
Evidence Law and the Jury: A Reassessment

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The common law of evidence is counterintuitive because it seeks to facilitate the search for truth by regulating fact-finders' access to and evaluation of evidence. Since truth seems most likely to emerge when adjudicators reason freely from all available information, this puzzling strategy of seeking truth through evidentiary regulation demands some explanation. The orthodox explanation is that evidentiary regulation functions as a form of judicial control over the jury. Because juries are untrained, non-professional adjudicators, they are said to lack the competence to evaluate evidence. On this view, evidence rules are primarily directed at constraining jury decision making and preventing jury error. This jury-centred view has been criticized, and scholars have advanced other explanations for truth-seeking evidence rules. Some suggest that evidence law operates chiefly to promote the search for truth within the context of the adversary system, while others contend that evidence rules are primarily directed at managing the risk of witness dishonesty.

This article examines the claim that evidence law represents a form of jury control, and also considers some competing explanations for evidence rules. The author argues that no single principle explains the law of evidence. A complex set of explanations is needed to account for the historical origins of the rules and to justify them analytically. Moreover, the salience of these various explanations can only be judged in particular doctrinal contexts. Jury-related rationales are most persuasive where there are solid reasons to believe that juries have trouble evaluating the particular form of evidence at issue. Social-scientific research does not support the conclusion that juries are generally incompetent adjudicators, but it does indicate that juries struggle with specific types of evidence. Consequently, the question whether a particular evidence rule can be justified on jury-control grounds depends, first, on the specific competencies required to evaluate the evidence and, second, on what is known about jury psychology and behaviour.

Le droit de la preuve en *common law* est contre-intuitif puisqu'il prétend faciliter la recherche de la vérité. En raison de la présomption que la vérité se dévoile plus facilement lorsque les juges sont libres de considérer toute information qui leur est disponible, l'encadrement de la preuve est une stratégie qui demande à être expliquée. L'explication orthodoxe de cette réglementation est qu'elle constitue une forme de contrôle judiciaire du jury. Les jurés étant des juges non-professionnels et sans formation, il est pris pour acquis que ces individus n'ont pas la compétence nécessaire pour évaluer la preuve. Selon ce point de vue, le droit de la preuve a la fonction de contraindre la délibération des jurés et d'éviter les erreurs qui pourraient survenir. Cet accent mis sur le jury a déjà été critiqué et plusieurs auteurs avancent d'autres explications pour l'existence de règles de preuve facilitant la recherche de la vérité. Certains suggèrent que le droit de la preuve existe afin de faciliter la recherche de la vérité dans un système adversarial, tandis que d'autres proposent que ces règles tentent de contrebalancer la malhonnêteté potentielle des témoins.

Cet article examine la théorie voulant que le droit de la preuve représente une forme de contrôle du jury et considère des explications alternatives pour l'existence des règles dans ce domaine. L'auteur soutient qu'un seul principe ne peut expliquer le droit de la preuve. Un ensemble complexe d'explications est requis afin d'exprimer adéquatement les origines historiques de ces règles et de les justifier de façon analytique. De plus, l'importance de chaque explication peut seulement être déterminée dans des contextes doctrinaux spécifiques. Les explications ayant rapport au jury sont persuasives lorsqu'il y a une raison solide de croire que les jurés auront de la difficulté à évaluer un type spécifique de preuve. Les recherches socio-scientifiques entreprises sur le sujet ne soutiennent pas la thèse que les jurés sont généralement incompetents. Conséquemment, la question de savoir si une règle de preuve spécifique peut être justifiée à l'aide d'une explication ayant rapport au contrôle du jury dépend, premièrement, des compétences particulières requises pour évaluer la preuve en question et, deuxièmement, sur ce qui est connu sur la psychologie et le comportement des jurés.

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Introduction

The common law of evidence is a puzzling creation.¹ Although the modern system of evidence law centred on exclusionary standards like the hearsay rule has only existed for about three centuries, it appears to many observers as a relic of obscure origins and questionable value.² Continental lawyers find it difficult to fathom,³ while even scholars within the common law tradition have called for its abolition.⁴ Evidence law, of course, has its defenders, but it seems worthwhile to investigate the doubts that surround the enterprise.

Much of this perplexity can be traced to a central and counterintuitive feature of evidence law: it seeks to rationalize the search for truth by regulating the introduction of proof at trial. Common sense suggests that accurate fact-finding is most likely to result when adjudicators reason freely from all available relevant information. Instead of ensuring free access to and permitting free evaluation of evidence, however, evidence law comprises a set of exceptions to this freedom of proof.⁵ If asked to envision an ideal method for ferreting out the truth about past events, few would imagine a process encumbered by technicalities that conceal relevant information from fact-finders and seek to control their evaluation of the evidence they are allowed to see. But the law of evidence constitutes just such a set of encumbrances. And while some pursue other policies, frequently the rules are directed at serving the search for truth itself. Thus, evidence rules appear apt to impede the very fact-finding they are designed to promote.

Why, then, does our law use evidence rules to advance the search for truth? The classic explanation points to the common law jury, which, it is argued, lacks competence to evaluate certain forms of proof. Unconstrained by evidentiary regulation, it is feared that lay juries would produce an unacceptably high level of

¹ For the purposes of this analysis, “common law” evidence denotes the system of evidence law in force in common law jurisdictions, including its common law, statutory, and constitutional elements.

² The hearsay rule and the three principal rules of criminal evidence—the corroboration, confessions, and character rules—developed primarily in the 18th century. See John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at 179 [Langbein, *Origins*]. See also J.M. Beattie, *Crime and the Courts in England, 1660–1800* (Oxford: Clarendon Press, 1986) at 363-76.

³ See Mirjan R. Damaška, *Evidence Law Adrift* (New Haven, Conn.: Yale University Press, 1997) at 1-2.

⁴ The calls for the abolition of evidence rules from within the common law tradition are reviewed in Alex Stein, “The Refoundation of Evidence Law” (1996) 9 Can. J.L. & Jur. 279 at 279-84. The most celebrated of evidence law’s abolitionist critics is 19th-century utilitarian and reformer Jeremy Bentham, who advocated a “natural” system of procedure defined by the nonexistence of technical rules (*Rationale of Judicial Evidence, Specially applied to English Practice* (London: Hunt and Clarke, 1827) vol. 4 at 7-9).

⁵ See e.g. William Twining, *Rethinking Evidence: Exploratory Essays*, 2d ed. (Cambridge: Cambridge University Press, 2006) at 192, 208-09 [Twining, *Rethinking Evidence*].

error in adjudication.⁶ The extent to which the jury in fact accounts for evidence law, either historically or analytically, is a matter of ongoing debate.⁷ Other explanations have been offered, the most promising of which focus on two other elements of a common law trial: the adversary nature of the proceedings, and the ever-present risk of witness dishonesty.⁸ Like the jury, these trial features are said to explain how the search for historical truth can be facilitated rather than defeated by regulating evidence.

This article is divided into three parts: the first will investigate what is so puzzling about evidence law, the second will examine the jury-centred explanation of this puzzle, and the third will consider alternative explanations. The discussion will demonstrate that there is no unitary solution to the evidence law puzzle. The rules of evidence are bound up with various features of the common law trial, including the jury, the adversary system, and the possibility of witness dishonesty. The salience of these justifications can only be judged in particular doctrinal contexts. Jury-related rationales are most persuasive where there are solid reasons to believe that juries have trouble evaluating the particular form of evidence at issue. The jury is not responsible for all of evidence law, but it is a crucial part of the story.

I. The Evidence Law Puzzle

The rules of evidence are technical in character, which is to say that they depart from everyday methods of determining the truth about past events.⁹ Nowhere is this departure more marked than in those rules that regulate access to or evaluation of evidence based on the theory that such regulation will lead to more accurate results. This approach appears perverse, as it seems to impose “limits which no one, layman or scientist, in search for the truth would tolerate.”¹⁰ For present purposes, this feature of common law adjudication will be labelled “the evidence law puzzle”. The nature of this puzzle will be fleshed out in this part.

⁶ See e.g. John H. Langbein, “Historical Foundations of the Law of Evidence: A View from the Ryder Sources” (1996) 96 Colum. L. Rev. 1168 at 1194 [Langbein, “Historical Foundations”].

⁷ See e.g. Frederick Schauer, “On the Supposed Jury-Dependence of Evidence Law” (2006) 155 U. Pa. L. Rev. 165.

⁸ See e.g. Dale A. Nance, “The Best Evidence Principle” (1988) 73 Iowa L. Rev. 227 [Nance, “Best Evidence”] (advancing an adversary-system explanation); Edward J. Imwinkelried, “The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law” (1992) 46 U. Miami L. Rev. 1069 (positing an explanation centred on witness dishonesty).

⁹ See Damaška, *Evidence Law Adrift*, *supra* note 3 at 11-12.

¹⁰ Edmund Morris Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (New York: Columbia University Press, 1956) at 87 [Morgan, *Problems of Proof*].

A. Truth and Other Policies

Truth finding holds pride of place among the objectives of formal adjudication, and for obvious reasons.¹¹ In general, if there were no dispute about what happened, there would be no trial. Juries, and in their absence, judges, try the facts, and their verdicts represent authoritative statements about past events.¹² The rule of law itself depends on accurate fact-finding, because justice according to law can only be achieved when the rules of substantive law are applied to true facts.¹³ The search for factual truth constitutes a necessary step in pursuit of the fundamental goal of legal process: the enforcement of rights and obligations.¹⁴

Of course, truth finding is not the only goal of adjudication. Other important values compete with the search for truth, so trial procedure is not—and cannot be—maximally truth promoting.¹⁵ The legal system erects side constraints on truth finding and contemplates that the search for truth may be sacrificed in any given case for the protection of other policies.¹⁶ A classic example is attorney-client privilege, which fosters lawyer-client relationships by shielding from view information that can be necessary to accurate fact determination.¹⁷ In addition to protecting certain socially valuable relationships, procedural rules pursue a wide variety of policies that constrain the search for truth, including procedural efficiency and affordability, state security, privacy, dignity, fairness, and due process.¹⁸

¹¹ See e.g. *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, 31 O.R. (3d) 480 (“[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth” at 1206, cited to S.C.R.).

¹² See Charles Nesson, “The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts” (1985) 98 Harv. L. Rev. 1357.

¹³ See e.g. Martin P. Golding, “On the Adversary System and Justice” in Richard Bronaugh, ed., *Philosophical Law: Authority, Equality, Adjudications, Privacy* (Westport, Conn.: Greenwood Press, 1978) 98 at 107.

¹⁴ See Bentham, *supra* note 4 at 477; Twining, *Rethinking Evidence*, *supra* note 5 at 199; William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985) at 16, 89 [Twining, *Theories of Evidence*]; David M. Paciocco, “‘Truth and Proof’: The Basics of the Law of Evidence in a ‘Guilt-Based’ System” (2001) 6 Can. Crim. L. Rev. 71 at 74 [Paciocco, “Truth and Proof”].

¹⁵ See Damaška, *Evidence Law Adrift*, *supra* note 3 at 121; Paul Roberts & Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2004) at 3-4; Mirjan Damaška, “Truth in Adjudication” (1998) 49 Hastings L.J. 289 at 301.

¹⁶ See Twining, *Rethinking Evidence*, *supra* note 5 at 199; Twining, *Theories of Evidence*, *supra* note 14 at 89.

¹⁷ See *R. v. Gruenke*, [1991] 3 S.C.R. 263, 6 W.W.R. 673 [*Gruenke* cited to S.C.R.] (“[t]he *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system” at 289).

¹⁸ See Twining, *Theories of Evidence*, *supra* note 14 at 14; D.J. Galligan, “More Scepticism About Scepticism”, Book Review of *Theories of Evidence: Bentham and Wigmore* by W. Twining, (1988) 8 Oxford J. Legal Stud. 255; Jack B. Weinstein, “Some Difficulties in Devising Rules for Determining Truth in Judicial Trials” (1966) 66 Colum. L. Rev. 223 at 241.

B. The Structure of Evidence Law

Thus, truth and other policies form a complex of varied and sometimes conflicting goals underlying trial procedure. These values and value conflicts find expression in the structure of evidence law, which, broadly understood, comprises the rules regulating the introduction of proof at trial. Historically, these rules developed ad hoc in response to various perceived problems attending legal process.¹⁹ Consequently, evidence law reflects no systematic plan or coherent analytical framework,²⁰ but instead represents a set of disparate exceptions to a general norm of “free proof.”²¹ This free-proof norm requires that juries, judges, and lawyers generally be unfettered by technical rules that interfere with common-sense processes of reasoning and fact-finding.²² Evidence law limits this freedom of proof by regulating and restricting the fact-finder’s access to and evaluation of particular forms of evidence.²³

Admittedly, evidence scholarship typically focuses on the question of free access to evidence, such that evidence law becomes identified with rules of exclusion.²⁴ However, the common law has long included rules that, while not restricting access to information, structure or limit the fact-finder’s free evaluation of evidence.²⁵ Examples include the existing and historical rules requiring corroboration of or cautionary jury instructions on certain types of evidence, as well as rules prohibiting certain inferences and declaring some evidentiary items admissible only for limited purposes.²⁶ It would therefore be a mistake to understand evidence law simply as a

¹⁹ James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898) at 3-4; Twining, *Theories of Evidence*, *supra* note 14 at 1.

²⁰ See e.g. Peter Murphy, “Evidence, Proof, and Facts: An Introductory Essay” in Peter Murphy, ed., *Evidence, Proof, and Facts* (Oxford: Oxford University Press, 2003) 1 at 2.

²¹ According to William Twining, pioneering 19th-century American evidence scholar James Bradley Thayer “treated the rules of evidence as a mixed group of exceptions to a principle of freedom of proof ... [N]early all modern writers on evidence in the common law would have accepted some version of Thayer’s thesis” (*Rethinking Evidence*, *supra* note 5 at 203).

²² *Ibid.* at 209.

²³ See generally Mirjan Damaška, “Free Proof and its Detractors” (1995) 43 *Am. J. Comp. L.* 343; Karl H. Kunert, “Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of ‘Free Proof’ in the German Code of Criminal Procedure” (1966-67) 16 *Buff. L. Rev.* 122 at 123-24, 155; William Twining, “Freedom of Proof and the Reform of Criminal Evidence” (1997) 31 *Isr. L. Rev.* 439 at 448-49.

²⁴ See e.g. Murphy, *supra* note 20 at 2 (“[t]he law is essentially exclusionary in nature”). But see Philip McNamara, “The Canons of Evidence: Rules of Exclusion or Rules of Use?” (1985) 10 *Adel. L.R.* 341 at 347 (arguing that the so-called exclusionary rules of evidence are better understood as rules of use that, in effect, limit the trier of fact’s “deliberative freedom”).

²⁵ See Damaška, *Evidence Law Adrift*, *supra* note 3 at 18, 24.

²⁶ Cautionary jury instructions are required, for example, whenever the prosecution relies on an eyewitness identification that the defence claims is mistaken. See *R. v. Haughton* (2004), 187 O.A.C. 67 at para. 18, 62 W.C.B. (2d) 276 (C.A.) [*Haughton*]; *infra* note 160 and accompanying text. An example of a rule making evidence admissible only for limited purposes is provided by the general

body of exclusionary rules.²⁷ To review, evidence rules limit freedom of proof by restricting access to evidence, but also by structuring the fact-finder's evidentiary analysis; they reflect no unitary policy but rather pursue a variety of policies. Evidence scholars have been challenged to impose order on this rather scattered set of exceptions to freedom of proof.

Most agree that evidence doctrines are essentially of two kinds: “intrinsic” rules directed at facilitating the pursuit of truth and “extrinsic” rules aimed at advancing other policies.²⁸ In John Henry Wigmore's well-known formulation, extrinsic rules are called the “rules of extrinsic policy” because they advance values and goals that lie outside the basic rationalist project of adjudication.²⁹ Privileges and rules excluding illegally-obtained evidence are obvious examples.³⁰ Wigmore called intrinsic rules the “rules of probative policy” and separated them into two subcategories: relevancy requirements and the rules of “auxiliary probative policy”.³¹ The two subcategories of probative-policy rules are both concerned with matters internal to the truth-seeking process. They ensure, respectively, that all evidence is minimally logically probative of the factual question and that particularly misleading or unreliable forms of proof—potentially unreliable hearsay evidence, for example—are not permitted to lead the fact-finder astray.³² Since Wigmore's formulation, the taxonomy has been simplified and the essential distinction now recognized is between intrinsic and extrinsic rules,³³

rule that when an accused testifies, criminal record evidence is admissible on the issue of the accused's credibility as a witness but not to show the accused's propensity to commit the offence. See *R. v. Corbett*, [1988] 1 S.C.R. 670, 85 N.R. 81 [*Corbett* cited to S.C.R.]; *infra* note 153 and accompanying text.

²⁷ See Twining, *Rethinking Evidence*, *supra* note 5 at 225-26.

²⁸ The labels “intrinsic” and “extrinsic” are borrowed from Mirjan Damaška, who uses them to distinguish between the two basic types of exclusionary rules (*Evidence Law Adrift*, *supra* note 3 at 12-17). In this analysis, the labels are used more inclusively and apply both to exclusionary rules and to other kinds of evidentiary regulation.

²⁹ *Evidence in Trials at Common Law*, rev. ed. by Peter Tillers (Boston: Little, Brown, 1983) vol. 1 at 689 [Wigmore, 1 *Evidence*] (stating that these rules pursue “extrinsic policies that override the policy of ascertaining the truth by all available means”).

³⁰ See e.g. *Gruenke*, *supra* note 17 at 286 (noting that communications covered by a class privilege are “excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence”); *Canadian Charter of Rights and Freedoms*, s. 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [*Charter*] (providing for the exclusion of evidence obtained in violation of constitutional rights).

³¹ 1 *Evidence*, *supra* note 29 at 688-89.

³² *Ibid.* See also *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, 274 D.L.R. (4th) 385 [*Khelawon*] (upholding the general rule that hearsay is inadmissible on reliability grounds).

³³ For different versions of this taxonomy, see Damaška, *Evidence Law Adrift*, *supra* note 3 at 12-17; Galligan, *supra* note 18 at 255; Paciocco, “Truth and Proof”, *supra* note 14 at 90-92. The distinction between intrinsic and extrinsic rules is complicated by the fact that truth-related and non-truth-related objectives can be difficult to differentiate. Some rules of evidence hamper the search for truth in individual cases, but are nonetheless claimed to be truth-promoting because their enforcement over time tends to produce more truthful outcomes in adjudication. See e.g. *ibid.* at 77. Attorney-client privilege, for example, can lead to the exclusion of important information in individual cases,

between doctrines ensuring “the rationality of proof” and those reflecting a “conflict of values”.³⁴

Ultimately, what is puzzling about the law of evidence is its intrinsic orientation—its truth-seeking quality. There is nothing mysterious about extrinsic rules, which simply allow the search for truth to be trumped in some cases by other pressing goals and values. Intrinsic rules, on the other hand, appear self-defeating. Restricting access to and evaluation of evidence seems likely to decrease, rather than increase, rationality in adjudication. Yet intrinsic rules make up the core of common law evidentiary regulation and are widely recognized as one of its distinctive features.³⁵ It therefore seems necessary to seek justifications for these intrinsic rules.

C. Common Law Ambivalence

The common law reflects an ambivalent attitude toward evidence. On the one hand, it is generally agreed that evidence and reason are the twin bases of any rational conclusion about past events.³⁶ Completeness of evidence is a scientific ideal that has become widely accepted as a means of reliably finding facts.³⁷ Fact-finders are therefore generally expected to reach the most accurate conclusions when they have access to and the freedom to reason from all the relevant evidence.³⁸ On the other hand, the common law contemplates the possibility that the very evidence that is relevant to the verdict also misleads the fact-finder. Certain forms of proof, while relevant, are thought to put the accuracy of fact-finding in jeopardy:

but is thought to facilitate truth-finding on a systemic level by encouraging clients to be open with their lawyers. See e.g. Damaška, “Truth in Adjudication”, *supra* note 15 at 307. Further muddying the distinction between intrinsic and extrinsic evidence rules is the reality that evidence rules often straddle both kinds of goals. The inadmissibility of coerced confessions, which is founded on the dual concerns that such confessions are both unreliable and the products of official mistreatment, probably constitutes the best example (Damaška, “Truth in Adjudication”, *supra* note 15 at 306-07).

³⁴ Galligan, *supra* note 18 at 255.

³⁵ See e.g. Damaška, *Evidence Law Adrift*, *supra* note 3 at 14, 24; John Henry Wigmore, *Evidence in Trials at Common Law*, rev. ed. by James H. Chadbourne (Boston: Little, Brown, 1972) vol. 4 at 396 [Wigmore, 4 *Evidence*]; Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3d ed. (London: Stevens & Sons, 1963) at 195ff.; Stein, *supra* note 4 at 282.

³⁶ By definition, rational adjudication seeks truth through reason on the basis of evidence. See e.g. Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, N.J.: Princeton University Press, 1950) at 80 (arguing that a rational trial process requires “an intelligent inquiry” based on all the evidence and directed at finding the truth).

³⁷ John D. Jackson, “Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach” (1988) 10 *Cardozo L. Rev.* 475 at 504 (discussing evidentiary completeness as an “ideal[] of the scientific method”).

³⁸ See e.g. Murphy, *supra* note 20 at 2; Richard D. Friedman, “Truth and Its Rivals in the Law of Hearsay and Confrontation” (1998) 49 *Hastings L.J.* 545 at 557. But see Stein, *supra* note 4 at 287-89 (arguing that giving fact-finders more information of uncertain value will not necessarily increase fact-finding accuracy).

The desirable end to be attained by the admission of every species of evidence, may be more than counterbalanced, in some instances, by the evil attending it; sometimes, in the shape of inconvenience and expense inseparable from its procurement; sometimes, from the danger of error arising from the deceptive nature of the evidence itself.³⁹

Put simply, the common law has always assumed that relevant evidence—the very heart of rational adjudication—sometimes poses a danger to accurate fact determination.

This assumption frequently takes the form of a fear that adjudicators are apt to misuse or overvalue certain forms of evidence. The apprehension that particular types of relevant information are vulnerable to misuse or overvaluation is emblematic of common law evidence, and it underpins the intrinsic rules so typical of that body of law.⁴⁰ The common law anxiety about the potential misuse of relevant evidence is built on a complex agglomeration of concerns about unreliability and prejudice. The two principal perceived dangers are, first, that adjudicators may be led into error by evidence that is less reliable than it appears, and second, that certain forms of evidence invite unfair prejudgment.⁴¹ Rules respecting hearsay, accomplice testimony, and bad character evidence, to name but a few, are driven largely by the concern that certain forms of relevant evidence may lead adjudicators astray: unreliability is the chief danger associated with hearsay and accomplice testimony, while bad character evidence is primarily feared to be prejudicial.⁴² Consciousness of these two dangers has given rise to numerous evidence rules.

From the perspective of common lawyers, then, evidence appears as a double-edged sword. They recognize that evidence is the basis of rational fact-finding, but they are also keenly aware of the possibility that certain forms of proof may be unreliable or prejudicial and may, as a result, endanger fact-finding accuracy. But where does this attitude come from? What lies at the root of this suspicion? Some understanding of why relevant evidence poses a danger to accurate fact-finding—some theory of error—is required.

³⁹ Edward Livingston, “Introductory Report to the Code of Evidence” in *The Complete Works of Edward Livingston on Criminal Jurisprudence* (New York: National Prison Association of the United States of America, 1873) vol. 1 at 421.

⁴⁰ See e.g. Damaška, *Evidence Law Adrift*, *supra* note 3 at 24.

⁴¹ *Ibid.* at 14-15; Williams, *supra* note 35 at 195 (noting the common law tendency to exclude evidence “regarded as unfair, or as dangerously misleading”); Stein, *supra* note 4 at 294 (labelling the dangers of unreliability and prejudice as “risk of overvaluation” and “verdicts *ad hominem*”, respectively). See also Paciocco, “Truth and Proof”, *supra* note 14 at 95-96 (observing that the classic manifestation of “prejudice” in criminal law is unfair prejudgment of the case against an accused).

⁴² On the reliability problems with hearsay evidence and accomplice testimony, see *Khelawon*, *supra* note 32 (hearsay); *R. v. Vetrovec*, [1982] 1 S.C.R. 811, 136 D.L.R. (3d) 89 [*Vetrovec* cited to S.C.R.] (testimony of unsavoury witnesses, including accomplices). On the prejudicial effect of bad character evidence against the accused, see *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717 at 744, 109 A.R. 81 [*B.(C.R.)* cited to S.C.R.].

II. The Jury Explanation

Traditionally, common lawyers have explained the dangers associated with unreliable and prejudicial evidence by reference to the jury system. Juries, as groups of laypersons, are said to lack competence to assess evidence and find facts.⁴³ The need to compensate for the adjudicative incompetence of these untrained, nonprofessional decision makers has been the standard explanation for the origin and continuing justification of evidentiary rules. Put simply, evidence law is classically understood as a form of judicial control over the jury. This view of the relationship between evidence law and the jury will be investigated in the pages that follow. After a brief description of the jury system and its justifications, the enduring patterns of jury mistrust and control within the common law tradition will be explored. Next, the focus will narrow to evidence law as jury control, with special attention paid to the ways in which evidence rules compensate for weaknesses in jury fact-finding.

A. The System and its Justifications

Trial juries are panels of ordinary people, chosen more or less at random, and called upon to adjudicate legal controversies arising in their local communities. Juries and their members are supposed to be impartial adjudicators, representative of the wider community of which they and the parties to the adjudication both form a part.⁴⁴ Fundamentally, the jury is a lay institution: juries deliberate and make decisions together, outside the immediate supervision and control of professional judges.⁴⁵ In a trial, the jury plays the role of the trier of fact, though its duties include not only finding the material facts but also applying the pertinent rules of law as explained by the judge. Juries are bound to decide the case only on the basis of the admissible evidence presented to them during the trial.⁴⁶ Historically in England, juries consisted of twelve members and their verdicts were required to be unanimous,⁴⁷ features that have been retained in some systems but modified in others.⁴⁸ Typically, the jury

⁴³ See e.g. Thayer, *supra* note 19 at 2. See also Part II.C.1.

⁴⁴ See e.g. *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 523-25, 3 C.R. (4th) 129 [*Sherratt* cited to S.C.R.].

⁴⁵ This feature sets common law juries apart from continental European forms of lay participation, which generally require lay assessors and professional judges to deliberate together. See Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, Conn.: Yale University Press, 1986) at 36; John H. Langbein, "Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?" [1981] *American Bar Foundation Research Journal* 195 at 205 [Langbein, "Mixed Court"].

⁴⁶ See e.g. *R. v. G(R.M.)*, [1996] 3 S.C.R. 362 at para. 15, 139 D.L.R. (4th) 193 [*G(R.M.)* cited to S.C.R.].

⁴⁷ See J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002) at 73, 76.

⁴⁸ In Canada, criminal juries have twelve members and must give their verdicts unanimously. The Supreme Court of the United States has held that, under the *Constitution of the United States*, criminal juries may have as few as six members and 10–2 majority verdicts are permissible. See *Williams v. Florida*, 399 U.S. 78 (1970); *Ballew v. Georgia*, 435 U.S. 223 (1978); *Apodaca v. Oregon*, 406 U.S.

returns a general verdict as to guilt or liability, and may also have a role in deciding the legal consequences that flow from the verdict—the amount of damages, the length of the term of imprisonment, or the like.⁴⁹ Juries deliberate in secret;⁵⁰ they are not required to give reasons for and are not accountable for their decisions in any way.⁵¹ A jury's verdict, once delivered, can be difficult if not impossible to overturn, particularly on grounds of factual error.⁵²

Although the jury system remains in place in Canada, the United States and many other parts of the world, the jury is in decline. Formal trials of all kinds have become rarer over time, and this broad historical trend is most obvious in the area of jury trial.⁵³ Civil jury trials have all but vanished except in Canada and the United States.⁵⁴ The criminal jury has proven more tenacious, but even in criminal cases, jury trials are everywhere the exception.⁵⁵ Yet jury trials nonetheless retain a systemic

404 (1972). However, most American jurisdictions require unanimous, twelve-person criminal juries (Nancy Jean King, "The American Criminal Jury" (1999) 62:2 Law and Contemp. Probs. 41 at 46). Juries in England and Wales are empanelled with twelve members, but they may deliver majority verdicts (Sally Lloyd-Bostock & Cheryl Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales" (1999) 62:2 Law & Contemp. Probs. 7 at 20, 36).

⁴⁹ Canadian criminal juries ordinarily offer only a general verdict on the issue of guilt, but occasionally they make non-binding sentencing recommendations. Pursuant to s. 745.2 of the *Criminal Code*, a jury that convicts a defendant of second degree murder should be asked whether it wishes to make a recommendation on the period of parole ineligibility to be imposed (R.S.C. 1985, c. C-46).

⁵⁰ Jury secrecy is protected in perpetuity by s. 649 of Canada's *Criminal Code* (*ibid.*), which makes it an offence to disclose the content of deliberations. Similar secrecy provisions apply in England and Wales, but not in the United States. See Lloyd-Bostock & Thomas, *supra* note 48 at 11-12; King, *supra* note 48 at 63 (arguing that U.S. free-speech protections are one explanation for the lack of American jury-secrecy rules).

⁵¹ See *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [*Morgentaler* cited to S.C.R.] ("[t]he jury is never called upon to explain the reasons which lie behind a verdict" at 78).

⁵² In Canada, only an unreasonable jury conviction can be set aside on grounds of factual error. See *R. v. Yebes*, [1987] 2 S.C.R. 168, 43 D.L.R. (4th) 424; *R. v. Binaris*, 2000 SCC 15 at para. 24, [2000] 1 S.C.R. 381, 184 D.L.R. (4th) 193.

⁵³ See *infra* notes 54, 55, 246, 247, and accompanying text.

⁵⁴ Neil Vidmar, "Foreword: The Common Law Jury" (1999) 62:2 Law & Contemp. Probs. 1 at 1-2.

⁵⁵ There are approximately 4000-5000 jury trials in Canada every year, accounting for less than 1 per cent of Canadian criminal cases (G. Ferguson, "Community Participation in Criminal Jury Trials and Restorative Justice Programs" (2001) at 40, 42 [unpublished, archived with author]). By contrast, a guilty plea is the outcome in roughly 70-90 per cent of Canadian criminal cases (*ibid.* at 24). The great majority of Canadian criminal trials are tried by a judge sitting alone (Neil Vidmar, "The Canadian Criminal Jury: Searching For a Middle Ground" (1999) 62:2 Law & Contemp. Probs. 141 at 147). American jurisdictions make much more extensive use of jury trial, and there are more than 150,000 such trials in the United States every year. See Dennis J. Devine *et al.*, "Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups" (2001) 7 Psychol. Pub. Pol'y & L. 622 at 622. See also Neil Vidmar, "A Historical and Comparative Perspective on the Common Law Jury" in Neil Vidmar, ed., *World Jury Systems* (Oxford: Oxford University Press, 2000) 1 at 7-11 (discussing the comparative strength of the jury system in the United States). Yet, the vast majority of American criminal cases are resolved through plea bargaining and never go to trial, while many of the

importance that belies their numbers because many of the most serious and important criminal cases are tried by juries.⁵⁶ The gravest offences in Canada's *Criminal Code*, notably murder and treason, are normally required to be tried by juries.⁵⁷ Jury trial is also protected as a fundamental right of the accused in Canada and many other jurisdictions.⁵⁸

Defenders of the jury system argue that it fulfills several functions that, alone or in combination, justify its continued existence. The jury is said to find facts accurately, to dispense justice in a way that reflects community values, to protect individuals against oppressive laws and law enforcement, to educate the public about the justice system, and to legitimize that system in the public eye.⁵⁹ Each of these justifications for the jury system will be examined in turn.

1. Finding Facts

On the face of it, juries exist primarily to find facts, and many justify the use of juries on the basis that they perform this task particularly well. The question whether juries are in fact skilled fact-finders is controversial and will be discussed below, but it is worth noting at the outset that claims that juries excel at accurate fact-finding are normally based on the perceived strengths of non-professional, group decision making. Group deliberation is thought to encourage a thorough consideration of

trials that do occur are bench trials presided over by a single judge (King, *supra* note 50 at 59). Similarly, only about 1 or 2 per cent of criminal trials in England and Wales are tried by jury (Lloyd-Bostock & Thomas, *supra* note 48 at 15).

⁵⁶ However rare jury trials may be in the general run of criminal cases, "of the more serious cases that do go to trial, jury trials are a common mode of trial" (Ferguson, *supra* note 55 at 42).

⁵⁷ The short list of the most serious indictable offences also includes alarming Her Majesty and inciting to mutiny; all these offences must be tried by jury unless both the accused and the Attorney General of Canada consent to a trial by judge alone (*Criminal Code*, *supra* note 49, ss. 469, 471, 473). Many other serious offences can be tried by jury at the option of the accused (*ibid.*, ss. 536-36.1).

⁵⁸ The right to a criminal jury trial is mentioned in two places in the *Constitution of the United States* and was constitutionally enshrined in Canada in 1982. See U.S. Const. art. III, §2, cl. 3; *ibid.*, amend. VI; *Charter*, *supra* note 30, s. 11(f) ("[a]ny person charged with an offence has the right ... to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment").

⁵⁹ This catalogue of justifications emerges from the Canadian legal literature. See e.g. Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper 27 (Ottawa: Minister of Supply and Services Canada, 1980) at 5-17; Law Reform Commission of Canada, *The Jury*, Report 16 (Ottawa: Minister of Supply and Services Canada, 1982) at 5; *Sherratt*, *supra* note 44 at 523-24; Ferguson, *supra* note 55 at 35. Analogous functions have been attributed to the jury by commentators in other common law jurisdictions. See e.g. Neil Vidmar, "A Historical and Comparative Perspective On the Common Law Jury" in Neil Vidmar, ed., *World Jury Systems* (Oxford: Oxford University Press, 2000) 1 at 2 [Vidmar, "Common Law Jury"]; Benjamin Kaplan, "Trial by Jury" in Harold J. Berman, ed., *Talks on American Law*, rev. ed. (Washington, D.C.: Voice of America, 1972) 51 at 53-55, 57.

issues and lead to more accurate verdicts.⁶⁰ The proven advantage of collective recall means that juries as groups remember significantly more evidence than would any given individual.⁶¹ And since jurors are lay people, their diverse knowledge and life experience enrich deliberations and help the jury interpret the import and weight of evidence.⁶² Finally, because notwithstanding jury-selection rules it appears impossible to find twelve jurors with no pre-existing attitudes or opinions, jurors' diverse preconceptions and biases are expected to cancel each other out in the jury room.⁶³ In sum, juries are imagined to be accurate fact-finders primarily because they function as groups and contain people from all walks of life; they draw on a diversity of experience and opinion, and a collective memory of the evidence to which no individual decision maker could have access.

2. Tempering the Law on Behalf of the Community

The claim that juries make excellent adjudicators is often advanced, but it has never been the sole or even the primary justification for the jury system, which is prized first and foremost as a political institution. Indeed, even if it could be shown that individual judges outperform juries as fact-finders, the jury system might well be retained on the basis of its political justifications. Juries serve a number of purposes that are broadly political, including the related functions of protecting individuals against state oppression and meting out legal justice in a way that conforms to community values. These twin functions depend on juries' power to moderate, or even ignore, the law.⁶⁴

Because juries apply legal standards and deliver general verdicts without reasons, they have the freedom to apply the law flexibly, in a way that responds to the equities of the case and reflects community standards of fairness and justice.⁶⁵ Just as courts of equity historically granted relief where strict application of the common law would have worked an injustice, juries infuse the community's values into their decisions by flexibly applying even those legal standards they recognize as valid and just. A jury tried to moderate the law in this way in the celebrated case of *R. v. Latimer*,⁶⁶ which involved a father who killed his severely disabled daughter with carbon monoxide

⁶⁰ See e.g. Randolph N. Jonakait, *The American Jury System* (New Haven, Conn.: Yale University Press, 2003) at 42-51; *The Jury in Criminal Trials*, *ibid.* at 6-7. See also *G(R.M.)*, *supra* note 46 (“the great strength and virtue of the jury system [is] that members of the community have indeed come together and reasoned together in order to reach their unanimous verdict” at para. 14).

⁶¹ See Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* (Cambridge, Mass.: Harvard University Press, 1983) at 81, 230.

⁶² See Jonakait, *supra* note 60 at 44-46.

⁶³ See e.g. *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 107, 199 D.L.R. (4th) 193 [*Find*] (noting that group deliberations have “diffusive effects”).

⁶⁴ See e.g. Weinstein, *supra* note 18 at 238.

⁶⁵ *The Jury in Criminal Trials*, *supra* note 59 at 8-10 (calling the jury “the [C]onscience of the [C]ommunity”).

⁶⁶ (16 November 1994), (Sask. Q.B.), *aff'd* (1995), 126 D.L.R. (4th) 203, 134 Sask. R. 1 (C.A.).

from his truck in order to save her from further pain, seizures, and surgery. Although a more planned and deliberate murder is hard to imagine, the jury at Robert Latimer's first trial convicted him of second degree murder rather than the first degree murder with which he was charged.⁶⁷ When improprieties in the jury-selection process necessitated a second trial,⁶⁸ Latimer was convicted again, but the second jury recommended to the judge that Latimer serve only one year in prison before becoming eligible for parole,⁶⁹ instead of the legally mandated ten-year minimum for second degree murder. Although its attempt was ultimately unsuccessful—Latimer is now serving life in prison without possibility of parole for ten years⁷⁰—it appears that the jury tried to moderate the sentencing requirements in circumstances where many in the community viewed the law as working an overly harsh result. Thus, even when a law (such as the law of murder) generally accords with the community's conscience, juries have a role in softening its application to achieve individualized justice.

In other cases, a jury's refusal to apply the law strictly can amount to a more radical defiance of legal commands. Juries have the power to "nullify" laws by refusing outright to convict accused persons who they are convinced are factually guilty,⁷¹ and there are many historical examples of such defiant acquittals by juries who refused to enforce laws that they saw as unjust, oppressive, or otherwise illegitimate.⁷² Hence, another recognized function of the jury is to protect individuals from oppressive or unjust laws and law enforcement.⁷³ The best-known Canadian example of jury nullification is the case of Henry Morgentaler, a doctor who in

⁶⁷ See *Criminal Code*, *supra* note 49, s. 231(2) ("[m]urder is first degree murder when it is planned and deliberate").

⁶⁸ See *R. v. Latimer*, [1997] 1 S.C.R. 217, 142 D.L.R. (4th) 577.

⁶⁹ *R. v. Latimer* (5 November 1997), (Sask. Q.B.).

⁷⁰ Evidently swayed by the jury's sense of justice, the judge presiding over the second trial relied on the dissenting reasons of Bayda C.J.A. in the appeal from Latimer's first conviction (*supra* note 66) and granted Latimer a constitutional exemption from the minimum period of parole ineligibility (*R. v. Latimer* (1997), [1998] 12 C.R. (5th) 112, [1998] 121 C.C.C. (3d) 326 (Sask. C.A.)). The trial judge held that, in these circumstances, to sentence Latimer to a ten-year period of parole ineligibility would amount to "cruel and unusual treatment or punishment" contrary to s. 12 of the *Charter* (*supra* note 30). A unanimous Saskatchewan Court of Appeal rejected this constitutional-exemption argument and imposed the mandatory minimum sentence of life imprisonment without possibility of parole for ten years (*R. v. Latimer* (1998), [1999] 131 C.C.C. (3d) 191, [1999] 6 W.W.R. 118), and that sentence was later upheld by the Supreme Court of Canada (*R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, 193 D.L.R. (4th) 577).

⁷¹ The jury's nullification power was acknowledged recently by the Supreme Court of Canada in *R. v. Krieger*, 2006 SCC 47, [2006] 2 S.C.R. 501, 272 D.L.R. (4th) 410 [*Krieger*] ("under the system of justice we have inherited from England juries are not entitled *as a matter of right* to refuse to apply the law — but they do have the *power* to do so when their consciences permit of no other course" at para. 27, emphasis in original). See also Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System" (1995) 105 Yale L.J. 677 at 700.

⁷² See King, *supra* note 50 at 50-51; Lloyd-Bostock & Thomas, *supra* note 48 at 9-10. For historical examples of jury nullification, see *infra* notes 83-88 and accompanying text.

⁷³ See e.g. Jonakait, *supra* note 60 at 25, 27; *The Jury in Criminal Trials*, *supra* note 59 at 11.

flagrant violation of the existing law operated free-standing abortion clinics in Quebec and Ontario in the 1970s and 1980s, and was on several occasions acquitted of abortion offences by Canadian juries.⁷⁴ The Morgentaler juries were not responding to the equities of the individual case; instead, by refusing to convict, they repudiated the criminal prohibition itself. By the time the Supreme Court of Canada struck down the abortion laws under the *Charter*, the Canadian jury had already spoken on the validity of those laws in the eyes of the community.⁷⁵

3. Educating the Public and Legitimizing the System

The final two functions of the jury system—education and legitimization—relate to the jury’s political role as a site for public participation.⁷⁶ Jury service provides members of the public with an opportunity to participate directly in the administration of justice, and therefore to learn about the operation of a system with which they might otherwise have little contact.⁷⁷ In addition to educating the community about the justice system, the jury bolsters the legitimacy of that system in the public eye. The community can be expected to have confidence in those judicial decisions its own representatives have made.⁷⁸ And indeed, there is evidence to suggest that in Canada and elsewhere, the public broadly supports the jury system and places great confidence in jury verdicts.⁷⁹

B. Mistrust and Control

Curiously, the same features that are thought to justify the jury’s existence also ground an abiding mistrust of the institution. The lay character of the jury legitimizes judicial decisions and provides an opportunity for community values to influence the administration of justice, but it also raises concerns about the inexperience and possible incompetence of juries as fact-finders. Inscrutable general verdicts empower juries to ignore the law for purposes both noble and base. The limited reviewability of their verdicts gives juries the freedom to apply the law in a way that reflects the conscience of the community, even as it hampers appellate courts in their efforts to control and correct fact-finding errors. The potential for jury nullification, the lack of accountability, the absence of reasons, and the secrecy of deliberations strengthen the

⁷⁴ See Don Stuart, *Canadian Criminal Law*, 5th ed. (Scarborough, Ont.: Thomson Carswell, 2007) at 539-42; Bruce Wardhaugh, “Socratic Civil Disobedience: Some Reflections on *Morgentaler*” (1989) 2 *Can. J.L. & Jur.* 91 at 102-06.

⁷⁵ In *Morgentaler* (*supra* note 51), the abortion laws were struck down as violative of women’s right to “security of the person” protected under s. 7 of the *Charter* (*supra* note 30).

⁷⁶ See generally Ferguson, *supra* note 55.

⁷⁷ See e.g. *ibid.* at 35; *The Jury in Criminal Trials*, *supra* note 59 at 13.

⁷⁸ See Ferguson, *ibid.*

⁷⁹ See e.g. *The Jury in Criminal Trials*, *supra* note 59 at 2, 15-16 (reporting survey research on the Canadian public’s views of the criminal jury); Christopher Granger, *The Criminal Jury Trial in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1996) at 29; Jonakait, *supra* note 60 at 22.

jury in its political role, but they also smack of arbitrariness.⁸⁰ According to legal historian and jury critic John Langbein:

Despite its merits, jury trial has always been fraught with danger. Jurors are untrained in the law, they decide without giving reasons, they have no continuing responsibility for the consequences of their decisions, and their verdicts are quite difficult to review. The risks of error and partiality in this system of adjudication are ineradicable.⁸¹

1. Three Risks

At bottom, the worry is that juries are prone to make wrong decisions. To decide a case correctly, a jury must render a verdict that reflects true facts and conforms to the applicable law, and it must reach that verdict not by hazard or on the basis of impermissible preconceptions, but on the basis of the evidence. Thus, doubts about the reliability of jury decision making are based on three distinct dangers: bias, lawlessness, and adjudicative incompetence. First, the ability to judge cases impartially may be compromised by individuals who bring their pre-existing biases into the jury room. Verdicts may be distorted by racist jurors, for example, or by those who have prejudged the accused guilty on the basis of negative pretrial publicity.⁸² Whether or not the resulting verdict is factually and legally correct, a jury whose decision-making process is tainted by bias fails in its adjudicative task.

Second, the rule of law may be undermined by juries that fail to apply the law or that apply it inconsistently. Juries' nullification power can be exercised in a morally reprehensible fashion, as evidenced by the notorious historical tendency of white juries in the southern United States to refuse to convict whites who did violence to blacks, even as they convicted blacks whose factual guilt was very much in doubt.⁸³ Experience has shown that the power to ignore the law becomes a pernicious form of lawlessness when it is used to circumvent equal justice. Moreover, strictly speaking, jury nullification runs counter to the rule of law even in cases where it is used for some high-minded purpose,⁸⁴ as when juries have nullified to protect religious minorities from persecution,⁸⁵ shield whistle-blowers from punishment,⁸⁶ and free

⁸⁰ See e.g. Franklin Strier, *Reconstructing Justice: An Agenda for Trial Reform* (Westport, Conn.: Quorum Books, 1994) at 61-62.

⁸¹ "Historical Foundations", *supra* note 6 at 1194. See also Langbein, *Origins*, *supra* note 2 at 321.

⁸² The risks of bias of these two kinds is well recognized in both Canada and the United States. See e.g. *R. v. Parks* (1993), 15 O.R. (3d) 324, 65 O.A.C. 122 (C.A.) [*Parks*] (bias against black accused); *R. v. Williams*, [1998] 1 S.C.R. 1128, 159 D.L.R. (4th) 493 (bias against aboriginal accused) [*Williams* cited to S.C.R.]; *Sherratt*, *supra* note 44 (pretrial publicity). See also David M. Tanovich, David M. Paciocco & Steven Skurka, *Jury Selection in Criminal Trials: Skills, Science, and the Law* (Concord, Ont.: Irwin Law, 1997) at 106-17; King, *supra* note 50 at 53-59.

⁸³ See e.g. Weinstein, *supra* note 18 at 237-39.

⁸⁴ Butler, *supra* note 71 at 706.

⁸⁵ *Bushell's Case* (1670), the most celebrated single case of jury nullification, appears to be an example of a jury nullifying the law in order to protect members of a religious minority (Vaugh. 135,

those who helped black slaves to escape.⁸⁷ Insofar as the laws that were sought to be enforced in such cases were morally wrong, most would agree that it was desirable for juries to act outside the law.⁸⁸ However, nullification undeniably raises the spectre of jury lawlessness. Finally, quite apart from those cases in which juries intentionally flout the law, juries may fail to apply the law because they are frequently incapable of understanding legal instructions.⁸⁹

The view that juries are incapable of properly applying the law is but one of a set of doubts about jury competence. Many are also skeptical about juries' competence to fulfill their core function of determining the facts. Hence, the final concern underlying jury mistrust is the idea that juries may be incompetent evaluators of evidence who cannot be trusted to find facts accurately.⁹⁰ The classic anxiety is that juries, as lay people, are vulnerable to misunderstanding the value of certain forms of proof.⁹¹ To summarize, it is feared that juries may be unable or unwilling to judge cases impartially, to apply the law faithfully, and to find facts accurately.

2. Jury-Control Strategies

Thus, trial by jury is viewed both as a cherished feature of the legal system and as a potential source of wrong decisions. The common law has maintained this ambivalent posture over centuries by preserving jury trial while devising procedural norms to manage the perceived risks to accuracy. Throughout the history of the jury,

124 E.R. 1006 (C.P.)). Bushell sat on the jury that acquitted prominent Quakers William Penn and William Mead of unlawful assembly, notwithstanding the fact that Penn and Mead had been preaching in the street. The case that bears his name established that the jury was the judge of the facts and that individual jurors could not be punished for reaching a verdict that the judge thought was incorrect.

⁸⁶ In 1985, an English jury acquitted Clive Ponting of offences under the *Official Secrets Act, 1911* (U.K.), 1 & 2 Geo. V, c. 28, s. 2, as rep. by *Official Secrets Act 1989* (U.K.), 1989, c. 6, s. 16(4), Sch. 2, when he disclosed classified documents revealing that government ministers had lied to Parliament about events that took place in the Falklands War (Lloyd-Bostock & Thomas, *supra* note 48 at 10).

⁸⁷ Abolitionist American juries nullified the law in cases prosecuted under the *Fugitive Slave Act*, c. 60, 9 Stat. 462 (1850) (Butler, *supra* note 71 at 703).

⁸⁸ In some cases, the moral appropriateness of jury nullification can be quite difficult to evaluate. Debate over what justifies jury nullification has raged in the United States since 1995, when legal academic Paul Butler published an essay advocating that black jurors acquit factually guilty black defendants in order to subvert the racist American criminal justice system (*ibid.*). For commentary, see Long X. Do, "Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake" (2000) 47 UCLA L. Rev. 1843.

⁸⁹ See e.g. Jonakait, *supra* note 60 at 198-217; Valerie P. Hans & Andrea J. Appel, "The Jury on Trial" in Walter F. Abbott & John Batt, eds., *A Handbook of Jury Research* (Philadelphia: American Law Institute–American Bar Association Committee on Continuing Professional Education, 1999) 3-1 at 3-11. See generally Joel D. Lieberman & Bruce D. Sales, "What Social Science Teaches Us About the Jury Instruction Process" (1997) 3 Psychol. Pub. Pol'y & L. 589.

⁹⁰ See e.g. Thayer, *supra* note 19 at 2.

⁹¹ See e.g. Wigmore, 1 *Evidence*, *supra* note 29 at 632 ("[o]ur system of admissibility is based on the purpose of saving the jurors from being misled by certain kinds of evidence").

these procedural devices have allowed judges to exercise some measure of control over jury adjudication.⁹² Certain such safeguards are built into the basic structure of the trial: jurors are bound by oath or affirmation to follow the law and to deliver a verdict based on the evidence, they are instructed that they must follow the law as explained to them by the trial judge, and the risks of bias and caprice are lessened by the requirements of group deliberation and unanimity. These and other trial features promote impartial jury verdicts in accordance with the law.⁹³ In addition, trial judges occasionally prevent juries from erroneously convicting defendants by directing a verdict of acquittal.⁹⁴ And should jury error still occur, in some cases it can be corrected through the appeal process.

Each of the principal perceived dangers of jury adjudication—bias, lawlessness, and incompetence—is associated with particular jury-control strategies. Bias is sought to be controlled largely through jury selection.⁹⁵ A change of venue can be ordered if pretrial publicity would prevent an impartial jury from being empanelled in the judicial district where the crime was committed.⁹⁶ The jury panel from which the trial jury is drawn can be challenged if improper procedures have resulted in an unrepresentative panel, a safeguard that occasionally benefits accused persons from racial minority groups who fear bias from juries on which those groups are unrepresented.⁹⁷ Most importantly, the biases of individual jurors are addressed directly by the challenge-for-cause process, whereby members of the jury panel can

⁹² See Langbein, “Historical Foundations”, *supra* note 6 at 1194-96.

⁹³ The Supreme Court of Canada has catalogued the trial safeguards aimed at improving jury performance:

The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest — all collaborate to keep the jury on the path to an impartial verdict ... (*Find, supra* note 63 at para. 107).

See also *Williams, supra* note 82 at paras. 24-25.

⁹⁴ Defence applications for directed verdicts rarely succeed. In Canada, the case must go to the jury as long as the prosecutor adduces *some* evidence on each essential element of the crime (*R. v. Charemski*, [1998] 1 S.C.R. 679 at para. 3, 157 D.L.R. (4th) 603).

⁹⁵ On jury selection in Canadian criminal trials, see generally Tanovich, Paciocco & Skurka, *supra* note 82; Granger, *supra* note 79.

⁹⁶ Unless a change of venue is ordered, criminal jury trials in Canada and the United States are held in the judicial district in which the crime was committed. Pretrial publicity is the most common reason for changes of venue. See Jonakait, *supra* note 60 at 108-13. See generally Granger, *ibid.* at 57-79.

⁹⁷ In Canada, the jury panel can be challenged if the method for selecting it is tainted by partiality, fraud, or wilful misconduct (*Criminal Code, supra* note 49, s. 629). However, such challenges typically fail where the process of summoning jurors was proper, even if the jury panel is in fact unrepresentative of the wider population in terms of gender or race. See Granger, *ibid.* at 148-54; Tanovich, Paciocco & Skurka, *supra* note 82 at 59-65.

be excused from sitting on the trial jury if they are adjudged partial.⁹⁸ Individual jurors can be excused on the basis of partiality because they hold racist attitudes, because they have prejudged the case on the basis of out-of-court information, because they have a personal interest in the outcome, and for other reasons.⁹⁹ While jury-selection rules can be manipulated by parties seeking to obtain a favourable jury, they are intended to prevent jury decision making from being tainted by bias.

The measures taken to control jury lawlessness are relatively modest. To compel juries to follow the law, courts rely primarily on the requirements that they swear or affirm to do so and that trial judges instruct them on the law.¹⁰⁰ While jurists hope and expect that the oath and legal instructions will lead juries to properly apply the law, as jury control devices they are potentially ineffectual and essentially hortatory in nature. Another procedural norm aimed at requiring jurors to follow the law is purely negative: juries in most jurisdictions cannot be told of their power to nullify laws and must decide to ignore the law on their own.¹⁰¹ The weakness of these devices may well reflect ambivalence about the jury's ability to ignore or moderate that law, which is viewed at once as an element of defensive safeguard and a source of lawlessness in the system.¹⁰²

Just as the risks of lawlessness and bias are associated with certain jury-control strategies, the danger that juries may be incompetent fact-finders lies at the root of a set of procedural norms. Rules of evidence limit or at least influence juries' access to and evaluation of evidence, often for the purpose of improving fact-finding accuracy. Some of those rules are directed at controlling a perceived problem of jury incompetence. The extent to which jury incompetence is a real—and not imagined—problem, and the extent to which particular evidence doctrines are in fact aimed at controlling it, will be addressed below. For now, it suffices to observe that rules of evidence give judges some measure of control over jury fact-finding, a control that is thought to keep some inherent weaknesses of jury fact-finding in check.

Another procedural device that permits judges to influence juries' evaluation of evidence is the judge's power to review the evidence and comment on its value. This judicial power of comment has been eliminated in most U.S. states by constitutional,

⁹⁸ Section 638(1)(b) of the *Criminal Code* permits both the prosecution and the defence to question individual jurors on the grounds that they are “not indifferent between the Queen and the accused” (*ibid.*). Jurors judged partial during this questioning are dismissed. In addition to this “[c]hallenge for cause” process (*ibid.*), both parties in a Canadian criminal case may challenge a limited number of jurors peremptorily (that is to say, with no stated reason) (*ibid.*, s. 634).

⁹⁹ See e.g. *Parks*, *supra* note 82 (bias against black accused); *Williams*, *supra* note 82 (bias against aboriginal accused); *Sherratt*, *supra* note 44 (pretrial publicity).

¹⁰⁰ See *Morgentaler*, *supra* note 51 at 76-78; *Find*, *supra* note 63 at para. 107.

¹⁰¹ See *Morgentaler*, *ibid.* at 78-79 (finding that it is improper to inform the jury that it may ignore the law because while it has a “*de facto* power” to do so, it has no right to do so). In agreement is *Sparf v. United States*, 156 U.S. 51 (1895).

¹⁰² See Parts II.A.2 and II.B.1.

statutory, or common law “no-comment rules”,¹⁰³ and even in those American jurisdictions where such commentary would be permissible, it is rarely offered in practice.¹⁰⁴ Other jurisdictions, like England and Canada, retain the practice and impose a positive duty on trial judges to review the evidence.¹⁰⁵ In Canada, the trial judge must review the evidence and may choose to offer opinions on its weight, provided that the jury is told that the judge’s views on the evidence are not binding.¹⁰⁶ This power to comment constitutes a potent tool for judicial influence over the jury, one that some argue improves the reliability of jury adjudication by offering needed professional assistance in the evaluation of evidence.¹⁰⁷ Together with the law of evidence, judicial comment on the evidence arguably compensates for the apprehended deficiencies of juries as finders of fact.

3. The Tradition of Jury Control

Arguably then, modern trial procedure incorporates a complex system of jury-control devices, including jury-selection rules aimed at excluding biased individuals, evidentiary rules that control the flow of information at trial, binding judicial instructions on the law, and influential judicial comments on the evidence.¹⁰⁸ Historically, common law judges had other ways of controlling juries.¹⁰⁹ Although a full review of this historical tradition is beyond the scope of this analysis, a brief discussion of the ways in which English judges exercised control over juries until the eighteenth century will highlight some distinctive features of the modern system.

One infamous historical form of jury control was the punishment of jurors who delivered false verdicts.¹¹⁰ This practice was ended in 1670 by *Bushell’s Case*, which

¹⁰³ King, *supra* note 50 at 48. Judicial comment on the evidence remains permissible in the federal system and in a minority of states (*ibid.*). See also Kenneth A. Krasity, “The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913” (1985) 62 *University of Detroit Journal of Urban Law* 595.

¹⁰⁴ Vidmar, “Common Law Jury”, *supra* note 59 at 42.

¹⁰⁵ *Ibid.* at 42.

¹⁰⁶ See *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627 at para. 27, 253 D.L.R. (4th) 76; Michael Hall, “Judicial Comment and the Jury’s Role in the Criminal Trial” (2007) 11 *Can. Crim L. Rev.* 247 at 249.

¹⁰⁷ See Langbein, “Mixed Court”, *supra* note 45 at 202 (arguing that it is a mistake to deny juries the benefits of such professional assistance). See also John Henry Wigmore, *Evidence in Trials at Common Law*, rev. ed. by James H. Chadbourne (Boston: Little, Brown, 1981) vol. 9 at 665-66 [Wigmore, 9 *Evidence*]. But see Hall, *supra* note 106 at 266.

¹⁰⁸ See e.g. Langbein, *Origins*, *supra* note 2 at 321; Langbein, “Mixed Court”, *supra* note 45 at 202; Vidmar, “Common Law Jury”, *supra* note 59 at 41-46.

¹⁰⁹ See e.g. Thayer, *supra* note 19 at 137-82.

¹¹⁰ On the punishment of jurors in criminal cases, see Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: University of Chicago Press, 1985) at 140-43. Civil juries could be punished through a process called the attain, in which a second, larger jury determined whether the first jury was guilty of perjury for delivering a

declared juries free to judge the evidence for themselves.¹¹¹ Until that time, early modern criminal juries could be fined or imprisoned if they insisted on acquitting when the judges thought a guilty verdict was warranted.¹¹² Generally, such punishment was justified on the basis that jurors who delivered false verdicts did so wilfully, but no proof of wilfulness appears to have been required. Instead, acquittals might be attributed to juror corruption or dishonesty whenever judges thought the evidence justified conviction.¹¹³ Evidently, the courts that punished defiant jurors equated incorrect results with jury misconduct.¹¹⁴

With the benefit of hindsight, the flaws of this approach are manifest. No modern observer will fail to notice that it rests on the dubious assumption that judges somehow know whether juries' verdicts are correct. Moreover, the tendency to conflate misdecision and wrongdoing obscures the possibility of good-faith error. While juries might sometimes flout the law intentionally, they also make honest mistakes. Modern jury-control techniques aimed at managing the risk of adjudicative incompetence—evidentiary rules and judicial comment on the evidence—appear primarily directed at controlling the risk of error in this true sense.

It is often assumed that *Bushell's Case* ushered in a new era of jury autonomy.¹¹⁵ However, in the decades after *Bushell's Case*, judges continued to exercise control over jury decision making in a surprising variety of ways.¹¹⁶ The judge's power to comment on the evidence constituted at that time "a wholly unrestricted power to comment on the merits of the case."¹¹⁷ Although the practice was probably rare, it was considered proper for judges to tell juries how they should decide the cases before them.¹¹⁸ And when a jury had the temerity to return a verdict with which the judge did not agree, "[i]t was open to the judge to reject a proffered verdict, probe its basis,

false verdict (Theodore F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth & Co., 1956) at 131-32).

¹¹¹ *Supra* note 83.

¹¹² This punishment was visited upon the jurors who in 1554 acquitted Sir Nicholas Throckmorton of High Treason contrary to the exhortations of the bench (T.B. Howell, ed., *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to Year 1783*, vol. 1 (London: T.C. Hansard, 1816) at 900-02).

¹¹³ Green, *supra* note 110 at 143.

¹¹⁴ See Thayer, *supra* note 19 at 137. Early juries were thought to possess "independent, original knowledge of the facts ... , and not merely inferential and reasoned knowledge" (*ibid.*). On this view of jury epistemology, wrong decisions were thought to arise from wilful misconduct (*ibid.*).

¹¹⁵ John H. Langbein, "The Criminal Trial before the Lawyers" (1978) 45 U. Chicago L. Rev. 263 at 285 [Langbein, "Criminal Trial"] (observing that, according to most commentators, *Bushell's Case* marks "the triumph of jury autonomy").

¹¹⁶ See *ibid.* at 284-300. See also Langbein, *Origins*, *supra* note 2 at 321-31; Green, *supra* note 110 at 274.

¹¹⁷ Langbein, "Criminal Trial", *supra* note 115 at 285. See also Beattie, *supra* note 2 at 345.

¹¹⁸ Langbein, *ibid.* at 285-86. The Supreme Court of Canada recently held in *Krieger* that a trial judge may not direct a jury to convict a criminal accused (*supra* note 71).

argue with the jury, give further instruction, and require redeliberation.”¹¹⁹ Although none rises to the coercive extreme of fining or imprisoning errant jurors, the various ways in which judges could influence or correct jury verdicts in the decades after *Bushell's Case* indicate that juries were still not entirely free to come to their own conclusions.¹²⁰ Judges retained the power to dominate the jury and the trial as a whole.¹²¹

The domineering tactics of early modern judges throw an important feature of contemporary practice into relief. Whereas historically it was possible to correct jury misdecision *ex post facto*, modern jury-control procedures aim to prevent juries from returning incorrect verdicts.¹²² The potential for jury bias to distort verdicts, for example, is dealt with not by retrospectively detecting those cases in which the risk has materialized, but rather by anticipating the problem and excluding partial jurors *ex ante*. Similarly, in our system, evidence is meticulously filtered and regulated before it is put before the jury.¹²³ And like evidentiary regulation, judicial instructions and comments seek to equip juries in advance with the analytical tools needed for fact-finding.¹²⁴ The limited reviewability of their verdicts means that even when a contemporary jury decides a case wrongly, normally the outcome will stand. As a result, our system of jury control focuses on prevention: “Prophylaxis substitutes for cure.”¹²⁵

The current system of jury control is, then, but a shadow of its former self. A tradition of judicial domination of the jury has given way to a more refined set of devices designed to guide and influence jury decision-making. This modern system is more concerned with good-faith error than with corruption and the wilful falsification of verdicts, and it is oriented toward preventing, rather than correcting, wrong decisions.

C. Evidence Law as Jury Control

The foregoing discussion has proceeded on the assumption that evidence law is the centrepiece of a modern system of jury control. And indeed, this is the orthodox view. Jury control constitutes the most time-honoured and widely-accepted

¹¹⁹ Langbein, *ibid.* at 291. Also among the jury-control techniques at the judge's disposal was the power to recommend a pardon, which could defeat a jury's ill-considered decision to convict (*ibid.* at 296-97).

¹²⁰ See Langbein, “Historical Foundations”, *supra* note 6 at 1195-96. See also Beattie, *supra* note 2 at 406-410.

¹²¹ See Langbein, “Criminal Trial”, *supra* note 115 at 295; Beattie, *supra* note 2 at 408.

¹²² See Langbein, *Origins*, *supra* note 2 at 330; Langbein, “Mixed Court”, *supra* note 45 at 202.

¹²³ See Damaška, *Evidence Law Adrift*, *supra* note 3 at 12.

¹²⁴ See Kunert, *supra* note 23 at 124.

¹²⁵ Langbein, “Historical Foundations”, *supra* note 6 at 1195. See also Damaška, *Evidence Law Adrift*, *supra* note 3 at 12.

“explanatory principle”¹²⁶ of evidence law. According to this principle or theory, evidence law improves fact-finding accuracy by preventing inexperienced, untrained, emotionally labile, and potentially incompetent lay jurors from reasoning inappropriately from certain problematic forms of proof. On this view, juries are prone to be led astray by unreliable and prejudicial evidence. The danger that evidence might mislead juries is frequently discussed by courts, and has been offered as an explicit justification for various evidence rules.¹²⁷

1. The Orthodoxy

Many scholars have embraced the jury-control theory of evidence law. James Bradley Thayer pronounced evidence law “the child of the jury”,¹²⁸ a declaration of paternity that has loomed large in evidence scholarship for more than a century. In his view, evidence law was primarily directed at compensating for the jury’s apprehended incompetence in evaluating evidence and finding facts.¹²⁹ Since Thayer, many scholars have argued or simply assumed that jury control is the central purpose or principle underlying evidence law.¹³⁰ Wigmore, for example, emphasized the role of the jury in the origin and maintenance of evidence law.¹³¹

Probably the most influential modern proponent of the jury-control theory of evidence law is John Langbein, who buttresses with historical evidence his claim that evidence law is directed at controlling the jury. He demonstrates that between the mid-eighteenth and late-nineteenth centuries, the judge’s power to control and correct jury verdicts was drastically curtailed.¹³² As discussed above, at the beginning of this period, judges could dominate jury decision making by exercising a sweeping authority to comment on the evidence, and even by such heavy-handed tactics as rejecting verdicts and requiring redeliberation.¹³³ By the end of this century of

¹²⁶ The term “explanatory principle” is used by Nance to describe a “vehicle for understanding existing rules of evidence” (Nance, “Best Evidence”, *supra* note 8 at 270). The same kind of principle has been labelled an “organizing principle” by Imwinkelried (*supra* note 8 at 1096).

¹²⁷ See e.g. *Corbett*, *supra* note 26 (“[t]here is perhaps a risk that if told of the fact that the accused has a criminal record, the jury will make more than it should of that fact” at 690-91); *Berkeley, In re* (1837), 4 Camp. 401, 171 E.R. 128 [*Berkeley* cited to E.R.] (“[i]n England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds” at 135 [footnote omitted]).

¹²⁸ Thayer, *supra* note 19 at 47.

¹²⁹ *Ibid.* at 2.

¹³⁰ On the persistence of Thayer’s idea, see Damaška, *Evidence Law Adrift*, *supra* note 3 at 2; Nance, “Best Evidence”, *supra* note 8 at 279. Among those who assume without argument the correctness of this view are King, *supra* note 49 at 48-49; David M. Paciocco, “Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof” (2001) 80 Can. Bar Rev. 433 at 449.

¹³¹ Wigmore, 1 *Evidence*, *supra* note 29 at 632.

¹³² *Origins*, *supra* note 2 at 330; “Historical Foundations”, *supra* note 6 at 1195-96.

¹³³ See *supra* notes 116-120 and accompanying text.

transition, these broad judicial powers had been severely restricted or eliminated altogether.¹³⁴ Over roughly the same period, the lawyer-dominated system of adversary trial took hold and the modern law of evidence was established.¹³⁵

Langbein draws a connection among these three historical developments: the weakening of the judge's power over the jury, the growing role of adversary lawyers, and the emergence of evidence law. The decline of judicial dominance over jury decision-making was gradual and began before the advent of adversarial trial, but the development of adversarialism "contributed to the weakening of the old system of judicial superintendence of jury verdicts and to the development of the new system of preventive jury control."¹³⁶ The older mechanisms were increasingly unsustainable as the judge's dominance waned and the trial came to be dominated by lawyers.¹³⁷ As the former system declined, new jury-control devices grew to fill the void. Hence, the modern law of evidence developed at the centre of a new system of jury control that was consistent with the adversarial nature of the modern trial.

Some scholars have argued that Langbein's earlier work undermines the jury-control theory by linking the development of modern evidentiary regulation with the advent of mature adversary trial.¹³⁸ Such a suggestion misinterprets Langbein's scholarship. While Langbein certainly identifies the development of adversary procedure as a precipitating event that encouraged the establishment of evidence law, he also unequivocally endorses the explanatory principle of jury control. Indeed, it is unfortunate that Langbein has been misinterpreted in this way, as he has consistently claimed that jury control is the basic purpose of evidence law.¹³⁹ "From the Middle Ages to our own day," he declared in 1996, "the driving concern animating the Anglo-American law of evidence has been to protect against the shortcomings of trial by jury."¹⁴⁰

However numerous and influential have been its advocates, the jury-control theory of evidence law has also often been doubted. Critics have questioned its explanatory power, suggesting that jury control represents neither the historical origin nor the most persuasive analytical justification for some important evidence doctrines. Moreover, the claim that juries are poor fact-finders has been criticized as

¹³⁴ Langbein, *Origins*, *supra* note 2 at 330; Langbein, "Historical Foundations", *supra* note 6 at 1196.

¹³⁵ Langbein, "Historical Foundations", *ibid.* at 1201.

¹³⁶ *Origins*, *supra* note 2 at 331.

¹³⁷ "Historical Foundations", *supra* note 6 at 1201.

¹³⁸ Nance refers to Langbein's "recent historical scholarship arguing that the modern rules of evidence were instituted primarily for the control of lawyers rather than for the control of juries" ("Best Evidence", *supra* note 8 at 229 [footnote omitted]). See also Imwinkelried, *supra* note 8 at 1073 (arguing that Langbein's historical research debunks the jury-control theory of evidence law).

¹³⁹ The very article cited by Nance and Imwinkelried to support their claims that Langbein's research undermines the jury-control principle describes the law of evidence as "the most prominent modern instrument of jury control" ("Criminal Trial", *supra* note 115 at 300).

¹⁴⁰ "Historical Foundations", *supra* note 6 at 1194.

empirically groundless. The explanatory power of the jury-control principle and the difficult problem of jury competence will be addressed in turn.

2. Explanatory Power

The explanatory principles of evidence law purport to justify evidence rules analytically, to describe their historical origins, or both.¹⁴¹ The jury-control principle has been criticized on the basis that its explanatory power is weak in both respects. Most frequently, these arguments have focused on the exclusion of hearsay. The idea that the hearsay rule was developed to prevent untrained and inexperienced lay juries from overvaluing unreliable second-hand information was popular among nineteenth-century judges,¹⁴² and has regularly been advanced by scholars up to the present day.¹⁴³

But, as several scholars have noted, apprehensions of jury incompetence were not uppermost in the minds of the seventeenth- and eighteenth-century judges whose concerns about hearsay hardened into an exclusionary rule.¹⁴⁴ Instead, the historical origins of the hearsay rule lie in concerns about lack of oath and cross-examination, process values that are crucial to the proper functioning of the adversary system. By the closing years of the eighteenth century, when the hearsay rule had taken hold in the civil and criminal courts,¹⁴⁵ concerns about the oath and cross-examination requirements had both been established as rationales for the exclusion of out-of-court statements.¹⁴⁶ Lack of oath appears to have been the principal concern in the earlier cases, while lack of cross-examination came to be recognized as the dominant rationale for the hearsay rule by the beginning of the nineteenth century.¹⁴⁷

¹⁴¹ On the distinction between the historical approach of identifying the origins of evidentiary rules and the analytical approach of examining their possible justifications, see Damaška, *Evidence Law Adrift*, *supra* note 3 at 3.

¹⁴² See e.g. *Wright v. Doe d. Tatham* (1837), 7 Ad. & E. 313, 112 E.R. 488 at 512 (Exch. Ct.); *Berkeley*, *supra* note 124 at 135. See also Williams, *supra* note 35 at 205.

¹⁴³ See e.g. Frank, *supra* note 36 at 123; Langbein, “Historical Foundations”, *supra* note 6 at 1195.

¹⁴⁴ See Edmund M. Morgan, “The Jury and the Exclusionary Rules of Evidence” (1937) 4 U. Chicago L. Rev. 247 at 252-53 [Morgan, “Exclusionary Rules”]; Morgan, *Problems of Proof*, *supra* note 10 at 106-07; Williams, *ibid.* at 206; Richard D. Friedman, “No Link: the Jury and the Origins of the Confrontation Right and the Hearsay Rule” in John W. Cairns & Grant McLeod, eds., “*The Dearest Birth Right of the People of England*”: *The Jury in the History of the Common Law* (Oxford: Hart, 2002) 93 at 98.

¹⁴⁵ See Langbein, *Origins*, *supra* note 2 at 242.

¹⁴⁶ See e.g. Morgan, “Exclusionary Rules”, *supra* note 144 at 253; Williams, *supra* note 35 at 206.

¹⁴⁷ See Langbein, *Origins*, *supra* note 2 at 237, 245-47. This shift in emphasis probably occurred because, since the 18th century, the oath requirement has increasingly been seen as an empty formality, ineffectual as a guarantee of truthful testimony. See *ibid.* at 246; Stephan Landsman, “The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England” (1990) 75 Cornell L. Rev. 497 at 598; Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (London: MacMillan, 1883) at 401. By contrast, faith in the power of cross-examination to

This adversary-system explanation remains the most analytically successful justification for the hearsay rule. Second-hand evidence cannot be subjected to the rigours of adversarial testing. By requiring witnesses to swear oaths, submit to cross-examination, and testify live in court, the adversary process provides triers of fact with the information they need to assess witnesses' sincerity, narration, perception, and memory.¹⁴⁸ Triers of fact are in no position to judge the trustworthiness of unsworn, uncross-examined statements made outside their presence. The Supreme Court of Canada has repeatedly affirmed that the hearsay rule is grounded in unease about the lack of opportunity to test the reliability of out-of-court statements.¹⁴⁹ The historical and analytical salience of this adversary-system explanation seriously undermines the idea that the hearsay rule can be explained as a jury-control device.

The jury-control explanation for the hearsay rule also conflicts with the available empirical information about jury behaviour. Far from overvaluing second-hand information, as the jury-control theory suggests juries do, there is some preliminary evidence suggesting that juries place little weight on hearsay evidence.¹⁵⁰ Just as an apprehension of jury incompetence does not explain the historical origins of hearsay law, jury control fails to provide a plausible justification for the rule.

Advocates of the jury-control principle do not, however, put their best foot forward when they offer the hearsay rule as an example of a jury-control device. Other evidence doctrines are more plausibly explained by reference to jury mistrust. Rules respecting prejudicial evidence of bad character, prior bad acts, and criminal history are examples.¹⁵¹ To reason properly from the accused's criminal record, for example, arguably requires a working understanding of the justice system and its norms, something lay juries might reasonably be expected to lack.¹⁵² The exclusion of such evidence may therefore be explained as a way of keeping in check the jury's

reveal true facts has remained strong over time. See e.g. *R. v. Lyttle*, 2004 SCC 5, 1 S.C.R. 193 at para. 1, 235 D.L.R. (4th) 244.

¹⁴⁸ Edmund M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 *Harv. L. Rev.* 177. See also Andrew L.-T. Choo, *Hearsay and Confrontation in Criminal Trials* (Oxford: Clarendon Press, 1996) at 11-12, 16-33; Landsman, *supra* note 147 at 565.

¹⁴⁹ See *Khelawon*, *supra* note 32 at para. 58; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 at paras. 159-60, 190 D.L.R. (4th) 591 [*Starr*]; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at 763-64, 61 O.A.C. 1.

¹⁵⁰ One Canadian mock-jury study on this point is Angela Paglia & Regina A. Schuller, "Jurors' Use of Hearsay Evidence: The Effects of Type and Timing of Instructions" (1998) 22 *Law & Human Behaviour* 501. In agreement is Peter Miene, Roger C. Park & Eugene Borgida, "Juror Decision Making and the Evaluation of Hearsay Evidence" (1992) 76 *Minn. L. Rev.* 683; Richard F. Rakos & Stephan Landsman, "Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions" (1992) 76 *Minn. L. Rev.* 655.

¹⁵¹ Morgan was generally hostile to jury-control explanations for evidence rules, but he acknowledged that rules excluding prejudicial evidence or evidence that might confuse the issues owe their "existence and persistence largely, though not entirely, to the jury" ("Exclusionary Rules", *supra* note 144 at 257). But see Damaška, *Evidence Law Adrift*, *supra* note 3 at 31-32.

¹⁵² See Nance, "Best Evidence", *supra* note 8 at 288.

inclination to reason improperly from this evidence.¹⁵³ The empirical evidence is difficult to interpret; it suggests but does not clearly establish that jurors are improperly influenced by negative information about the accused's antecedents.¹⁵⁴ However, the jury-control principle arguably justifies rules restricting such evidence because there exists a plausible risk that juries might rush to condemn defendants who have unsavoury histories irrespective of the evidence particular to the charge.¹⁵⁵

An even stronger example of the explanatory power of the jury-control rationale is the rule excluding involuntary confessions.¹⁵⁶ The confessions rule reflects in part a concern that coerced confessions are potentially unreliable but deceptively persuasive in the eyes of the jury. This concern is borne out by the social-science literature, which demonstrates, first, that people generally believe that innocent suspects do not confess except under torture, and second, that false confessions are not uncommon

¹⁵³ Of course, such evidence is not always excluded. In Canada, when an accused puts his or her character in issue, criminal record evidence is admissible under s. 666 of the *Criminal Code* to neutralize the accused's claim of good character (*supra* note 49). Where the accused does not put character in issue but chooses to testify, the record is admissible on the issue of the accused's testimonial credibility but not on the issue of propensity to commit the offence, and can be excluded entirely if the prejudicial effect of admitting the record exceeds its probative value. See *Corbett, supra* note 26. Where an accused neither testifies nor raises the issue of character, the accused's criminal record is inadmissible.

¹⁵⁴ Two 30-year-old Canadian studies based on participants' reactions to short written case descriptions suggest that evidence of prior convictions strongly influences jurors' assessments of guilt (A.N. Doob & H.M. Kirshenbaum, "Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused" (1972) 15 *Crim. L.Q.* 88; Valerie P. Hans & Anthony N. Doob, "Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries" (1976) 18 *Crim. L.Q.* 235). In agreement are Roselle L. Wissler & Michael J. Saks ("On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt" (1985) 9 *Law & Human Behaviour* 37). But see V. Gordon Rose, *Social Cognition and Section 12 of the Canada Evidence Act: Can Jurors "Properly" Use Criminal Record Evidence?* (Ph.D. Thesis, Simon Fraser University, 2003) [unpublished, archived at UMI ProQuest Digital Dissertations] (reporting a Canadian simulation study in which criminal history evidence did not affect individual verdicts). A British simulation study indicates that a recent, similar criminal conviction increases jurors' perceptions of guilt, but also, surprisingly, suggests that a previous *dissimilar* criminal conviction might lower jurors' likelihood of finding guilt (Sally Lloyd-Bostock, "The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study" (2000) *Crim. L. Rev.* 734 at 741-48).

¹⁵⁵ Such rules are explicitly grounded on this perceived risk:

The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning (*B.(C.R.)*, *supra* note 42 at 744).

In agreement are *Corbett, supra* note 26 at 690-91; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908 at para. 31, 213 D.L.R. (4th) 385 [*Handy*].

¹⁵⁶ See *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, 187 N.S.R. (2d) 201 [*Oickle*].

even in the absence of torture.¹⁵⁷ Coupled with the recognition that false confessions represent one of the leading causes of wrongful convictions,¹⁵⁸ the disconnect between popular beliefs and empirical data about the value of confession evidence offers a convincing justification for the exclusion of coerced confessions. The Supreme Court of Canada has recently justified the confessions rule in just this way.¹⁵⁹ Here, the jury-control rationale succeeds analytically. Since ordinary people lack the knowledge to properly evaluate involuntary confessions, such evidence should be kept from juries.

Similarly, the rule requiring trial judges to caution juries about the frailties of eyewitness identification evidence can be justified on jury-control grounds. When the prosecution relies on contested eyewitness identification testimony, Canadian case law requires that the trial judge caution the jury on the frailties of eyewitness identification.¹⁶⁰ The judge should both warn the jury to be cautious in relying on such evidence and identify any special weaknesses of the eyewitness testimony in the case.¹⁶¹ Such judicial warnings are thought necessary because of the danger, widely recognized by courts and psychologists, that ordinary people may overestimate the value of unreliable eyewitness evidence and fail to grasp the psychological factors

¹⁵⁷ See e.g. Richard A. Leo & Richard J. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88 J. Crim. L. & Criminology 429 at 430, 444.

¹⁵⁸ See Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (New York: New American Library, 2003) at 365 (calculating that false confessions contributed to wrongful convictions in 27 per cent of the original trials relating to the first 130 DNA-exoneration cases in the United States); Canada, FPT Heads of Prosecutions Committee, *Report on the Prevention of Miscarriages of Justice* (2004) at 3, online: Department of Justice Canada <<http://canada.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf>> [*Prevention Report*] (identifying false confessions as a major contributor to wrongful convictions in Canada).

¹⁵⁹ A majority of the Court held in *Oickle* that a restatement of the confessions rule was necessary in order to respond to the problem of false confessions (*supra* note 156 at para. 32). The majority then underscored the danger that juries might fail to recognize false confessions, the very occurrence of which seems counterintuitive. The Court explained:

The history of police interrogations is not without its unsavoury chapters. Physical abuse, if not routine, was certainly not unknown. Today such practices are much less common. In this context, it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely. ... However, this intuition is not always correct. A large body of literature has developed documenting hundreds of cases where confessions have been proven false ... (*ibid.* at paras. 34-35 [citations omitted]).

¹⁶⁰ See e.g. *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445 at para. 79, 211 D.L.R. (4th) 223, Bastarache J., dissenting [*Hibbert*]; *R. v. Carey* (1996), 113 C.C.C. (3d) 74 at 79-80, 33 W.C.B. (2d) 74 (Qc. C.A.); *Haughton*, *supra* note 26.

¹⁶¹ See e.g. *R. v. Canning*, [1986] 1 S.C.R. 991, 74 N.S.R. (2d) 90; *Hibbert*, *ibid.* at para. 81, Bastarache J., dissenting.

pointing to unreliability.¹⁶² Ultimately, the warnings aim to prevent the wrongful convictions that are known to result from uncritical acceptance of this evidence.¹⁶³ Since their purpose is to influence jury fact-finding, the warnings are clearly directed at jury control. And they can be justified as such, because experience has revealed that jurors are prone to misjudge the value of this evidence.

Ultimately, the explanatory power of the jury-control principle varies depending on which evidence doctrine is considered. The hearsay rule cannot be plausibly explained as jury control, but certain other evidence rules can. Because so much depends on context, it would be difficult to justify any general conclusion about whether jury control explains the law of evidence.

3. The Competence Problem

Because it rests on doubts about jury competence, the jury-control principle cannot be evaluated without grappling with those doubts. Jury-control proponents argue that evidence rules are justified because they counteract frailties in jury reasoning, while critics insist that juries' high level of adjudicative competence undermines the jury-control theory.¹⁶⁴ This subsection will address what kinds of competence deficits are imagined to afflict the jury, and proceeds to probe their empirical groundings. It is argued that, for the purposes of evaluating jury-control rationales in evidence law, the jury's competence to evaluate evidence should be assessed in absolute terms rather than in comparison to judicial competence, and in reference to specific forms of evidence rather than at large. Juries are probably generally competent to adjudicate, but evidentiary regulation can be justified on jury-control grounds if juries are prone to making particular kinds of mistakes.

a. Finding a Reference Point

Until recent decades, analysis of jury competence was not particularly careful or sophisticated. That common people were too inexperienced, emotional, inattentive, and dim-witted to adjudicate disputes in courts of law appears to have been obvious

¹⁶² See e.g. Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge: Cambridge University Press, 1995) at 171-209 (reviewing studies demonstrating that lay people lack knowledge of certain important findings in eyewitness psychology and are insensitive to the factors correlated with identification accuracy); Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal*, 3d ed. (Charlottesville, Va.: Lexis, 1997) at 6-8 (cataloguing various widespread misconceptions among jurors about eyewitness memory).

¹⁶³ See e.g. Dwyer, Neufeld & Scheck, *supra* note 158 at 365 (calculating that mistaken identification contributed to wrongful convictions in 78 per cent of the original trials leading to the first 130 DNA-exoneration cases in the United States); *Prevention Report*, *supra* note 158 at 3 (identifying eyewitness error as a major contributor to wrongful convictions in Canada).

¹⁶⁴ See Part II.C.3.b.

to some of the common law's most distinguished jurists. For example, Glanville Williams described the jury as follows:

They are very often good, kindly souls, skilled at their own jobs, competent and reliable in the affairs to which they are accustomed; but persons whose ordinary occupations are of a humble character rarely qualify to be regarded as first-rate intellectual machines.¹⁶⁵

No modern commentator would own up to such brazen elitism, but it is worth noting that, however framed, evidence rules based on jury-control rationales are somewhat paternalistic.¹⁶⁶ There is always an implicit comparison between jury performance and some standard of fact-finding excellence of which the jury is deemed to fall short.

One longstanding question is whether jury competence should be measured against the performance of judges or by some "absolute standard".¹⁶⁷ Most often, jury performance is evaluated against that of a single professional judge, a comparison that appears sensible because it contrasts the two basic trial-court arrangements available in modern common law procedure. Some view the judge-jury comparison as a necessary underpinning of jury-control rationales in evidence law. On this view, an evidentiary rule can only be justified on jury-control grounds where a single judge would deal with the evidence more competently than would a lay jury.¹⁶⁸ Consequently, it is argued, evidence of a kind that both professional judges and lay juries have trouble evaluating cannot be regulated on the basis of any deficiency in jury fact-finding.¹⁶⁹

While ostensibly appealing, this argument cannot ultimately succeed. Frequently, evidence rules may indeed be justified on jury-control grounds even if a single judge would fare no better than a jury at analyzing the evidence. The real question is whether a particular evidentiary doctrine can counteract some weakness in jury reasoning and improve the accuracy of jury verdicts. In general, that question can be

¹⁶⁵ Williams, *supra* note 35 at 272. See also Frank, *supra* note 36 at 138-39 (suggesting that jury trial is an irrational mode of proof, comparable to the ordeals); Thayer, *supra* note 19 at 2 (describing the jury as an institution that "need[s] ... watching", like an errant child).

¹⁶⁶ See Ronald J. Allen & Brian Leiter, "Naturalized Epistemology and the Law of Evidence" (2001) 87 Va. L. Rev. 1491 at 1502 (suggesting that "epistemic paternalism" is a feature of evidence rules in general), citing Brian Leiter, "The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence" (1997) B.Y.U.L. Rev. 803 at 814-15; Dale A. Nance, "Naturalized Epistemology and the Critique of Evidence Theory" (2001) 87 Va. L. Rev. 1551 at 1556-57 [Nance, "Epistemology"] (observing that this paternalism exists only to the extent that evidentiary rules aim at jury control).

¹⁶⁷ Neil J. Vidmar, "Foreword: Empirical Research and the Issue of Jury Competence" (1989) 52:4 Law & Contemp. Probs. 1 at 1, 2 [Vidmar, "Jury Competence"].

¹⁶⁸ See Damaška, *Evidence Law Adrift*, *supra* note 3 at 30. See also Nance, "Best Evidence", *supra* note 8 at 286-87.

¹⁶⁹ See Damaška, *Evidence Law Adrift*, *ibid.* at 31-32 (dismissing the jury-control rationale for bad character evidence rules on the basis that the tendency to reason through propensity probably afflicts judges as well as juries).

answered without reference to any judge–jury comparison. If lay juries lack the cognitive tools to properly evaluate evidence, and if an evidentiary rule can effectively overcome that weakness, then that rule is justified, irrespective of how a single judge would perform.

In some contexts, no doubt, comparisons of judge and jury competence represent an indispensable analytical tool. For example, one who would point to the alleged incompetence of the jury to advocate the elimination of the jury system and the use of bench trials in all cases bears the onus of demonstrating that a single professional judge is better at evaluating evidence than a jury. The judge–jury comparison is therefore relevant to the overall justification of the jury system. Similarly, rules of evidence operating to replace jury judgment with judicial discretion rely on an unfavourable comparative evaluation of juries and judges. Rules granting trial judges discretion to exclude information from the jury are the best examples. Unless a professional judge’s evaluation of evidence is considered somehow more trustworthy than the jury’s evaluation, it seems difficult to justify trial judges’ obligation to exclude irrelevant evidence,¹⁷⁰ much less their discretion to exclude relevant evidence if its prejudicial effect outweighs its probative value.¹⁷¹ Thus, the judge–jury comparison remains significant where either the wisdom of the jury system itself or the displacement of jury evaluation by judicial discretion is at stake.

On the whole, however, evidentiary regulation grounded on deficits in jury competence implies no performance comparison between judge and jury. Most intrinsic rules transcend individual judicial discretion: they are binding, general rules that have developed through the work of legislators and appellate courts. In Canada, almost all of the recent important developments in evidence law have emanated from the Supreme Court of Canada.¹⁷² Like juries, trial judges are subject to these rules:

[I]n administering these sorts of rules the trial judge himself is bound by the assessments of someone else as to the value of this sort of evidence; thus in this situation the question may not be whether the trial judge’s assessment of the value of evidence is to displace the jury’s assessment but is whether some sort of communally established assessment should displace the jury’s right to hear and evaluate the evidence in question.¹⁷³

¹⁷⁰ See John Henry Wigmore, *Evidence in Trials at Common Law*, rev. ed. by Peter Tillers (Boston: Little, Brown, 1983) vol. 1A at 1021 [Wigmore, 1A *Evidence*]. But see Nance, “Best Evidence”, *supra* note 8 at 272-74.

¹⁷¹ The common law discretion to exclude prejudicial evidence (reaffirmed in Canada in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193) “assumes that the judge has some reliable calculus or method for determining the ‘correct’ value of relevant evidence” (Wigmore, 1 *Evidence*, *supra* note 29 at 688).

¹⁷² See e.g. *Khelawon*, *supra* note 32 (hearsay); *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419 (expert evidence); *Oickle*, *supra* note 156 (confessions); *Handy*, *supra* note 156 (accused’s prior bad acts).

¹⁷³ Wigmore, 1A *Evidence*, *supra* note 170 at 1023. See also Schauer, *supra* note 7 at 184, 186.

To the extent that intrinsic rules are justified by the frailties of jury fact-finding, it need only be shown that such frailties exist and that the communally established rules of evidence compensate for them in a way that reliably improves jury fact-finding.

In other words, the question is not whether a single judge would do a better job in evaluating the evidence than a jury, but whether the law has accurately identified some frailty in jury reasoning and implemented a rule that effectively counteracts it. Of course it is possible—perhaps even probable—that judges engage in some of the same kinds of faulty reasoning as juries. Arguably, however, instead of undermining the jury-control rationale for evidence rules, frailties in judges' reasoning actually strengthen this justification. Because they bind both judges and juries, general evidentiary norms directed at counteracting known frailties in jury reasoning may operate to correct those defects when they arise in the reasoning of judges.¹⁷⁴

Consider the confessions rule, which I have argued can be justified in part by the jury-control principle. Faced with empirical evidence that ordinary people overestimate the reliability of confession evidence, the Supreme Court of Canada reaffirmed the exclusion of involuntary confessions partly on the basis that the rule excludes from the consideration of the jury those confessions most likely to be false.¹⁷⁵ Since it probably does prevent some juries from being led astray by unreliable confession evidence, the rule can plausibly be justified as a jury-control device. This justification does not depend on any assumption about how a hypothetical professional judge might interpret dubious confession evidence. Even if individual trial judges have as much trouble as juries with this evidence, the confessions rule can be justified as jury control because it increases the accuracy of jury decision making.

As a practical matter, it would be difficult to assess the comparative competence of judges and juries, even if it were desirable to do so. In reality, judicial competence in evaluating problematic forms of proof like confessions or eyewitness testimony probably varies widely and lies on average somewhere between jury competence and the standard of excellence in fact-finding envisioned by appellate courts. But little empirical evidence is available to shed light on the mental processes of trial judges.¹⁷⁶ Juries, on the other hand, have been extensively studied in the psychological literature. Since jury reasoning is a subject we know something about, it should come as no surprise that certain rules of evidence are directed at controlling the frailties of jury fact-finding. The necessarily speculative but plausible conclusion that judges also have difficulty evaluating problematic forms of proof does not undermine those

¹⁷⁴ See Schauer, *ibid.*

¹⁷⁵ See *Oickle*, *supra* note 156 at paras. 32-36.

¹⁷⁶ See Jennifer L. Devenport, Steven D. Penrod & Brian L. Cutler, "Eyewitness Identification Evidence: Evaluating Commonsense Evaluations" (1997) 3 *Psychol. Pub. Pol'y & L.* 338 at 356-57 (reviewing studies of attorneys', judges', and jurors' knowledge of the factors affecting the accuracy of eyewitness testimony, and revealing that, while there are many studies of lay knowledge, only a handful investigate judges' beliefs).

jury-control efforts. Evidentiary rules can be justified if they offset the known weaknesses of jury reasoning, weaknesses that are established not by comparison to trial judges but by reference to what lawmakers know about the causes of verdict error and the psychology of proof.

b. General and Specific Competencies

The jury-control principle can, then, plausibly justify evidentiary rules that compensate for some demonstrable deficit in jury fact-finding, but an important question remains: what are the real deficiencies of juries as finders of fact? The question of jury competence is not as simple as the legal theorists of former times imagined. Some still doubt the general competence of juries as finders of fact, but such radical doubts find little support in the empirical literature. The seminal study on the matter emerged from the Chicago Jury Project: investigating patterns of judge-jury disagreement in thousands of actual American criminal trials in the 1950s, the research produced an overall agreement rate of 75 per cent and found that disagreement was usually the result of jury leniency.¹⁷⁷ Despite its age and some serious methodological flaws,¹⁷⁸ that study is still cited as evidence that juries are no less competent than judges at deciding cases.¹⁷⁹ Since that time, the findings of jury researchers have suggested that jury fact-finding is “remarkably competent”.¹⁸⁰ The empirical work consistently indicates that, in general, the strength of the evidence is the strongest determinant of jury verdicts,¹⁸¹ a finding that supports the conclusion that, on the whole, juries make competent finders of fact.

This conclusion may appear to defeat the jury-control theory of evidence law. In reality, however, the fact that juries are generally good fact-finders does not rob the jury-control principle of all its explanatory power. Jury-control rationales need not be

¹⁷⁷ Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (Boston: Little, Brown, 1966) at 56-59.

¹⁷⁸ On the methodological problems with the Chicago Jury Project study, see Michael H. Walsh, “The American Jury: A Reassessment”, Book Review of *The American Jury* by Harry Kalven, Jr. & Hans Zeisel, (1969) 79 *Yale L.J.* 142. According to Walsh, Kalven and Zeisel’s work reveals

little more than that judge and jury decide on[e] in four cases differently. As they acknowledged, this datum is not particularly useful. We don’t know for certain who is correct—judge or jury. Even if we did, we lack a context in which to decide how much disagreement is too much. Furthermore, we have not been given a convincing explanation of why judges and juries disagree (*ibid.* at 158).

For an argument that the age of the Chicago Jury Project limits its current usefulness, see Vidmar, “Jury Competence”, *supra* note 167 at 4.

¹⁷⁹ The continuing relevance of the study is discussed in Vidmar, *ibid.* at 4; Hans & Appel, *supra* note 89 at 3-5.

¹⁸⁰ Hastie, Penrod & Pennington, *supra* note 61 at 230. See also Hans & Appel, *ibid.* at 3-4 to 3-7.

¹⁸¹ See e.g. Devine *et al.*, *supra* note 55 (“[t]here is ample evidence supporting the conclusion that SOE [strength of evidence] is the primary determinant of jury verdicts in criminal trials in most circumstances, but it remains to be determined how important SOE is relative to the many irrelevant biasing factors that may influence jury verdicts” at 686); Jonakait, *supra* note 60 at 221.

rooted in any negative judgment of juries' overall adjudicative competence, but may, instead, be based on narrow presuppositions about how juries reason from particular species of evidence. Courts and commentators make a variety of assumptions about how juries find facts—for example, that juries are prone to convict defendants with criminal records irrespective of the weight of the evidence, that they overvalue potentially unreliable hearsay information or eyewitness testimony, or that they underestimate the probability of false confessions. Such assumptions may be more or less correct, but in any event they inform the law of evidence.¹⁸²

Much depends on the validity of those assumptions, which can only be tested one at a time. Jury research supports the idea that juries' skill in evaluating evidence and finding facts, while strong in general, varies according to the type of evidence under consideration. Juries are known to struggle, for instance, in understanding legal instructions and properly evaluating statistical, scientific, and expert evidence.¹⁸³ They are apt to place great weight on eyewitness identification and confessions arising from police interrogations, even in circumstances where the reliability of the evidence is gravely in doubt.¹⁸⁴ Even if we are generally confident in juries' fact-finding abilities, rules regulating these forms of proof may be justified on jury-control grounds. The issue is the jury's ability to deal with particular forms of evidence rather than its general ability to find facts: it is a question of specific jury competencies, not general jury competence.

Understood in this way, the jury-control principle is consistent with the continued existence of the jury as an important common law institution. With some justification, courts have been wary of openly embracing the logic of jury control, for fear of casting aspersions on the jury system itself.¹⁸⁵ In the words of Chief Justice Dickson:

It is of course, entirely possible to construct an argument disputing the theory of trial by jury. Juries are capable of egregious mistakes and they may at times seem to be ill-adapted to the exigencies of an increasingly complicated and refined criminal law. But until the paradigm is altered by Parliament, the Court should not be heard to call into question the capacity of juries to do the job assigned to them.¹⁸⁶

To be sure, when they are based on negative global judgments about jury competence, jury-control rationales undermine jury legitimacy. Indeed, taken to an

¹⁸² See Nance, "Epistemology", *supra* note 166 ("[e]mpirical studies conducted in recent decades have shown that many of the rather condescending assertions lawyers have been making regularly for decades, indeed for centuries, about how jurors react to evidence are false, or at least considerably off-target" at 1561 [footnote omitted]); Kunert, *supra* note 23 ("[t]he outcome of cases is largely determined by the notions—based largely on guesses, fictions, and assumptions—that judges have of the lay fact-finder's mind" at 133).

¹⁸³ See Hans & Appel, *supra* note 89 at 3–7 to 3–11. See also Hastie, Penrod & Pennington, *supra* note 61 at 231.

¹⁸⁴ See *supra* notes 154–60 and accompanying text.

¹⁸⁵ See Damaška, *Evidence Law Adrift*, *supra* note 3 at 29; Kunert, *supra* note 23 at 133–38.

¹⁸⁶ Corbett, *supra* note 26 at 693.

extreme, jury-control rationales might suggest that the jury is best replaced by another adjudicator, such as a judge.¹⁸⁷ However, as long as jury-control efforts are directed at counteracting specific, demonstrable deficiencies in jury reasoning, they can only be expected to improve verdict accuracy and enhance jury legitimacy.

III. Competing Explanations

The jury is not the only feature of common law trial that raises a danger of error thought to be amenable to control through evidentiary regulation. Analogous stories have also been recounted about the adversary system and dangers of false testimony, with overzealous partisan advocates and dishonest fact witnesses taking the place of incompetent juries as the weak link in the trial process. In this section, the merits of these competing explanations will be briefly reviewed. Like jury control, each of the explanatory principles under consideration accounts to some extent for the law of evidence. Still, none of the proposed explanations emerges as pre-eminent. On the whole, the law of evidence trades on a complex set of assumptions about which features of the adjudicative system, and which actors in the trial, present a risk of error that requires control.

A. The Adversary System

No other explanation of evidence law matches the jury theory in terms of longevity or general acceptance. Indeed, only one other explanation poses a serious challenge: that centered on the adversary system. As this theory's most influential proponent, Edmund Morgan, pointed out in the 1930s, "the adversary feature of our system is quite as distinctive as is its use of a jury, ..." and it seems reasonable to expect that the adversary character of common law proceedings, and not just concerns about jury competence, would shape the rules of evidence.¹⁸⁸ Since Morgan's time, scholars have continued to draw connections between evidentiary regulation and adversary process.¹⁸⁹ Historically, there is little doubt that the rules of evidence arose in part through judges' efforts to even up prosecutorial advantage and

¹⁸⁷ Bentham put it this way:

If there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence: if they are not fit to be trusted with this, not even with the benefit of the judge's assistance and advice, what is it they are fit to be trusted with? Better trust them with nothing at all, and do without them altogether (*Rationale of Judicial Evidence, Specially applied to English Practice* (London: Hunt and Clarke, 1827) vol. 5 at 17).

See also Wigmore, 1A *Evidence*, *supra* note 170 at 1025.

¹⁸⁸ Morgan, "Exclusionary Rule", *supra* note 144 at 248.

¹⁸⁹ See e.g. Jenny McEwan, *Evidence and the Adversarial Process: The Modern Law*, 2d ed. (Oxford: Hart, 1998) at 26-32; Nance, "Best Evidence", *supra* note 8; Damaška, *Evidence Law Adrift*, *supra* note 3.

achieve an appropriate balance in criminal procedure.¹⁹⁰ It is a more difficult question whether, analytically, the current system of evidence law can be justified by the adversary character of common law trials.

1. Features, Justifications, and Criticisms

Much has been written about adversary or contentious procedure, and there is broad agreement about what constitute its basic features.¹⁹¹ Adversarial trials, whether civil or criminal, are essentially contests whose ruling principle is fair play between formally equal adversaries.¹⁹² The parties, through their lawyers, have a significant measure of autonomy and control over the process: they collect and present the evidence, and they determine which issues are in dispute.¹⁹³ Whereas nonadversary judges are actively involved in developing cases, adversary judges remain relatively passive as the parties produce the evidence.¹⁹⁴ Adversary procedure is governed by a complex network of formal rules, which the judge is responsible for enforcing impartially against the parties.¹⁹⁵

This system has been justified on a number of grounds, most of which relate to the party-control feature of the process.¹⁹⁶ Frequently, proponents claim that adversary procedure is the surest method of arriving at the truth about factual disputes.¹⁹⁷ Permitting the adversaries to investigate the case and produce the evidence results in the most thorough airing of relevant information, it is argued, because such a process puts the power of self-interest and competition to the service of truth seeking.¹⁹⁸ Moreover, since adversary procedure prevents judges (and juries) from being involved in developing the case, it is said to protect their impartiality.¹⁹⁹ In addition, control of the case by the parties rather than the judge is argued to offer some

¹⁹⁰ See Murphy, *supra* note 20 at 2; Langbein, *Origins*, *supra* note 2 at 177.

¹⁹¹ See e.g. Stephan Landsman, *The Adversary System: A Description and Defense* (Washington: American Enterprise Institute for Public Policy Research, 1984); Lon L. Fuller, "The Adversary System" in Berman, *supra* note 59, 35 at 35; Mirjan Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121 U. Pa. L. Rev. 506 at 563-64 [Damaška, "Evidentiary Barriers"]; Golding, *supra* note 13.

¹⁹² Damaška, *Evidentiary Barriers*, *ibid.* at 563-64; Golding, *ibid.* at 98-104.

¹⁹³ See e.g. Landsman, *supra* note 191 at 4.

¹⁹⁴ See e.g. *ibid.* at 2-4; Kunert, *supra* note 23 at 160-63.

¹⁹⁵ On procedural rules in adversary systems, see e.g. Landsmann, *ibid.* at 4-6; Damaška, *Evidentiary Barriers*, *supra* note 191 at 564. On the judge's role in rule enforcement, see e.g. McEwan, *supra* note 189 at 2; Strier, *supra* note 80 at 15.

¹⁹⁶ See generally Gary Goodpaster, "On the Theory of American Adversary Criminal Trial" (1987) 78 J. Crim. L. & Criminology 118 at 121-29.

¹⁹⁷ *Ibid.* at 121; Jackson, *supra* note 37 at 501.

¹⁹⁸ See e.g. Fuller, *supra* note 191 at 36; Robert J. Kutak, "The Adversary System and the Practice of Law" in David Luban, ed., *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, N.J.: Rowman & Allanheld, 1983) 172 at 174.

¹⁹⁹ See e.g. Damaška, *Evidence Law Adrift*, *supra* note 3 at 95; Fuller, *ibid.* at 36, 44-45.

protection from the abuse of official power.²⁰⁰ Party control is also said to protect the important values of individual autonomy and dignity by permitting individuals to press their claims against others, including the state.²⁰¹ Finally, the adversary system is sometimes argued to be uniquely suited to protecting individual rights and to inculcating a sense of satisfaction and procedural fairness for participants.²⁰²

Like its justifications, criticisms of adversary procedures centre on the control of the evidence by parties and their lawyers. When parties present their cases in the context of a partisan contest, normally neither the parties themselves nor their lawyers have any duty to seek the truth.²⁰³ Admittedly, criminal prosecutors are an exception to this rule, as they are ethically bound to seek justice rather than victory.²⁰⁴ Other advocates, however, “are ... attitudinally and ethically committed to winning the contest rather than to some other goal, such as discovery of truth or fairness to the opposing side.”²⁰⁵ Even the adversary judge as the trier of law has no direct responsibility to ensure that the truth emerges.²⁰⁶ Insofar as truth seeking is not the primary role of professional courtroom actors, the adversary system relies on an expectation of inadvertent truth discovery.²⁰⁷ Not surprisingly, adversary procedure has been criticized for being insufficiently committed to, and insufficiently likely to result in, the discovery of truth.²⁰⁸

Critics have pointed to two basic problems: the “wealth effect” and the “combat effect”.²⁰⁹ First, adversary procedure is more advantageous to the wealthy because the results of litigation often depend on the skill level of the lawyers the parties can afford

²⁰⁰ See e.g. McEwan, *supra* note 189 at 2-3; Jackson, *supra* note 37 at 484.

²⁰¹ See e.g. Alan Donagan, “Justifying Legal Practice in the Adversary System” in Luban, *supra* note 198, 123 at 133 (“[a] society fails to respect the human dignity of those within its jurisdiction if it denies them a fair opportunity to raise questions about what is due to them under the law ... [A]ny social-judicial system in which the adversary system is not an element must fail to respect the dignity of its members”); Monroe H. Freedman, “Judge Frankel’s Search for Truth” (1975) 123 U. Pa. L. Rev. 1060 at 1065.

²⁰² See e.g. Golding, *supra* note 13 at 112-16; Strier, *supra* note 80 at 28-29, 33.

²⁰³ Legal advocates normally have “no substantive duty like the healer’s undertaking to promote health or the shipbuilder’s to fashion a seaworthy vessel. There is no ‘Duty to Seek Justice’ or ‘Duty to Promote the Quest for Truth’” (Marvin E. Frankel, *Partisan Justice* (New York: Hill and Wang, 1980) at 25).

²⁰⁴ See H. Richard Uviller, “The Advocate, The Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea” (1975) 123 U. Pa. L. Rev. 1067 at 1070; Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 639 (noting that, in Canada, the Crown prosecutor has a dual role as an advocate and a “minister of justice”).

²⁰⁵ Goodpaster, *supra* note 196 at 120 [footnote omitted].

²⁰⁶ See Frankel, *Partisan Justice*, *supra* note 203 at 43; McEwan, *supra* note 189 at 3.

²⁰⁷ Marvin E. Frankel, “The Search For Truth: An Umpireal View” (1975) 123 U. Pa. L. Rev. 1031 at 1035, 1037 [Frankel, “Search For Truth”]; Goodpaster, *supra* note 196 at 124.

²⁰⁸ See e.g. Frank, *supra* note 36 at 80-102; Frankel, *supra* note 203 at 12; Strier, *supra* note 80 at 53-57.

²⁰⁹ Langbein, *Origins*, *supra* note 2 at 1-2 [emphasis omitted].

to pay and the exhaustiveness of the factual inquiries they can afford to make.²¹⁰ Second, the search for truth can become distorted in the course of adversarial combat. Zealous advocates are often permitted, even ethically bound, to resort to strategies that hamper the fact-finder's effort to arrive at the truth.²¹¹ Where the parties control its production, the evidence may be incomplete because information that is not helpful to either party will not be presented.²¹² That is, a witness with relevant evidence that might aid the search for truth will not be brought forward if the witness's evidence does not support the theory of the case advanced by either adversary. Furthermore, the information presented may be distorted through adversarial tactics such as witness preparation, suggestive pretrial questioning, and even cross-examination, which can be used to destroy the credibility of honest witnesses.²¹³ Partisan control over gathering and presenting evidence distorts fact-finding, it is feared, by producing a skewed, incomplete, and misleading evidentiary picture.

2. Evidence Law as Advocate Control

As noted above, scholars have argued that the adversary character of common law proceedings explains much of the law of evidence.²¹⁴ In particular, evidence rules arguably promote the search for truth in two main ways related to the adversary system. First, the rules sometimes facilitate the testing of evidence within an adversary framework. Second, the rules often act to curb the truth-distorting excesses of adversary process. These two functions of evidentiary regulation will be discussed, briefly, in turn.

a. Facilitating Adversary Testing

As explained above, adversary procedure vests the parties with responsibility for developing the evidence. The adversaries are permitted to gather and present their own evidence, and they are also expected to challenge and test the strength of the evidence presented by the opposing side. The central mechanism for this adversarial testing is cross-examination. The opportunity to cross-examine opposing witnesses is considered fundamental to a fair adversarial contest because cross-examination can expose falsehoods, weaknesses and inconsistencies in testimony.²¹⁵ Evidence rules sometimes operate to protect this opportunity for adversarial testing. Most importantly, it has already been argued that the hearsay rule is best explained as a

²¹⁰ See e.g. *ibid.*; Frank, *supra* note 36 at 95; Strier, *supra* note 80 at 51-93.

²¹¹ See e.g. Frankel, "Search for Truth", *supra* note 207 at 1038.

²¹² See e.g. Damaška, *supra* note 3 at 100; Jackson, *supra* note 37 at 504.

²¹³ See e.g. Frankel, *Partisan Justice*, *supra* note 203 at 16; Strier, *supra* note 80 at 55-57.

²¹⁴ See *supra* notes 185-86 and accompanying text.

²¹⁵ See *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 at paras. 1, 41-43, 234 D.L.R. (4th) 257 [Lyttle].

guarantor of adversarial scrutiny.²¹⁶ Hearsay evidence is presumptively inadmissible because witnesses must normally testify live in court, where they can be subjected to cross-examination at the time they give their statements.²¹⁷

b. *Restraining Adversarial Excess*

Alongside their important role in facilitating the adversarial testing of testimony, evidence rules have a second function associated with the adversary character of common law trials. As noted above, party control of the evidence gives rise to a concern that adversary tactics may hamper the search for truth, and the law of evidence is frequently explained as a set of restraints on this truth-distorting adversarial excess.²¹⁸ As a rationale for evidence law, this theory has been called the “advocate control” principle, because it stresses the need to control the machinations of adversary lawyers in the interests of accurately finding facts.²¹⁹ The most important modern proponent of this principle is Dale Nance, who maintains that evidence rules are informed by a “best evidence principle” requiring adversaries to furnish the fact-finders with the epistemically best evidence available.²²⁰ On this view, evidence law recognizes that advocates may be operating under incentives to withhold important evidence or to otherwise distort the fact-finding process.²²¹ The intrinsic rules of evidence promote the search for truth by controlling those incentives and compelling the adversaries to present the court with the most reliable information to be had.²²²

Some important features of evidence law are persuasively justified by this advocate-control principle.²²³ For example, parties may wish to use cross-examination to put unfounded suggestions to opposing witnesses and thereby to introduce innuendo and speculation harmful to the adversary. However, in Canada, a party’s

²¹⁶ See *supra* notes 145-47 and accompanying text.

²¹⁷ See *Khelawon*, *supra* note 32 at paras. 2, 35; *Williams*, *supra* note 35 at 203 (“[t]he only satisfactory ground for excluding first-hand hearsay ... is to compel the party wishing to tender the evidence to produce the actual declarant in court for cross-examination”); Nance, “Best Evidence”, *supra* note 8 at 282-83. But see *Friedman*, *supra* note 38 (“[i]f hearsay evidence is excluded on the ground that it will cause the production of better evidence by the proponent—live testimony—it will often be a failed bluff” at 560).

²¹⁸ See e.g. *Stephan Landsman*, “Who Needs Evidence Rules, Anyway?” (1992) 25 *Loy. L.A. L. Rev.* 635 at 635; Nance, “Best Evidence”, *ibid.* at 291.

²¹⁹ The label “advocate control” is borrowed from Nance, “Epistemology”, *supra* note 166 at 1556. For an early statement of this rationale, see Sir James Fitzjames Stephen, *Report of the Select Committee on the Bill to Define and Amend the Indian Law of Evidence* (31 March 1871), reproduced in *Murphy*, *supra* note 20, 65 (“[a]ctive and zealous advocates, who have no rules of evidence to restrain their zeal, would have it in their power to prevent the administration of justice to the basest purposes . . .” at 67).

²²⁰ Nance, “Best Evidence”, *supra* note 8.

²²¹ See *ibid.* at 239.

²²² *Ibid.*; *Damaška*, *Evidence Law Adrift*, *supra* note 3 at 84-85.

²²³ See Nance, “Best Evidence”, *supra* note 8 at 281.

ability to exploit the adversary process in this way is limited by an evidentiary rule requiring that all suggestions put to witnesses in cross-examination have a good faith basis.²²⁴

The advocate-control principle also provides a persuasive supplementary justification for the hearsay rule. A party might prefer to have certain information presented to the fact-finder second-hand, as when the hearsay witness appears more likeable or trustworthy than the original declarant. However, the hearsay rule ensures that the fact-finder is not at the whim of the adversary in this respect: as discussed above, the declarant must come to court so that the evidence can be subjected to adversarial testing.²²⁵ Similarly, the traditional common law exclusion of lay opinion testimony was directed at ensuring that, instead of hearing lay witnesses' evaluation of the facts, fact-finders heard what witnesses observed and remained free to draw their own conclusions. And while the general rule against lay-opinion testimony has been relaxed in the United States and Canada, both jurisdictions have retained a preference for particularized narrations of witnesses' observations.²²⁶ Both the hearsay rule and the surviving lay-opinion rules require adversaries to produce evidence in a form and from a source that serves the fact-finder's epistemic needs rather than the parties' strategic interests.²²⁷ In this way, the evidence rules override adversary preferences and make certain that fact-finders have access to the most reliable and epistemically useful information available.

B. Dishonesty

A final rationale for evidence law—albeit one that is less widely accepted than jury- or adversary-system explanations—is the need to detect and prevent lying. Controlling dishonesty was among the key motivations of the judges who developed the law of evidence. In the eighteenth century, when the rules of criminal evidence were principally established, the English judiciary was plagued by scandals involving the wrongful conviction of innocent defendants on the basis of perjured testimony.²²⁸ The prosecutorial practice of the period, which encouraged false witnessing by rewarding Crown witnesses and professional thief catchers for implicating others, was largely responsible.²²⁹ Judges responded to the ensuing widespread concern about

²²⁴ Lytle, *supra* note 215.

²²⁵ See Nance, "Best Evidence", *supra* note 8 at 282-83.

²²⁶ See *ibid.* at 286 (arguing that the preference for "the most elemental observations of the witness" enshrined in U.S. Fed. R. Evid. 701(a) reflects a concern about providing the fact-finder with the best available information); *R. v. Graat*, [1982] 2 S.C.R. 819 at 841, 144 D.L.R. (3d) 267 (permitting witnesses to testify to their opinions that the accused was impaired by alcohol because the testimony was "merely ... a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly").

²²⁷ See Nance, "Best Evidence", *supra* note 8 at 264, 274, 286.

²²⁸ See e.g. Langbein, *Origins*, *supra* note 2 at 148-65.

²²⁹ *Ibid.*; Imwinkelried, *supra* note 8 at 1078-81.

the potential for perjury partly through rules of evidence. Most notably, the requirement that accomplice testimony be corroborated was developed during this period to control the problem of dishonest Crown witnesses.²³⁰ The corroboration rule lives on in Canada in the form of a judicial discretion, and in some cases, a requirement to warn the jury about accepting the testimony of “unsavoury” witnesses.²³¹ It was and is manifestly directed at controlling the problem of lying and deceit.

The chief proponent of the dishonesty-centred explanation of evidence law is Edward Imwinkelried, who suggests that various evidentiary doctrines are explained in part by a concern about lying.²³² Even the exclusion of hearsay evidence is partly grounded on a dishonesty-control rationale, since cross-examination is needed to test the declarant’s sincerity, among other aspects of testimonial reliability.²³³ This idea that the danger of deceit informs the hearsay rule is borne out in Canadian law, where the presence or absence of a motive to lie on the part of the declarant frequently arises as a factor when courts consider whether hearsay evidence is reliable enough to be admitted.²³⁴ As Imwinkelried’s work establishes, the risk of false testimony is an important idea running through evidence law.

Indeed, concern about deception so pervades evidence law that one might wonder whether, instead of explaining them, worries about witness dishonesty are just an inherent part of truth-pursuing evidence rules. By definition, intrinsic rules are concerned about the risk of error arising from prejudicial and unreliable (that is, faulty, or factually incorrect) evidence. Testimony can be faulty either because it is mistaken or dishonest. Perhaps it is not surprising, then, nor particularly illuminating, to observe that a concern about dishonesty constitutes one of the concerns at the root of intrinsic rules. Significantly, explanations connected to the jury and the adversary system can both subsume concerns about the risk of false testimony.²³⁵ Arguably, dishonest testimony becomes most problematic when the inexperienced and credulous jury does not recognize it for what it is, or when, absent proper adversarial testing, its defects are not exposed. It would therefore be wrong to suppose that the jury and adversary system explanations for evidence law cannot account for the law’s anxiety over witness dishonesty. Ultimately, whether or not mendacity control is best understood as an independent explanatory principle, it is important to be mindful of the extent to which evidentiary rules are directed at a perceived risk of dishonesty.

²³⁰ See Langbein, *Origins*, *supra* note 2 at 165; Imwinkelried, *ibid.* at 1080.

²³¹ *Vetrovec*, *supra* note 42 at 820.

²³² Imwinkelried, *supra* note 8 (pointing to this explanation for rules about witness competence, the oath, the authentication of documents, bad character evidence, hearsay, and opinion evidence).

²³³ See *ibid.* at 1089-90. See also *supra* note 148 and accompanying text.

²³⁴ See *Khelawon*, *supra* note 32; *Starr*, *supra* note 149; *R. v. Smith*, [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590.

²³⁵ But see Imwinkelried, *supra* note 8 at 1088 (equating the principle that the parties should produce the best available evidence with a single-minded concern about “innocent errors”).

C. The Complex Picture

The debate over the explanatory principles of evidence law is largely a debate about whom to mistrust. Is our fear that juries may misconstrue the evidence, that adversaries may obscure the truth, or that witnesses may perjure themselves? Of whom are we afraid, and whom are we trying to control? It seems doubtful that these questions can ever be answered in any decisive way.

Certainly some authors identify one explanatory principle as the primary, underlying principle of evidence law. Thayer, among others, focused on the jury, while recently evidence scholars have suggested that the central rationale for evidence law lies elsewhere. Nance argues that the best evidence principle, which is concerned with advocate control, constitutes a superior explanatory principle to the traditional jury-centred rationale for evidence law. According to Imwinkelried, both of those explanatory principles are inferior to the dishonesty-control rationale, which he claims constitutes “the best explanatory hypothesis for the logical structure of Evidence law.”²³⁶ The modern theorists admit forthrightly that no one principle explains the totality of evidence law, an admission that militates in favour of interpreting their claims modestly.²³⁷ But beyond arguing the explanatory power of the various rationales for evidence law, these scholars purport to choose the best, unifying theories, or even to explain the law’s “logical structure”.²³⁸ Such ambitious claims are difficult to defend.

The search for an “organizing principle”²³⁹ of evidence law is vain because evidence law is not organized around a principle. Given the ad hoc nature of evidentiary regulation, there is no reason to believe that the various possible rationales for evidence rules are mutually exclusive. A more tenable position is to recognize that various factors, including the trial features under consideration, play a role in explaining evidence law.²⁴⁰ The origins and justifications of evidentiary rules are best uncovered in specific doctrinal contexts. And one could easily add yet more layers of complexity to the picture. Issues that cannot entirely be disentangled from the explanatory principles include extrinsic policy considerations like fairness and due process, as well as concerns about the efficient conduct of the trial process, such as affordability, speed, and finality.

This complexity has long been recognized by evidence scholars, though the subtlety of the positions taken by historical participants in this debate has often been overlooked. For example, Wigmore is usually considered a champion of the jury-control theory of evidence law, but he also explicitly recognized the explanatory role

²³⁶ *Ibid.* at 1072.

²³⁷ See *ibid.* at 1095; Nance, “Best Evidence”, *supra* note 8 at 287.

²³⁸ Imwinkelried, *supra* note 8.

²³⁹ *Ibid.* at 1096.

²⁴⁰ See e.g. Murphy, *supra* note 20 at 2.

of, among other factors, adversarial excess and witness dishonesty.²⁴¹ As a body of doctrine, he insisted that evidence law had a sound basis in the “experience of human nature”:²⁴²

That human nature is represented in the witnesses, the counsel, and the jurors. All three, in their weaknesses, have been kept in mind by the law of evidence. The multifold untrustworthinesses of witnesses; the constant partisan zeal, the lurking chicanery, the needless unpreparedness of counsel; the crude reasoning, the strong irrational emotions, the testimonial inexperience of jurors—all these elements have been considered.²⁴³

Similarly, Edmund Morgan is frequently remembered for having refuted the jury-control theory of evidence law and having advanced the adversary-system explanation in its stead, when his work expressly indicates that he accepted the explanatory importance of both these trial features.²⁴⁴

Since multiple explanatory principles are needed to account for the whole body of law, attempts to isolate one explanation as the core idea driving evidence law are futile at best. Nevertheless, studying the rationales behind evidence law reveals much about both specific evidentiary doctrines and the working theory of the adjudicative system itself. For example, to the extent that jury-control rationales have currency, the system seems to doubt juries’ adjudicative competence; insofar as the courts emphasize controls on perjury, they appear to assume that witness dishonesty is rampant.²⁴⁵ Hence, as the rationales for evidentiary regulation are disputed, the operating assumptions of evidence law are contested and unsettled.

Conclusion

This analysis has affirmed that evidence law and the jury are linked. Jury control does not offer a unifying theory of common law evidence, since many evidence doctrines are grounded in other policies, including concerns about the adversary system and the risk of witness dishonesty. However, doubts about jury fact-finding do ground some important features of evidentiary regulation. Rules aimed at strengthening jury adjudication cannot be justified by a belief that juries are generally incompetent, because such a global negative judgment finds little support in jury

²⁴¹ See Twining, *Theories of Evidence*, *supra* note 14 at 157-58.

²⁴² Wigmore, 1 *Evidence*, *supra* note 29 at 632.

²⁴³ *Ibid.* at 632-33.

²⁴⁴ See Morgan, “Exclusionary Rules”, *supra* note 144:

What then is the conclusion of the whole matter? Our exclusionary rules of evidence are the resultant of several factors. ... The adversary theory of litigation is directly responsible for many of them; and judicial distrust of the jury for not a few. But the *dictum* of the great Thayer that the English law of evidence is “the child of the jury” is, it is suggested with the greatest deference, not more than a half-truth (*ibid.* at 258 [footnotes omitted]).

²⁴⁵ See Imwinkelried, *supra* note 8 at 1081.

research. In fact, evidentiary regulation aimed at compensating for circumscribed, demonstrable weaknesses in jury fact-finding only strengthens the jury system. Whether a particular rule can be justified on jury-control grounds depends, first, on the specific competencies required to evaluate the particular form of evidence and, second, on what we know about jury psychology and behaviour. The real deficiencies in jury performance may be particular and surmountable instead of general and devastating.

The ongoing decline of the common law jury is of great interest to evidence scholars. Jury trial has gone from a simple and routine means of disposition in the seventeenth- and eighteenth-century English courts²⁴⁶ to a complex procedure that is highly regarded but rarely used throughout the modern common law world. Today, the vast majority of cases are dealt with through civil settlement or guilty pleas, and those cases that do go to trial are usually adjudicated by judge alone, even in the criminal context. In fact, the ordinary functioning of the justice system depends on these alternative means of disposition, as jury adjudication has become so elaborate, expensive, and time-consuming that resort to it is rare by necessity.²⁴⁷ Yet, even as jury trial has declined, most lawyers, judges, and scholars have continued to approach evidentiary issues from inside a framework that designates jury trial as the paradigmatic form of adjudication.²⁴⁸ The real question for evidence scholars is whether it is defensible to continue to focus so much attention on the jury.

²⁴⁶ Beattie, *supra* note 2 at 314-15.

²⁴⁷ See e.g. John H. Langbein, "Torture and Plea Bargaining" (1978) 46 U. Chicago L. Rev. 3 at 9; Frankel, *supra* note 203 ("[t]he jury trial ... amounts in practice to a carefully husbanded ornament, displayed on only a small fraction of its possible occasions. The effort to use it more would clog the machinery beyond management" at 20).

²⁴⁸ See e.g. Twining, *Rethinking Evidence*, *supra* note 5 at 201, 226-27; Damaška, *Evidence Law Adrift*, *supra* note 3 at 26, 126-29.