people may be exposed differently to different risks of error. See supra n.130, at pp.87-88.
trials needs more elaboration and it is to this issue that I now turn.

2. THE PRINCIPLE OF EQUALITY

As a system of rules and principles which regulates the treatment of individuals by the state, the law of criminal evidence strives to maintain risk-distributive equality between citizens. One of the salient manifestations of the principle of equality is the presumption of innocence. Professor Rupert Cross argued that -

"When it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt."144

This narrow view has been criticised for its court-centredness\textsuperscript{145} and I shall now support, on other grounds, a wider understanding of the presumption. The presumption of innocence is an essentially comparative right. Its meaning and limits derive from the treatment of other people. Freedom from risks of error in processes of applying the criminal law is one of the fundamental liberties of the individual, and it is the first principle of justice that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."\textsuperscript{146}

The presumption of innocence stands, in my view, for this general principle. According to this presumption, the accused ought to be treated like any other innocent

\textsuperscript{145} See W.Twining, Rethinking Evidence, 207-208 (1990):

"... is it the case that the principle that one is presumed innocent until proven guilty is only relevant to this one kind of decision [i.e. decisions in relation to conviction of acquittal in disputed trials]? Does it not provide an actual or potential rationale for rules governing many other decisions - to arrest, to charge, to grant bail- and in other branches of law (e.g. defamation)? ... [i]s not the principle one that should apply to the treatment of all suspects and accused persons at every stage in criminal process, not just in respect of arguments at trial? ... [T]he narrow interpretation given to it [i.e. the presumption of innocence] by Cross and some other writers on evidence does a disservice to an important general principle of our political morality."

\textsuperscript{146} J.Rawls, A Theory of Justice, 60 (1972). This broadened understanding of the presumption of innocence also corresponds to the second principle of justice advocated by Rawls which embraces fair, i.e., equal allocation of opportunities (id., and chap.14).
person until proven guilty. Thus, the presumption of innocence aims at preventing an inclination to suspect that a person arrested and indicted is probably guilty as charged.\textsuperscript{147} Like any other person, the defendant should carry no risk of error owing to the fact that the prosecution believes him to be guilty. The prosecution's belief must always be disregarded in evaluating evidence.\textsuperscript{148} On its positive side, the presumption means that the accused must never be deprived of any of the legal rights, powers, immunities and privileges assigned by the law to other people. Subject to limitations imposed by the law, a mere fact of accusation does not detract from the right of the defendant to equal concern and respect. This wider meaning of the presumption of innocence goes beyond the maxim "in dubio pro reo" not just in many respects extraneous to the trial itself. The presumption, on its wider understanding, requires that all criminal processes, including the proof of guilt, comply with the standards of equal treatment and not merely with the standards and burdens of proof. This wider meaning would justify many egalitarian practices,


\textsuperscript{148} For a most revealing account of the tensions between the courts and the procuracy in the Soviet Union, resulting in the use of the presumption of innocence as a device for counteracting pre-trial determinations of guilt see G.Fletcher, The Presumption of Innocence in the Soviet Union, (1968) 15 UCLA L.R. 1203.
not only the requirement of proof beyond reasonable doubt.

This point can be exemplified by a hard case of classification of criminal defences. Assuming that the suggested interpretation of the third exception to the Woolmington rule is the right one, and that excuses but not justifications must preponderantly be proved by the accused, what should be decided by the court if the nature of the defence in question is unclear? Given that the presumption of innocence means that the accused must be treated with concern and respect equal to that of any other innocent person, his claim of innocence cannot, without good reasons, be treated as inferior to any other claim of innocence. In other words, his defence must be regarded as a justification that renders his act unblameworthy and not as an excuse.149


This, of course, is not the only example which shows that the presumption of innocence is wider than the rule "in dubio pro reo". The narrow view of that presumption is characteristic of the orthodox understanding of the law of evidence as consisting of a few disparate rules and freedom of proof. If, apart from the standards of proof and a few rules, there are no principles to be generally applied, it must not be surprising that the presumption of innocence ends up in being reduced to the existing standards of proof.
This equality-based understanding of the presumption of innocence is supported by many particular instances in the law of evidence. Manifestations of the principle of risk-distributive equality can be found in other evidentiary rules. Take, for example, the rules of corroboration. Some of them are based on obsolete reasons. Others, like the requirement of corroboration warning in relation to victims testifying in trials for sexual offences, are most questionable. The requirement which applies to cases of perjury is probably grounded on the extra-probative policy not to deter witnesses from testifying. The obligation to warn the jury in relation to accomplices and the discretionary warning in cases of identification

150 See A. Zuckerman, supra n.128, at pp.171-73.

151 See id., at p.159; I. Dennis, Corroboration Requirements Reconsidered, [1984] Crim.L.R. 316; J. Temkin, Rape and the Legal Process, ch. 3 (1987). The requirements in regard to procuration and adjacent offences (such as administering drugs to facilitate sexual intercourse) that appear in the Sexual Offences Act 1956, seem to be devoid of any rationale. In Keane’s view (supra n.141, at p.140), these offences "... are easily alleged and difficult to refute." None of the parts of this observation is supported by empirical evidence or reported cases. See Zuckerman, supra n.128, at p.172. See also R v Chance [1988] 3 All ER 225.

152 Zuckerman, id., at pp.171-72. As Zuckerman wrote, relying on the 11th Report of the Criminal Law Revision Committee (1972), this objective can be pursued without corroboration requirements. It can be pursued, for example, by requiring the DPP’s consent as a precondition of bringing charges for perjury. Id.

153 Dennis, supra n.151; Zuckerman, id., at pp.155ff; 176ff; G. Williams, Corroboration: Accomplices, [1962] Crim.L.R. 588. See also W. Twining, Rethinking
appear to be rather more rational. Being based on experience, these requirements aim at eliminating the risks of overvaluation of potentially unreliable evidence.\textsuperscript{154} These rules, and especially the requirement concerning accomplices, tend to be overinclusive and underinclusive. They apply to situations where there is little or no risk of perjury or mistake\textsuperscript{155}. By contrast, 


\textsuperscript{154} The problem of mistaken identification is notorious. See supra n.153. As has recently been reemphasised by Lord Griffiths,

"Experience has taught judges that no matter how honest a witness and no matter how convinced he may be of the rightness of his opinion his evidence of identity may be wrong and that it is at least highly desirable that such evidence should be corroborated."


Accomplices often (but not always) have an incentive to present biased accounts, especially when they are called by the prosecution while criminal proceedings against them are pending. See R v Pipe (1966) 51 Cr.App.Rep. 17; Davies v DPP [1954] 1 All ER 507. For a more recent example see R v Ataou [1988] 2 All ER 321.

Another rule of corroboration is stated in s. 89(2) of the Road Traffic Regulation Act. This rule requires that a person

"... shall not ... be convicted solely on the evidence of one witness to the effect that, in the opinion of the witness, the person ... was driving the vehicle at a speed exceeding the specified limit."

Presumably, this rule is based on the observation that non-expert opinions of this kind are generally unreliable.

\textsuperscript{155} This is true especially in respect of accomplices - see Zuckerman, supra n.128, at pp.157-58. For example,
they do not apply to non-accomplices in situations where the risk of perjury and erroneous conviction is as great as it would be if the witness were an accomplice.\textsuperscript{156} This inflexibility requires an explanation.

These requirements of corroboration and corroboration warning can only be explained by the principle of risk-distributive equality. When certain types of evidence known to be potentially unreliable are relied on to support convictions, cogent reasons should exist to distinguish the safe cases that involve such evidence from the risky ones. To cancel out the risks of error which, ex hypothesi, are perceptible, these cogent reasons have also to be perceptible and articulated. This is so because the accused is as entitled to be protected from risks of error as any other innocent person. He should never be exposed to an extra risk not shared by others. His right to equal concern and respect requires that prior to his conviction, any doubt as to

"There is little justification for insisting on a warning when a witness is an accessory after the fact ... because the witness's natural motive is not to inculpate but rather to exculpate the accused and thereby exculpate himself." \textit{id.}

This may also be true in some cases of identification - see, e.g., \textit{R v Chance [1988] 3 All ER 225 (CA)} where the Court of Appeal decided that there is no need for warning as to the danger of misidentification if there is no real dispute that the accused had an intercourse with the complainant.

\textsuperscript{156} Zuckerman, \textit{id.}, at p.157. It is not difficult to imagine such instances, e.g., a case where two drivers were involved in a traffic accident for which only one of them can be blamed.
his guilt be judicially eliminated in a publicly scrutinizable way. If a decision to convict him on the basis of a prima facie doubtful testimony is made, cogent reasons ought to be given to single out his case from all other instances in which other defendants had been protected. The requirements of corroboration and corroboration warning tend thus to equalize the treatment of criminal defendants, i.e., to apply the principle of protecting the innocent in a maximally equal fashion.

When the requirements of corroboration and warning are understood in this way and regarded as particular instances of the principle of risk-distributive equality, the problems of underinclusiveness and overinclusiveness to be faced by those justifying these rules would evaporate. It is true that in many cases involving dubious testimonies or otherwise suspicious evidence neither a warning to the jury nor corroboration are formally required, but this surely does not mean that cogent reasons eliminating the existing doubts must not be articulated in such cases. This does not mean that no special caution and additional evidentiary support, substantially similar to "corroboration" and "warning", must take place in such cases. The only difference between these informal safeguards and the formal requirements of warning and corroboration would simply be a matter of technicality. To avoid inequality,
both formal and informal safeguards must be applied systematically. It should be emphasised once again that what matters here is equal concern and respect of different defendants rather than the relative rigidity and formality of the standards enhancing these values. It is also true that in some cases the rules of corroboration and warning of the jury appear to be too rigid. This rigidity would disappear if these rules are understood functionally as reflecting the need of maintaining equality in safeguarding defendants from the risks of erroneous convictions, and some recent cases seem to be moving in that direction.\textsuperscript{157}

Hence, what has to be done is not to replace the requirements of corroboration and warning by freedom of proof, but coherently to apply the principles which

\textsuperscript{157} See Crossland v DPP [1988] 3 All ER 712 and R v Chance [1988] 3 All ER 225 and Zuckerman's comment in Annual Report on Evidence, (1988) All ER. This process, depicted by Zuckerman as "The Retreat of Formalism" (supra n.128, at pp.173-76), started before these cases. See also an important judgment of the Court of Appeal in R v. McInnes [1989] Crim.L.Rev. 889 (A young girl, who was abducted and raped, identified the appellant as a person who did it. She gave a description of the upholstery of his car in which, according to her, she had been abducted and some other details about its contents. This evidence, corresponding to what had later been found in the appellant's car, has been held to be "independent" and therefore capable of corroborating. The girl's knowledge of these facts was one which could not be possessed by her unless her testimony was truthful. R v. Willoughby (1989) 88 Cr.App.Rep. 91, a case in which the victim's testimony about the existence of a spot on the defendant's face has been held not to be "independent", was thus distinguished).
underlie them. It is only those rules which do not reflect any principles that must be abolished.

The rules regulating the use of evidence about character should be explained in a similar way. Subject to admissibility of highly probative evidence about "system" and similar-facts\textsuperscript{158}, and other evidence directly relevant to the issue,\textsuperscript{159} the bad character of the accused, e.g., the mere fact that he had previously committed a crime, cannot be used as evidence against him.\textsuperscript{160} Previous misdeeds must not undermine the accused's right to equal standing and he must be treated for all risk-distributive purposes like any other person presumed to be innocent. This decision-oriented explanation of the rule has been brought forward by Kaplan:

"... we might rationally weigh ... the disutility of convicting an innocent man differently in different cases. The better the reputation of the defendant, the greater the tragedy of his fall from grace, and hence perhaps the greater disutility of convicting him should he be innocent. ... Converse reasoning makes clear a very important reason for

\textsuperscript{158} See Zuckerman, supra n.128, ch.12. I shall refer to those two later in this chapter.

\textsuperscript{159} See id., at pp.251-257. Zuckerman rightly criticises the distinction made by the majority of the Law Lords in Jones v. DPP [1962] 1 All ER 569, between "direct" and "indirect" relevance to the issue. This distinction is logically insupportable. He also appears to be right in arguing elsewhere that the decision of the Court of Appeal in R v Anderson [1988] 2 All ER 549 would help in resolving some of the problems generated by that distinction. See his comment in Annual Report on Evidence (1988) All ER.

\textsuperscript{160} See s 1(f) of the Criminal Evidence Act 1898.
excluding evidence of previous convictions from the prosecution's case... Not only may such evidence lead the jurors to the wholly rational conclusion that if the defendant has committed previous crimes he is more likely to be guilty of this one; it may also lead them to the perhaps rational but clearly undesirable conclusion that because of his earlier convictions, ... the disutility of convicting the defendant should he be innocent, is minimal."161

However, if the defendant puts his character in issue, asking (inter alia) for an extra protection from the risk of error, his misdeeds, revealing the negative aspects of his make up and thus equalizing his moral standing with that of other people, would be allowed to be tendered by the prosecution.162 Similarly, when the defendant invokes an imputation on "... the character of the prosecutor or the witnesses for the prosecution", his bad character may also be revealed.163 This rule ought to be interpreted as related only to situations where the accused is asking for an additional risk-distributive protection, i.e., if his defence -

"... is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of


162 s. 1(f)(ii) of the 1898 Act. In a number of Australian decisions discussed by Zuckerman (supra n.128, pp.261-62, fn.34) the jury was directed that the information about the defendant's misdeeds should only be used for removing from the jurors' minds the impression that the accused has a good character. In England refuting evidence to this effect was said to be relevant only to the credibility of the accused but not to the facts in issue. As Zuckerman argues, it would be enough for the jury to be directed by the principle "judge the act, not the actor" and there should be no room for all these spurious distinctions. id.

163 s. 1(f)(ii) of the 1898 Act.
the witnesses for the prosecution upon the ground that his conduct - not his evidence in the case, but his conduct outside the evidence given by him-makes him an unreliable witness . . . "  

Unfortunately, this rule has later been reinterpreted in Selvey and Britzman and, subject to discretion, is now applied to any kind of imputation, including an attribution to a policeman of an isolated act of fabricating a confession. It is submitted that in the light of these deviations from Preston the rule has become divorced from its risk-distributive rationale. It is possible, for example, that the accused testifying at voir dire that he was beaten up by the police be exposed to cross-examination about his character.

If a defendant testifies against his co-accused, the latter would be entitled to cross-examine him like an ordinary witness for the prosecution, and this would ________________


165 Selvey v DPP [1968] 2 All ER 497.

166 R v Britzman [1983] 1 All ER 369.

167 Britzman, id.

168 Cf. Zuckerman, supra n.128, at pp.264ff (the discussion entitled "A Practice Lacking a Sound Principle").

169 It is highly probable, however, that in such a case the judge will disallow this cross-examination by using his discretion.
include a cross-examination about his character. The principles of risk-distribution underlying this rule must be explained in Hohfeldian terms. Risk-distributive immunities of the accused vis-à-vis the prosecution are different from those of the accused vis-à-vis his co-accused. As the latter like any other accused is entitled to be protected from the risks of error, his right to cross-examination must, apparently, not be restricted. However, had this been the law, the allocation of the risks of error between the accused, testifying for his defence by undermining that of another accused, and the prosecution would be affected to the detriment of the former. This conclusion seems to be straightforward, given that the prosecution is not entitled to cross-examine the defendant on his character, or otherwise expose his "bad disposition", when he contradicts one of its witnesses.

To avoid a possible prejudice to the accused without impeding the right of his co-accused to cross-examination, the courts striving "to contain the dispute within the bounds of fairness ... and not allow the

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171 Cf. Lui Mei-lin v. R [1989] 1 All ER 359, an interesting decision which displays a similar approach in a different context.
trial to degenerate into a mud-slinging match"., 172 have invoked the distinction between -

"... evidence which does no more than contradict something which a co-accused has said without further advancing the prosecution's case in any significant degree ... [and] evidence which, if the jury believes it, would establish the co-accused's guilt." 173

It has been decided that it is only in the latter case that the co-accused would be entitled to cross-examine the accused on his character and rely on his previous misdeeds. This distinction has been further elaborated by discriminating between -

"... evidence that clearly undermines the [other's] defence ... [and] inconvenience to or inconsistency with the other’s defence [which] is not of itself sufficient. [Thus] ..., mere denial of participation in a joint venture is not of itself sufficient to rank as evidence against the co-defendant. For the proviso to apply, such denial must lead to the conclusion that if the witness did not participate then it must have been the other who did. [But] ... where the one defendant asserts ... one view of the joint venture which is directly contradicted by the other, such contradiction may be evidence against the co-defendant." 174

One wonders, if a testimony of one of the prosecution’s witnesses is "merely inconsistent" with or otherwise "inconvenient" to that of the accused, would such a testimony be bound to be excluded on the grounds of irrelevancy? Assuming that it would not, and that the

172 Zuckerman, supra n.128, at p.281.
173 Murdoch v Taylor [1965] 1 All ER 406, 415 (HL)
accused would thus be entitled to expose the character of the witness, why should a similarly situated accused be restricted in cross-examining his co-accused who testified with the same effect as a witness for the prosecution? As the answer to this question cannot be grounded upon the dubious distinctions between "direct" and "indirect" testimonial conflicts or "more" and "less" serious contradictions, judicial attempts to use these distinctions in seeking a proper balance between the conflicting risk-distributive interests of the jointly tried defendants are doomed to failure. For there is no balance between these interests which can adequately be struck without disrupting the risk-distributive balance between each one of those defendants and the prosecution.

The principle of protecting the innocent and that of equality (or the presumption of innocence, when it is understood comparatively) demand that subject to the need to eliminate logically irrelevant evidence, all witnesses supporting the prosecution, including the co-accused testifying for himself, be available for unconstrained cross-examination. No restrictions should be imposed on the right of the defendant to cross-examine his co-accused who testified in any way detrimental to this defendant. The same principles

175 Cf. Zuckerman, supra n.128, at pp.251-59; 280-83.
demand that the co-accused, like any other individual, be protected from the risks of error vis-á-vis the prosecution. Hence, no inference from his previous record that can be drawn for protecting another defendant can be drawn, directly or via his credibility vis-á-vis the prosecution, for the purposes of his conviction. If a warning of the jury to this effect cannot be anticipated to be effective, the proper solution would be to split up the indictment and order separate trials. \(^{176}\) This solution has, however, been rejected by the courts on several occasions. \(^{177}\) Lawton LJ had explained this policy by saying that -

"... in the majority of cases where men are charged jointly, it is clearly in the interests of justice and the ascertainment of the truth that all the men so charged should be tried together." \(^{178}\)

This policy of non-splitting up the indictments, imposing on one of the jointly tried defendants an extra risk for the purposes of ascertaining the truth, amounts to double-counting or rebalancing of the already balanced interests. It violates the right to equal standing of the defendant who was exposed to cross-examination on his past misdeeds. This defendant would


\(^{177}\) Zuckerman, supra n.128, at p.283.

\(^{178}\) R v Hoggins [1967] 3 All ER 334, 336; and see R v Varley [1982] 2 All ER 519, 522.
carry more risks of error than other presumptively innocent defendants. This risk is being imposed on this defendant simply because it happened to him to be charged together with another person. Furthermore, an imposition of that extra risk would arbitrarily be dependent on the order in which the co-accused persons will testify. If an accused is lucky enough not to give evidence before his co-accused, he might later find himself in a position properly to defend himself against the charges without implicating his co-accused and thus exposing himself to an unpleasant cross-examination. If, however, he is unlucky to testify first, he would have to account for the possibility that his co-accused might later implicate him to protect himself. This might well impel him to undermine the expected, from his point of view, testimony of his co-accused. Hence, his co-accused, before entering the witness-box, would have to expect that his testimony be undermined. Even if the accused testifying first abstains from undermining his defence, he would have to expect to be implicated later on at his cross-examination. This, in turn, would drive the co-accused to undermine the accused and this possibility known to the accused might lead the latter to the conclusion that his best option in such circumstances of uncertainty would be to implicate the co-accused while testifying in chief. As these deliberations can take place only when there is a
conflict of interests between some of the defendants,\textsuperscript{179} the deliberations of these defendants, none of whom can be certain about the defence tactics planned by the rest, would lead to the self-fulfilling expectations of 'cut-throat defences'. Each one of the defendants would have to assume that undermining imputations might be invoked both against and by anyone of them.\textsuperscript{180} As such initial expectations might be self-fulfilling, it would be perfectly rational for these defendants to adopt them at the first place.\textsuperscript{181} It should now be clear that the defendant testifying before his co-accused would be exposed to greater risks. This is so because his co-accused has an option to abstain from testifying after cross-examining him on his prior misdeeds. It is also clear that both defendants would be exposed to greater risks than each of them would have carried had he been tried separately. No valid principle can support such impositions of the risks of error. Within a principled

\textsuperscript{179} When there is no conflict, sec.1(f)(iii) of the 1898 Act would never be in use. In such cases, the accused persons will be pursuing their common interests and will typically be represented by the same counsel (or by counsel acting in concert).

\textsuperscript{180} Part of these problems are mentioned in Zuckerman, supra n.128, at p.282, nn.99-101 and the accompanying text. For a more recent example of "cut-throat" defences see R v Mir, Ahmed, Dalil [1989] Crim.L.R. 894. See also R.Munday, Irregular Disclosure of Evidence of Bad Character, [1990] Crim.L.R. 92, 93.

\textsuperscript{181} This notion of "self-fulfilling expectations" belongs to decision theory. For its application to a distant but revealing situation see L.A.Bebchuk, Toward Undistorted Choice and Equal Treatment in Corporate Takeovers, (1985) 98 Harv.L.R. 1693, 1724-25.
framework of risk-distribution separation of the trials would appear to be the only right solution of these problems.

2.2 HEARSAY PROBLEMS REVISITED
Similar arguments support the rule against hearsay when this rule aims at protecting the accused. I have already referred to this rule for different purposes and shall now support it from another angle, the principle of equal concern and respect embraced by the presumption of innocence. This principle, as was mentioned above, is epitomized by the rule that perceptible doubts as to the guilt of the accused should lead to his acquittal. This principle aims at preventing deliberate risk-impositions, tolerating to some extent accidental exposures to the risk of wrongful conviction. As has been explained above, it is only the former risk-impositions, but not the latter that violate the equal standing of the accused by treating him less favourably than other individuals. As to the non-perceptible risk-impositions, those are shared by everyone as a matter of necessity. These risk-impositions are accidental and although regrettable, cannot be avoided. This crucial distinction between perceptible and non-perceptible doubts justifies and even requires that the accused be facilitated in substantiating doubts relevant to his guilt. Doubts surrounding untested evidence might well
be imperceptible, and the right of cross-examination granted to the defendant as part of his general right of unimpeded access to evidence facilitates the elicitation of such doubts, i.e., the defendant’s opportunities of making these doubts perceptible. The principle of risk-distributive equality requires this right to be equally enjoyed by all persons charged with criminal offences and hence the rule against hearsay. Generally speaking, an admission of hearsay obstructs the opportunities of the accused to make the doubts surrounding this type of evidence perceptible. It is true that hearsay can be reliable, but this does not solve the problem, for we are to distinguish between two different kinds of reliability. Hearsay, as any other evidence, may be "reliable per se" when, correspondingly to our shared knowledge, it is regarded as unsusceptible to falsification. Alternatively, it may well be thought to be reliable because, being in principle susceptible to falsification, is has not been falsified de facto. The first kind of reliability is, to say the least, plainly exceptional. It can be accommodated within a few exceptions to the rule and must thus not bother those who think that hearsay should not be admissible. It is the second kind of reliability that has to be dealt with in justifying the rule against hearsay.

Bearing this in mind, the objection against the hearsay rules can be restated as follows:

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"Evidence, including hearsay, might be reliable despite its susceptibility to falsification and notwithstanding the lack of adequate opportunity to falsify it. In this field everything depends on the circumstances and it is epistemologically wrong, and indeed very misleading, to discriminate between different classes of evidence." 182

Enough has been said in this work to support the view that it is the morality of risk-distributive choices that must be justified. Granted that this objection is epistemologically sound, viz. that hearsay may indeed be reliable, it says nothing about the link or the absence of a link between a denial of an opportunity to examine this evidence and the effect of such denials on the allocation of the risks of error. To say that this would, when appropriate, be taken into account in answering the question "Had the defendant's guilt been proved beyond all reasonable doubt?", is simply to beg the question. For we are not interested here in the technique in which the lack of opportunity to substantiate doubts is accounted for in making decisions about perceptibility of doubts. If a lack of this opportunity is taken into account, this decisional factor should be morally constant and not epistemologically variable. As such, it may well be formalised within the rules of admissibility. By contrast, if this moral factor is not always taken into account, this might violate both the principle of equality and that of protecting the innocent.

The objection against the hearsay rules must thus be reformulated as follows:

"Hearsay statements susceptible to falsification might be reliable despite the lack of opportunity to falsify them. This lack of opportunity, depending on infinite factual matters and varying from case to case, may and may not be significant for risk-distributive purposes. Therefore, there is no possibility of devising rules for dealing with different hearsay statements."183

Evidently, when there are no especially cogent reasons to dispel all the doubts surrounding an out-of-court statement, and when such reasons cannot be articulated, the lack of opportunity to falsify the statement becomes relevant for risk-distributive purposes. Note that the mere fact that the statement had not been falsified should not be one of those reasons. If the statement is relied on without these special reasons, the accused's right to equal concern and respect would be violated as he would be unable to substantiate (i.e., to make perceptible) the doubts surrounding the statement. This may also violate the principle of protecting the innocent.

The opposition to admitting hearsay is thus well-supported by the moral and political principles of risk-distribution. Subject to special and cogent reasons, it would never be justifiable to convict a person on the

basis of this kind of evidence. It would be
unjustifiable, for example, to say to this person:

"Like anyone else, you are entitled to acquittal on
the grounds of perceptible doubts only. Now you
ought to be convicted as the doubts as to your
guilt are not really ‘reasonable’. They are
imperceptible, and the fact that you were unable to
substantiate them by cross-examining the maker of
the statement upon which we decide to base your
conviction is immaterial."

The existing exceptions to the rule against hearsay
constitute an attempt at consolidating the types of
special reasons, ones which are capable of justifying a
reliance on hearsay. The main reason for creating
exceptions is the circumstantial reliability of the
statements coupled with their being the best evidence
that can be obtained.184 These exceptions cannot be
discussed here,185 but it must be pointed out that the
vast majority of them are based upon the existence of an
adequate opportunity to falsify the statement admitted
in evidence. Res gestae and other spontaneous statements
provide striking examples of supporting information186
necessary to facilitate the accused's opportunities to
examine the evidence against him. Such attempts at
consolidating special reasons that can justify reliance

184 A classical statement of these two reasons
appears in J.H. Wigmore, A Treatise on the Anglo-
American System of Evidence in Trials at Common Law,
vol.5, par.1420-22 (1961). For analysis see L.Tribe,

185 See A.Keane, supra n.140, chaps.10-12.

186 See the statement of the relevant guidelines as
to the admissibility of such statements in R v Andrews
[1987] 1 All ER 513, 520-21 (HL).
on hearsay cannot be successful, for it can hardly be possible to set out these reasons in advance. They are, however, revealing of the risk-distributive principles that stand behind them, the principle of equality and that of protecting the innocent. The rule against hearsay and its exceptions would thus be better understood as a species of those principles. They would also be better justified in that form, i.e., not as scattered and disparate exceptions to the exception to the principle of freedom of proof, but as particular instances that merely exemplify the way in which the fact-finding discretion of adjudicators is regulated by the general principles of the law. The rule and its exceptions leave adjudicators with substantial discretion\textsuperscript{187}, and the sooner the dichotomy of rules/discretion is discarded, the better would be the prospects of the law of evidence to reveal its inner rationality.\textsuperscript{188} For when a discretion exists, it should

\textsuperscript{187} See Zuckerman, supra n.128, at pp.187-221. As Lord Reid remarked: "[i]t is difficult to make any general statement about the law of hearsay which is entirely accurate." See Myers v DPP [1964] 2 All ER 881, 884. This indeterminacy is one of the signs of discretion, but Lord Reid continued his judgment by saying (at p.885) that judges have no power of modifying the law of hearsay, either by expanding the exceptions to the rule or otherwise. As Zuckerman shows, referring to R v Andrews [1987] 1 All ER 513 and other cases, "the courts have not been unfailingly faithful" to this ruling. See supra n.128, at pp.187ff.

not always be understood as a strong one. It ought to be guided by the relevant principles. To borrow once again from Dworkin,

"There is no such thing as 'the law' as a collection of discrete propositions, each with its own canonical form. People have legal rights, and principles of political morality figure ... in deciding what legal rights they have."

'The law' must surely embrace the law of evidence, all its rules and exceptions. As has already been mentioned, these rules and exceptions should be viewed as non-exhaustive representatives of the more general legally preemptive reasons. To substantiate this approach further, I shall now examine the definition of hearsay, different uses of hearsay statements and the new exceptions to the rule recently introduced by the Criminal Justice Act 1988.

Let us start with the definition. The rule against hearsay can be understood as either statement-oriented or declarant-oriented. According to the statement-oriented definition,

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not

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the truth of the statement, but the fact that it
was made."191

According to the declarant-oriented definition of the
rule, where a declarant’s observation, memory, sincerity
or other testimonial capacities are relevant for
evaluating the probative value of his statement or
implied non-verbal utterance, a non-original account of
those made by another person would be hearsay.192 It is
clear that under the proposed principle-based approach
it is the second definition that has to be preferred.
The accused should be facilitated in eliciting and
substantiating the doubts which, if the original maker
of the statement is not cross-examined, would remain
latent and non-observable. The principle of protecting

191 Subramaniam v DPP [1956] 1 WLR 965, 969-70. But
see the dictum of Baron Parke in Wright v. Doe d Tatham
(1837) 7 Ad & El 313, 388-89: "Proof of a particular
fact, which is not of itself a matter in issue, but
which is relevant only as implying a statement or
opinion of a third person on the matter in issue, is
inadmissible in all cases where such a statement or
opinion not on oath would be of itself inadmissible ..."
As was commented on by an American academic:

"Baron Parke’s dictum is ... awfully clever-
perhaps too clever. ... Even though there are
hearsay risks in this category of evidence, risks
perhaps as great on the average as those of verbal
hearsay, is the magnitude of the problem such that
the aggregate of these risks justifies taxing our
three-pound brains in the effort to eliminate them
when experience tells us that, unless we all wax
as clever in the courtroom as Baron Parke in his
chambers, the effort will succeed only 'unevenly'?"

See O.G.Wellborn III, The Definition of Hearsay in the
Federal Rules of Evidence, (1982) 61 Tex.L.Rev. 49, 63-
64. Probably, it is for these reasons of practicality
that the statement-oriented definition has ultimately
been adopted in England.

192 Park (supra n.190) advocates this approach.
the innocent and that of equality work out the maximal level of the risks to which persons accused of crimes may legitimately be exposed by allowing only the genuinely non-perceptible doubts to be disregarded. When an accused is denied the right of cross-examining the maker of an out-of-court statement, and thus restricted in substantiating the doubts surrounding that statement, these principles are violated. It does not make any difference in this respect whether the right of substantiating the doubts is denied in respect of the truth of the statement or the testimonial capacities of its maker. For it is not the form in which evidence in delivered that matters here. What matters is the defendant’s opportunity to substantiate the doubts by cross-examination (or otherwise) and this objective can only be pursued by principles, not by rules.

This point would become clearer if we discuss the arguments about the definition of hearsay recently canvassed by Stephen Guest193. Favouring the restrictive statement-based definition of hearsay, he argues that an adoption of the wide declarant-based definition is bound to end up in a reductio ad absurdum. For example, when the defendant is observed by a witness to stalk the victim with a dagger and then plunge it into the victim’s body and thus slaying him, this witness’s

testimony about these events would be hearsay so far as this account aims at proving the communicated intention of the killer. This example seems to me to be flawed because, in my view, the accused’s utterances, both express and implied, are not hearsay when they are tendered against him. He cannot be said to have been denied his right to cross-examination in relation to them. This objection may, nevertheless, seem to be an ad hoc one, for Guest’s example can be changed, substituting the defendant by somebody else. To take another example, W testifies to the effect that D ran away from the accused’s house, and the inference which should impliedly follow from this (granted that it is relevant to the trial) is that D was afraid of the accused. D does not appear to give evidence in court, but we do not have any reason to doubt W’s account. In my view, W’s testimony ought to be classified as hearsay insofar as D’s motives for running away from the accused’s house are concerned. This is so because the accused must be given a full opportunity to elicit doubts concerning the motives communicated by D, and if these doubts are left imperceptible and thus non-countable in the final risk-distributive judgment, the accused, being imposed an extra risk, would be denied his right to equal concern and respect. It would not be enough to say to him that we do not have any reason to doubt our conclusion. He has a right to doubt it, and any decision that ignores his lack of opportunity to
make his doubts perceptible amounts to a fresh political decision redistributing the risks of error.

Guest's example can, however, be substituted by another which may eliminate this flaw. R v Rice\textsuperscript{194} would perhaps be a good example. In that case, the prosecution had to establish that the defendant flew from London to Manchester on a particular day. To establish this fact, the prosecution produced a used air-ticket bearing the defendant's name as one of the passengers on a flight from London to Manchester. It was decided that this ticket is not hearsay and can be used for the aforementioned purpose as real evidence.\textsuperscript{195} To bring ourselves closer to Guest's example, let us now assume that this ticket is used to prove that it was bought by the accused in order to set up an alibi as part of his plan to commit an offence in London. Nobody can testify that he saw the accused, or anyone else that can be connected with the accused, issuing this ticket. Nevertheless, the ticket ought to be admitted and would probably not be regarded as hearsay. Despite this, Guest's argument from the "reductio ad absurdum" holds in this case. The ticket asserts that the accused was seen (or heard) to have booked (by himself or via others) for the flight to Manchester. There is no direct

\textsuperscript{194} R v Rice [1963] 1 QB 857.

\textsuperscript{195} id., at p.871. This decision is not unproblematic. See Keane, supra n.141, at p.192; R.Cross, On Evidence, 6th ed., 460-61 (1985).
witness to verify this assertion by his personal knowledge and be cross-examined on it. According to the suggested approach, as the accused can adequately cross-examine the travel agent or any other person responsible for issuing tickets similar to that produced at the trial about their general practices, the ticket, if admitted, would not impose upon him any extra risk of wrongful conviction. Hence, the ticket is not "hearsay" and must therefore be admitted.

It should now become transparent that Guest's argument would hold so long as the rule against hearsay is understood as a "rule" and not as a "principle". So long as we are to speak conceptually by using rigorous definitions, our ultimate choice is bound to be in any event either underinclusive or overinclusive. But definitions like these characterise only rules, which apply in an all-or-nothing fashion, rather than principles which can be more or less weighty. If, as was suggested above, the rule against hearsay be viewed as a species of risk-distributive principles, it would not end up in the reductio ad absurdum consequent upon the overinclusiveness of the rule's definition. It would also not be underinclusive as the "handy rule of thumb" advocated by Guest. The main question would thus not be "How are we to classify this piece of evidence?", but rather "Does the admission of this evidence or the reliance on it fit the risk-distributive rights of the
defendant?" This question has to be answered by reference to the principle of equality and that of protecting the innocent.196, 197

196 To take another example, in R v O'Connor (1987) 85 Cr.App.Rep. 298, a case involving conspiracy charges, the prosecution wanted to take advantage of s.74 of the Police and Criminal Evidence Act 1984 by tendering in evidence another man's conviction of conspiring with the accused. Exercising its discretion under s.78 of the Act, the Court of Appeal held that this evidence, having an adverse effect on the fairness of the proceedings, should have been excluded. This evidence exposed the accused to a considerable risk of error without allowing him to eliminate that risk by cross-examination. In our terms, an imposition of this aggravated risk on the accused violated his right to equal treatment.

This, of course, is not to say that Stephen Guest does not accept the principle-based approach per se. Far from opposing it, he is in fact sceptical about the rationality of the rule against hearsay and thus advocates a restrictive approach as to the scope of this rule (see, e.g, supra n.194, in 41 Cur.Leg.Prob., p.45).

197 I agree with Guest's criticism of Tapper (id, at pp.38-41), but am rather uneasy about his treatment of Tribe's thesis (id, pp.42-44). As Guest convincingly demonstrates, Tapper's distinction between intentionally and non-intentionally assertive types of conduct (Cross, supra n.195, esp. at p.461) can serve no useful purpose in defining "hearsay". Hearsay dangers might well exist in respect of both "publicly" implied and "privately" conveyed meanings. This distinction has been adopted by the Federal Rules of Evidence, rule 801(a) and criticised by Wellborn, supra n.191, pp.73-81. Wellborn, however, does not suggest to abandon it altogether (id., at p.92).

Contrary to Guest's suggestions, Tribe (supra n.184) does not contend that his triangle, depicting inferential routes from an utterance or action to their probandum, via the actor's belief in that probandum, is based on "reliability". It is based on the relevancy of that evidence, determining when the actor's testimonial qualities ought to be tested by cross-examination. When the actor's belief in what is inferred from his conduct or utterance is relevant to the probandum, his utterance or conduct would amount to hearsay. When, as a matter of logical relevancy, we move directly from his conduct or assertion to our probandum, this evidence should not be regarded as hearsay. What in Tribe's thesis was based on reliability is the reasons for making exceptions to the hearsay rule. On his view, when one of the inferential
My discussion of the principles underlying the hearsay rules has so far been based on the assumption that this kind of evidence is adduced against the accused. Under these principles, the risks of error to be faced by the accused are radically different from the risks that have to be borne by the prosecution. The accused must be required to produce the best evidence available to him and has to be allowed to rely on such evidence even if it is hearsay. For it is the accused, not the prosecution, who has the full right to be facilitated in substantiating doubts. If a hearsay statement, being the best evidence available to the accused, is not admitted by the court, this would violate both the principle of protecting the innocent and that of equal concern and respect. For the court not to consider this evidence, is simply to disregard the doubts, which can possibly be perceptible, instead of eliminating them by properly evaluating the statement. Given, as I have assumed, that

routes, going via the actor's belief from his utterance or action to our probandum is reliable, his utterance or action ought to be admissible as an exception to the hearsay rule. Tribe accordingly depicted the "left-side" and the "right-side" exceptions. The former are based on the actor's sincerity and narration, while the latter on his observation and memory. The former factors deal with the question: Did the actor really believe in what he is meant to convey? The latter ones deal with the question: Did his belief really correspond to the reported events? See also R.Lempert & S.Saltzburg, A Modern Approach to Evidence, 2d, ed., 350-65 (1982); M.Graham, "Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay, [1982] U.Ill.L.Rev. 887; R.Friedman, Route Analysis of Credibility and Hearsay, (1987) 96 Yale L.J. 667.
the accused had produced his best proofs, why should his trial be different for risk-distributive purposes from all other trials in which the defendants are not restricted in defending themselves? The only difference between this and other defendants would be the luck. For it is a sheer luck for other defendants that they do not have to rely on hearsay in defending themselves. There is no principled distinction between them and those accused who are bound to rely on hearsay.

This way of looking at hearsay problems can now be exemplified by the judgment delivered by the House of Lords in R v. Blastland\textsuperscript{198} and the criticism levelled against this judgment by some academic writers.\textsuperscript{199} The appellant was convicted of forcibly buggering and murdering a twelve-year-old boy. At his trial he admitted meeting the deceased boy and attempting to bugger him, but contended that when he saw a man

\textsuperscript{198} R v Blastland [1985] 2 All ER 1095 (HL). Another case in which the defendant was not allowed to rely on hearsay in proving his innocence is Sparks v R [1964] 1 All ER 727 (PC). The accused defended himself by contending that it was not him who indecently assaulted a four-year-old girl. The trial judge refused to allow him to ask the girl's mother whether her daughter had said to her shortly after the assault that her attacker was 'a coloured boy'. This ruling was upheld by the Privy Council on the grounds of the hearsay rule.

observing what he was doing he panicked and ran away to his home, leaving the boy unharmed. He gave a description of the other man (Mark) who had also come under suspicion and was interrogated by the police. In a series of interviews with police officers, Mark had successively made and withdrawn confessions of buggering and murdering the boy. Shortly after the event Mark had said to a woman he was living with and to different people that a boy was murdered. The defence wished to adduce all the statements given by Mark, but the trial judge ruled that this evidence would be hearsay and is therefore inadmissible. The defence also wished to call Mark and treat him as a hostile witness, but this had not been allowed. The appellant was ultimately convicted on the basis of the evidence which apparently was overwhelming. He appealed on the ground that the trial judge erred in excluding the statements given by Mark. His appeal was dismissed by the Court of Appeal and later by the House of Lords.

The House of Lords has decided that a confession made by a person other than the defendant to the facts constitutive of the offence with which the defendant is

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200 No complaint was made in relation to the judge’s refusal to allow the defence to summon Mark and treat him as hostile. id, at p.1098. It appears that this could be a proper solution of the problem. The trial judge’s decision seems to be right as a matter of authority but rather problematic so far as the exercise of his discretion is concerned. Cf. Keane, supra n.141, at pp.113-116.
charged is inadmissible as hearsay unless it can be shown to fall within the scope of the recognised exceptions. Lord Bridge, after having paid regard to the "no new exceptions" rule laid down in R v Myers, remarked that -

"To admit in criminal trials statements confessing to the crime for which the defendant is being tried made by third parties not called as witnesses would be to create a very significant and, many might think, a dangerous new exception." Mark's statements have also been held inadmissible as evidence of his state of mind, viz. of his knowledge of the murder before the body of the boy had been found. It was suggested on behalf of the appellant that this evidence was relevant to show that Mark could have buggered and murdered the boy, the argument which, according to Lord Bridge, "... appears to proceed from its premises to its conclusion by a formidable chain of reasoning." This argument, however,

"... if it is right ..., does appear to lead to the very odd result that the inference that Mark may have himself committed the murder may be supported indirectly by what Mark said, though if he had directly acknowledged guilt this would have been excluded."

201 The House of Lords had, in fact, refused leave to appeal on that point (id., p.1098), but made clear later in the judgment (pp.1098-1100) that such evidence would not be admissible.

202 Myers v DPP [1964] 2 All ER 881, 885 (HL).
203 id., 1098gh.
204 id., at p.1099c.
205 id.
This odd result had been avoided as Mark's statements were held to be only remotely relevant to the facts in issue. For what was relevant was not the fact of Mark's knowledge but how he had come by that knowledge, a question that can be answered in a number of ways. This evidence provided "... no rational basis whatever on which the jury could be invited to draw an inference as to the source of that [Mark's] knowledge." An invitation to the jury to do so would thus be a "mere speculation". Therefore -

"... to allow this evidence of what Mark said to be put before the jury as supporting the conclusion the he, rather than the appellant, may have been the murderer seems ..., in the light of the principles on which the exclusion of hearsay depends, to be open to still graver objection than allowing evidence that he had directly admitted the crime. If the latter is excluded as evidence to which no probative value can safely be attributed, the same objection applies a fortiori to the admission of the former." 

This decision has been criticised by P.B.Carter who argued, inter alia, that the House of Lords ought to have distinguished between the assertive and the demonstrative probativeness of the disputed statements. The latter may well be relevant and admissible as evidence of a state of mind. D.J.Birch

206 id., at p.1100a.

207 id., at p.1100ab.

208 Carter, supra n.199, at p.115. For similar criticism of the judgment see C.R.Williams, Issues at the Penumbra of Hearsay, (1987) 11 Adelaide L.R. 113, 124-125; 138-139.
realistically argued that the courts "fiddle the concepts of hearsay and relevance to admit only evidence which it is considered desirable to admit."\(^{209}\) One is left to wonder what would be the position of Carter if all his arguments are accepted with the effect that statements similar to those of Mark are freely tendered as evidence against defendants? Surely, it would not be unreasonable to say that such statements, even when they are admitted to prove the "state of mind" of their makers rather than the truth of their contents, would be unfairly prejudicial for accused persons. As the latter would not be able to cross-examine the makers of such statements, their right to be facilitated in substantiating doubts would be infringed. The risk of error to which these defendants would be exposed would thus be higher than the usual accidental risks. Hence, there are cogent reasons for not admitting such statements as evidence against the accused, and what follows from this is that the major question is not one of classification of the statements as either 'assertive' or 'demonstrative'. The central question is what are or should be the risk-distributive rights of the defendant on the one hand and the prosecution on the other. The question is what are and should be the principles of risk-distribution that guide the judges when they admit or refuse to admit different pieces of evidence? In my view, Mark's statements should have been

\(^{209}\) Birch, supra n.199, at p.35.
admitted in Blastland as evidence needed to establish innocence. The evidence against the accused appeared to be overwhelming, and yet the refusal to admit the statements given by Mark was inconsistent with the principles of risk-distribution presented above. For it was just a matter of luck for Blastland that he had to rely on those statements. He could not have summoned Mark as the judge had made it clear that it would not be possible to treat Mark as a hostile witness and cross-examine him about his statements. He attempted to adduce the best evidence at his disposal, and this evidence, if true, was capable of generating serious doubts in relation to his guilt. As the prosecution's risk-related rights are different from those of the accused, the possibility that Mark's statements be overevaluated by the jury should have played no role in making a decision as to whether to admit them in evidence.

Although the decision in Blastland cannot be seen as inconsistent with authorities, it is unfortunate that the opportunity to apply the hearsay rules in a principled way, protecting accused persons from unjustifiable risks of error, has been missed. And if, as it appears to be the case, the courts do exercise discretion when they apply the rule against hearsay, the

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210 See Birch, supra n.199, and Zuckerman, supra n.128, at pp.187ff. See also A.Ashworth & R.Pattenden, Reliability, Hearsay Evidence and the English Criminal Trial, (1986) 102 LQR 292; and Williams, supra n.208.
decision in Blastland is doubly wrong. For it both obfuscates the discretion and leaves it unstructured and open to ad hoc decisions. It is somewhat hard to avoid the impression that the key factor in Blastland was not the formal status of Mark’s statements, but the seemingly overwhelming evidence supporting the guilt of the accused.

I now turn to the new exceptions to the rule against hearsay that have been introduced by the Criminal Justice Act 1988. Under the provisions contained in part two of the Act, different documented statements have now become admissible to prove the truth of their contents in criminal proceedings. The details of these provisions need not to be discussed here.\footnote{For details see D. Birch, The Evidence Provisions in the Criminal Justice Act 1988, [1989] Crim.L.R. 15; Zuckerman, supra n.128, at pp.218-221; Keane, supra n.141, at pp.251-262.} I shall examine the requirement of documentation which applies to any statement to be admitted by virtue of these provisions and other conditions for admissibility of statements under section 23 of the Act. I shall concentrate on this section because it contains a most far-reaching exception to the rule against hearsay. Section 24 renders admissible different statements made in ordinary course of business, trade, occupation or in official capacities. Other routes of admissibility under this section follow those of section 23. Alternatively,
they are dependent on the absolute lack of recollection of those who had previously prepared such statements.\textsuperscript{212,213} Both sections are qualified by the provisions explaining that none of them will "...render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984."\textsuperscript{214} It is hoped that if a person who gave such a confession has not been charged and his confession is submitted qua a written

\begin{itemize}
\item \textsuperscript{212} The last condition is completely irrational. As has been mentioned by R. Cross, On Evidence, 6th ed., 252 (1985):
\begin{quote}
"The number of cases in which the witness's memory remains a 'perfect blank' may not be as high as that suggested, but allowance must be made for numerous situations in which memory is only partly revived."
\end{quote}
\end{itemize}

See also Zuckerman, supra n.128, at p.191. Such strikingly anti-empirical strategies of legislation have been criticised as "The way of the baffled medic: Prescribe first; diagnose later - if at all". W. Twining, Rethinking Evidence, ch.10 (1990).

\begin{itemize}
\item \textsuperscript{213} Other statements referred to by this and other sections, namely those which would be admissible if prepared under sections 29-31, or Schedule 13, paragraph 6 of the Act, need not bother us here. Those are expert reports and other statements prepared for criminal proceedings by judicial or other authorised officials in the form of glossaries or otherwise. Such statements appear to be less problematic than those dealt with by section 23. When those statements present typical hearsay dangers the principles similar to those suggested in this chapter should apply. When a statement, satisfying the conditions of ss. 23 or 24, was prepared for the purposes of criminal proceedings or investigation otherwise than in accordance with the above-mentioned provisions, the court can admit it at its discretion under s. 26. This inclusionary discretion has to be affected by considerations similar to those affecting the discretion under s. 25 of the Act.
\end{itemize}

\begin{itemize}
\item \textsuperscript{214} s.23(4) and s.24(3) of the Act.
\end{itemize}
"statement" against another, it would not be admissible merely because this person is not an "accused". It must be hoped, in addition, that the fact that this restriction speaks of confessions that would not be admissible "under section 76", but not under section 78 of the Police and Criminal Evidence Act 1984 would not be assigned any significance. Special reference to that section was not necessary as it confers general discretion to the courts to exclude any item of evidence and it is in this way that those provisions of sections 23 and 24 ought to be understood.\(^{215}\) It is unthinkable, for example, that confessions which, according to section 78, cannot be admitted because they have been recorded contrary to Codes of Practice C or E, issued by virtue of section 66 of the Police and Criminal Evidence

\(^{215}\) Zuckerman, supra n.128, at p.221. S.28(1)(b) of the Act seems to preserve this and other exclusionary discretions, and it is also possible that s.78 had not been referred to because s.25 of the Act confers on the court a very wide discretion to exclude any statement on the grounds of "fairness".

This does not yet answer the following question: Can the accused object the admissibility of a statement obtained from another person by violating this person's rights? Apparently, section 78 is based on fairness of the "proceedings" and, unlike s. 25 of the new Act, not on unfairness to the accused. The reported decisions in which evidence was excluded under s.78 appear to have linked the exclusionary discretion with an infringement of one of the rights belonging to the accused (see infra n.216). It is, however, still an open question whether some disciplinary considerations and a moral integrity of the criminal process as a whole could enter into this discretionary framework of "fairness". See Dennis, infra n.216; Zuckerman, id., chs. 15 & 16.
Act, would nevertheless be admitted qua "statements" under the Criminal Justice Act 1988.

The precondition that in order to be admissible, a statement that falls within one of the new exceptions to the hearsay rule has to be made by its maker in a document seems to be disadvantageous to the accused. The latter has no power of obtaining statements from private persons in a documentary form. That power, when it exists, is vested in the crime-investigating and other legal authorities. Hence, if the accused is bound by the documentary restriction, as he seems to be, his defence


"... would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

would be dependent upon collection of written exculpatory evidence by his adversaries. Oral statements, typically relied on by accused persons, would continue to be kept out in the shadow of Blastland. To be admissible, they would have to be shown to fall within the ambit of one of the old exceptions to the rule against hearsay. This anomalous result could be avoided if both the rule against hearsay and its orthodox exceptions were understood as binding the prosecution only, requiring the defence to produce the best evidence available. As a matter of principle, this understanding of the rule presents it in its best light.

Under the new exceptions, a statement made in a document shall be admissible if its maker is dead or being bodily or mentally unfit is unable to attend as a witness. Such a statement would also be admissible if its maker is outside the United Kingdom; and: it is either not reasonably practicable to secure his attendance or: he cannot be found despite the fact that all reasonable steps have been taken to find him.\(^{217}\) Alternatively, when such a statement was made to a crime-investigating official, it would be admissible when it is clear that "...the person who made it does not give oral evidence through fear or because he is kept out of the way."\(^ {218}\) Section 25 of the Act enables the court to exclude any

\(^{217}\) ss.23(2); 24(4)(i) of the Act.

\(^{218}\) ss.23(3); 24(4)(ii) of the Act.
statement admissible under sections 23 or 24 when it is in the interests of justice that it shall not be admitted. This discretion ought to be exercised having regard:

"to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."\(^{219}\)

This provision is most important and I shall come back to it soon after discussing the conditions for admitting hearsay statements set out in section 23.

The three routes of admissibility mentioned in section 23 (2) are based on the best evidence principle. This principle is sound so far as evidence tendered by the defendant is concerned. There are good reasons to exclude or not to rely on hearsay for purposes of conviction even when it is the best evidence that can possibly be attained. Such evidence, when admitted, limits the opportunities of the accused to substantiate the doubts surrounding it, leaving many or some of those doubts imperceptible. As the latter doubts do not count in applying the criminal requirement of proof beyond all reasonable doubt, the accused, being restricted in proving these doubts to be "perceptible" and thus "reasonable", would be denied his right to equal concern and respect. The requirements set out by section 23 (2)

\(^{219}\) s.25(2)(d) of the Act.
are nevertheless reasonable, for they are to be read together with the exclusionary discretion given to the court by section 25.

The requirements of section 23 (3) are less balanced and somewhat irrational. As the condition for admissibility of a statement is that its maker abstains from testifying at the trial, the accused who is willing to intimidate this witness without admissibilizing his statement, would be facing a relatively simple task. Instead of keeping this witness "out of the way" or making him fearful of testifying, he can "persuade" the witness to appear in the court, retract his incriminating statement, and decline to answer to any further questions.\footnote{Cf. Zuckerman, supra n.128, at p.219. In Israel, in such circumstances the statement would be admissible. Under section 10 A (1) of the Evidence Ordinance (New Version) 1971 (introduced in 1979), a written statement given out of court is admissible if it is substantially inconsistent with the testimony of its maker. See E.Harnon, The Hearsay Rule and Some of Its Exceptions, in The Institute of Comparative Law in Japan, Chuo University, 'Conflict and Integration: Comparative Law in the World Today', 385, 402-09 (1988). The same would be true according to Rule 801(d)(1) of the Federal Rules of Evidence of the U.S.A. See California v. Green, 399 U.S. 149 (1970); C.McCormick, On Evidence, 3d ed, 746 (1984).} As has already been explained in part one, the tacit assumption behind this provision which does not specify those who either keep the maker of the statement "out of the way" or frighten him is that prospective witnesses for the prosecution might be so treated by an "invisi\textsuperscript{b}le hand" somehow connected with
the defendant.\textsuperscript{221} In addition to the ordinary hearsay risks, the use of this provision would involve an implicit imputation on the defendant, namely that the "invisible hand" causing the witness's fear or non-attendance belongs to or is connected with him. And this plainly prejudicial to the defendant suggestion is undisprovable: the real cause of the witness's non-attendance would never be one of the facts in issue. Although it is true that in trials by jury issues of admissibility will be discussed in the jurors' absence, the reasons which motivated the maker of the statement to refrain from testifying might reappear, tacitly if not explicitly, at the time of summing up and directing the jury.\textsuperscript{222} In non-jury trials and in Magistrates'

\textsuperscript{221} Cf. sec. 13 (3) of the Criminal Justice Act 1925. It is presumably for this reason that the explicit requirement of "... means of the procurement of a person accused ... or on behalf of such an accused person" has been left out in the Commons Amendments of the 29th of June 1988 to the Criminal Justice Bill (No.70), sec.21(3)(b). In Israel, the position is similar. Under s.10A(b) of the Evidence Ordinance, a prior statement is likewise admissible if its maker refrains from testifying because improper means have been employed to prevent him from doing so. It would, however, not be enough in Israel to show that this person simply "fears" and therefore does not testify. The "fear-licence" not to summon an available witness created by s.23 was criticised by Zuckerman, supra n.128, at p.219. The English provisions have probably been motivated by intimidations of witnesses in terrorist trials. See Keane, supra n.141, at p.253.

\textsuperscript{222} Cf. Scott v R [1989] 2 All ER 305, 315-16 (PC), advising HM to allow two separate appeals from Jamaica, one of them on the grounds of an inadvertent misdirection of the jury concerning the deposition of the witness who was subsequently killed:

"Their Lordships ... feel considerable unease that the judge's remarks may have at least implanted in
Courts this problem is self-evident. It would therefore be most unwise for the defendant to challenge, in such circumstances, the admissibility of the statement on the basis of section 23(3). The best way for him to contest its admissibility would be to rely on the discretion to exclude evidence bestowed on the court by section 25, but this discretion may not entirely guarantee him from being suspected of, e.g., intimidating the maker of the statement. This might prevent the defendant from challenging the admissibility of both unreliable and intangible statement.\textsuperscript{223}

\begin{quote}
the jury's mind the suspicion that Green was killed to prevent him giving evidence that identified the accused. The judge ... should have avoided language in the summing up that could be interpreted as carrying any implication that the witness had been killed to prevent him giving evidence." (id., at p.316)
\end{quote}

But what can be told to the jury who must evaluate a statement given by the deceased or by a person who declines to testify out of fear? Would it not be a misdirection if the jury is told that there is no connection whatsoever between the witness's death or disappearance and the trial? Lack of any suggestion may equally be misleading, for the jury might draw its own conclusions based on the "presumption" against coincidences.

\textsuperscript{223} Another irrationality of these arrangements, and at this time from the point of view of the prosecution, is that they hold only in regard to statements given to the police and other crime-investigating authorities. If, knowingly to the accused, a person incriminates him in a statement which was not made to one of such authorities, the accused "would have" to reach that person before those authorities, and if he succeeds in intimidating that person, there would be no possibility of admitting the statement.
All this, along with other hearsay risks, might violate both the principle of protecting the innocent and that of equality. If the discretion to exclude evidence conferred on the courts by section 25 is not exercised to prevent such violations, the accused would be at risk of wrongful conviction and, in addition, subject to an unequal risk-distributive treatment. Section 25 has been designed to prevent all this, and if it had not existed, the protection of the rights of the accused would have to be anchored on section 78 of the Police and Criminal Evidence Act 1984. Section 25 has, therefore, a paramount importance. According to it, the court has to consider, first, "... any risk, having regard in particular to whether it is likely to be possible to controvert the statement"; and, second, general considerations of fairness to the defendant. It is therefore submitted that this section stands or ought to be interpreted as standing for the same principles of

224 See R v O'Loughlin [1988] 3 All ER 431 (in which written depositions were excluded) and reaffirmation of this authority in Scott v R [1989] 2 All ER 305, 311-12 (PC). In the latter case it was mentioned (at p.313) that depositions can be excluded only in rare circumstances and that -

"neither the ability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion."

Note, that this guidance holds in relation to "depositions" taken before examining justices under s.13 (3) of the Criminal Justice Act 1925, and that different considerations might apply to written statements which are not "depositions".
protecting the innocent and risk-distributive equality that constitute the moral foundations of the law of criminal evidence. When the accused is denied an opportunity to substantiate the doubts which surround a statement adduced against him, this statement must usually not be admitted as, contrary to both the principle of risk-distributive equality and that of protecting the innocent, this would impose on him an extra risk of wrongful conviction. Under the suggested approach, these principles would lead to a very intensive use of section 25. This outcome is inevitable if the law of criminal evidence is to maintain a principle-based approach to the risk of error.225

225 This outcome ought to be attributed to the one-sidedness of many of the new exceptions and to the anomalous intrusion into the process of proof of probative sanctions against the defendant suspected of threatening the witness. To be inferentially sound, these sanctions, i.e., the facts constitutive of their operation, must be proved beyond all reasonable doubt. See R v Acton Justices, Ex Parte McMullen and others; R v Tower Bridge Justices, Ex parte Lawlor, The Times, 10.5.1990 (CA), where this requirement has been judicially imposed. This judgment also supports the view that the main emphasis will now be put on sections 25 and 26 of the Act.
2.3 THE EUROPEAN DIMENSION: THE PRINCIPLE OF "EQUAL ARMS"

The preceding exemplification of the risk-distributive principles stresses the need to facilitate the access to and the examination of all the relevant evidence by the defendant. Both the principle of risk-distributive equality and that of protecting the innocent demand that the defendant be facilitated in producing evidence to exonerate himself and in examining incriminating evidence brought by the prosecution. Naturally, the question which arises here is to what extent should the defendant be so facilitated? The answer to this question is that he, like any other individual accused of a crime, should be so facilitated both maximally and equally. The requirement of the maximally possible facilitation in evidentiary matters follows from the distinction drawn between deliberate and merely accidental risk-impositions. If, knowingly to the judge or other triers of facts, the defendant, contesting the charges, had not maximally been facilitated in evidentiary matters, this would amount to deliberately imposing upon him the risk of misdecision. Such risk-impositions would not merely expose criminal defendants to the possibility of being wrongly convicted. They would violate the defendants' right to equal concern and respect by imposing on them, in addition to the accidental risks antecedently decided to be shared by everyone else, some of the "fresh" and undistributed in
advance risks of error. A decision to convict an unfacilitated defendant on the grounds that his defence had failed at showing a "perceptible" or "reasonable" doubt in the incriminating evidence would also be a hypocrisy.226

This requirement of maximal facilitation is not as abstract as it might appear at first glance. The necessary condition for its being satisfied is that the forensic opportunities of the accused are equal to those of the prosecution. This, however, might not always be sufficient for maximal facilitation and this condition should therefore be viewed as a minimal and constant requirement deriving from the principles of protecting the innocent and risk-distributive equality. When this condition is not satisfied, the accused cannot be regarded as being given an adequate opportunity to substantiate the doubts concerning evidence about his guilt. Forensic opportunities of the parties should therefore never be unbalanced for this reason alone, without recourse to different arguments criticising

226 To maintain that such convictions would be justifiable because criminal defendants always have a better knowledge as to their guilt or innocence is to commit the fallacy of linking the accused's onus of supplying the best available evidence with the risks of error resulting from non-persuasion. An unfacilitated defendant might testify and yet fail at generating a perceptible doubt because he has not been facilitated. This fallacy was dismantled by James Bradley Thayer as early as in 1890. See J.B.Thayer, The Burdens of Proof, (1890-91) 4 Harv.L.Rev. 45 and his Preliminary Treatise on Evidence at Common Law, ch.9 (1898).
forensically unbalanced instances as giving rise to misuses of different powers vested in state authorities.

This minimal and constant standard of forensic equilibrium should be maintained in England by virtue of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6(3) of this Convention provides that—

"3. Everyone charged with a criminal offence has the following minimum rights: ...

(d) 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."

As the provisions of this article and their effect on the English law have not been discussed in the standard textbooks on criminal evidence, I shall first present the most important decisions that have been delivered by the European Court and Commission of Human Rights, highlighting these provisions. This presentation will be followed by the discussion of these provisions.

Decisions delivered by the European Court and Commission of Human Rights reveal the following basic principles. First, it has been decided that the main objective of article 6(3)(d) is to maintain the principle of "equal

227 Decisions of the European Court of Human Rights appear in 'The European Court of Human Rights, series A, Judgments and Decisions'. They will be referred to as E CtHR/J&D. Decisions of the Commission are published in a series 'The Council of Europe, European Commission of Human Rights - Decisions and Reports' and will be referred to as ECHR/D&R.
arms" in criminal trials, i.e., to ensure that persons accused of crimes are given the same opportunity as the prosecution to examine the witnesses. 228 Only in exceptional circumstances, and when the interests of the defendant during the examination of witnesses can be safeguarded by his counsel, it is possible that some of the prosecution’s witnesses be heard by the court in the absence of the defendant. Thus, in X v. Denmark, 229 the applicant complained that at his trial in Denmark he has been ordered by the court to leave the courtroom when the main witness for the prosecution abstained out of fear from testifying. As the applicant’s counsel was given a full opportunity to cross-examine the witness, the Commission held that no violation of the article had taken place in that case. Similarly, the Commission held that no complaint can be made when a witness fearful of retaliation on behalf of the defendant, is permitted to testify in camera and be cross-examined by the defendant’s counsel without the presence of the defendant. Moreover, the identity of this witness may not be disclosed to the defendant. 230


An apparent violation of article 6(3)(d) can be detected when the prosecution's evidence is based primarily on statements given out of court and when the makers of those statements were unavailable for cross-examination. The applicant Unterpertinger\textsuperscript{231} was tried and convicted by an Austrian court of assaulting and wounding his wife and step-daughter. As his wife and step-daughter refused to testify against him, making use of the privilege granted to close relatives of the defendant, Unterpertinger's conviction was based on their statements to the police. The Commission has found this complaint apparently justified, but the Court had finally decided that no violation has taken place in this case.\textsuperscript{232} It was held by the court that article 6(3)(d) does not provide an absolute right to cross-examination and that such a right cannot be deduced from the "equal arms" principle. Thus, when the trial accords with the principle of "equal arms", an exclusion of evidence on the grounds of public policy would not violate article 6(3)(d).\textsuperscript{233} As in this case both parties have been given an equal opportunity to examine the evidence, no violation of this principle can be detected. The fact that the appellant's conviction was

\textsuperscript{231} supra n.228.

\textsuperscript{232} This decision was delivered by the "technical majority" of five judges against five, the President's vote being decisive.

based upon hearsay could thus only fall within article 6(1) dealing with the right to fair trial. This right has also not been infringed in the appellant's case, for his conviction was supported by the evidence other than the contested statements and he was given an adequate opportunity to refute the allegations against him.\textsuperscript{234}

The holding in \textit{X v. Belgium}\textsuperscript{235} stands for similar principles. The applicant was charged with arson and causing death. The evidence against him included a statement given to the investigators by an unidentified informer. One of the police officers testified that this informer, guaranteed by the police that his identity will be kept in secret, reported that a violent confrontation between the accused and the victim took place shortly before the arson. This testimony was admitted, and the court had later directed the jury that in evaluating its weight the fact that the maker of the statement did not appear before the court and had not been cross-examined ought to be taken into account. The applicant was found guilty as charged. Following his conviction, he complained before the Commission that by admitting the statement of the informer in his case the

\textsuperscript{234} This part of the decision was supported by the majority of five judges against four with one abstention.

\textsuperscript{235} Appl. 8417/78 \textit{X v. Belgium} (1979) 16 ECHR/D&R 200.
court acted in contravention of article 6(3)(d). The Commission, however, decided that -

"Article 6, par. 3d., cannot be interpreted as guaranteeing an accused person an absolute right to have brought before the court, with a view to having him cross-examined, any informant who has been partly responsible for the direction investigations have taken. In the course of their duties police officers may well have [an] occasion to take confidential information from persons with a legitimate interest in remaining anonymous ...

The question which arises in the present case is therefore not so much that of the accused's right to have an informant summoned to appear in court as that of weighing the court's use of statements made by an informant against the applicant's right to a fair trial within the meaning of Article 6, paragraph 1, of the Convention. The police officer did indeed state under oath that this informant had reported a violent dispute between the accused and the victim on the evening of the fire, and the defence was not able to evaluate the source and validity of such statements. It should, however, be pointed out that the applicant had been able to produce in court various witnesses who contested that a dispute had taken place and that the jury's attention was drawn to the status of a statement [not] made under oath and not corroborated during the proceedings in court. The Commission also points out that this indirect testimony was not the only item of evidence ..." [the Commission further lists the incriminating pieces of evidence other than the disputed statement and ultimately dismisses the application.]

In one of the recent cases,236 the Court held that article 6 does not lay down any rules of admissibility of evidence. It was held that the Court has only to ascertain whether or not the appellant was fairly treated at his trial.237


237 In that case, the appellant, after being found guilty of attempted murder, complained that some of his conversations have been unlawfully eavesdropped, recorded and subsequently submitted as evidence against him. He contended that the admission of this illegally
To sum up, the European Court and Commission of Human Rights have interpreted article 6(3)(d) in a narrow court-centred fashion. On their interpretation, it would suffice if at the trial itself the accused's opportunities of cross-examining witnesses are equal to those of the prosecution. What seems to have been omitted is that at different pre-trial stages the prosecution usually has better opportunities to examine witnesses. If one of such witnesses does not later appear in court, it would, in my view, be most spurious to maintain that the defendant lacking an adequate opportunity to cross-examine the witness is in a position similar to that of the prosecution. What seems better to reflect the principle of "equal arms" is a wide forensic equalization, rather than the narrow and court-centred notion of equality. The reluctance of the Court and the Commission to introduce, by virtue of article 6, exclusionary principles into legal systems of European countries can easily be understood. Exclusionary rules are alien to processes of proof taking place in most countries of Continental Europe. But there is no need to introduce such rules and adversarial patterns of legal procedure in order to obtained evidence contravened article 6(1) by violating his right to fair trial. The Court had rejected that submission.

maintain equality. Equality can be maintained if the process of decision-making is properly structured, and this can be attained by instructive guidelines addressed to the understanding of decision-makers, not indispensably by rigid mandatory precepts directed to their will. Similarly, it can be maintained within a non-partisan framework of collecting and examining facts when the officials appointed for this purpose are not one-sided. Attention has to be paid to the fact that under article 6(3)(d) the accused has a right to either "examine" the witnesses against him or "have" them "examined". This second alternative gives rise to the possibility of witnesses being examined by a neutral official and not necessarily by the accused or his counsel.239

Hence, no radical restructuring of local procedural systems is required by the principle of "equal arms", and it is against this fact that the middle ground adopted by the Human Rights judiciary in Strasbourg ought to be understood. According to this approach, out-of-court statements are still to be singled out for special treatment, but their treatment must not be an exclusion. When any such statement is the only evidence produced against the accused, it should usually not be

239 This interpretation of the article is supported by one of the judges in Unterpertinger v Austria (1986) 110 ECHR/J&D 5, 26, who distinguished between "counter-questioning" of witnesses and "having" [them] "examined".
sufficient for his conviction. But when there is some other evidence supporting his conviction and it can adequately be examined, there would be no wrong in relying on the statement as well.

The deficiency of this approach lies in its inexplicable court-centredness. It maintains forensic equality in a rather limited sense, without accounting for inequalities existing at different pre-trial stages and attempting to eliminate them by laying down more serious limitations on the use of hearsay. This approach (which, perhaps, is not the last word on this matter) merely aims at setting out the minimal standards of procedural fairness. Its court-centredness is thus relatively (but not entirely) innocuous. Concentrating on extreme cases which justify interference of the European Court, it ought to be viewed as a baseline which indicates the aspiration that accused persons be maximally facilitated in defending themselves by examining all the evidence incriminating them and tendering their own evidence. As has been mentioned above, the maintenance of "equal arms" is a necessary, but not sufficient component of the principle of risk-distributive equality and that of protecting the innocent.

This minimal standard of "equal arms" must affect the application of the new exceptions to the hearsay rule created by the Criminal Justice Act 1988 and should
affect other cases involving hearsay. Thus, the possibility of convicting the defendant on the basis of an out-of-court statement alone ought to be questioned. And when the best evidence available to the defendant is hearsay and it is needed for his defence, not to admit it might probably contravene article 6. As the prosecution can now more freely tender written statements as evidence incriminating the defendant, who is rather more restricted in obtaining such statements for his defence, the principle of "equal arms" would require that criminal defendants always be allowed to adduce the best evidence available to them. The implications of this standard are, of course, wider than these. It must be applied as an integral component of the principle of equality and that of protecting the innocent. If it be so applied, the law of criminal evidence would be maintained as a just and morally coherent entity.

3. GENERAL IMPLICATIONS OF THE PRINCIPLE-BASED APPROACH
The suggested approach aims at maintaining the law of criminal evidence as a morally coherent entity. Along with other criteria epistemologically relevant to fact-finding processes, it examines the justifiability of reasoning about facts contested in criminal trials. This

240 As I have said earlier, accused persons should, of course, be entitled to this independently of the European Convention.
approach, if adopted, would also extend the scope of appellate review within which risk-distributive decisions made by the trial courts ought to be scrutinized. It would, in addition, mark out the ways in which particular rules of evidence are to be interpreted and applied. These points will now be exemplified.

3.1 JUSTIFIABILITY OF INFERENCES

Consider, for example, the frequently debated issue of inferences that can legitimately be drawn from the accused's disposition and character. The classic statement of the rules concerning such inferences and the admissibility of similar fact evidence tending to support them was made by Lord Herschell LC in Makin:\n
"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show


the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

This statement, that could be regarded as a principle rather than rule, has subsequently been ossified into rigid categories of the issues which can and cannot be proved by "similar facts", leading to different groups of relevancy, the "admissibility-tickets", or pegs upon which the prosecution were permitted to hang the "dirty linen" of the defendant. 243 The two main categories of the issues which could be established by similar facts were a "system", viz. the offender's identity inferable from the "striking similarity" between his "hallmarking" previous acts and the act in question; and the falsity of allegedly innocent exculpations, e.g., mistake of fact or lack of mens rea, provable by a less than "strikingly" similar conduct which must not necessarily amount to the accused's "signature at the scene of the crime". The deossification of the doctrine of similar facts had taken place in 1974 in Boardman v DPP, when the House of Lords had effectively abolished the distinctions between different kinds of relevancy as a basis of admissibility. 244 This decision, followed by others, has led to the academic controversy about both


244 Boardman v DPP [1974] 3 All ER 887.
the nature and the extent of judicial discretion to be exercised in admitting or excluding similar facts; about what had remained from the rigid exclusionary rule and what difference, if at all, should this positivist rule/discretion dichotomy make for appellate review.\footnote{For a representative sample see supra n.241. Zuckerman's views had previously appeared in a non-condensed form in 'Similar Fact Evidence: The Unobservable Rule', (1987) 103 LQR 187.}

Instead of reiterating these debates and examining them against the speeches delivered by the Law Lords in Boardman,\footnote{In my view, Boardman stands for the following propositions: (1) Similar facts are admissible against the accused when they, as distinguished from the moral or legal reprehensibility associated with them, support one or more of the facts in issue; (2) When evidence about such facts is tendered to judge the actor and not his act, i.e., to support an inference from the reprehensibility of the acts previously committed by the accused, this evidence must be excluded, for the inference suggested to be drawn from it is legally prohibited; (3) If the evidence tendered by the prosecution gives rise to both (1) and (2), the judge must balance its probative value (1) against its potential prejudicial effects (2), and when the latter tend to outweigh the former, the evidence should be excluded. I therefore agree with the analysis of the post-Boardman law made by Hoffmann and Zuckerman, but this subject to my rejection of the law/discretion dichotomy. On this point (but not on others) I agree with Allan.} I shall apply the suggested principle-based approach to inferential problems arising from similar fact evidence.

Following the principle of risk-distributive equality, an accused should never carry an additional risk of error simply because he had previously committed a criminal offence. To impose on him an extra risk,
lessening the moral regret associated with convicting a person who had never been involved in a crime, would be to deny him his right to equal concern and respect. This right should not be violated by a fresh political decision to augment the risks to be carried by those who had previously committed crimes even when this would be beneficial to society. No inference can thus be drawn from the fact that the accused had behaved reprehensibly on some other occasion and no risk-distributive decision ought to be affected by the reprehensibility of his previous misdeeds. The accused, in Hohfeldian terms, has an immunity from any character-based imposition of the risks of error. It is this immunity from the risks of error that constitutes, in my view, the central core of the law's moral attitude to similar fact evidence. This is so because the bare reprehensibility of the accused's acts extrinsic to the current criminal accusation can by itself hardly cause the jury to convict him when no other evidence was adduced rationally to support the accusation.247 And even if this immunity is to be

247 For a relatively recent case empirically supporting this view see R v Brazil (CA, 19.4.1985; unpublished and available via the LEXIS). The accused was found guilty of conspiracy to commit burglary and handle stolen goods and of a series of burglaries on 11 counts in total. His conviction was based on the similarities found in the modus operandi, the channel of disposal of the goods and in other details relevant to the most, but not to all, of the charges. The jury had acquitted the accused on some of the counts and as has been mentioned by Lord Justice Lloyd,

"[these] ... acquittals tend to demonstrate that the jury followed the judge's directions carefully, by considering each count separately and did not,
understood as a rather more general directive "Judge the act, not the actor", it would still be an immunity from the risks of error and nothing more than that.

This understanding of the law concerning similar facts, character and disposition clarifies that what the accused is immunized from is the possibility of drawing inferences (risk-distributive and other) from the reprehensibility of his previous acts in order to establish his guilt. He has no immunity from inferences that can be drawn from his previous acts as facts when, taken in isolation from their moral reprehensibility, they are logically relevant to the currently adjudicated charges. Thus, if the defendant charged with conspiracy to commit offences connected with terrorism tries to explain her possession of false identity documents and a large sum of money by saying that these items were held by her not with a view to assist in carrying out explosions as was alleged by the prosecution, but to smuggle IRA prisoners out of the country, her explanation can be rebutted by showing that she was wanted by the police in Northern Ireland and it was therefore unlikely that she was entrusted by her IRA associates with the task of smuggling of prisoners.248

as counsel for the appellant suggested, convict on counts as to which there was no sufficient evidence by reason of a blanket of suspicion and prejudice."

I shall return to this judgment later in this chapter.

248 See R v Anderson [1988] 2 All ER 549.
Similarly, evidence of a "system" capable of identifying the wrongdoer and evidence that tends to refute an innocent explanation given by the defendant by showing, for example, that as a person previously involved in the same type of conduct he was unlikely to be unaware of what he was doing, would be relevant independently of the value judgements that can be formed about the defendant's prior misdeeds. In all cases like these, no inferences are drawn from the moral reprehensibility of the defendants' prior conduct, as distinguished from the conduct itself. Thus, in Anderson's case,\textsuperscript{249} evidence showing that the defendant was wanted by the police, presumably in connection with something illegal, was relevant as a fact, i.e., independently of any value judgement that could be formed by the jurors about that "something".

However, in certain cases inferences that can relevantly be drawn from the defendant's past misdeeds cannot be insulated from their moral reprehensibility. In such cases, if the prejudicial effect of the evidence outweighs its probative value, this evidence must be excluded. It must be excluded because of the preponderant risk of exposing the defendant, who is entitled to be treated like any other presumptively innocent individual, to the risk-distributive inequality. And again, it is because of the strong

\textsuperscript{249} id.
suspicion that the facts be replaced by their moral reprehensibility in deciding against the defendant that similar facts and other evidence about the defendant's misdeeds should be excluded in such cases. Hence, the distinction between facts and their reprehensibility deriving from the principle of risk-distributive equality is and should be maintained.

It can be argued against this distinction between facts and their reprehensibility that as a matter of fact those who had committed crimes are more likely than others to commit them again and it is our rational experience-based belief that a burglar will not tire of burglary that, for extrinsic reasons, must not be used against the accused despite its probative value. As such generalisations can rationally be said to increase the probability of guilt, they cannot be distinguished from "facts" and their prohibition cannot thus be explained by the principle of equality. This prohibition must therefore be justified by something else, namely by the need to maintain a balance between the probativity of evidence and its prejudicial effects. The trouble with this argument is that there is no unproblematic way of connecting its sound generalisation to particular cases. The fact that those who had previously acted in a criminal way are more likely than others to commit crimes would not have any probative effect on a particular defendant unless he is assumed to
belong to a certain sub-group of people embraced by this generalisation. For not all those who had formerly committed different crimes are equally likely to commit them again. As the distribution of the recidivism's likelihoods differs from one sub-group of offenders to another, and as the differences between different sub-groups and individuals might well be enormous, what can justify an application of the generalisation concerning past crimes to a particular defendant? If there is no sound reason to single him out, he should be treated like any other presumptively innocent person, and if there are reasons to treat him differently, they have to be justified by risk-distributive principles capable of outweighing that of equality. As the latter principle should normally prevail in such cases, the distinction between prior misdeeds as facts and their moral reprehensibility would have always to be made.250

250 A clear support for this argument can be found in the following words of Dworkin:

"This principle, for example, informs the doctrine that a man is innocent until proved guilty, and helps to explain why it seems wrong to imprison a man awaiting trial on the basis of a prediction that he might commit further crimes if released on bail. For any such prediction, if it is sound, must be based on the view that an individual is a member of a class having particular features, which class is more likely than others to commit crime. The prediction, that is, must be actuarial, like the prediction an insurance company makes about the likelihood of teenagers to have automobile accidents. But it is unjust to put someone in jail on the basis of a judgment about a class, however accurate, because that denies his claim to equal respect as an individual."

The post-Boardman case-law provides clear support to these views. In R v Brazil, Lord Justice Lloyd of the Court of Appeal made the following clarifying remarks:

"In deciding on the admissibility of similar fact evidence, it does not always help to ask such questions as: Was there a striking similarity?, Did the cases bear a hallmark?, Was there an underlying unit? or does the evidence tend to rebut a defence which would otherwise be available to the appellant? These, and other tests, have been useful from time to time; they serve their purpose. But, having regard to the protean variety of fact and circumstance to which criminal litigation gives rise, they will not necessarily provide the answer in all cases. ... It is the recognition that the similarity between two sets of facts is such that it points to a causal connection between them rather than to a chance accusation, which makes the similarity 'striking'. This is why Lord Scarman, in giving the judgment of this court in R v Scarrott251 said that the phrase 'strikingly similar' was no more than a label, which is not to be confused with the substance of the law which it labels. ... "There is a dictum of the late Mr Justice Frankfurter which is directly applicable to this situation. ... He said: 'A phrase begins life as a literary expression; its felicity leads to its lazy repetition, and repetition soon establishes it as a legal formula, indiscriminately used to express different ideas.'"252

This clarification has been followed by a restatement of the law:

"The first question in any case where admissibility of similar fact evidence arises will be: What is the issue to which the evidence is directed? For the approach will not necessarily be the same in every case. The second question will be: Will the evidence assist the jury in arriving at a conclusion on that issue, on some ground other than the defendant's bad character or disposition to

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252 supra, n.247. His Lordship, citing from LJ Scarman (as he was at that time), referred to Tiller v Atlantic Coast Railroad Co., 318 US 54, 68 (1943).
commit the sort of crime with which he is charged? ... The third question will be whether, assuming the evidence of similar facts is probative in that sense, nevertheless, its prejudicial influence on the minds of the jury would be out of all proportion to its true evidential value, in which case that judge has a discretion to exclude it."

This approach has later been adopted in two more recent decisions of the Court of Appeal.\textsuperscript{253}

\subsection{3.2 APPELLATE REVIEW}

The principle-based structuring of risk-distributive decisions in criminal adjudication would, of course, affect many other aspects of reasoning about disputed facts. Some of those aspects, such as the application of standards and burdens of proof and their links with the substantive criminal law, have already been discussed in detail. This approach would also entail a creation of a different framework of appellate decision-making. A more active scrutiny of factual reasoning taking place in the trial courts should replace the orthodox principle of non-interference, embracing all aspects of risk-distributive decision-making. If a trial court's decision cannot be justified by the relevant principles of risk-distribution, it should be regarded as "unsatisfactory" or wrong as a matter of "law", and must therefore be set aside in accordance with section 2 of the Criminal Appeal Act 1968. Such decisions should also

be viewed as causing a "miscarriage of justice", so that the proviso of section 2 shall not be applicable.

3.3 RISK-DISTRIBUTIVE UTILITY

The principle of utility, having little room for application in criminal adjudication, might nevertheless have some effect on particular kinds of risk-distributive decisions. The application of risk-distributive utility to "excuses", as differentiated from "justifications", is an important but not the only instance in which this principle might prevail. For example, in R v Lambie\textsuperscript{254} a significant factual dispute has been resolved under uncertainty in a risk-distributively utilitarian way. The defendant, who was issued with a credit card by her bank, had undertaken to use this card only within her specified credit limit. In contravention of this condition, the defendant used the card incurring a debt, and was thus requested by the bank to refrain from using the card any further and to return it to the bank. She promised to return the card, but despite this used it for different transactions and has been charged with obtaining a pecuniary advantage by deception in connection with one of them. It was established that she visited a Mothercare shop, selected goods, produced the card to a manager and signed the voucher completed by the manager, who checked that the card was current in date, that it was not on the current

\textsuperscript{254} R v Lambie [1981] 2 All ER 776 (HL).
stop list and that the signature on the voucher corresponded with that on the card. Subsequently, the defendant was allowed to take away the goods. After having sent the voucher to the bank, Mothercare were paid by the bank in accordance with their own agreement. The defendant's major submission was that Mothercare were entitled to recover from the bank in connection with any transaction preceded by the routine precautions taken by the manager. The manager made therefore no assumption about the defendant's credit standing and there was no evidence from which the jury could properly infer that she was in fact induced by any representation which the defendant might have made to allow the transaction to be completed.

The central passage of the judgment delivered by the law lords in this case reads as follows:

"[C]redit card frauds are all too frequently perpetrated, and if conviction of offenders ... can only be obtained if the prosecution are able in each case to call the person on whom the fraud was immediately perpetrated to say that he or she positively remembered the particular transaction and, had the truth been known, would never had entered into that supposedly well-remembered transaction, the guilty would often escape conviction. ... [W]here as in the present case no one could reasonably be expected to remember a particular transaction in detail, and the inference of inducement may well be in all the circumstances quite irresistible, I see no reason in principle why it should not be left to the jury to decide, on the evidence of the case as a whole, whether that inference is in truth irresistible as to my mind it is in the present case."

This mixed statement of principle and policy can be reconstructed in terms of risk-distributive rights. The
principle of protecting the innocent grants to the accused its immunity only in regard to facts constitutive of criminal blameworthiness. Correspondingly, the principle of equality ought to protect only equals, and those relying on facts not constitutive of criminal blameworthiness are not to be treated in the same way as other presumptively innocent defendants. The accused who was proved beyond reasonable doubt to have done everything which was dependent on his conduct to complete a criminal offence would not become unblameworthy if for some reason not dependent on his conduct he fails, as a matter of fact, to complete the offence. The fact that an attempt to commit a crime which was factually impossible to accomplish is punishable clearly supports this view.\textsuperscript{255} It can hardly be argued that such an accused ought to be regarded as less blameworthy than he would have been had he succeeded to complete the offence. The fact that a lighter punishment is usually imposed for attempts must have no effect on our conclusion about blameworthiness. First, punishable attempts vary in the degrees of their dangerousness: it is enough for an act to be "more than merely preparatory\textsuperscript{256} in order to be qualified as an


\textsuperscript{256} s.1(1) of the Criminal Attempts Act 1981.
attempt. Second, punishment is not incontestably a matter of deterrence and might well be motivated by retributive factors of "just deserts" and by a desire to educate citizens and strengthen their instinct to obey the law. On this view, it would not be irrational to impose heavier punishments on those who have succeeded in completing crimes than on those who have not despite the fact that it was just a matter of luck for some of the latter ones not to succeed.\textsuperscript{257}

Returning to our case, it is evident that the defendant committed a blameworthy act which, at the very least, amounted to attempted deception. From her point of view, she has done all she could to complete the offence. All this was established beyond reasonable doubt. What was less clear is the question whether she succeeded in deceiving the store's manager, but this fact was not of itself constitutive of her blameworthiness.\textsuperscript{258} This fact could therefore be proved at a level of moral certainty lower than that of beyond

\textsuperscript{257} Those who invoke the luck-based criticism against this view about punishment tend to overlook the conclusory nature of their argument and might thus be guilty of "petitio principii". For determination of the factors morally relevant to punishment precedes a characterisation of an event as "fortuitous" and not vice versa. See Note, The Luck of the Law: Allusions to Fortuity in Legal Discourse, (1989) 102 Harv.L.R. 1862. Cf. with T. Nagel, Mortal Questions, 24ff (1979).

\textsuperscript{258} This case was criticised on the grounds of substantive law, but this must not bother us here. See G. Williams, Textbook of Criminal Law, 2d ed., 780 (1983).
reasonable doubt and the accused could justifiably be exposed to a greater risk of error in connection with it. The only objection that could be levelled against this would be that this balance of risk-distributive interests should be articulated and anchored in the formal law. For it is hazardous for persons accused of crimes if risk-distribution is dictated by policy considerations and not by their actual rights in connection with criminal processes.

3.4 INTERPRETING AND APPLYING THE RULES
One of the significant consequences of the suggested approach is that evidentiary rules ought to be understood and applied not as disparate exceptions to the principle of freedom of proof, but as a species of risk-distributive principles. This point has already been exemplified by many rules to which one should add the general provision of section 78 of the Police and Criminal Evidence Act 1984 authorising the court to exclude any evidence which, if admitted, would have an adverse effect on the "fairness of the proceedings". Frequently leading to exclusion of improperly obtained evidence on extra-probative grounds, this provision can also be relevant for risk-distributive purposes. Its wide notion of "fairness" can and should incorporate the principle of equality and that of protecting the

259 See supra n.216.
innocent. Thus, in R v O'Connor, an admissible evidence had been excluded on the grounds of "fairness" because it had a tendency of aggravating the risk of error faced by the accused.\textsuperscript{260} In my view, an admission of such evidence contradicts the principle of equality and might also violate the principle of protecting the innocent, and when criminal proceedings are conducted in contravention of one of those principles, they cannot be said to be "fair".\textsuperscript{261} Hence, these principles help in applying the open-textured provision of section 78.\textsuperscript{262}

I shall conclude this chapter by proposing a possible solution to another problem of interpretation which arises in connection with one of the important rules of evidence. Under section 76(2) of the Police and Criminal Evidence Act 1984, a confession made by an accused person would not be admissible if it was or may have been obtained -

\begin{enumerate}
\item by oppression of the person who made it;\textsuperscript{263}
\item in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof ...
\end{enumerate}

\begin{footnotes}
\item[260] See supra n.196.
\item[261] Cf. Dennis, supra n.216, at pp.33; 35ff.
\item[262] The decision in R v O'Loughlin [1988] 3 All ER 431 is also susceptible to this rationalization.
\item[263] This includes "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)" - s.76(8) of the Act.
\end{footnotes}
These provisions consist of (a) the general standards that should be maintained by the police in interrogating suspects and (b) the causation between an interrogation that falls below the standards and the suspect's confession.\textsuperscript{264} They confer rights upon persons interrogated by the police. They are "protective"\textsuperscript{265} and are not primarily aimed at disciplining the police force. This can easily be learnt from the following. First, it is the prosecution that bears the burden of "proving to the court beyond reasonable doubt that the confession was not obtained as aforesaid." Second, the American doctrine of "fruits of the poisonous tree" was rejected by sub-sections (5) and (6) of section 76. If it were intended to adopt a "disciplinary approach", would it be consistent with this approach to use the exclusionary sanction against the police when it is merely more likely than not (but not beyond any doubt) that its officers did not misbehave? Given that the standard of proof adopted by this section leads, in the long run of cases, to a greater amount of factually incorrect decisions than any other standard or proof, the answer to this question must be in the negative. Would it be consistent for a "disciplinary approach" to admit in evidence the "fruits of poisonous trees", grossly weakening its mechanism of exclusionary


\textsuperscript{265} See A.Ashworth, Excluding Evidence as Protecting Rights, [1977] Crim.L.Rev. 723.
disincentive? "Not entirely" as an answer to this question would be an understatement. Additionally, the requirement of causation between improper means of interrogation adopted by the police and confessions made by the suspects does not seem to be in tune with a "disciplinary approach". It leaves the causally "unsuccessful" improprieties in interrogating suspects unaffected by the rule of exclusion, whereby the "operational failure" of such practices is not to be weighed to the credit of those who, from their point of view, have done all they could to elicit a confession from their suspect. If a suspect eventually makes a confession as a result of something other than the improper means of interrogation which was operated upon him by the police, it is, to say the least, not altogether clear that a disciplinary approach should not react to such improprieties. It is therefore highly unlikely that the idea of disciplining the police stands behind section 76. This section must thus be interpreted as protecting the rights of the suspect. There is no other rationale that can plausibly be said to explain the provisions of this section.\textsuperscript{266}

\textsuperscript{266} It is also implausible to maintain that this section was aimed at securing the reliability of each particular confession, for it clarifies that when a confession was obtained in contravention of this section's provisions, it has to be excluded "notwithstanding that it may be true".

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The central question is, of course, what exactly are these rights of the suspect? To answer this question, the generally prohibited by section 76 methods of interrogation must be looked at. First, the section protects the suspect from any "oppression". Second, it protects him from being interrogated in any other way "... likely to render unreliable any confession which might be made by him in consequence thereof". These two protections, existing along with those which derive from the criminal law, the law of tort and the disciplinary regulations binding upon the police, differ from all those in their being corroborated by exclusionary sanctions which confer exclusionary rights upon individuals charged with criminal offences. These sanctions are closely connected with the means of obtaining confessions which, at the general level, cast doubts on their reliability. These protections cannot therefore be regarded as "extrinsic" in Wigmore's taxonomy. Nor can they be regarded as "intrinsic", for they require the court to ignore the possibility of a particular confession being credible. These protections are risk-distributive. They distribute the risks of error surrounding confessions, and it must thus be asked what are the principles of risk-distribution that these protections are based upon.267

267 This view is supported by the fact that the possibility of excluding evidence on purely "extrinsic" grounds, generically covered by the notion of "fairness", is recognised by section 78 of the Police and Criminal Evidence Act 1984. See supra, n.216.
To answer this question, one has to recognise that a disagreement about the meanings of "oppression" and "anything likely to render unreliable any confession" cannot be an empirical disagreement. A disagreement about each one of those is bound to be a theoretical or normative disagreement. It would never be a disagreement about plain and empirically ascertainable facts. It would be a disagreement about moral standards or principles.\(^\text{268}\) The principle of equality should, it is submitted, play a crucial role in applying section 76. The principle of risk-distributive equality requires the courts to enforce the general standards of interrogation with rigorous consistency irrespective of the effect that a particular non-compliance with one of these standards might have had on the reliability of a particular confession elicited from a particular suspect. If a confession had been obtained improperly, it should be excluded because the non-compliance with the standards would unjustifiably aggravate the risks of error borne by the defendant if this confession is admitted. This principle is an off-shoot of the more general principle of equality which has to be applied to any treatment of an individual by the police and all other state authorities. The prohibition of "oppression"

\(^{268}\) A failure to apprehend this in R v Fulling [1987] 2 All ER 65 has been recorded by Zuckerman, supra n.128, at pp.332-33, and discussed in part 3 of this work.
is a plainly general standard which should be applied to everyone. The prohibition of saying or doing "anything" which is "likely" to render unreliable "any" confession has, in my view, been spelled out hypothetically in order "... to encourage the court to concentrate its attention on the propriety of the [general] standards of interrogation." It is not always easy to deduce from these general standards more concrete permissions and prohibitions. This difficult task cannot be undertaken here, but it must be recorded that violence, fierce psychological pressure and various inducements should always end up in exclusion of confessions. What is far more important for our present discussion is that these standards have to be applied universally, i.e., irrespectively of personal characteristics of different suspects. This is required by the principle of equality and would be the most appropriate interpretation of section 76.

This interpretation would also solve another problem mentioned by Zuckerman:

"Parliament ... has provided that the prosecution must prove beyond reasonable doubt that nothing said or done was likely to render any confession unreliable. The expression 'beyond reasonable doubt' denotes a degree of probative strength: it is the highest measure required by the law. The word 'likely' also denotes a degree of probative

269 See Zuckerman, supra n.128, at pp.336fn.95-337.

270 See, in addition to all other sources mentioned in this part of this chapter, P.Mirfield, Confessions, (1985).
strength; but one of lesser extent. This double reference to degrees of probative support is confusing. Does it mean that the prosecution has to prove to the highest degree of proof that there was no degree of the lesser kind ... that something ... would render the confession unreliable?"\(^{271}\)

As he rightly concludes, this difficulty disappears if section 76 be interpreted as referring to the general standards, as has been suggested above. For if this is the case, the conclusion would be that -

"... what has to be proved beyond reasonable doubt is only that the confession was obtained in consequence of the act of which a complaint is made. The further factor, that the act in question 'was likely ... to render unreliable any confession', is not an object of proof in the normal way but is something that the judge has to establish as a matter of evaluation."\(^{272}\)

Zuckerman, however, argues that this conclusion is not free of doubt:

"If the reason for exclusion under s.76(2)(b) is deviation from standards of propriety, then real evidence obtained by such deviation should also be excluded, but this is not the case."\(^{273}\)

This doubt seems to rest on the orthodox "extrinsic"/"intrinsic" dichotomy which neglects the idea of risk-distributive principles. There are two qualitatively different groups of standards of propriety that should apply to police behaviour. One group consists of propriety standards aimed at securing that police officers do not abuse the powers they are entrusted with irrespective of the reliability of the

\(^{271}\) Zuckerman, supra n.128, at p.337.

\(^{272}\) id., at p.338.

\(^{273}\) id., fn.99.
evidence they gather. Another group of standards is aimed at preventing abuses which might adversely affect the reliability of that evidence in the long run of cases, and it is this type of standards that section 76 is concentrated on. The fact that the existing arrangements are inconsistent with extrinsic disciplinary policy can only support the idea that it is the risk-distributive policy that had in fact been endorsed.274

This approach, having important practical implications, is not as "defendant-biased" as it may be thought at the first glance. For example, in R v Harvey275, a psychopathic woman of low intelligence had made a confession of murder. Her confession was excluded on the grounds of section 76(2)(b) solely because it could have been obtained as a result of hearing a confession made by her lover. There was a psychiatric evidence to the effect that she could have confessed in making a rather child-like attempt to exonerate her lover by taking the blame on herself. As the police did not

274 I shall abstain from discussing an objection that the suggested interpretation "has never been intended by Parliament". Enough has been said above about empirical and theoretical disagreements about law. In cases involving statutory interpretation a preferable approach would be an analysis of the law, not a psychoanalysis of the legislator and its putative "intent". See A.Barak, Judicial Discretion (1989), who vividly exemplifies this by actual judicial practices.

275 R v Harvey [1988] Crim.L.R. 241. Cf. R v Rennie [1982] 1 All ER 385 (CA), a decision which was delivered before the 1984 Act had come into force.
behave improperly in that case, these peculiarities must, in my opinion, have affected the weight and not the admissibility of the accused's confession. The accused was not entitled to any risk-distributive immunity consequent upon an infringement of the general standards of interrogation, for no infringement of any of those standards had taken place in her case. Nor was she entitled to special rights that other suspects do not possess. At the very best, her confession could be excluded had it been clear that its prejudicial effect outweighs its probative value as it might well be the case.276

In other words, here and elsewhere the accused should be entitled to no more, but also to no less,277 than any other accused in all risk-distributive matters. This principle of morality along with other legally relevant principles should be maintained throughout the whole process of criminal adjudication. Together with other moral principles, it should also constitute the basis for further developments in the law of criminal evidence and procedure.

276 This general principle is applicable in such situations. Under section 82(3) of the Police and Criminal Evidence Act 1984, "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence ... at its discretion".

CHAPTER TEN

RISK-DISTRIBUTION IN ADMINISTRATIVE FACT-FINDING

1. INTRODUCTION

The primary objective of this work is to construct a framework of normative regulation for risk-distributive decisions taking place in contested trials. Legal fact-finding is, however, by no means confined to adjudicative matters. Decisions made by various administrative officials, institutions and tribunals, exercising their wide-ranging powers, are no less "legal". Individuals and institutions entrusted with these powers do not operate in a "wild" and legally unconstrained world. They frequently have a substantial discretion, and although more than one decision that can be arrived at within the scope of any of their discretions can legally be justifiable, their discretions are not left entirely unstructured by the law. Like judges and jurors, administrative officials and institutions frequently make their decisions under uncertainty. Their decisions often involve risks of error and it matters how these risks are dealt with in different administrative settings. These settings can either be curial or extra-curial. They may or may not involve individual rights. The protean variety of these settings makes it difficult, if not impossible, to construct a unified framework for all administrative decisions which involve ascertainment of facts under
uncertainty. Hence, a comprehensive inquiry into administrative fact-finding that would cover all kinds of decisions on all their legal and institutional backgrounds cannot be undertaken here. My aim in this chapter is to examine the implications of the principle-based approach which was developed in this work for administrative decision-making. As was mentioned in the first chapter, this approach should apply to administrative decisions "mutatis mutandis", and it is the general questions arising in connection with this "mutatis mutandis" that will now be examined. Is there any room for regulating different administrative decisions by risk-distributive principles and what are these principles? Can these principles be claimed to be part of the "law" and should they be identical to those that should be applied in adjudicative matters? Is there a scope for distinctive administrative principles, different from the adjudicative ones, which should guide officials entrusted with administrative powers in making their decisions in conditions of uncertainty? Do these special principles constitute part of the law? What effect should they have on different discretionary powers? How do they vary in different administrative contexts? What impact, if at all, should they have on judicial review of administrative decisions?

On the traditionalist account, administrative decision-making is not regulated by any risk-distributive
principles. According to this view, the law of administrative evidence does not include a great deal of constraints. Administrative decisions take place in conditions of "freedom of proof". Normally, evidentiary rules do not apply to these decisions, not even in tribunals.¹ Administrative officials and tribunals are, however, not entirely free to determine facts as they wish. Their decisions must never be arbitrary. They have to follow fair procedures, especially if their decisions affect private individuals. Individuals affected by their decisions often have a right to be heard. This principle of audi alteram partem together with other principles of "natural justice", of which evidentiary rules form no part,² determine the fairness of administrative procedures. These principles confer on individuals varying rights to participate in procedures which can affect their interests and protect them against possible bias. As to the more substantive level, here the general principle is that decisions delivered by administrators must rationally be based on good evidence and be "reasonable" on the whole.³ Evidently,


³ Wade, supra n.1, at pp.319ff ("Findings of fact are the domain where a deciding authority or tribunal can fairly expect to be master in its own house."); P.Craig, Administrative Law, 2d ed., 218-20 (1989), and the cases cited therein.
none of those principles contains risk-distributive guidelines besides the recognition that the seriousness of the interests affected by administrative decisions and the gravity of the consequences that follow from them must have some impact on the "good evidence" and "fair process" requirements. Apart from this lacuna, the vision of administrative fact-finding adopted by traditionalist scholars appears to be flawed in three additional respects. First, it has identified the law of administrative fact-finding with one of its offshoots, judicial review of administrative decisions. As has recently been shown, this court-centredness has no justification. Undoubtedly, courts play an important role in reviewing decisions made by administrative officials and in formulating principles of law which should apply to these decisions. However, to infer from this that administrative law has no real life outside courthouses is very much similar to insisting that "real" health cannot exist outside hospitals. In his study of official discretion, Galligan observed that the courts'  

4 See, e.g., Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320 and the discussion of this and some other cases by D. Galligan, Discretionary Powers: A Legal Study of Official Discretion, 314-20 (1986). As he concluded the descriptive part of his discussion (id., at p.317),

"How far the courts go in demanding evidential support must be determined, therefore, according to constitutional doctrines and the nature of the decision, the capacities of the administrative body, and the nature of the interests that are affected."
"... opportunities to contribute to principles of good administration arise in exercising common law powers of review, or in interpreting and applying statutory principles couched in general and abstract terms. From a practical, legal point of view, the judicial role has been regarded as the centrepiece of administrative law. No doubt, some of the more traditional approaches to administrative law, written primarily as guides for practitioners, have exaggerated the role of judicial review. ... [T]he courts have created through precedent a body of doctrine concerned directly with the regulation of discretion. ... This does not imply the unimportance of other sources of legal principles, nor does it even imply that judicial review is the most important."  

De Smith, the author of the leading treatise on judicial review, opened it by confessing that his subject-matter is "inevitably sporadic and peripheral". This character of judicial review is consequent not only upon the constitutional balance of political powers which limits the "justiciability" of curial interferences with administrative decisions. This character also results from expansions and professionalization of official discretions which make many of them unsuitable for judicial review that follows the adjudicative model. It also results from both the size and complexity of the tasks performed by different officials to whom many of the specialized policies of state management have been


7 See A.Witkon, Justiciability, (1966) 1 Israel LR 40; and also Harlow & Rawlings, supra n.5, at pp.311-20.
delegated and, in addition, from the polycentricity\textsuperscript{8} of many of their functions.\textsuperscript{9} Hence, to take judicial review as a main source from which principles of administrative fact-finding ought to be discerned is unwarranted. These principles might well be found in administrative procedures and fact-finding themselves, not only in judicial decisions about administrative decisions.\textsuperscript{10} For example, pre-trial decisions made by crime-investigating authorities in regard to identification of suspects appear to be no less and perhaps even more important than their subsequent judicial examination.\textsuperscript{11} Professionalized decision-making in more specialized fields of official discretion is based on many other non-judicial standards. Such decisions do not always fit the ways of adjudicative thinking, but it would be unjustifiable if for that reason alone the standards which affect or should affect these decisions be regarded as "extra-legal".

\begin{enumerate}
\item The notion of "polycentricity" which refers to the diverse interests ("centers") to be accounted for in making a decision is taken from L. Fuller, The Forms and Limits of Adjudication, (1978) 92 Harv.L.R. 353.
\item These phenomena are explained by Galligan, supra n.4, esp. at pp.72-78; 84; 244-46.
\item For similar criticism see W. Twining, Rethinking Evidence, in chaps. 1, 2, 6 and 11 (1990).
\end{enumerate}
Second, the traditionalist perception of administrative processes of fact-finding rests on a particular positivist conception of the contents of law. It implies that only those rules that can be identified empirically and traced to their ultimate authoritative source (e.g. the "rule of recognition") by the test of "pedigree" can be labeled as "law". When these rules run out and the process of decision-making becomes discretionary, standards and principles do not form part of the law even when decision-makers are in fact being guided by these standards and principles. On this view, law ceases to exist at the point where its rules leave the judges and other legal officials with discretion. Hence, the law of evidence which applies to administrative decisions consists of the loosely defined requirements of "reasonableness" and "good evidence" and, in exceptional cases, of a tiny number of the rules imported from adjudication. This understanding of the law is not above criticism. It pays no regard to the distinction between "strong" and "weak" senses of discretion drawn by Dworkin and, as a result of the above, to the functions of legal constraints that render many of the discretions "weak". More fundamentally, a strong case can be made for treating moral and political

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reasons that justify the existing legal arrangements as authoritative and therefore preemptive. These reasons, formulated as general principles, can be claimed to be "legal" and direct judges and other officials in their decision-making. In administrative law, where decisions are guided by many internally developed standards and procedures, the tendency to reject the assimilation of law with rules and to defy the dichotomy of law and discretion is perhaps even stronger than elsewhere.13 This issue has been taken up in connection with the law of evidence in parts two and three above and there is no need to pursue it any further by reiterating the arguments against the thesis that law is exhausted by its explicit rules.

Lastly, the traditionalist account of administrative fact-finding does not conduct any investigation into the question of rights that individuals affected by administrative decisions may and may not have in relation to risk-allocations under uncertainty. It is typically presupposed and sometimes made explicit that discretion is synonymous to the absence of rights, and it is this assumption that, presumably, has prevented such an investigation from taking place. This assumption is trebly inaccurate. Many administrative decisions, and especially those made by tribunals, deal with many

13 See Galligan, supra n.4, specifically at pp.30-33; 56-64.
important rights which have not been subjected to any discretion. The right not to be racially (or sexually) discriminated against in employment dealt with by industrial tribunals is one of such rights. As decision-making in relation to these rights involves risks of error, it is pertinent to ask how should these risks be distributed. It seems to be clear that the allocation of these risks cannot be a matter of unfettered discretion. The law of administrative evidence must therefore provide an answer to this question. Additionally, many administrative decisions which are based on discretion and do not directly deal with any of the vested rights of individuals affect private interests which public officials ought to take into their consideration. An endeavour sharply to distinguish between strong "judgement-independent" rights and "judgment-dependent" interests tends to suppress a distinct category of reasoning-related rights which are no less judgement-independent. These rights are akin to other judgement-independent rights because they impose duties on decision-makers to pay due regard to particular considerations or interests which have to be weighed up. Decisions involving such rights can only be justified by these and not any other considerations. The weight that has to be attributed to these reasons is variable and judgement-dependent, but this does not mean that the duty to take them into account and the corresponding
right are also judgement-dependent.\textsuperscript{14} When any of such processes of balancing takes place under uncertainty, the risks of error which accompany any of those guiding considerations must be accounted for. For if they are not considered, the legally protected interests at stake could not be said to have been given their proper weight. Finally, some of the administrative powers are conferred on public officials to create individual rights.\textsuperscript{15} Such cases cannot properly be represented by the "rights/discretion" dichotomy. Where the object of discretion is the realization of an individual interest, this discretion has to be used "...to determine how or the extent to which a personal interest is to be advanced or satisfied".\textsuperscript{16} When such discretions are exercised in conditions of uncertainty, as usually happens, adequate realization of individual interests cannot dispense with risk-distributive considerations. This raises the question about the legal propriety of these considerations in the light of the risk-

\textsuperscript{14} Neil MacCormick has seemingly underestimated this in his recent paper (N. MacCormick, Discretion and Rights, (1989) 8 Law & Philosophy 23). This echoes his "second-order justification" theory of discretionary reasoning which becomes relevant when the law runs out. A "second-order" justification was presented as an important component of judicial reasoning but is not based on any rights. See N. MacCormick, Legal Reasoning and Legal Theory, 100ff (1978). See also p.231 where his rejection of the 'Rights Thesis' can be found. Cf. G. Christie, An Essay on Discretion, [1986] Duke L.J. 747.

\textsuperscript{15} See generally C. Reich, The New Property, (1963-4) 73 Yale L.J. 733.

\textsuperscript{16} Galligan, supra n.4, at p.190.
distributive rights to which those affected by official decisions are to be entitled. The law of administrative evidence must make an attempt to answer this question.

These considerations set up the framework and single out the main organizing idea for my subsequent discussion. Like civil and criminal laws, administrative law consists of many propositions which can be identified empirically as authoritative legal materials or "preinterpretive data". These propositions are based on political or moral reasons of more general character. Some of these reasons might reveal, in general moral terms, the law's risk-distributive preferences. These preferences, formed as principles, ought to be regarded as legally preemptive for risk-distributive purposes and along with explicit legal provisions, which are rare, erratic and disparate, should build up the rights to which people affected by administrative decisions are entitled. This interpretive approach has been delineated in parts two and three and then substantiated at some length in part four. Its relevancy to administrative law will be explained in the remaining part of this chapter. I shall suggest that this approach should apply to most administrative decisions, and especially to those that affect individual rights, and typify different frameworks of administrative decision-making which require its rearrangement and adjustments. This part of my discussion draws on Galligan's "Discretionary
Powers".\(^7\) It will be preceded by examination and criticism of the influential study of administrative evidence and procedure undertaken by Kenneth C. Davis.\(^{18}\) This study has been chosen as a paradigm not merely due to its ambit and authoritativeness. Professor Davis pioneered the idea of structuring administrative discretions,\(^{19}\) and it could be expected that this idea should have had its impact on his writing on administrative fact-finding. Although his treatise was devoted to American administrative law, his discussion of fact-finding is most relevant for our present purposes. In this respect, there are no fundamental differences between English and American legal arrangements which apply to administrative matters.

2. FREEDOM OF PROOF IN ADMINISTRATIVE LAW

Davis's discussion of administrative procedures and fact-finding is presented in three extensive chapters. The problems related to evidence and fact-finding are

\(^{17}\) Galligan, supra n.4.


\(^{19}\) K.C. Davis, Discretionary Justice, (1969). For discussion see Galligan, supra n.4, at pp.167-69 and other sources mentioned therein.
discussed in chapter 16. Chapter 14 is devoted to procedures and is supplemented by the discussion of the "due process" requirements taking place in chapter 12. It has to be read in the light of the preceding discussion of formal and informal procedures in chapter 13. Chapter 14 also sheds light on the important distinction between adjudicative facts which should affect concrete subjects of monocentric decision-making and broad legislative facts needed for polycentric policy decisions. Davis demonstrates that different procedures are and should be employed for handling each type of facts, and that procedural arrangements are to be adjusted to the tasks to be performed by administrators rather than be dependent on their formal characterization as "adjudication" or "rule-making". 20 Chapter 15 which discusses in great detail the problems related to judicial and official notice constitutes a great advance in comparison with traditional books on evidence which, concentrating on the rather technical sides of the question "What can be noticed?", tend to marginalize and even ignore some of these problems. This misconception has been corrected in a few of the more recent studies, acknowledging that many generalisations,

20 Cf. M. Damaska, The Faces of Justice and State Authority, (1986) where this theme is insightfully developed. Damaska's distinction between "conflict-solving" and "policy-implementing" types of procedures seems to have captured the problems related to this issue far better. One, however, must not forget that the treatise of Professor Davis has been addressed not only to legal theorists but also and perhaps mainly to practitioners.
and not only the indisputable ones, are and should be invoked in legal reasoning about facts and that many of the problems they raise transgress the evidentiary technicalities dealt with in orthodox writings.21 Davis has drawn a distinction between adjudicative and policy-oriented generalisations, arguing that different truth-certifying procedures are to be conducted in assessing the probative weight of each one of those, and that subject to the parties' right to challenge any fact, "legislative facts" forming policy-oriented generalisations ought to be noticed even when they are controversial. Furthermore, subject to this right of challenge, contestable "adjudicative facts" should, subject to exceptions, also be noticeable.22 Davis's approach has been motivated by the plurality of factual matters affecting both administrative and judicial processes and by the plurality of the processes themselves.23 His general attitude stated in chapter 16


22 Davis has thus taken Wigmore's position (which, in turn, was based on Thayer) in the famous Wigmore-Morgan controversy on judicial notice. See J.H.Wigmore, 9 Evidence, par.2567; E.Morgan, Judicial Notice, (1944) 57 Harv. L.R. 269; J.McNaughton, Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy, (1961) 14 Vand.L.R. 779 (supporting Morgan who maintained that if taking judicial notice of a fact means that it is indisputable it must follow that this fact may not be challenged).

23 His approach has later been taken up in C.McCormick, On Evidence, 3d. ed., 928ff (1984).
was that besides the due process and cogent evidence requirements which should always guide official decision-makers, administrative fact-finding should not be subject to legal regulation. His views of administrative fact-determination, are remarkably akin, if not entirely similar, to those expressed by orthodox writers (subject to what has been said about judicial notice). The main difference between him and many of these writers\textsuperscript{24} is that he maintained that administrative fact-finding, conducted in conditions of free proof, is rationally superior to the adjudicative models nurtured by "jury thinking"\textsuperscript{25} and fostering evidentiary rules which impede factual inquiry. He acknowledged that some of the rules based on extra-probative policies, such as privileges and the like, can be justified.\textsuperscript{26} It is all other exclusionary rules that have, in his opinion, to be abolished.

His study of evidentiary issues\textsuperscript{27} starts with spotting a striking anomaly: the system governing federal courts applies to less than 14\% of trials whereas the administrative system is in use in more than 86\% of all

\textsuperscript{24} Some of the orthodox writers supported the view that all evidentiary rules must be abolished. See supra chapter 1.

\textsuperscript{25} Davis, supra n.18, at p.219. (All my references to Davis relate to volume 3 of his treatise)

\textsuperscript{26} id., at p.274.

\textsuperscript{27} id., ch.16.
federal trials. Unlike the former system, the latter one operates without elaborate rules and "It has worked so well for more than three decades that no significant proposal has been made for changing it." 28 Evidentiary rules are designed for juries, but the number of jury trials even in the United States is not very big. A comparative study is therefore required to determine which system produces better results. This observation led to his critique of the institutions that undertook the reform of the law of evidence in adjudication and ignored the administrative system of proof and fact-finding. He wrote:

"If the purpose of any trial, whether in a court or in an agency, is to find facts accurately and efficiently, then having two systems of evidence, one of which excludes particular evidence and the other admits, is irrational, unless some reason justifies the difference. But the three groups [i.e., the institutions involved in the legislative reform in the U.S.A.] have pointed to no such reason. They have assumed that they should ignore the system which operates smoothly in more than 86% of federal trials, and they have assumed that they should formulate for courts a set of rules that are designed for juries, even though 72% of federal civil cases are without juries and even though 97 or 98% of all trials in all kinds of federal and state tribunals are without juries." 29

This criticism is most powerful. 30 One, however, might expect it to be followed by explanations about how those agencies in fact decide in conditions of uncertainty and

28 id., at p.219.
29 id., at p.220.
what makes their decisions to be rationally superior to those made under the regime of evidentiary rules. Professor Davis provides an answer to the second question only. He adopts a qualified Benthamite position by arguing that evidentiary rules are anomalous, erratic and eccentric. They are "...absurdly inappropriate when the factfinder is not a jury" and should therefore neither be applied in trials without jury nor in administrative decision-making. He then goes on to explicate a small number of discretionary regulations relating to evidence in administrative decision-making, namely, the discretion to exclude from the official's record immaterial, irrelevant, unreliable and unduly repetitious evidence and even hearsay if it is "not of the sort upon which responsible persons are accustomed to rely." He also discusses provisions that determine standards and burdens of persuasion and analyses at some length the "residuum rule" - an ambiguous rule not applicable in England which requires the court to set aside any administrative finding not

31 Bentham supported on utilitarian grounds only some of the rules that can be justified by extraneous policies. Davis has not gone as far as to propose that non-utilitarian extrinsic rules be abolished as well. See id., pp.233; 263-64; 274. For criticism of Bentham's approach to extra-probative rules see A.Stein, Bentham, Wigmore and Freedom of Proof, (1987) 22 Israel L.R. 245, 272-75.

32 Davis, supra n.18, at p.233.

33 id., at p.236; 264-267.

34 id., at pp.255-62.

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supported by evidence which would be admissible in adjudication.\textsuperscript{35} This rule, as Davis shows, is now rarely applied in the United States.

It must now be apparent that according to Davis a system of proof produces "better results" if, on the whole, it leads to a greater number of correct decisions than any other system. For Professor Davis, the statutory objectives provide the central focus for all administrative actions and his "better results" are synonymous with the overall effectiveness.\textsuperscript{36} This endeavour to attain overall effectiveness must only be circumscribed by fair procedures which entitle all those affected by administrative action to have their day before unbiased administrators. His position becomes clearer in the light of his proposal to expand, subject to fair hearings, both the range and the scope of official and judicial notice, the legal permission to use extra-record facts and generalisations.\textsuperscript{37} In this chapter he gave the following statement which is relevant to the problems of decision-making under uncertainty:

\textsuperscript{35} id., at pp.239-55.

\textsuperscript{36} For differences between administrative "effectiveness", which refers to realization of goals, and "efficiency", denoting the relationship between available resources and outcomes, see Galligan, supra n.4, at pp.129-32.

\textsuperscript{37} Davis, supra n.18, ch.15, passim.
"In every age of world history, human knowledge has had limits, and guesses are made about questions that lie beyond the limits. In a modern democracy, which guess to make may be committed to a majority of a democratic assembly, to a court, or to an administrative agency. A guess is appropriate, not because it is good, but because no one has anything better."38

To restate this, in a modern democracy, uncertainties surrounding socially significant reasons for action are simply transferred to different authorities along with the power of deciding what these reasons should be. Authoritative guesses are thus akin to Razian preemptive reasons which can be both "exclusionary reasons", ones that prevent any further non-authoritative reflection, and first-order reasons for action.39 Authoritative reasons or guesses can, however, only be preemptive within their jurisdictional limits,40 i.e., to the extent to which they are legally accepted to exclude all other reasons of other authorities and individuals. This, to be sure, is a matter of interpretation to which no general answer can be given. Are all administrative authorities really empowered to allocate all risks of error in all matters? Should they be so empowered? Or, perhaps, there are authoritatively superior risk-distributive reasons or principles that preempt, or

38 id., at p. 161.


40 For distinction between substantive and jurisdictional matters see Craig, supra n.3, at pp.240-53.
"trump", some of the risk-distributive reasons of some administrative officials and authorities in at least some matters?\textsuperscript{41}

In his discussion of discretionary powers, Galligan distinguished between the "direct" and "simple" relationships between means and ends in administrative decision-making and the "modified" ones.\textsuperscript{42} A simple or direct relationship between the two is "an idealized picture which assumes the relationship to be technical and mechanical."\textsuperscript{43} A more realistic picture would show the means adopted as "shaped by a range of constraints; subgoals have to be set and attained in order to accommodate the constraints, and the final outcome is likely to be a more modest level of achievement of the overall statutory goals."\textsuperscript{44} When decisions about means and ends are made under uncertainty, risk-distributive considerations may well be part of those constraints.\textsuperscript{45}


\textsuperscript{42} Galligan, supra n.4, at pp.112-14.

\textsuperscript{43} id., at p.113.

\textsuperscript{44} id.

\textsuperscript{45} Galligan's "list of constraints" was asserted to be non-exhaustive and to include, among other matters, procedures which may and may not be adopted by decision-makers. See id., at p.114. It also includes moral acceptability of official decisions in the eyes of the general public. id, at p.113. Officials' risk-related preferences may well affect the acceptability of their decisions.
The extent to which such considerations should influence administrative decision-making is a separate matter which has to be determined against the relevant legal and institutional frameworks. These frameworks may or may not justify a utilitarian truth-maximising approach which pays no regard to internal distributions of the risks of misdecision.

Professor Davis appears to have either disregarded these problems or, which is more likely, taken an almost unqualified utilitarian stance in relation to administrative fact-finding. If the former is true, his account of administrative evidence is incomplete and even flawed like those of the orthodox writers. If the latter is true, this position is normatively questionable and descriptively unsound. It is normatively questionable not merely because the credentials of risk-distributive utilitarianism in administrative matters are far from being established. This approach ought to be questioned because it makes no contextual differentiation between variable matters submitted to administrative control, pays almost no regard to the possibility that different matters might require different risk-distributive solutions, and, finally, that not all risk-distributive matters ought to be delegated to administrators at the first place. Davis's approach appears to be descriptively unsound because the law's position on all these issues,
including the issue of risk-distributive rights that people may and may not have in connection with administrative decision-making processes, can only be clarified by interpretation which, if necessary, must go beyond explicit legal arrangements. Some of these issues will now be discussed.

3. STRUCTURING RISK-DISTRIBUTIVE DISCRETION

Once it is appreciated that "[t]he administrative process is not a single, discrete phenomenon ...", but, reflecting amongst other things different relations between individuals and the state, "is itself made up of a range of organizations and functions ...", it becomes clear that there can be no one unified legal framework within which all administrative findings of fact in conditions of uncertainty ought to be examined. Legal principles affecting the distribution of the risks of error should vary in accordance with the nature of the risks to be allocated in various administrative settings, and the latter differ from each other in functions that have to be performed by administrative authorities, institutional structures within which these authorities operate, and individual rights which might be affected by their decisions. The principles of risk-distribution discussed so far belong to what can usefully be described as the "Private Law Model" of

46 Galligan, supra n.4, at p.118.
adjudication which has to be distinguished from the "Public Law Model" of administrative decision-making.\textsuperscript{47} The functions or objectives of the Private Law are to maintain social order by providing stable legal facilities for both private relations and relations between individuals and the state. The functions of the Public Law are to supplement the relatively minimalist or "reactive"\textsuperscript{48} maintenance of the existing social equilibrium by the Private Law by positive interventionist regulation, pursuit of welfare and the like.\textsuperscript{49} The institutional structure of the Private Law is evidenced by a firm separation of powers vested in different institutions and division of functions to be performed by these institutions. Powers of creating general rules are vested in the legislature. Executive and administrative bodies are responsible for implementation of the rules. Finally, courts adjudicate disputes arising in connection with those rules and their implementation. Within the Public Law, the legislature sets social objectives in a broad fashion and delegates their realization to executive and administration, conferring upon them discretionary

\textsuperscript{47} The following discussion of these two "ideal types" (hereinafter referred to as Public Law and Private Law) draws on Galligan, supra n.4, at p.86ff.

\textsuperscript{48} See M.Damaska, supra n.20, at pp.73-80.

\textsuperscript{49} The exact features of these two models may of course vary from state to state. The "ideal types" described in the text are referring to Western legal cultures. A far wider map can be found in Damaska, supra n.20.
powers necessary for proper accomplishment of these objectives in constantly changing situations. The wide range and complexity of social objectives and functional differentiation of their pursuers, coupled with the increasing need to maintain high levels of efficiency in accomplishing them, lead to administrative powerfulness and professionalization and thus separate the Public Law as an independent set of by and large independent legal "sub-systems". These sub-systems produce their own "realities" where empirical evidence, mixed with professionalized perceptions about the world, is professionally selected, characterised by concepts, channelled and moulded into categories and then probabilistically assessed in a way which eventually generates factual findings not readily absorbable by the Private Law. At their extreme, these sub-systems can be characterised as totally independent discourses constructing "realities" on which Private Law cannot exercise its epistemic authority. When legal disputes

50 Cf. Galligan, supra n.4, at pp.80-84.

51 Cf. Galligan, supra n.4, at pp.33-37, and esp. at pp. 82-83.

52 Cf. Galligan, supra n.4, pp.82-3, discussing implications of Luhmann's theory for law:

"One of the effects of the positivization of law, and the putting aside the natural law constraints, is that the law is whatever the lawmaker decrees. This has enabled legal regulation to be extended over any area of activity for whatever reasons seem fit. However, the increasing complexity of other social sub-systems, and their differentiation from the total environment and from each
concerning these sub-systems are brought before ordinary Private Law courts accustomed to construct and reconstruct "realities" belonging to the Private Law only, they are concerned with jurisdictional limits and procedural constraints, i.e., with the space which these sub-systems are allowed to occupy in social life and with the minimal standards of fairness and "reasonableness" set out by the Private Law. They do not adjudicate the merits of substantive outcomes generated within these sub-systems, but at the same other, make it correspondingly difficult for legal systems to formulate abstract norms capable of accommodating the complexity and variability of the situations sought to be regulated. ... [E]ven if the goals and values are stated, there is no guarantee, because of functional differentiation, that they can be achieved simply by the decrees or decisions of one set of officials. Legal regulation is then at risk either of distorting reality by imposing formal rules, or of being forced to rely on extremely abstract statements of purposes."

Galligan, however, seems to have suspended his own judgement about epistemology of administrative fact-finding, namely, as to whether administrative determinations of fact, or some of them, can be viewed as independent reality-constructions, deviating from what is generally assumed within the rationalist tradition of evidence and proof. Cf. his remarks in More Scepticism about Scepticism, (1988) 8 Ox.J.L.S. 249, 264-65. This difficult question is beyond the reach of the present work. Cf. Teubner, infra n.55.

53 This is not to say that Private Law "realities" differ or must differ metaphysically from those belonging to the Public Law systems and sub-systems. What makes these realities different is the methods of selecting, processing and conceptualizing different data adopted by functionally differentiated authorities and officials.

54 See Galligan, supra n.4, at p.87; Craig, supra n.40.
time, for the sake of legitimacy and proper division of powers, they cannot let these sub-systems out of their jurisdictional and procedural control.

Gunther Teubner has recently described this tension relevantly to our present purposes:

"Law cannot take over full epistemic authority and responsibility for the reality constructions involved, but at the same time it does not totally delegate epistemic authority to other social discourses. Rather, as a precondition for the incorporation of social knowledge, the legal system defines certain fundamental requirements relating to procedure and methods of cognition."55

He exemplified this point by the decision delivered by the German Supreme Court on the constitutionality of labour participation and co-determination of economic organizations, issues which ought to be resolved considering their socio-economic consequences. Firms, employers' associations, trade unions, government and parliament, participating in this dispute, had submitted briefs with detailed scenarios - the contested "reality constructions" of these socio-economic consequences. The court refused to take any substantive position on these submissions and resorted to a procedural solution of the dispute. In Teubner's words,

" Instead of confirming or rejecting reality constructions, the court allocated risks of information and risks of prediction among the collective actors involved, including the court itself ... In several more recent decisions this tendency has been strengthened: to abstain from a

material construction of reality and to proceduralize the legal solution; to delegate epistemic authority to different collective actors, ... to allocate risks of information and prediction; to define procedures and methods; to decide which collective actor must bear the "burden of proof" for reality constructions; and to define responsibilities for failures in information and prediction. To a certain degree, a constructivist perspective would favor such attempts to "proceduralize" the conflict between epistemic autonomy and heteronomy in modern law."

Legal relationships between citizens and the state maintained by the Private Law importantly differ from those existing within the Public Law. Within the Private Law, the definition and protection of private rights are located at the centre of the stage. In the Public Law these rights are displaced. They lose their primacy, become subordinated to policy goals and can easily be outbalanced by competing interests. Within the Private Law, the state's powers of interference with private autonomy are restricted by rights which determine the boundaries of this autonomy. State intervention in private actions can thus only be effected through legal rules and is likely to be restrained. Within the Public Law model, the state's intervention is effected through discretions conferred on various officials and institutions where the main object is to attain the policy goals set up by the state. By conferring these discretions on officials, the state can be seen as

56 id., (emphasis added).
57 See Galligan, supra n.4, at pp.87-88.
striving towards a more or less comprehensive theory of
the "good life" and trying to use it as a basis of its
all-encompassing programme of both material and moral
betterment of its citizens.\textsuperscript{58} Within the Private Law,
legal disputes concentrate on the rights and are
resolved by the courts with an emphasis on applying the
law. This right-based deontology forms no part of the
Public Law where the main emphasis is on the policy
goals to be attained and decision strategies are
therefore outcome-oriented.\textsuperscript{59} At its extreme, Public Law
fully accomplishes O. W. Holmes's programme in which
"black-letter" men are replaced by "social engineers",
men of statistics and masters of economics whose aim is
to maximise general welfare. Adjudicative procedures in
the Private Law are characterised by distinctive
participation of the rights-holders. In the Public Law,
participation of those affected by administrative
decisions, although reminiscent of its adjudicative
counter-part, is being politicised. Interest-groups and
private individuals with loosely defined personal
"interests" are allowed to take part in proceedings as a
matter of discretion without being entitled to strict
procedural rights. However, when it appears that
participation would not advance any utility which is

\textsuperscript{58} See Damaska, supra n.20, at p.80.

\textsuperscript{59} See, e.g., McLoughlin v. O'Brian [1983] 1 AC
410, and the discussion of this case in R.Dworkin, Law's
Empire, 23-29 (1986), where the tensions between these
two approaches are exemplified.
calculated by reference to the policy goals to be attained, it may well be restricted or even disallowed. And again, this can be true only in respect of the most radical type of Public Law.60

Both Public and Private Law are ideal types, exhibiting polarized frameworks of legal decision-making. As such, they are useful for identifying the main ingredients of actual decisional frameworks. In reality, oscillating and incisively differentiated frameworks like those two are not always maintained. Public and Private law features are often mixed. The same is true about different types of procedure adopted by administrative decision-makers which vary in accordance with the issues to be settled, normative frameworks surrounding these issues and various private and public interests that can be affected by administrative decisions.61 Adjudication is apt for individualized determination of rights and duties when they are settled and allocated between those affected by official decisions by fairly determinate

60 For detailed account, explaining, inter alia, the reasons for Public Law's expansion in a modern society see Galligan supra n.4, ch.2.

61 See Galligan, id., p. 114. As he wrote, "process values", existing independently of outcomes, might also affect procedures. The problem of risk-distribution is by its very nature concerned with outcomes of administrative decisions. Possible implications of "process values" are therefore beyond the reach of the present discussion. This issue is highlighted by the sources mentioned in chapter 9, n.130.
legal rules or standards. This is essentially a Private Law type of legal procedure. A modified form of adjudication may be appropriate when the issues that have to be resolved are polycentric, the interests affected tend to be less determinate, and the decisional standards to be applied less settled. This form of decision-making, in which individual rights and discretion are often intertwined, results from amalgamation of Private and Public Law systems. The paradigm of administration can be sub-divided into two classes, depending on the specificity of the policy issues involved. Decisions about specific issues of policy are more individualized. They are guided by standards, but these standards are typically non-rigid and likely to be abstract and in conflict. They do not confer any rights on individuals and leave the officials empowered to weigh them with very substantial discretion. In exercising their discretion, the officials have to account for a wide range of public and private interests affected by their decisions. Decisions of general policy typically require the administrators to formulate general standards for application in future cases. Such decisions involve an even greater amount of discretion and the standards guiding them are fewer and even more abstract. Normally, they affect a very wide

62 This discussion follows Galligan, id., pp.114ff.
range of interests.63 All these are also ideal types, for most "discretionary decisions fall into one or other of a combination of these types", and "the lines between them cannot be drawn too precisely."64 Being ideal types, they are useful in identifying the areas of administrative decision-making where risk-distributive principles can be claimed to apply. These areas can be identified by interpretation of the law. More specifically, the law's authorising provisions granting discretionary powers to officials and tribunals, the purposes and limits of their authorisation and the rights of those affected by their decisions ought to be ascertained. This interpretation must account not only for the text itself, but also for the implicitly relevant factors, such as practice, context and the institutional environment within which administrative decisions are to take place. It should follow the conventions adopted by the community of interpreters.65

For example, if a contextual interpretation of the relevant legal arrangements reveals that the given administrative scheme follows the Public Law model and

63 id., at p.115. For other discussions of these matters see Harlow & Rawlings, supra n.5, at pp.61-67 and J.Jowell, The Legal Control of Administrative Discretion, [1973] Public Law 178, 195-97.

64 Galligan, id., at p.116.

65 Galligan, id., at pp.193-95; 290-304. A detailed account of conventionalist interpretation is given in part 3.
that either a specific or general issue of policy is at stake, the administrator would probably be empowered to settle the issue by determining his own principles for decisions under uncertainty. If he is to decide incrementally, i.e. ad hoc, solving his specific problem in a decentralized way independently of other officials, he would have to evaluate the importance of the interests involved, the probabilities of possible outcomes of his decision and to apply to all these his scheme of risk-related preferences. To reduce complexity and attain more information, he might allow wider participation of different interest-holders and assess the competing interests and the probabilities relevant for his decision more accurately. Incrementalism is particularly apt for adopting these procedures.

Are the officials entrusted with wide administrative powers authorised to endorse any of the risk-related attitudes? This is the central question that ought to be asked about administrative decision-making under uncertainty, and it is this question that has been left unanswered by the orthodox writers on evidence and administrative law. Undeniably, powers of discretion cannot be exercised irrationally or arbitrarily. Any law conferring such powers is and should be interpreted as

66 For discussion of incrementalism in exercising discretion see Galligan, id., at pp.122-28.

67 Galligan, id., at p.128.
saying that they can only be exercised rationally and in a non-arbitrary way. But the trouble is that there is more than one rational and non-arbitrary approach to risk-distribution. An administrator might adopt, for example, the "maximin" principle, a conservative approach which by choosing an act whose minimum represents the maximum value for all minimums of all other acts, picks the best of the worst. As a person entrusted with discretion accompanied by responsibilities, he may well be institutionally bound to proceed with this caution and exercise risk-aversion. Alternatively, he might adopt a less cautious approach, known as the "minimax regret" principle, which focuses on the missed opportunities and guides the decision-maker to choose the course of action which minimises the value of these opportunities. He might also determine for himself an "optimism index" on the scale between 0 and 1 and employ it in compromising between "maximin" and "maximax" solutions. This approach is known as the "optimism-pessimism" rule. It guides the decision-maker to choose the course of action which represents the maximal value amongst those of all the possible compromises between the optimal and the minimal arrived


69 Resnik, supra n.68, at pp.28-32.

70 id., at pp.32-34.
at by using his "optimism index". It is for him to determine this index, but would it be right for him to equate it with "1" and choose a risk-indifferent "maximax" course of action? Leaving aside the extreme cases of making decisions in emergency situations, any such course of action would necessarily be grossly unreasonable and thus illegal.

Another option open to an administrator is to adopt the "expected value" approach coupled with the "principle of insufficient reason". Following this approach, he must presuppose that all the unknown facts relevant to his decision are equiprobable and then to calculate on this assumption, combined with the actually known probabilities, the probability of each of the possible outcomes of his decision, to assign numerical values to the desirabilities of these outcomes, to multiply each of those values by their probabilities and finally choose the course of action which leads to the outcome represented by the highest resulting number. This approach does not entirely fit incrementalism, for its pre-supposition of equiprobability undermines to a certain extent the idea of individualized justice reflected by this way of decision-making. It appears to

71 id.

72 id., at pp.35-37 and chap.3. An administrator might also choose a course of action supported by a majority of the rational attitudes to the risk of error. This might lead to the notorious "voting paradox". See id., at pp.37-40.
be more appropriate for the administrative strategy of "comprehensive planning", long-term determinations of policies which might require the officials to maximise the number of factually correct decisions and their corresponding utilities. Single incrementalist decisions seem to be better served by other less speculative attitudes to risk.73 Similar considerations would apply to the decisional strategy of "scientific management" aimed at maintaining objectivity and scientism in decision-making coupled with a separation of administration from politics.74 This strategy, based on efficiency and professionalism, sharp vertical lines of hierarchy and clear divisions of responsibilities with a strong suppression of value-judgements, has often been criticised as unrealistic and unduly objectifying.75

Administration, it has been said,

"... involves more than the application of technical skills and logic, and it has come to be recognized that issues of policy and value are unavoidable. ... Policy is inherently evaluative, and even issues of fact may not be merely matters of objective evidence and assessment."76

Nevertheless, scientific management might still be

73 For differences between "incrementalism" and "comprehensive planning" see Galligan, supra n.4, at pp.120-28.

74 id., at pp.118-20.

75 id., p.119.

76 id., pp.119; 121. Additionally, scientific theories have not properly accounted for both need and utility of more informal and adaptable frameworks of administrative organizations. id., at p.119.

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appropriate in particular contexts, and in these contexts formalisation of the official attitudes to risk, facilitated by one of the theories of decision under uncertainty, might even be more pertinent.

I am not suggesting that one of these theories should necessarily be adopted. My claim is far more modest. Since any discretionary authority is conditioned upon the requirements of rationality and non-arbitrariness, or is deemed to be so conditioned, the power-holders' attitudes to risk displayed, under uncertainty, by their decisions should also be rational and non-arbitrary. Their risk-related preferences must be articulated and supported by reasons. Administrators cannot be risk-indifferent, and the limited amount of rational risk-related strategies should make their discretions even more structured. The choice between these strategies within the Public Law system cannot be subject to comprehensive judicial review. Courts should interfere with these choices when they are so unreasonable that no

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77 See id., at pp.119-20, arguing that this approach should not be totally discarded.

78 Decision theories would require administrators to comply with a minimal set of ordering conditions, such as "connectivity" and "transitivity" of their preferences. Although these conditions well accord with the ordinary common-sense notions of consistency and coherence, the problem of different decisional outcomes being incommensurable should not be neglected. Incommensurability might present an obstacle to any theory of decision. See, e.g., Resnik, supra n.68, at pp.22-25; D.Kaye, The Laws of Probability and the Law of the Land, (1979) 47 U.Chi.L.R. 34.
official would have followed them. But as has already been made clear, judicial review of administrative action is only one of the facets of administrative law. Officials and institutions may determine their internal strategies of risk-handling and these strategies may well be regarded as binding if, for example, there are no cogent reasons to depart from them. Why should these strategies not be regarded as being part of the law?

Furthermore, an adoption of one of such strategies should lead to appropriate adjustments of the truth-certifying procedures taking place in administration. To be consistent, these procedures must fit the pre-determined attitudes to the risks of misdecision, and it appears to be clear that not any procedure readily fits each of the attitudes to risk that can rationally be adopted. An example can be taken from the approach to hearsay statements which has seemingly been adopted by the Social Security Appeal Tribunals in cases relating to disqualification from unemployment benefit. The general principle which appears to have been crystallized is that when the only evidence supporting disqualification is hearsay and this evidence cannot properly be examined, it should normally not be relied

79 See, for example, Galligan's discussion of the judgments reviewing factual findings in exercising slum clearance powers of Ministers of Housing. Supra n.4, at pp.314-15.
upon and must always be treated with extreme caution.\textsuperscript{80} As Logie and Watchman write in their study of these tribunals,

"In practical terms, the result would seem to be that the use of hearsay is so severely restricted that it is virtually inadmissible."\textsuperscript{81}

Interestingly, none of the decisions dealt with in this study can provide an opposite example where a statement adduced by a person resisting his disqualification has been treated in a similar way. The tribunals' approach is probably motivated by their conviction that a mistaken disqualification from the benefit causes far more harm than erroneous refusals to disqualify people who, if all the relevant facts were known, ought to be disqualified.\textsuperscript{82} It is only for this reason that a less restrictive approach to hearsay which would have led, in

\begin{footnotesize}
\begin{enumerate}
  \item See Logie & Watchman, supra n.12, at pp.115-18.
  \item id., at p.116.
  \item id., at pp.117-18. Cf. the controversial American case of Mathews v. Eldridge 424 US 319 (1976) where the constitutionality of terminating a social security benefit without a hearing was questioned. Stressing the dependency of procedures on the nature of the risks of error involved in administrative decision-making, the Supreme Court had controversially subjected the issue to what appears to be a straightforward utilitarian calculation. Noticing that if the "due process" clause were interpreted to require that hearings be conducted when benefits were cancelled, all the extra expenses incurred on the agency would come from the funds devoted to other social security beneficiaries, the Court decided that no hearing is required by the constitution. For critical discussion see R.Dworkin, A Matter of Principle, 72, 99ff. (1986); J.Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, (1976) 44 U.Chicago.L.R. 28.
\end{enumerate}
\end{footnotesize}
the long run of cases, to a far greater number of correct decisions could justifiably be rejected. If the risk of mistaken disqualification were treated differently, this would presumably have led the tribunals to adopt rather different, more utilitarian, procedures of admitting and examining evidence. This dependency of administrative truth-certifying procedures upon the nature of the risks of error seems to exist in all other cases as well.

Administrative strategies of risk-handling in the Public Law are bound to be less structured than those in the Private Law where, in addition to the requirements of risk-distributive rationality and non-arbitrariness, individual rights require the officials to appropriate their attitudes to risk in a way which pays adequate regard to those rights by treating them, for example, with equal concern and respect. The existence or non-existence of different rights is a matter of interpretation. When they exist, they are bound to be supplemented by appropriate risk-distributive rights which should also be determined by interpretation. For example, when the administrative framework under

83 The burden of proof in disqualification from the benefit proceedings lies on the presenting officer. See Logie & Watchman, id. The position that this burden cannot usually be discharged by hearsay, holding irrespective of the concrete weight which can be attributed to each piece of evidence, can only be justified by an additional protective strategy aimed to minimise certain kinds of errors which are considered as particularly harmful.
consideration is akin to the Private Law model of adjudication, and the issues which have to be settled are "monocentric" rights rather than policies, the same principles of risk-distribution which should normally apply in adjudicative matters must be applied within this framework.¹⁸⁴ The principle of risk-distributive equality and that of utility would be most pertinent here. In addition, in dealing with decisions and procedures of disciplinary tribunals one might also consider a possible adaptation of the innocent-protecting principle. When rights and policies are mixed, and monocentricity of decisions is coupled with their polycentric facets, the process of adjudication changes accordingly. Within this process of modified adjudication, application of the principles of risk-distribution becomes very complex, but this surely cannot be the reason for not applying them. In a modified adjudication, risk-related attitudes of decision-makers should also be regulated. Their decisions ought to be more structured than those made in respect of policy issues not involving any right of the individual.

I shall now exemplify each one of these decisional frameworks and their corresponding risk-distributive aspects.

¹⁸⁴ These principles are set out in chapters 8 and 9.
In Bushell v. Secretary of State for the Environment,\textsuperscript{85} the House of Lords held that even though a hearing was necessary at a local inquiry into the government's decision to build a highway through particular areas as part of a wider national scheme, this hearing need not include any cross-examination of the experts employed by the government in making its traffic predictions for the relevant areas within the scheme.\textsuperscript{86} The objectors contesting these traffic predictions were permitted to call witnesses on their behalf, but disallowed to cross-examine the witnesses testifying on behalf of the Department of Environment in support of its programme. Later, this programme has been confirmed and the objectors petitioned to the court for judicial review. Their application was based on two complaints,\textsuperscript{87} one of which - the denial of cross-examination - is especially relevant for our discussion. When the case reached the House of Lords, Lord Diplock, whose judgment was especially clear on this point, emphasised the differences between procedures that have to be followed in adjudication and administrative methods of fact-

\textsuperscript{85} Bushell v Secretary of State for the Environment [1980] 2 All ER 608.

\textsuperscript{86} This was a majority opinion from which Lord Edmund-Davies had dissented.

\textsuperscript{87} The objectors have also complained that the Department's traffic prediction has later been revised relevantly to their case, but the minister found these changes insignificant and thus confirmed the original programme.
finding. The only requirement which binds administrators who exercise their discretion as to the procedures to be conducted at their inquiries is that these procedures must be fair.\textsuperscript{88} He explained this requirement, mentioning that -

"What is fair procedure is to be judged ... in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. ... Discretion in making administrative decisions is conferred on a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department. ... The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise are to be treated as the minister’s own knowledge, his own expertise. ... This is an integral part of the decision-making process itself; it is not to be equiparated with the minister receiving evidence, expert opinion or advice from sources outside the department after the local inquiry has been closed. ... [F]airness requires that the objectors should have an opportunity of communicating to the minister the reasons for their objections ... and the facts on which they are based ... [and] that the objectors should be given sufficient information about the reasons relied on by the department."\textsuperscript{89}

In the light of the administrative reality existing in this case, Lord Diplock went on to say that fairness of the inquiry "of this kind and magnitude", which is "quite unlike any civil litigation", had not been impugned by the inspector’s decision to disallow cross-examination of the department’s experts. Thus, the inspector conducting this inquiry -

\textsuperscript{88} Supra n.85, at pp.612-13.
\textsuperscript{89} id., at p.613.
"... must have a wide discretion as to the procedure to be followed in order to achieve its objectives. These are to enable him to ascertain the facts that are relevant to each of the objections, to understand the arguments for and against them and, if he feels qualified to do so, to weigh their respective merits, so that he may provide the minister with a fair, accurate and adequate report on these matters. ... To 'over-judicialise' the inquiry by insisting on observance of the procedures of a court of justice ... would not be fair. It would, in my view, be quite fallacious to suppose that at an inquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to cross-examination on behalf of the parties who disagree with what they have said."\textsuperscript{90}

The discretionary framework dealt with in Bushell clearly belongs to the Public Law model. If it was in the overall interest of the public to build the motorway according to the schemes favoured by the department, and the interests of those inconvenienced by this decision have properly been considered, no individual or group of people can oppose this decision as a matter of right.\textsuperscript{91} Risks of error accompanying this decision could therefore be calculated by the inspector and the minister at their discretion as part of the analysis of costs and benefits which has to incorporate the costs of the more expensive procedures argued for by the objectors. The best calculation of utility accounting for these costs as well as for the risk of the highway scheme being unwise could, as Dworkin wrote,

\textsuperscript{90} id.

\textsuperscript{91} See Dworkin, supra n.82, at pp.78-79; 98-100.
"recommend the cheaper procedure followed by an increased risk of the worse program, rather than the more expensive procedure followed by a heightened chance of the better."92

This cost-benefit analysis belongs to the government's discretion and should be guided by administrative and professional standards rather than by judicial ones. Even if the traffic flow estimates relevant to the government's schemes have been miscalculated from the professional point of view, there is no reason to assume that an adoption of the more expensive "judicialised" procedures could have done better. Bearing in mind what has been said above about independent legal sub-systems and professionalized realities upon which full epistemic authority of the courts cannot be exercised, one has to read the following statement of Lord Diplock:

"The methods used by the department for arriving at these estimates are very complex. So far as I am capable of understanding them as one who is by now (I hope) a reasonably well-informed layman, it is obvious to me that no one who is not an expert in this esoteric subject could form a useful judgment as to their merits."93

Such sub-systems, usually not involving individual rights, follow their self-generated principles of risk-distribution which are by and large utilitarian. When one of such sub-systems is judicially reviewed, the court tends to proceduralize the review by limiting its

92 id., at p.99.
93 supra n.85, at p.615.
scope to examining the fairness of administrative inquiries rather than the substance of their outcomes.\textsuperscript{94}

The Private Law type of adjudication before administrators can be exemplified by discrimination cases handled by special Industrial Tribunals. The prohibited discrimination in employment may either be sexual or racial.\textsuperscript{95} It can be a "direct" one, viz. sexually or racially motivated, when an employer treats one of his employees, on either sexual or racial grounds, less favourably than the rest of his employees. It can also be "indirect" when an employer sets an unjustifiable condition for workforce recruitment or promotion to the disadvantage of a person's sexual or racial group relative to members of other racial or sexual groups with which, to his or her detriment, this person is unable to comply. The problem which arose in discrimination cases is whether statistical evidence can be used to establish direct discrimination, namely, what, if any, inferences about racial or sexual motivation can validly be drawn from the statistical composition of the defendant's workforce? It is obvious that such evidence might well be required to establish an indirect discrimination, a cause of action based on comparison between men and women and different ethnic

\textsuperscript{94} Cf. with Galligan's discussion of Bushell, supra n.4, at pp.377-79.

\textsuperscript{95} See Sex Discrimination Act 1975, s. 1; Race Relations Act 1976, s. 1.
groups. But how can such statistics prove racial or sexual motivation?

In West Midlands Passenger Transport Executive v

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96 J. Gardner, Racial Discrimination and Statistics, (1989) 105 L.Q.R. 183. However, as the rationale behind the prohibition of indirect discrimination is not altogether clear, it might not be easy to classify as either discriminatory or not a great deal of employment-related conditions. This leads to uncertainties of the ultimate probanda in such cases. There are at least four theories explaining this prohibition. Under the "Intent Theory", an indirect discrimination is simply an irrebuttable presumption of racially (or sexually) motivated employment policy. The "Past Discrimination" theory contends that the prohibition of indirect discrimination aims at identifying and rectifying the continuing effects of past discrimination. The "Functional Equivalence" is another theory which explains indirect discrimination as similar to direct one: both are based on the irrelevant for productivity employment criteria which are not within the control of a person employed or applying for a job and must therefore be prohibited. The "Utility Theory" maintains that both types of discrimination must be prohibited as this would increase the overall efficiency of the employment market. S. Willborn, Proof of Discrimination in the United Kingdom and the United States, (1986) 5 Civil Justice Quart. 321, 328ff and the sources cited therein. Under the each of the last three theories which are grounded on decision-making reminiscent of comprehensive planning, statistical evidence will be relevant. It might not be relevant under the first theory, as it requires an individualized decision-making. Each one of those theories may dictate different risk-related preferences in fact-finding. Cf. the discussion of American law in R. Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, (1981) 34 Vand. L.R. 1205. Gardner's assumption that the "... goal of achieving a representative level of participation by ethnic minorities in social institutions ..." [i.e. the "Past Discrimination" theory, A.S.] "... is central to the indirect discrimination model" (id., at p. 186) has probably led him to opine that statistical evidence is obviously relevant in all such cases. This assumption is debatable.
Singh,\textsuperscript{97} the employer's submission that statistics about ethnic composition of his workforce are irrelevant and should therefore not be admitted in evidence was rejected by the Industrial Tribunal and the Court of Appeal. Mr. Singh, whose application for promotion to the rank of senior inspector on Birmingham's buses was refused, complained before the Industrial Tribunal about direct discrimination on the grounds of race. He sought and was granted an order for discovery of his employer's statistics concerning the ethnic balance of the employees at the level of senior inspector. The decision in which this order was approved of by the Court of Appeal has received an unqualified welcome in its subsequent review.\textsuperscript{98} This decision has been welcomed because direct discrimination becomes substantially easier to prove\textsuperscript{99} and because "a representative level of participation of ethnic minorities ... has finally come to be viewed as a goal which informs the direct discrimination model as well."\textsuperscript{100}


\textsuperscript{98} Gardner, supra n.96.


\textsuperscript{100} Gardner, supra n.96, at p.186.
The latter conclusion was perhaps premature. Although it is true that the Court of Appeal emphasised that direct discrimination of an individual would necessarily involve questions about different ethnic groups and their status in his employer's decision-making, the way in which this case was dealt with by the court was rather like a traditional tort action within the Private Law model. The central question in this case - "Has the claimant been mistreated on racial grounds?" - was about Mr. Singh's right not to be discriminated against on racial grounds rather than about adequate representation of his ethnic group at the relevant level of the defendant's workforce. Statistical evidence about a racial imbalance was not, after all, held to be decisive. Such evidence can become decisive when the tribunal regards the two conflicting contentions about racial motivation of the employer to be equally probable. 101 In this case, when an inference about the employer's racial motivation is validly to be drawn, it can only be based on his "similar facts" or a "system" rather than on anything like an integration of ethnic minorities. 102 This is so because here, as in ordinary civil adjudication, monocentric in its character, the rights of both parties and the risks of error affecting

101 Cf. Gardner, id., at p.185.

them must be treated equally. Be the policy of ethnic integration as noble as it can ever get to be, it cannot constitute a legally adequate basis for judicially imposing risks of error. Risk-imposition can only be justified on the grounds of principle, not policy.\textsuperscript{103} Statistics showing ethnic minorities at a particular workplace as under-represented do not of themselves justify any inference about racially motivated employment policy. For this explanation to be adopted within the Private Law system of adjudication, it must be more probable than any other possible explanation.\textsuperscript{104}

It might still be asked, what are the interpretive credentials of the opinion that direct discrimination belongs to the Private Law type of adjudication? The answer to this question is that if the law of direct discrimination were really Public, and its rational core were not the direct rights and obligations of the parties in dispute, but a wider policy of ethnic integration, the dependency of this policy's

\textsuperscript{103} As a matter of policy, it is unclear whether an employer operating an ethnic monitoring programme as part of his policy of "equal opportunities" should carry an aggravated risk of error in relation to his existing or non-existing racial motivation. Those who do not operate such a programme must seemingly be rather more suspicious of discriminating.

\textsuperscript{104} Gardner (supra n.96, at p.185) is right in arguing that as a result of Singh, "... alternative allegations of direct and indirect discrimination become more comfortable bedfellows", but the differences in inferences that can be drawn from statistical evidence in these different cases should not be left unnoticed.
implementation on personal racial motivations of employers would contribute very little to its rationality.\textsuperscript{105} It is the legal framework of indirect discrimination that, belonging to the Public Law, really fits this policy. Within this framework of comprehensive "social engineering" statistical evidence should play a far greater role.\textsuperscript{106} Here, a different dispensation of the risks of error, one which tends to maximise the overall amount of correct decisions in the long run of cases and contributes to the ethnic balance of the workforce, might well be justified.

Elements of both Public and Private Law, adjudication and administration, policy and rights, may sometimes be combined in a single decisional framework. An example can be found in decision-making of the Panel on Take-Overs and Mergers. This body,

"[l]acking any authority de jure, ...exercises immense power de facto by devising, promulgating, amending and interpreting the City Code on Take­overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon

\textsuperscript{105} Moreover, as social science research indicates, some employers may even not be aware of subtle discriminatory factors affecting their decisions. See Willborn, supra n.96, at p.321, n.1 and the sources mentioned therein.

\textsuperscript{106} See Willborn, supra n.96, at p.326-27. I assume that the possibility of explaining the indirect discrimination doctrine as a mere presumption of racially motivated employment policy (supra n.96) ought to be rejected. See id., at p.329.
The decisions have become in principle subject to judicial review which, however, can only be exercised ex post facto by granting a declaratory relief. One of the main responsibilities of this body is to protect dispersed shareholders of large companies who, in the event of take-over, are incapable of presenting a position of a single owner as to the price to be paid for their respective holdings. Being unaware of the position of other shareholders as to the bid price, and fearful of the possibility of being "frozen out" as part of the minority which would substantially reduce the value of his holdings, a single shareholder finds himself under a very strong pressure to tender his shares even when he considers the bid price to be low. As the same is true about most of his fellow shareholders, none of them knowing the position of another and the speculations of other shareholders about his own view of the bid price, the decision to tender at a low price becomes "a self-fulfilling expectation", one

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108 Datafin, id.
which can rationally be adopted at the first place.\textsuperscript{109} When a take-over bid is partial, i.e., for less than 100\% of the target's shares, the situation of dispersed shareholders is even worse. This leads to the problem of unequal treatment and distorted choice of private shareholders,\textsuperscript{110} and it is one of the objectives of the Panel to protect their rights.\textsuperscript{111} The Panel must also consider the more general economic impacts of take-overs and amongst them the influences exerted upon the stock market by the limitations imposed by the City Code on the freedom of contract. What should be the Panel's risk-related preferences when its decision, affecting both individual rights and the stock market, is to take place under uncertainty? Should it pay regard to the interests of particular shareholders or should it maximise the average amount of protection given to

\textsuperscript{109} See L.A. Bebchuk, Toward Undistorted Choice and Equal Treatment in Corporate Take-Overs, (1985) 98 Harv.L.R. 1693, 1724-25. This article also reveals some inadequacies in the City Code.


target shareholders in general? The Panel is free to devise its own ways of procedure and fact-finding in settling complex issues and there is no clear answer to these questions.

How should these and other complexities be dealt with from the risk-distributive point of view? Fragmentation of different frameworks of administrative decision-making which singles out more concrete organizing categories (such as "racial integration", "immigration control", "land-use planning", "control of corporate take-overs", "detention and treatment of criminal suspects", etc.) seems to be the most promising way of reducing complexities.112 Each category might reveal and justify its own principles of risk-distribution. This interpretive task of constructing, let alone applying, these principles in varying administrative contexts is uneasy.113 But, as had once been remarked by a philosopher who also was a distinguished practitioner of public administration,

"If we have to find our way over difficult seas and under murky skies without compass or chronometer, we need not on that account allow the ship to drive at random."114

112 See Harlow & Rawlings, supra n.5, at p.256.

113 Harlow & Rawlings, supra n.5, have adopted a fragmentary approach coupled with a discussion of some more general issues of administrative law. The structure of their approach can, perhaps, constitute an example of manageable fragmentation.


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