

## AGAINST 'FREE PROOF'\*

*Alex Stein\*\**

### I. Introduction

Consider the following statements, which describe the Anglo-American laws of evidence:

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 a 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.<sup>1</sup>

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.<sup>2</sup>

Whether these and similar statements adequately portray the law is, I think, an open question.<sup>3</sup> Another question arising in connection with these statements is of a normative nature. Is there room for evidentiary rules that will constrain the power of adjudicators to resolve disputed issues of fact? This question will be discussed below.

\* Based on A. Stein, "The Refoundation of Evidence Law", (1996) 9 Can. J. L. & Juris. 279, 279-284; 289-322 (hereafter: REL), where one can find a more detailed account of the author's view on the subject.

\*\* Faculty of Law, The Hebrew University of Jerusalem.

1 J. Heydon, *Evidence: Cases and Materials* (2nd ed., 1984) 3.

2 W.L. Twining, *Rethinking Evidence* (1990) 197.

3 See REL, 322-342.

## II. *The Idea of "Free Proof"*

Promulgated by Jeremy Bentham and his followers,<sup>4</sup> this idea opposes legal regulation of judicial<sup>5</sup> fact-finding. In its contemporary form, which largely corresponds to the prevailing evidence doctrine, this idea holds the following:

Subject to —

- (1) values overriding decisional accuracy on exceptional grounds (such as protection of state secrets and confidentiality of certain communications, usually protected by evidentiary privileges);
- (2) evidentiary incentives fostering socially beneficial conduct (such as formation of certain and predictable contracts, promoted by the "parol evidence" rule; or proper treatment of suspects by the police, promoted by the rules which exclude illegally obtained evidence);
- (3) freestanding process values;<sup>6</sup>

4 See J. Bentham, *Rationale of Judicial Evidence*, vol. V, (1827) 477-494; C.F. Chamberlyne, "The Modern Law of Evidence and Its Purpose", (1908) 42 Am. L.R. 757; Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter", in *Lectures On Legal Topics, 1921-1922* (1926) 89, at 96-104; J. H. Wigmore, *A Treatise on The Anglo-American System of Evidence in Trials at Common Law* (3rd ed., 1940) §8c (endorsing many of Bentham's claims, but not supporting a wholesale abolition of evidentiary rules); K.C. Davis, "An Approach to Rules of Evidence for Non-Jury Cases", (1964) 50 A.B.A.J. 723, at 726; K.C. Davis, *Administrative Law Treatise* (1980) §16:2. For discussions of this idea see W.L. Twining, *Theories of Evidence: Bentham and Wigmore* (1985) and A.D.E. Lewis, "The Background to Bentham on Evidence", (1990) 2 *Utilitas* 195.

5 I use the terms 'judges' and 'judicial' generically, as referring both to judges and jurors.

6 Procedural justice is not invariably treated as instrumentalist. To certain procedural arrangements, such as the right to be heard and present evidence, people may be entitled deontologically. This may explain, for example, the accused's right to cross-examination, when the admissibility of a testimony incriminating him is conditioned upon providing him an adequate opportunity to exercise this right. Evidence excluded under this condition would be excluded not because it is devoid of probativity; it would be excluded because to force a person into a criminal trial without providing him a fair opportunity to confront adverse witnesses is devoid of political warrant. Findings that could be made on the basis of unexamined testimonial accounts could be accurate, but their accuracy is not the issue. The issue is whether the community where criminal trials are allowed to be conducted without full participation of the accused is politically attractive. See R. Summers, "Evaluating and Improving Legal

- (4) provisions preventing undue prejudice; and
  - (5) social preferences in the allocation of the risk of error, espoused by the burdens and standards of proof;
- inferences to be drawn by judges from evidential sources in deciding about legally material events (as prescribed by the relevant substantive law) should not be governed by the law. Validity of these inferences is a matter of evidential relevancy and weight, as determined by common sense, logic and general experience.

Under the prevailing evidence doctrine, Freedom of Proof is a normal and, indeed, proper regime for conducting adjudicative fact-finding missions. This freedom is surrounded, but not interfered with, by evidentiary rules and principles laid down by the law, which promote a number of important, but not inferential and therefore extrinsic objectives of judicial fact-finding. Epistemic rationality both cannot and should not be controlled by the law. It is the law itself, to the extent that its reliance on empirical facts is concerned, that ought to be

Process — A Plea for 'Process Values', (1974) 60 Cornell L.R. 1; M.D. Bayles, "Principles for Legal Procedure", (1986) 5 Law & Phil. 33.

As pointed out by Lawrence Tribe: "The right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one. ... For when the government acts in a way that singles out identifiable individuals — in a way that is likely to be premised on suppositions about specific persons — it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*". L. Tribe, *American Constitutional Law* (1978) 503-504.

There is, however, a good reason to be skeptical about freestanding procedural rights. Let it be assumed, counterfactually, that there is no epistemic fallibility problem and that we live in a world of infallible judges. Would there be room in this world for procedural rights that are valuable intrinsically rather than instrumentally? I believe this question should be answered in the negative. If so, the right to be heard seems to be related more closely to our epistemic fallibility than it is related to our moral virtuousness.

Procedural rights may also be taken (rather exotically) as a source of some indispensable psychological satisfactions. See, e.g., D. Leonard, "The Use of Character to Prove Conduct", (1986-87) 58 U. Colorado L.R. 1 (offering a catharsis-based explanation to the right to adduce evidence highlighting one's character). It is, however, an empirical question whether they are actually taken in this way. Whether the taxpayers' subsidy of litigation should cover also psychological (or otherwise ritualistic) satisfactions of the litigants is another question casting serious doubts upon the "freestanding rights" approach.

subordinated to the canons of epistemic rationality. Judges do not need any special rules that will tell them how to resolve disagreements about empirical facts. Armed with experiential knowledge, which proved to be creditworthy, they will adequately resolve such disagreements by relying upon evidence and their cognitive skills alone.

Judicial determination of evidential relevancy and weight is thus contended to be a purely epistemic activity. Having “no mandamus to the logical faculty”<sup>7</sup> (and presumably to the epistemological faculty as well), law should exert no control over this activity. There is, therefore,

[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.<sup>8</sup>

This, however, is not the case with disagreements about values, vastly unsusceptible to an objective solution. To bestow upon individual judges the power of making legally enforceable value-preferences would amount to licensing judicial dictatorship. Enforceable value-preferences can only be determined by social agreement, namely, by the law. Law, after all, has proved to be the only viable, albeit imperfect, common denominator of society which is both liberal and pluralist.<sup>9</sup>

This approach explains the differential treatment afforded by the supporters of free proof to the substantive law, on the one hand, and to the law of evidence, on the other. If evidential and substantive rights were derived from a basically similar moral calculus, then, contrary to what most legal systems actually do, we should be reluctant to leave evidential matters in the hands of individual judges. To leave judges with this discretion would be identical to licensing them to resolve questions of contract, crime and tort, and even constitutional questions, by applying their own value-preferences.<sup>10</sup> For well-known reasons, legal systems in established democracies tend not to provide judges with this licence. This licence is believed to be undemocratic, unlike the

7 J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) 314n.

8 L.J. Cohen, “Freedom of Proof”, in W.L. Twining (ed.) *Facts in Law*, (1983) 16 A.R.S.P. 1, at 21.

9 Cf. Joseph Raz, *The Morality of Freedom* (1986) 181.

10 This refers to a “strong discretion”, according to the taxonomy developed by R. Dworkin, *Taking Rights Seriously* (1977) 31-39.

licence to decide evidential matters, with which judges are commonly provided. For that purpose, the supporters of free proof distinguish between matters that are purely evidential and thus can be settled by applying the prevailing epistemic standards alone, and matters that require value-judgments similar to those situated in the domain of substantive law. These latter matters are typically classified as “extrinsic” to fact-finding.

Freedom of Proof thus rests upon two assumptions, one explicit and another implicit. Originating from the general faith in human epistemic competence, its first (explicit) assumption holds judges capable of conducting rational evidence-based reasoning about facts.<sup>11</sup> This assumption, upon which most people habitually proceed in their practical affairs, will not be questioned by this paper. It will be taken here as practically justified. Practical reasoning would be thoroughly impoverished — and, indeed, halted in indecision — if this assumption be eroded by any doubt cast upon its philosophical foundations.<sup>12</sup>

Another, implicit, assumption forming the foundations of free proof is this:

Evidential relevancy and weight (also described as ‘probative value’ of the evidence) both can and should be determined by judges without resorting to value-preferences.

Fact-finding and value-preferences are thus held to be segregated. Values, to the extent that they are recognized by the law, may, of course, affect the scope and consequently the outcomes of judicial inquiries into contested facts, but they should contain no precepts for judicial evaluation of evidence. The inner rationality of that latter function is and should remain purely epistemic.

11 Cohen, *supra* n. 8, at 10ff.

12 See L.J. Cohen, *The Probable and the Provable* (1977) ch. 24. For further discussion of this assumption, see Twining, *supra* n. 2, at ch. 4. For its challenges based upon cognitive theory, see D. Kahneman, P. Slovic & A. Tversky (eds.), *Judgment Under Uncertainty: Heuristics and Biases* (1982). For its recent legal-philosophical challenges, see D. Nicolson, “Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse”, (1994) 57 M.L.R. 726; M.L. Seigel, “A Pragmatic Critique of Modern Evidence Scholarship”, (1994) 88 NW. U. L. R. 995.

As previously, I will label this assumption by the name “the assumption of separation”.<sup>13</sup> Traditional expository writings on the law of evidence not only maintain this assumption, but also tend to strengthen it even further. This is done as follows:

- (1) by portraying evidentiary rules as exceptions to Freedom of Proof, which, in turn, are subject to their own exceptions that reinstate this freedom. This marginalizes the legal, i.e., value-motivated, interference with the allegedly empirical reasoning followed by judges;
- (2) by dichotomously dividing the already exceptional rules into two distinct (Wigmorean) categories:
  - (a) rules based upon ‘auxiliary’ or ‘probative’ policies, justified on empirical grounds (that is, by experience);
  - (b) rules motivated by ‘extrinsic’ policies, i.e., by the *exceptionally* strong value considerations which set aside decisional rectitude.

This attains further marginalization of the role played by values in judicial fact-finding. A vivid example of this marginalization can be found in Dale Nance’s influential article, dedicated to the “best evidence principle”. Professor Nance writes:

More generally, this Article demonstrates that, putting aside the rules, such as those governing privileges, which are said to serve extrinsic social policies, the remaining evidentiary rules are more plausibly attributable to the epistemic concerns of a tribunal ... This operationalized meaning, which can be said to refer to the evidence that is “epistemically best”, is the primary focus of our attention.<sup>14</sup>

The assumption of separation is obviously essential for sustaining Freedom of Proof. To support Freedom of Proof without endorsing this assumption is to subscribe to a dubious theory of political legitimacy that authorizes judges to adjudicate cases by invoking their private values. This theory is unattractive, and it should come as no surprise that none of the free proof adherents has ever advocated it.

<sup>13</sup> Stein, REL, at 296ff.

<sup>14</sup> See D. Nance, “The Best Evidence Principle”, (1988) 73 Iowa L. R. 227, at 229; 240.

The assumption of separation will now be brought to scrutiny by focusing upon judicial determination of evidential weight. Determination of relevancy need not be discussed because it raises no special problems which would not be involved in determining weight. Under the conventional doctrine, evidence is relevant when it is potentially weighty, i.e., when it is *prima facie* capable of supporting some legally significant hypothesis by increasing its probability.<sup>15</sup> Determination of evidential weight, i.e., of the actual extent to which evidence supports its hypothesis, is therefore the only judicial function that needs to be examined. The main question probing the validity of the assumption of separation can thus be defined with greater particularity:

Can judicial determination of evidential weight be justified by purely epistemic criteria?

Note, that this question is of normative nature and that it refers to all decisional parameters that *ought to be* accounted for in judicial determination of evidential weight. This normative question cannot be answered by a simple plain-fact description of existing judicial practices. It would be flawed to attest descriptively: "Judicial determination of weight is a purely epistemic task because judges habitually discharge it without resorting to reasoning other than empirical". The burden to be lifted by any participant in the free proof debate is justificatory in its character. To determine evidential weight without accounting for all factors that need to be accounted for, is to embark upon flawed and thus inherently unjustifiable reasoning.

In what follows, I will demonstrate that the assumption of separation breaks down.<sup>16</sup> Adjudicative fact-finding is saturated by allocations of the risk of error in conditions of uncertainty. Allocation of this risk is thoroughly dependent upon values. As such, it should be regulated by the law, more specifically, by the law of evidence. The law of evidence should confer upon litigants a set of rights against risks, which should assume the form of immunities against judicial impositions of the risk of error. Rights of this kind are, in fact, provided (although not always

15 See Federal Rule of Evidence (USA) (hereafter: FRE) 401; J.L. Montrose, "Basic Concepts of the Law of Evidence", (1954) 70 L.Q.R. 527; R. Lempert, "Modeling Relevance", (1977) 75 Mich. L.R. 1021; P. Tillers, "Modern Theories of Relevancy", in Wigmore, *supra* n. 4, vol. 1A (Tillers Revision, 1983) §37.

16 For full argument, see Stein, REL.

adequately) by the core evidentiary rules, such as “hearsay”, “character” and “opinion”.

Materialization of the risk of error translates itself into an erroneous verdict, which wrongly deprives a person of his liberty or property. Allocation of the risk of error should therefore be regarded as a value-laden decision of distinctively substantive nature. When evidential rights are perceived, as they should be, as immunities against risk of error, the existing discretionary practices in the domain of procedure and the non-discretionism in the area of substantive rights seem to be a living contradiction. In a recent article, which (amongst other things) suggested to reinterpret the law of evidence into a web of rights against risks, I have argued that this contradiction is real.<sup>17</sup> Discretionism in the area of procedure and evidence and non-discretionism in the area of substantive law are mutually inconsistent. Evidential discretionism is as dangerous to the liberal-democratic values as discretionism in the area of substantive law.<sup>18</sup>

### III. *The Assumption of Separation*

The assumption of separation breaks down for a relatively straightforward reason. Evidence is scarce. In any trial, at least some of the relevant evidence is not available. Judges must consequently settle disputed issues of fact under incomplete information. Their reasoning would thus have to account for the unrealized forensic possibilities by attempting to resolve the following counterfactual issue:

17 Stein, REL.

18 Scholars paying less attention to the risk-of-error problem may still favor (wrongly, in my opinion) the demolition of formal structures in the area of evidence law. See, e.g., M.R. Damaska, *Evidence Law Adrift* (1997). Those who adopt Bentham's utilitarian approach, which perceives the law of procedure and evidence as aiming solely to maximize the amount of correct decisions, would also support evidential discretionism. Because facts of each case are unique, particularized rulings on evidentiary matters will promote decisional accuracy far better than general rules. The utility principle will thus allow the risk of error to be allocated by judges, with no immunities granted to individual litigants. As for the risks regarded as especially harmful, such as conviction of an innocent person, they should be avoided — each risk individually — on utilitarian grounds. See G. J. Postema, *Bentham and the Common Law Tradition* (1986) 341-357; 403-408; W.L. Twining, *Theories of Evidence: Bentham & Wigmore* (1985) 47ff., 98-100.



Could the decision be different, if more evidence (and thus more information) were available, or if the existing evidence were subjected to a more rigorous and extensive examination?

Questions like this can never receive determinate answers. This is so because generalizations to be relied upon in counterfactual reasoning can be derived only from the possible, rather than actual worlds. The applicability of such generalizations to individual cases would thus be open to unceasing questioning aimed at destroying, constructing and reconstructing judicial inferences. To avoid endlessness, this questioning would have to be terminated at some point. But to terminate it at any given point is to make a strategic choice, rather than epistemic decision. To terminate it at any given point is to decide strategically about the bounds of the judicial inquiry, rather than to decide epistemically about its contents. This is especially true in criminal cases, where the unrealized forensic possibilities are allowed to cast reasonable doubts upon the defendant's guilt.<sup>19</sup> The key question to be resolved in a criminal trial is whether the defendant is guilty as charged, not whether he is guilty as charged on the assumption that all the required information is contained in the existing evidence.<sup>20</sup>

This is the place to distinguish between *probability* of the litigated facts and the evidential sufficiency or *weight* that marks every probability judgment. Probability is determined *on the basis* of the existing evidence, without being affected by the broadness, or the resiliency, of its underlying evidential base which depends on the extent of the judicial inquiry. This latter factor, which (following Keynes<sup>21</sup>) I will denote as 'weight', refers to the sufficiency of the evidence upon which the probability judgment is made. Probability can thus be perceived as derived from the contents of the evidence upon which it was determined, but not from the relative amount of that evidence. Decisions concerning the latter, i.e., decisions about *sufficiency* of the evidence for delivering a verdict, are not probability decisions. Weight, in other words, is a

19 In civil cases, missing evidence may be left unaccounted for, if its absence cannot be attributed to one of the parties in dispute. This will allocate the risk of error in a roughly equal fashion. See A. Porat & A. Stein, "Liability for Uncertainty: Making Evidential Damage Actionable", (1997) 18 Cardozo L.R. 501.

20 See L. J. Cohen, "The Role of Evidential Weight in Criminal Proof", (1986) 66 B.U.L.R. 635, at 636-37.

21 J. M. Keynes, *A Treatise on Probability* (1st ed., 1921) 77.

function of the extent to which information relevant to the probability judgment is specified by the evidence. Some probability judgments may thus be weightier than others. Two probability judgments pointing to the same conclusion may carry different weights. Evidence can have no weight *per se*; it is only arguments *from the evidence*, which move the inferential process forward, that can carry greater or lesser weight, depending on the broadness of their evidential bases. As explained by Keynes,

As the relevant evidence at our disposal increases, the magnitude of the probability of the argument may either decrease or increase, according as the new knowledge strengthens the unfavourable or the favourable evidence; but *something* seems to have increased in either case, — we have a more substantial basis upon which to rest our conclusion. I express this by saying that an accession of new evidence increases the *weight* of an argument. New evidence will sometimes decrease the probability of an argument, but it will always increase its “weight”. [W]eight, to speak metaphorically, measures the *sum* of the favourable and unfavourable evidence, the probability measures the *difference*.<sup>22</sup>

This fundamental distinction is applicable not only to mathematical, but also to non-mathematical probabilities, such as those employed in adjudication.<sup>23</sup> By following this distinction, we can see that any probability judgment (e.g., a verdict holding that the accused’s guilt was established beyond a reasonable doubt), is conditionalized, as a matter of its cogency, upon its evidential base. Some probability judgments should accordingly be regarded as more cogent than others.

Judicial reasoning about disputed facts should therefore be perceived as operating within two dimensions (probability and weight) rather than within one dimension only (probability). Decisions made within the probability dimension have to conform with the controlling standards of proof, such as “proof beyond all reasonable doubt”, if the case is criminal, or “proof by a preponderance of the evidence”, if the case is civil. As already mentioned, the need to have these standards prescribed by the law is not contested by the supporters of free proof. The support-

22 Keynes, *ibid.*, at 77, 84.

23 See A. Stein, “Judicial Fact-Finding and the Bayesian Method: The Case for Deeper Scepticism About their Combination”, (1996) 1 *Int. J. Evidence & Proof* 25.

ers of free proof accept this form of fact-finding regulation because it reflects the societal preferences in the allocation of the risk of error, which ought to be determined democratically rather than by judges alone. As commonly accepted, judges are not in a privileged position for determining such preferences.

However, according to the free proof supporters, this should not be the case with decisions as to whether the evidence satisfies the controlling standard of proof in a particular case. The supporters of free proof would leave such decisions in the hands of individual judges. If they were to use the "weight-probability" terminology, they would say that no regulation is required in the dimension of weight. What probability is yielded by such and such evidence — so they would say — is a distinctively epistemic matter over which law should exercise no control.

But what if we told them, as I did now, that judgments pointing to the same probability may have different weights, depending on the scope of their underlying judicial inquiries and the amount of evidence gathered thereby? Probability judgments can validly be rendered by following the prevailing epistemic standards, so long as their background informational conditions are taken as given. This, however, is not the case with decisions concerning the adequacy of the given informational conditions. In practical reasoning, the same informational conditions may be adequate in some cases, but not adequate in others. This is so because full information is never available, and because judicial inquiries must be stopped and thus hedged at some point. Any such hedging is a strategic rather than epistemic choice that entails allocation of the risk of error.

It does not take much to show that hedging is bound to take place in any judicial inference drawn from any piece of evidence. Propositions referring to evidential 'weight' or 'credibility' should always be understood as referring to evidential *arguments* and not to evidential sources. Evidential sources have no weight; they either exist or do not exist. It is only the arguments that transform evidential sources into evidence that can carry weight by being more or less cogent. To say, for example, that 'Testimonial account T given by W about H is credible', would make no sense, unless this statement is uttered elliptically (as typically is the case) and thus argues in favor of some implicit argument which transforms T into H.<sup>24</sup> The cogency of this argument is supplied by its

24 Such arguments have been labeled and dealt with as "transforming arguments" in Stein, REL.

supporting reasons, ultimately grounded in some epistemological theory. In judicial fact-finding, the controlling epistemological theory is that of logical empiricism.<sup>25</sup> Therefore, when a person argues from T to H by contending that his argument (not T!) is sufficiently 'weighty' or 'credible', he ought to be understood as implying that he has empirically sufficient reasons for inferring H from T.

Evidential weight should accordingly be understood as a function of reasons brought in support of the relevant evidential argument. Always going beyond the assertive contents of a single evidential source, these reasons rely upon numerous sources of evidence, including general experience. These reasons are invariably 'ampliative' in their nature. They always amplify the existing information rather than merely reiterate it (in the trivial sense or by statistical enumeration) and apply it deductively.<sup>26</sup> Pointing to the non-demonstrable, these reasons entail the usual problem of inductive uncertainty and their outcome is bound to be probabilistic.<sup>27</sup> They are also bound to be incomplete, and not just because of the usual inductive uncertainty problem. Full examination of these reasons will require information, time and resources that are never available in judicial trials.<sup>28</sup>

#### IV. Applications

Regulation of judicial fact-finding may operate in three key fashions, which will now be outlined with regard to criminal cases.<sup>29</sup>

First, given that judicial inquiries are bound to be hedged, inquiries that involve unacceptable risks should not be allowed *ab initio*. This prohibition should be implemented by excluding evidence which gives rise to an unacceptably risky inquiry. It may justify, on perfectly rational grounds, the inadmissibility of hearsay statements, of character evidence and of scientifically controversial data, when adduced *against the accused*.

25 See Twining, *supra* n. 2, at chs. 3 & 4.

26 The term 'ampliative induction' is taken from L.J. Cohen, *An Introduction to the Philosophy of Induction and Probability* (1989) 1-4.

27 See Cohen, *ibid.*, at §1.

28 See Stein, REL, at 309-311.

29 For discussion of the same issue with regard to civil cases, see Stein, REL, at 333-342.

Under the hearsay rule, an out-of-court statement cannot be admitted as evidence to the truth of its contents.<sup>30</sup> Subject to numerous exceptions, such evidence is excluded for lack of cross-examination. To the extent that this rule works in favor of the accused, it can be justified as an immunity from the risk of error. Its justification can easily be understood by unfolding the credibility-related inferences relied upon by the proponent and the opponent of a hearsay statement. Take a (sadly) typical criminal case where, for some unidentified reason, a key prosecution witness failed to testify in court after incriminating the accused out of court (in front of the police or at a grand jury hearing).<sup>31</sup> Scarcity of information characterizing cases like this would result in the applicability of at least two generalizations:

- (1) People uninterested in the outcome of an investigation usually tell the truth;
- (2) People interested in the outcome of an investigation might promote their interests by resorting to falsehood.

The validity of these generalizations, as applicable or inapplicable to the case at hand, can never be fully examined. At some point, judicial inquiry into this issue is bound to be hedged. The accused's objection to the admission of the above statement would consequently run as follows:

- (1) He was not given an opportunity to fully cross-examine the witness at his trial;
- (2) Judges have therefore to hypothesize about what could have happened, if he had fully cross-examined this witness;
- (3) If he had fully cross-examined this witness, new information, which could thus be obtained, might have brought his case under the second, exculpatory generalization.

30 See FRE 801. For a broader definition, adopted in England, see *Wright v. Doe d. Tatham* (1837) 7 A & E 313; *R. v. Kearley* [1992] 2 All ER 345.

31 In Israel, such statements would usually be admissible under sec. 10A of the Evidence Ordinance [New Version] 1971.

Putting aside the exceptional cases covered by justifiable exceptions to the hearsay rule,<sup>32</sup> I can envisage no sustainable response to this objection.<sup>33</sup>

Now, take the rule which excludes prior convictions and other reprehensible traits of character as evidence against the accused. Any argument built upon such evidence would entail a generalization that attributes some recurring causal relationship to personality and action. Applicable to some cases, but not to others, such generalizations are not susceptible to individualized testing. Their individualized applicability to a case at hand can never be adequately ascertained. Because any judicial inquiry into this issue is bound to be hedged, it is, in my view, rightly regarded as too risky to get started in the first place. The accused should be granted an immunity from the risk of error attendant upon character evidence.

Let me now turn to the well-known controversy about the admissibility of novel scientific findings, not yet approved of by the scientific community. The famous decision in *Frye v. United States* laid down the rigid standard of 'standing and scientific recognition' as a precondition for admitting scientific evidence.<sup>34</sup> Much criticized and not always followed by judges,<sup>35</sup> this standard had, nonetheless, survived until 1993, when it was repealed by the Supreme Court of the United States.<sup>36</sup> Preceded by a questionable dictum about scientific rationality,<sup>37</sup> the new standard set by this Court requires that scientific evidence be susceptible to empirical testing and falsifiability. From now onwards, 'standing scientific recognition' *per se* will affect the 'weight' rather than admissibility

32 Those that are based upon functionally equivalent substitutes to cross-examination, which would secure the testability of the disputed statement: see E. Swift, "A Foundation Fact Approach to Hearsay", (1987) 75 Calif. L.R. 1339.

33 See Stein, REL, at 312-316. Hebrew speakers will find more on this issue in A. Stein, "Hearsay Statements as Evidence in Criminal Trials: 'Is' and 'Ought'", (1992) 21 *Mishpatim* 325, and in A. Stein, "The Admissibility of Out-of-Court Statements as Evidence in Criminal Trials: On the New Bill, New Ideas, and the Same Old Tenets", (1993) 10 *Mechkarei Mishpat* 157.

34 *Frye v. United States* 293 F. 1013 (1923).

35 See P.C. Giannelly, "The Admissibility of Novel Scientific Evidence. *Frye v. United States*: A Half-Century Later", (1980) 80 Colum. L.R. 1197.

36 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S. Ct. 2786 (1993).

37 The Supreme Court had seemingly adjudicated the notorious Popper-Kuhn controversy in the philosophy of science favorably to Karl Popper. See *ibid.*, at 2796-2797.

of scientific findings.<sup>38</sup> In England, without explicitly endorsing *Frye*, courts have displayed a fair measure of conservativeness towards scientific findings that are yet to be approved of by the relevant scientific community.<sup>39</sup> In Israel, the admissibility principle is at least as liberal as in the United States after *Daubert*.<sup>40</sup>

Part of this controversy could be eliminated if its stakes were properly defined. Fact-finding in adjudication is concerned with an allocation of the risk of error. Allocation of this risk cannot be dependent upon judicial forecasting of the success (or failure) of the ongoing scientific evolution or revolution.<sup>41</sup> Scientific evidence failing to satisfy the *Frye* standard should therefore always be excluded when offered against the defendant in a criminal case. Such evidence should be excluded because there would be no *individualized* way of relating it, rather than its negation, to the case at hand.<sup>42</sup>

The inevitability of hedging makes some inquiries unacceptably risky in comparison with inquiries otherwise directed to the same end. When the favored inquiries are available, evidence opening them up becomes *preemptive*. This evidence takes priority over evidence leading to judicial inquiries that are unacceptably risky. Evidence marked as inferior would accordingly be excluded; also, when one of the litigants is responsible for thwarting a favored inquiry, inferences adversely affecting him may be prescribed as mandatory and thus preempt other competing inferences.

Judges should therefore follow the 'best evidence principle', which would exclude secondary evidence when better evidence is available. This principle would ascribe preferability not merely to an original

38 *Ibid.*, at 2797. For a revealing discussion of the problems posed by *Daubert*, see R.J. Allen, "Expertise and the *Daubert* Decision", (1994) 84 J. Crim. L. & Criminology 1157.

39 See A.A.S. Zuckerman, *The Principles of Criminal Evidence* (1989) 62-69.

40 See, e.g., *Aflalu v. State of Israel*, (1980) 34(iii) P.D. 56; *Brooks v. State of Israel*, (1989) 43(iii) P.D. 441.

41 Because judges are both institutionally and *de facto* incompetent to resolve scientific controversies, they can only defer to experts. See Allen, *supra* n. 38; Zuckerman, *supra* n. 39, at 63-64.

42 For another skeptical view concerning the applicability of *Daubert* to evidence incriminating the accused see M.A. Berger, "Procedural Paradigms for Applying the *Daubert* Test", (1994) 78 Minn. L.R. 1345, at 1352-1363. Unlike myself, Professor Berger stops short of arguing that *Frye* should be reinstated for this limited (but evidently important) purpose.

document, as opposed to its duplicate, but also to a testimony, as opposed to an out-of-court statement given by the same witness.<sup>43</sup> Although many such statements are already excluded under the hearsay rule, this expansion of the 'best evidence' principle would not be redundant. It would apply to *admissible* hearsay statements. Any such statement should be excluded if the person who made it is available and thus can be called and cross-examined as a witness. This restriction should apply to both the prosecution and the accused.

Furthermore, in virtually every case, the accused will be the best witness to testify about his guilt or innocence. His testimony should thus be regarded as preemptive in relation to his other evidence. To exclude this evidence when the accused abstains from testifying would practically abolish the right of silence, which would be highly controversial. At the same time, the accused's refusal to take the stand should normally lead to adverse inferences, which will strengthen the prosecution's case.<sup>44</sup>

Relatedly, when one of the prosecution witnesses does not testify as a result of violence, intimidation or other improper means exerted by (or on behalf of) the accused, any prior statement made by this witness should be admitted as evidence against the accused. The latter's objection to the admission of this statement, ordinarily sustainable under the hearsay rule, would consequently be preempted. Apart from that, the accused's resort to improper means should be used as evidence supporting his conviction.<sup>45</sup> These principles would foster admission of the best evidence.

43 See Nance, *supra* n. 14. Cf. M.L. Seigel, "Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule", (1992) 72 B. U. L.R. 893 (a more radical proposal to replace the hearsay rules by a broad best evidence principle).

44 This approach is taken by the Israeli Law of Criminal Procedure [Consolidated Version], sec. 162. In the United States, this approach would require an abolition of *Griffin v. California*, 380 US 609 (1965).

45 Provided that his actions against the witness have been proven beyond reasonable doubt (as required, e.g., in England, in *R. v. Acton Justices, Ex Parte McMullen and others*; *R. v. Tower Bridge Magistrates' Court, Ex parte Lawlor*, 92 Cr. App. Rep. 98, 104 (1991)). In the US, admissibility conditions can be proven by a mere preponderance of the evidence: see *Bourjaily v. United States*, 483 US 171 (1987); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796, n. 10 (1993). Generally adequate, this rule should become more differentiated. My proposal largely corresponds to FRE 804(b)(6) and to the argument made by R.D. Friedman, "Confrontation and the Definition of Chutzpa", in this issue on p. 506 (except for the standard



Finally, in some cases, no hedging may be allowed until the existence or the non-existence of some specified information is adequately ascertained. Determination of facts not preceded and ultimately not supported by such an inquiry may also be considered an unacceptable risk. This risk-allocating strategy may produce different corroboration requirements for specified kinds of cases, e.g., for cases involving accomplice testimony, identification evidence or confessions. It may also produce more demanding specificity standards for informational bases upon which judicial evaluations of the relevant probabilities will be conditionalized. For example, statistical inference alone, even when properly determined, may not be regarded as sufficient for conviction.<sup>46</sup>

As demonstrated above, exclusionary, preemptive and corroborative strategies that allocate risk of error can explain at least some of the existing evidentiary rules. If these strategies be implemented across the board as general decisional standards, the legal control over judicial evaluations of weight would be tightened up most significantly. It would affect every single inference made under uncertainty by the triers of fact. This *weight-controlling* regulation of fact-finding would thus work together with the *probability-controlling* and *finding-controlling* regulation, as exhibited by the existing standards and burdens of proof. The viability of this regulatory scheme I have demonstrated elsewhere.<sup>47</sup>

of proof requirement, which, under the American law and on Friedman's account, is considerably less exacting). In Israel, the disputed statement would be admitted under even less stringent conditions set by sec. 10A(b) of the Evidence Ordinance [New Version] 1971.

46 Cf. *State of Connecticut v. Skipper*, 637 A. 2d 1101 (1994).

47 See Stein, REL, at 322-342.