Canadian Journal of Law & Jurisprudence XXX No.1 February 2017, 187-213
© *Canadian Journal of Law & Jurisprudence* 2017 doi: 10.1017/cjlj.2017.8

When Procedure Takes Priority:
A Theoretical Evaluation of the Contemporary Trends in Criminal Procedure and Evidence Law

Ofer Malcai and Ronit Levine-Schnur

1. Introduction

Anglo-American legal tradition demonstrates a kind of schizophrenic approach towards the relationship between procedural and substantive law. On the one hand, procedural norms are perceived as rules aiming to serve the substantive law and as a means for achieving its goals.[1] In that sense, substantive norms are viewed as 'prior' in principle to procedural norms.[2] On the other hand, although substantive law is perceived as principally prior to procedure, the adjudication of the merits of a case is traditionally assumed to be conducted under rigid procedural constraints, and the resolution of procedural questions is supposed to be undertaken independently and prior to the determination of the relevant substantive questions.[3] We call this view the 'lexical dichotomy' approach.[4]

The lexical dichotomy approach sounds plausible: before deciding a certain substantive question, one must determine what the decision procedure will be. For instance, the decision as to whether certain evidence is admissible should be

We thank David Enoch, Barak Medina, Re'em Segev, Eyal Zamir and an anonymous referee for their helpful comments. We are grateful to the Edmond J. Safra Center for Ethics, Tel Aviv University and the Centre for Moral and Political Philosophy, Hebrew University (Malcai) and to the Centre for Ethics and the Halbert Post-doctoral Fellowship Program, University of Toronto and to the Somorgon Fund (Levine-Schnur) for their support during our post-doctoral studies.

1. In *In re Coles and Ravenshear*, [1907] 1 KB 1-4, it was set by Collins MR that "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case." See also Charles E Clark, "The Handmaid of Justice" (1938) 23 Wash ULQ 297. For Jeremy Bentham's instrumentalist approach to legal procedure, see "Scotch Reform" in John Bowring, ed, *The Works of Jeremy Bentham*, vol 5 (Edinburgh: William Tait, 1843).
2. JA Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000) at 361; AAS Zuckerman, "Dismissal for Delay—The Emergence of a New Philosophy of Procedure" (1998) 17 CJQ 223.
3. In the words of Henry Sumner Maine, the "substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms": see *Dissertations on Early Laws and Custom* (London: John Murray, 1883) at ch XI. See also H Patrick Glenn, *Legal Traditions of the World*, 3rd ed (Oxford: Oxford University Press, 2007) 225-31; Janet Walker & Lorne Sossin, *Civil Litigation* (Toronto: Irwin Law, 2010) at 52-53.
4. It could be argued that the contrast between serving substantive law, on the one hand, and resolving procedural questions independently and prior to the determination of the relevant substantive question, on the other hand, is dissolved when one realizes that there is an inherent difference between the *justification* of a rule and its *application* in particular cases. We think, however, that acknowledging the gap between the justification of a rule and its application in a particular case does not make the distinction superficial, for a question may be raised as to whether considerations related to the particular substantive matter should play a role in the application of a procedural rule. The lexical dichotomy approach holds that such considerations may not play such a role; namely, that the correct criteria of applying procedural rules are procedural rather than substantive. We discuss this issue in Section 2.

made prior to deciding on the substantive question, since the legal answer to the substantive question might depend on whether or not that evidence is admissible. According to this logic, a legal decision regarding certain substantive questions should be made under the constraints imposed by the decision procedure for questions of that type.

Despite the *prima facie* plausibility of the lexical dichotomy approach, the contemporary legal trend is to relax its applicability and obscure the distinction between substance and procedure.[5] Over time, it was realized that procedure may exercise a determinative effect on the application of substantive rights,[6] and thus procedures should *not* be perceived as independent and isolated from the relevant substantive rights.[7] This shift of perception regarding procedure can be related to more general changes in the perception of legal normativity and the judicial role. The judicial function shifted, at least to some extent, from a method of adjudication based on the application of legal *rules* to specific cases by using categorization and conceptual analysis, to a method of adjudication based on the application of *standards* and *reasons*.[8] This general legal phenomenon has allowed for principles and standards to filter into procedural branches of the law as well.[9] In Canada, for instance, civil procedure currently contains general principles according to which procedural rules should be liberally interpreted and justly applied.[10] The enactment of the *Canadian Charter of Rights and Freedoms* in 1982 led to further prioritizing of basic principles of human rights over rigid rules of criminal procedure—and to an increase in courts' willingness to interpret rules of procedure in a purposive, non-technical way.[11]

The tendency of modern legal systems to relax the lexical dichotomy approach is manifested, *inter alia*, by the greater flexibility of procedural rules and extension of judicial discretion to deviate from those rules,[12] as well as

---

5. See, for example, Robert G Bone, "Who Decides? A Critical Look at Procedural Discretion" (2007) 28 Cardozo L Rev 1961, 1973.

6. For example, Case C-394/07, *Gambazzi v Daimler Chrysler Canada Inc, CIBC Mellon Trust*, [2009] ECR I-02563.

7. Carla Crifò, "Enforcement of Process Requirements: A Search for Solid Grounds" (2014) 34 Oxford J Legal Stud 325, 328-29.

8. See, for example, Morton J Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977) at 254; Pierre Schlag, "Rules and Standards" (1985) 33 UCLA L Rev 379; Frederick Schauer, "The Jurisprudence of Reasons" (1987) 85 Mich L Rev 847.

9. See, for example, Paul Roberts, "Theorizing Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication" in Antony Duff et al, eds, *The Trial on Trial Volume II: Judgment and Calling to Account* (Oxford: Hart, 2006) at 37. For the influence of human rights discourse on English criminal procedure, see Andrew Ashworth, Alison Macdonald & Ben Emmerson, eds, *Human Rights and Criminal Justice*, 3rd ed (London: Sweet & Maxwell, 2012). For the constitutional dimension of American criminal procedure see Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1998).

10. Walker & Sossin, *supra* note 3 at 30-31.

11. See David M Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed (Toronto: Irwin Law, 2008) at 545-46.

12. See, for example, *ibid*; Bone, *supra* note 5; David Marcus, "Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure" (2011) Utah L Rev 927, 941-42; SB Burbank, "The Transformation of American Civil Procedure: The Example of Rule 11" (1989) 137 U Pa L Rev 1925. For a critical discussion of this trend see Crifò, *supra* note 7, who argues that procedural rules ought to be considered binding upon the judiciary.

by a growing dependency on procedural norms in substantive law and further deviation from the ideal that procedural norms should apply equally to large areas of substantive law (e.g., civil law).[13] In evidence law, this tendency is visible in the reduction of constraints against the admission of evidence while maintaining only sporadic exceptions to the doctrine of 'free proof'—which grants fact-finders the discretion to consider any evidence that they believe to be of probative value[14]—and in the growing impact of substantive issues on evidentiary norms.[15]

The trend of obscuring the distinction between substance and procedure has also been expressed in academic writing. While some views still espouse the existence of 'process values' and distinct procedural rights that are substance-independent,[16] other scholars have recently argued in favour of relaxing the substance-procedure dichotomy.[17] It was theorized that procedure is 'the agency of change' by which the meaning (and economic value) of substantive legal claims is determined;[18] that not only is procedural law inherently substantive, but substantive law is also inherently procedural[19] and 'procedural rights just are substantive rights' namely, derivative substantive rights regarding risk imposition through official adjudications.[20] Yet, as much as one can agree that the traditional dichotomy between substance and procedure has suffered from theoretical and normative difficulties, there is doubt as to whether the distinction should be totally abolished. The understanding that procedural norms share some characteristics with substantive norms does not preclude the existence of theoretical and normative differences between the two.

---

13. This ideal, sometimes referred to as 'transsubstantivity,' reflects the view that procedure and substantive law are distinct legal categories. See Stephen N Subrin, "The Limitations of Transsubstantive Procedure: An Essay on Adjusting the 'One Size Fits All' Assumption" (2009) 87 Denver U L Rev 377 at 384; David Marcus, "The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure" (2010) 59 DePaul L Rev 371, 385. For the view that civil standard of proof varies with the seriousness of the matter, see *R v Khan*, [1990] 2 SCR 531 and Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed (Canada: Lexis Nexis, 2009) [*Sopinka*].

14. See, for example, Alex Stein, "The Refoundation of Evidence Law" (1996) 9 Can J L & Juris 279 at 286; Paciocco & Stuesser, *supra* note 11 at 4; William Twining, *Rethinking Evidence: Exploratory Essays*, 2nd ed (Toronto: Canadian University Press, 2006); Paul Roberts & Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2010) at 700.

15. This trend is reflected for instance in the recent endorsement of judicial use of otherwise technically inadmissible information in a host of national security-based decisions. See Paciocco & Stuesser, *supra* note 11 at 7. For additional example, see Richard A Bierschbach & Alex Stein, "Mediating Rules in Criminal Law" (2007) 93 Va L Rev 1197.

16. See, for example, Robert S Summers, "Evaluating and Improving Legal Processes—A Plea for 'Process Values'" (1974) 60 Cornell L Rev 1, 4: "[A] legal process can be good, *as a process* … not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality, and humaneness."; DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Oxford University Press, 1996); Crifò, *supra* note 7 at 329.

17. See, for example, Walker & Sossin, *supra* note 3 at 1-3; Bone, *supra* note 5.

18. See Jay Tidmarsh, "Procedure, Substance, and *Erie*" (2011) 64 Vand L Rev 877.

19. See Thomas O Main, "The Procedural Foundation of Substantive Law" (2010) 87 Wash U L Rev 801 at 841.

20. See Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?" (1998) 17 Law & Phil 19.

Notwithstanding these movements, theoretical questions concerning the relationship between legal procedures and substantive outcomes—for instance, whether there are *non-instrumental* reasons for suppressing illegally obtained evidence—still remain unresolved. The main purpose of this paper is to fill this theoretical gap by analyzing the priority relationships that may exist between procedural norms and substantive outcomes. This theoretical framework assists in evaluating different positions regarding the status of specific procedural rules, as well as in revealing the moral commitments which underlie the aforementioned legal trends. More generally, we aim to explore the moral foundations of criminal procedure—an issue which remains relatively under-explored. Focusing on criminal evidence law, we demonstrate how the priority relations between criminal evidentiary rules and substantive outcomes can be related to the normative considerations underlying legal disputes, such as those about the uniformity (and substance-dependency) of legal restrictions on fact-finders or the freedom to deviate from procedural norms.

Before we embark on this discussion, it is worth noting that we do not provide here a definition of 'procedural norm' and count instead on the ordinary language meaning of the term. Our conception of 'procedural norm' is rather broad: it includes not only adjudication and evidentiary rules but also, for instance, rules of interpretation and rules governing the democratic process. It should be emphasized, however, that the discussion below does not depend on accepting this broad understanding.

The discussion proceeds as follows. In Section 2, we distinguish between two priority relationships that may exist between substance and procedure: 'justification priority,' which refers to whether the direction of justification is from the procedure to the substantive outcome or vice versa,[21] and 'normative priority,' which refers to whether procedural or substantive norms should govern in a case of clash between them. We discuss the interaction between these two notions and their relation to the consequentialist and deontological accounts of legal procedure in Section 3. We then apply, in Section 4, the theoretical analysis to current evidentiary dilemmas, such as those about the inadmissibility of probative evidence seized in violation of rights, the exclusion of statistical and character evidence, and the standard of proof beyond a reasonable doubt. A conclusion ensues.

2. Two Notions of Priority

A. Justificational Priority

The idea of justificational priority is concerned with the direction of justification. Some procedures are justified in virtue of their likelihood to bring about a just or correct outcome. Think, for example, of dividing a cake using the

21. We first introduced this concept in Ofer Malcai & Ronit Levine-Schnur, "Which Came First, the Procedure or the Substance? Justificational Priority and the Substance—Procedure Distinction" (2014) 34 Oxford J Legal Stud 1, 2.

'you-cut-I-choose' method: the one who cuts the cake is the last to get her share. This procedure is justified in virtue of its likelihood to lead to the just outcome—an equal division of the cake. However, with regard to other procedures, the direction of justification is reversed: the outcome is justified in virtue of it being a product of an independently justified procedure. A paradigmatic example is allocating an indivisible good between equally entitled claimants via a fair lottery, such as a coin toss. We refer to these two phenomena as 'justificational priority' of the outcome and or the procedure, respectively.[22]

Unlike the coin toss and cake division examples in which identifying the direction of justification is rather straightforward, the task is more complicated in the legal context, as often the justification criteria are a mix of substantive and procedural factors. However, there are cases in which the dominant direction can be identified. Consider, for instance, regulation that aims to gain the most valuable offer through public auction or competitive public bidding. Such procedural regulation is justified because it leads to a certain desirable outcome (e.g., maximizing public gain). By contrast, rules of estoppel, for example, reflect the opposite direction of justification. The concrete legal outcome is not justified independently of the procedure but rather in virtue of the fairness considerations underlying the procedural rule (of estoppel) that brings about that outcome.

Cases in which the procedure has justificational priority over *all* its consequences,[23] or the *ultimate* justification of the outcome rests upon its being the result of a certain procedure, can be referred to as cases of *pure* justificational priority of the procedure. In such cases, a deontological consideration must be involved, because consequentialist theories lack the resources to justify the procedure without referring to some consequences thereof.

Consider, for example, the right to make full answer and defence. On one account of this procedural right, the outcome has justificational priority over the procedure in the sense that this procedural right is justified in virtue of the instrumental contribution a hearing makes to the accuracy of the outcome of a trial. On another account, the procedure has justificational priority over the outcome because denying a defendant the opportunity to be heard is unjust, regardless of whether or not a hearing would assist in reaching the right verdict.[24] Yet, even according to this 'procedural' account, the right to be heard would not have pure justificational priority unless it reflects a deontological value. If it reflects a consequentialist consideration—albeit one intrinsic to the legal process itself as opposed to its outcome (e.g., if it is vindicated by the role that

---

22. John Rawls, *A Theory of Justice*, revised ed (Cambridge: Harvard University Press, 1999) at 74 presents the 'you-cut-I-choose' method and gambling as examples of what he refers to as 'perfect procedural justice' and 'pure procedural justice,' respectively.

23. Note that the consequences of legal procedures manifest in a variety of realms. Specifically, a distinction must be made between the concrete outcome of a specific legal process (in the realm of the actual parties) and more general social outcomes of legal procedures.

24. For a similar distinction between 'error reduction account' and 'process values account,' see Denise Meyerson, "The Moral Justification for the Right to Make Full Answer and Defence" (2015) 35 Oxford J Legal Stud 237.

a hearing plays in creating a sense of self-respect)—the procedure does not have pure justificational priority.[25]

The notion of justificational priority can be easily conflated with another, somewhat close notion, which is concerned not with justification but with truth-making. A central question of philosophy of law and jurisprudence is whether the criterion for the validity of legal norms, or the truth maker of legal propositions (e.g., 'the defendant is guilty as charged'), is procedural (e.g., 'the defendant was convicted following due criminal process') or substantive (e.g., 'the defendant perpetrated the crime').[26] Whenever the criterion for the truth of a legal proposition (or the validity of a legal norm) is procedural, we will refer to the procedure as having 'metaphysical priority' over the substance. This follows vice versa: whenever the criterion for the truth of a legal proposition (or the validity of a legal norm) is substantive, we will say that the substance has 'metaphysical priority' over the procedure.[27]

Procedures that have justificational priority may also have metaphysical priority. For example, a coin toss procedure used to determine which tennis player will serve first—Serena Williams or Maria Sharapova—has justificational priority over the outcome. It may also have metaphysical priority, since the criterion which determines the truth-value of the proposition that, say, Serena is the one who should serve first (i.e., the proposition's truth maker) is procedural. The proposition is true if and only if Serena won the coin toss.

Generally speaking, the term 'justificational' may refer to different normative systems: epistemic, moral, legal, religious, and so forth. The distinction between justificational priority and metaphysical priority is clear when the direction of justification means the direction of epistemic justification. For example, perhaps what justifies our belief in Fermat's Last Theorem is the fact that certain mathematicians have proved its correctness. However, this is not to say that the correctness of Fermat's Theorem depends on the application of the proof procedure by the mathematicians.

Nevertheless, the distinction between justificational priority and metaphysical priority is less clear when it comes to moral or legal justification.[28] It is difficult

---

25. See *ibid* for a similar account of the right to be heard. Although Meyerson is not explicit about the consequentialist nature of her account, it seems that this is the natural interpretation of her view, which relies on empirical (contingent) findings and refers to "the role participation plays in sustaining identity-based and affective bonds to a group" (at 264). Meyerson's 'process values account' can thus be contrasted with pure procedural accounts—which are independent of contingent empirical facts—such as the view that hearing is constitutive to the fairness of the process.

26. For example, according to Ronald Dworkin's theory of 'law as integrity,' propositions of law are true "if they figure in or follow from the principles of justice, fairness, and procedural due process that provide best constructive interpretation of the community's legal practice." See *Law's Empire* (Cambridge: Harvard University Press, 1986) at 225.

27. Metaphysical priority of procedure is related to constructivist positions. Constructivism (as a metaphysical thesis) regarding a certain discourse can be characterized as the view that holds metaphysical priority of procedure over substance regarding all the propositions of that discourse. See David Enoch, "Can there be a Global, Interesting, Coherent Constructivism about Practical Reason?" (2009) 12 Phil Expl 319, 322.

28. *Ibid* at 322.

to point to the exact difference between the proposition that the criterion for the moral justification of a certain action is procedural, and the proposition that the criterion for the truth or validity of the claim that the action is morally right is procedural. In these normative contexts, the distinction between justification and truth is often obscured.[29]

B. Normative Priority

Let us consider now a second priority relation between procedure and substance, which refers to the normative supremacy of procedural over substantive norms. We first present the general idea of a certain procedure having 'normative priority' over the substantive outcome. We then distinguish between two different scales and contexts in which the question of normative priority of procedural norms may arise.

(i) The general idea

We say that a procedural norm has 'normative priority' over substance if it should prevail when it clashes with the substantive norm whose content or applicability is at stake.

Consider, for example, the traditional common-law rule against double jeopardy, which forbids a person acquitted of an offence from being retried for it.[30] This rule imposes a procedural constraint on placing a person who has already been acquitted in jeopardy again, even when there are substantive considerations in favour of doing so. As an example, in a case where a jury's findings as to the facts were inappropriately applied to the law as stated by the trial court, and the defendant would likely be convicted upon retrial, the defendant still could not be re-prosecuted.

If the normative considerations that underlie substantive norms are always defeated by the considerations underlying the procedural norm, we can say that the procedural norm has lexical normative priority. In such a case, the court does not have discretion to balance between substantive and procedural considerations or to deviate from the procedural norm. If, on the other hand, the procedural considerations are principally superior to the substantive considerations, but there are exceptions to this procedural superiority in which the substantive considerations prevail, we can say that the procedural norm has non-lexical normative priority.

---

29. The difference between what is morally justified and what is morally right might be related to the (more) subjective character of moral justification, as opposed to the (more) objective character of moral truths. According to this suggestion, for instance, a conviction of an innocent person can be morally justified (if there is clear and convincing evidence of his guilt) but nevertheless morally wrong. For a discussion of subjective and objective positions about morality, see Michael J Zimmerman, "Is Moral Obligation Objective or Subjective?" (2006) 18 Utilitas 329.

30. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982 s 11(h). For an historical overview, see Jay A Sigler, "A History of Double Jeopardy" (1963) AJLH 283; George C Thomas III, *Double Jeopardy: The History, the Law* (New York: New York University Press, 1998).

In such cases, the court might balance the substantive and the procedural considerations, and has discretion to deviate from the procedural norm.

The question of supremacy of procedural norms over substantive norms is related to the lexical dichotomy approach mentioned in the Introduction. Recall that under this approach, the court is required to decide a procedural question (regarding the content or applicability of a certain procedural norm) independently and prior to the resolution of the substantive matter. Indeed, if a procedural norm has normative supremacy over substantive law, then the decision of whether or not it applies must be made independently and prior to the decision of any substantial questions. It seems, then, that the tendency of modern legal systems to relax the lexical dichotomy approach reflects a transition in the normative status of legal procedure.

It could be objected that there is a sense in which procedure is always prior to substance. The court's decision on a procedural question may be necessary as a logical requirement for the adjudication of the substantive issue. For example, it will never be the case that a court will announce the verdict first and then rule on the (in)admissibility of evidence on which the verdict relies. This is true regardless of whether the relevant admissibility rule is flexible or not; even a flexible rule of admissibility is a rule of admissibility, not a rule about the substantive outcome of the case.[31]

Indeed, rules of admissibility may be classified as 'logically prior,' in the above sense, to substantive legal outcomes. However, the question of the independence of procedural decision from substantive law may arise even if the procedural norm has this kind of logical priority. Consider again evidence admissibility. Although rules of admissibility have logical priority over substantive law—in the sense that deciding the admissibility of evidence is indispensable to making the substantive decision—the question may still be raised whether or not the procedural considerations underlying the admissibility rule at stake have normative supremacy over the substantive considerations.

A flexible procedural rule allows courts to incorporate in their decision on a procedural matter (such as admissibility of evidence) considerations related to the particular substantive issue. In this way, the lexical dichotomy between procedure and substance is relaxed. Of course, a flexible procedural norm does not guarantee a specific outcome. Rather, it enables courts to balance procedural considerations with considerations related to the particular substantive context. Considerations of the latter type extend beyond traditional evidentiary considerations like the reliability or relevancy of the evidence and may depend, for instance, on the severity of the crime or the interests of the victim. For example, according to hearsay 'principled approach,' a hearsay statement can be admitted if it is necessary and sufficiently reliable.[32] It is true that whether the hearsay meets the necessity and threshold reliability will be determined on a *voir dire*. While the procedural question is formally decided first, it is hard to say that it is independent from the substantive matters related to the particular case. For

31. We thank the referee for pressing us on this point.
32. *R v Khan*, *supra* note 13.

instance, a child's statement will be often admitted without oral evidence, and the lack of cross examination will influence the weight of the prior statement.[33] We will return to this point and demonstrate it further in Section 4.

(ii) 'Local' versus 'global' normative priority

The concept of normative priority presented above refers to the priority of a certain procedural norm over the relevant substantive norms. The question of priority is examined, in this case, from the perspective of the court that needs to apply the law in order to arrive at a judgment in a concrete case. We may term such normative priority 'local normative priority.' We can also think of another notion of normative priority, in which the hierarchical relations between a certain procedural norm and the substantive law are examined with respect to the legal system as a whole (or with respect to a considerable portion of it). In this case, the normative relationship between substance and procedure is examined from the point of view of the legislator who needs to determine whether the procedural norm under consideration should have priority over the substantive law as a whole (or a large subset of it, e.g., civil law or criminal law) or only in a particular substantive context. We refer to the former case as a case of 'global normative priority.'

Local normative priority of a certain procedural norm (e.g., limitation period) can be explained by considerations of the judicial role, or about the appropriate division of normative labor between the legislature and the courts in a democracy.[34] In contrast, global normative priority of procedural norms (e.g., the criminal standard of proof) is more closely related to the content of the specific procedural norm and reflects a more fundamental moral intuition about its supremacy. If a certain procedural norm does not have global normative priority—that is, if there is a strong correlation between that norm and the substantive law (e.g., if every criminal offence had its own standard of proof)—then applying that procedural norm does not mean attributing normative supremacy to the procedural considerations, rather than to the substantive ones. Such normative supremacy seems to fit better with independence of the procedure from the particular specific content of the relevant substantive norms.

A procedural norm has lexical global normative priority if there are no exceptions to the global applicability of that norm. This means that the considerations at the core of the procedural norm should not be weighed by the legislator against other considerations or purposes of substantive law. In contrast, if in principle the procedural norm should be applied to a large area of law, but it is permissible—or even obligatory—to make exceptions to this global character in certain circumstances because of substantive considerations, then the procedural norm has non-lexical global normative priority.

Traditional standards of proof—on the 'balance of probabilities,' in civil proceedings, and 'beyond reasonable doubt' in criminal proceedings—are clear

33. *Sopinka*, *supra* note 13 at 267-68.
34. See Crifò, *supra* note 7 at 329.

examples of procedural norms that display global normative priority.[35] However, contemporary trends demonstrate a departure from the idea that this normative priority is lexical. Regarding the civil standard of proof,[36] it was suggested that this standard is somewhat flexible and can vary with the seriousness of the allegation in question.[37] In addition, several formulations of a third standard, such as 'clear and convincing evidence,' have been proposed over the years, though this idea has not gained an overall acceptance.[38]

Lexical global normative priority of procedural norms fits naturally with the existence of a deontological constraint that prevents balancing between the procedural considerations and considerations related to the substantive outcome. In contrast, consequentialist moral theories hold that the moral status of actions is determined solely by the goodness of their consequences and require departure from procedural norms whenever the consequences of applying them would be worse than the consequences of not applying them.[39] Since the consequences of applying a certain procedure may depend on the context wherein it is applied, consequentialist moral theories are generally compatible with dependence of the procedure on the specific legal context—namely, with non-lexical global normative priority.

The current tendency to relax the lexical dichotomy approach, as described in the Introduction, and to obscure the differences between procedure and substance is discernible in the reduction of the number of procedural norms that display lexical global normative priority[40] and the extension of judicial discretion to

---

35. *Sodeman v R*, [1936] CLR 192 at 216-17 (HCA); *MacGregor v Ryan*, [1965] SCR 757; *Home Secretary v Rehman*, [2001] UKHL 47 at para 55.

36. We discuss the criminal standard of proof in Section 4C.

37. For example, in *B v Chief Constable of Avon and Somerset* [2001] 1 WLR 340, 368, Lord Bingham stated that "In a serious case … the difference between the two standards is, in truth, largely illusory … a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard." See also Mike Redmayne, "Standard of Proof in Civil Litigation" (1999) 62 Mod L Rev 167.

38. *Sopinka*, *supra* note 13 at 208, mentions decisions of trial courts and appellate courts which continue "to refer to a third standard of a high degree of probability in civil cases where serious misconduct, for example fraud, was alleged." In England, a notable case is *In re Doherty* [2008] 1 WLR 1499 at para 23: "only two standards are recognised by the common law." See also Adrian Keane & Paul McKeown, *The Modern Law of Evidence* (Oxford: Oxford University Press, 2014) at 110: "although there is a single civil standard [of proof], it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences of the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities."

39. Note, however, that there is no necessary link between non-lexical global normative priority of procedure and consequentialism. Deontologists may also be concerned with consequences (e.g., the accuracy of the outcome). Furthermore, deontological constraints need not be absolute. Indeed, in the legal context—where decisions can have wide-ranging implications beyond the case at hand—it seems likely that consequentialist considerations might sometimes justify decisions that depart from deontological principles. Thus, non-lexical global normative priority of procedural rules may be compatible with a deontological approach. The point is that only consequentialist theories (and not deontological ones) require deviating from procedural rules whenever this would lead to better consequences, since only for consequentialists, consequences are the only thing that matters (but see *infra* note 99 for the suggestion that rule-consequentialism may accommodate lexical global normative priority of procedural rule). This makes it much less likely that the justification of a procedural rule that has lexical global normative priority would be merely consequentialist.

40. In the context of civil procedure, global normative priority of procedural norms is reflected in the transsubstantive approach, which experiences reduction nowadays. See *supra* note 13 and text.

deviate from procedural rules.[41] Take as an example the rule against double jeopardy: while a jury's acquittal was considered final in traditional common law, contemporary English law departed from this rule and now allows the quashing of acquittal of certain serious offences if there is 'a new and compelling evidence' against the acquitted person in relation to the qualifying offence.[42]

In Section 4, we demonstrate how the conceptual framework developed here can be applied to some ongoing debates about the status of criminal procedural norms. Before this, let us make the main conceptual point of the paper, which concerns the interaction between justificational priority and normative priority of procedural norms.

3. Deviating from Procedural Norms

Justificational priority and normative priority are different concepts, though they might be mistakenly conflated. The fact that X is normatively prior to Y does not imply that X is justificationally prior to Y. For example, perhaps the duty of a physician to save her patient's life does not permit her to operate on the patient without her consent. If so, we can say that in this particular context, the obligation to respect personal autonomy is normatively prior to the obligation to save lives. This, however, does not imply that what justifies the obligation to save lives is the obligation to respect personal autonomy; that is, the obligation to respect personal autonomy is not justificationally prior to the obligation to save lives.

There is, however, an important relationship between the concepts of justificational and normative priority. It seems that pure justificational priority of a certain procedure implies the lexical normative priority of that procedure. If the ultimate justification of the legal outcome rests on its being the result of a certain procedure, then there is no room for judicial discretion to deviate from that procedure due to substantive considerations. Relatedly, if the justification of the legal outcome rests on its being a result of certain procedure, then the decision about the validity or applicability of the relevant procedural norms should be made independently and prior to the decision regarding the substantive matter. That is to say that the substantive questions should be decided under the predetermined procedural constraints, as the lexical dichotomy approach prescribes.

The inverse direction is less clear. It seems that in cases in which the procedural norm has normative priority because of an 'external' reason, such as the procedural efficiency of the judicial system, it is hard to say that the concrete substantive outcome—in the realm of the parties to the proceeding—is justified by the procedural norm. Consider, for example, a limitation on the time available for cross-examination, which is justified by a concern for judicial efficiency.

---

41. There is an inherent tension between global normative priority of procedural rules and the ideal of flexibility, as flexibility of procedural rules makes room for substance-dependency. For a discussion of this issue in the context of the American Federal Rules of Civil Procedure, 1938, see David L Shapiro, "Federal Rule 16: A Look at the Theory and Practice of Rulemaking" (1989) 137 U Pa L Rev 1969; Stephen B Burbank & Linda J Silberman, "Civil Procedure Reform in Comparative Context: The United States of America" (1997) 45 Am J Comp L 675.

42. *Criminal Justice Act, 2003*, c 44, s 78.

Assume further that this limitation has normative priority. Now, if the concrete legal outcome of a specific trial, in the realm of the actual parties, is justified, then it is justified despite that procedural limitation, not because of it. Therefore, with regard to the concrete outcome, in the realm of the parties, there is no justificational priority of the procedure, although it has normative priority.

We submit, therefore, that pure justification priority of the procedure over the outcome entails lexical normative priority of that procedure, but not the opposite. Lexical normative priority of the procedure does not entail pure justificational priority of that procedure over the substantive outcome. The conclusion that pure justificational priority of a certain procedural norm entails lexical normative priority of that norm has an important implication: the notion of justificational priority can assist in addressing the question of whether or not the court should have judicial discretion to deviate from a certain procedural rule.

If a procedural rule has pure justificational priority—in other words, if the ultimate justification of the legal outcome rests upon its being the result of the application of a certain procedural rule—then the court should not have discretion to deviate from that rule. A different conclusion may be reached if the outcome has justificational priority over the procedural rule—that is, the procedural rule is justified in virtue of its likelihood to lead to a certain desirable outcome. In such a case, if one could guarantee that the right outcome would be obtained, then the mere existence of a procedural defect would not make a normative difference and the court might have discretion to deviate from the prescriptions of the procedural rule.

This point can be simply demonstrated by the paradigmatic examples of justificational priority: the coin toss and the cake division. In cases where a coin toss is the appropriate procedure—for example, when an indivisible good has to be allocated between two claimants with equal claims—there is no room to allow judicial discretion to deviate from the coin toss or similar lottery procedure, regardless of the result of applying that procedure. This is not the case with regard to the cake division example. Deviation from the 'you-cut-I-choose' method might be appropriate, for example, if applying that method leads to a very unequal division of the cake (for instance, because the cutter's hand was unsteady). In other words, discretion should be allowed when the application of the procedural norm does not lead to the desirable outcome of equal division.

In the legal context, the question of judicial discretion arises in cases where tension exists between procedural and substantive norms and considerations. For example, a question arises whether the evidentiary rule that excludes probative evidence seized in violation of the defendant's constitutional rights[43] has lexical normative priority or if a deviation from that rule is permissible—or even obligatory—in certain circumstances. The concept of justificational priority might assist the discussion of such dilemmas: while pure justificational priority of a certain procedural norm implies lexical normative priority which prohibits judicial discretion to deviate from that norm, justificational priority

43. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 s 24(2).

of a certain outcome may leave room for judicial discretion. In what follows, we demonstrate this point by reframing several such dilemmas in terms of normative and justificational priority. It should be emphasized, however, that we do not aim to resolve these dilemmas, but rather to clarify the conceptual space within which they take place and point to general moral commitments underlying disputed legal views.[44]

4. Current Evidentiary Debates

Many evidentiary rules in criminal litigation are allegedly justified in virtue of their likelihood to lead to the desirable outcome of a low frequency of erroneous convictions, while maintaining a reasonable frequency of erroneous acquittals.[45] However, with regard to the concrete outcome of a particular criminal trial—namely, the conviction or acquittal of a specific defendant (as opposed to the general outcome of reducing the frequency of wrongful convictions)—the direction of justification appears to be from the criminal procedure to the outcome. That is to say that the resultant conviction in a concrete case is justified in virtue of the fact that the defendant was convicted under a fair and reliable criminal process.[46]

As suggested before, the direction of justification is relevant to whether or not the court should have discretion to deviate from procedural norms. If a procedural norm has pure justificational priority over the substantive outcome, a deontological constraint must be involved, which implies lexical normative priority of the procedure.[47] In what follows, we demonstrate this point by discussing some examples of evidentiary rules: the inadmissibility of probative evidence seized in violation of rights, the exclusion of statistical and character evidence, and the context-dependency of the reasonable doubt standard of proof.

A. Probative Evidence Seized in Violation of Rights

The classification of criminal evidentiary rules as a case of justificational priority of a certain outcome—such as the outcome of minimizing erroneous convictions while maintaining a reasonable frequency of erroneous acquittals—reflects a consequentialist approach, according to which the moral justification of these rules depends solely on the consequences of their application. This classification

---

44. Conceptual analysis, of course, cannot produce normative conclusions by itself, for these can only be deduced from premises which include at least one normative proposition. Similarly, the question whether or not a certain procedural norm has justificational priority is not a merely conceptual question. It involves a normative judgment of the form: 'X is the moral (or legal) justification of Y.'

45. An influential formulation is: "the law holds that it is better that ten guilty persons escape, than that one innocent suffer." See William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765) at c 27 at 359.

46. Similarly, RA Duff argues that "[t]o convict a guilty defendant without giving her a hearing is not to produce a just verdict by unjust means; for the justice of a verdict is internally related to the justice of the procedures which produce it." See *Trials and Punishments* (Toronto: Canadian University Press, 1986) at 119.

47. We discuss below the option of moderate deontological constraint, which allows deviation from the relevant procedural norm in certain circumstances.

can be rejected on general moral grounds by denying the consequentialist account of the relevant evidentiary rule. The debate over the direction of justification—which is related, as mentioned, to the debate between consequentialist and deontological approaches to evidence rules—can be illustrated by the case of probative and reliable evidence that was seized in violation of rights, such as the right to privacy or autonomy.

Current trends in North American and English jurisprudence regarding the inadmissibility of unconstitutionally or illegally obtained evidence demonstrate the alleged departure from the lexical dichotomy approach. Albeit moving in opposite directions, different legal systems are driven towards a flexible, contextual 'balancing approach.' For example, in *R v Grant* the Supreme Court of Canada revised *R v Stillman*'s "all-but-automatic exclusionary rule for non-discoverable conscriptive" test, and adopted a more sensitive balancing test for exclusion which only takes this fact into account, among other factors, to assess the effect of admitting the evidence on society's confidence in the justice system.[48] In the US, the exclusion of evidence seized in violation of constitutional rights was generally mandatory.[49] However, in the last decades, the scope of the Fourth Amendment exclusionary rule had been gradually narrowed down.[50] In contrast to the American constitutional tradition, the common law traditionally refused to consider the circumstances in which the evidence was obtained as a reason for inadmissibility. Yet, contemporary legislation and the gradual constitutionalization of English criminal procedure demonstrate a departure from the common law tradition. Most notably, section 78 of the *Police and Criminal Evidence Act, 1984* provides courts with judicial discretion to exclude evidence if, given the circumstances under which it was seized, the admission of that evidence would have an adverse effect on the fairness of the proceedings. The concept of 'fair trial' as applied by the English courts is, however, highly flexible, open-ended, and context-sensitive.[51]

The justification for the exclusion of probative and reliable evidence seized in violation of rights cannot rely on the desirable outcome of sustaining a low rate of erroneous convictions. This is not to say, however, that such exclusionary rules cannot be justified in virtue of their leading to another outcome—for instance, guiding police behaviour in future cases and thereby minimizing violations of rights.[52] Notice that in this case, the exclusionary rule also does not display pure justificational priority, which requires that the justification of the

48. *R v Grant*, [2009] 2 SCR 353; *R v Stillman*, [1997] 1 SCR 697.
49. See, for example, *Mapp v Ohio* (1961), 367 US 643.
50. See, for example, *Hudson v Michigan* (2006), 547 US 586, 591; *Herring v US* (2009), 129 S Ct 695. For a review of the case law see Mark E Cammack, "The United States: The Rise and Fall of the Constitutional Exclusionary Rule" in Stephen C Thaman, ed, *Exclusionary Rules in Comparative Law* (New York: Springer, 2013) at 3.
51. See Roberts & Zuckerman, *supra* note 14 at 196-205. For a critical discussion of Section 78 case law, see Andrew LT Choo & Susan Nash, "What's the Matter with Section 78?" (1999) Crim L Rev 929.
52. The rights to autonomy or privacy may reflect a deontological consideration. It is the reference to the outcome of minimizing violations of these rights which gives the justification its consequentialist character.

rule be non-consequentialist. We turn now to discuss a more detailed illustration of this point.

Let us first stipulate that a certain exclusionary rule, which excludes probative and reliable evidence seized in violation of rights, does not have pure justificational priority—namely, it is justified in virtue of its instrumental role in bringing about desirable outcomes, such as minimizing future violations of rights.[53] Under this assumption, it seems that at least sometimes, such as in cases of very serious crimes, it is morally justified not to acquit a defendant who is guilty, even though his rights were violated.[54]

In this regard, there seems to be a gap between the *ex-ante* perspective—when the law aims to deter unlawful police conduct in order to minimize the violation of rights of the presumably innocent—and the *ex-post* perspective—when it is proven that the defendant has committed the crime. It might be argued that the fact that the defendant is guilty is relevant not only to the all-things-considered normative status of the legal outcome, but also to the normative status of the violation itself (the act which has violated the defendant's rights). According to this suggestion, a state of affairs wherein an innocent person is subject to an unlawful search is morally worse than a state of affairs wherein a person who, for instance, was illegally carrying a gun is subject to the same unlawful search, even if there is no difference between the epistemic (mental) state of the relevant agent (i.e., the policeman) conducting the search in each of the two cases.

The existence of a gap between the *ex-post* and *ex-ante* perspectives is typical to substance-procedure dilemmas.[55] For instance, from an *ex-ante* perspective, the criminal procedure aims at providing incentives to submit a notice of appeal on time, but from an *ex-post* perspective, it might be wrong to reject a justified criminal appeal only because the appellant (or his lawyer) failed to submit it on time. The solution in this case might be to create significant incentives to submit an appeal on time without making the substantive outcome of the appeal *strictly* conditional on when the appeal was submitted. Back to the question of evidence

---

53. See, for example, *Stone v Powell* (1976), 428 US 465, 486 for the view that "[t]he primary justification for the exclusionary rule … is the deterrence of police conduct that violates Fourth Amendment rights."

54. One can argue that in the case of a serious crime, the reason for assigning priority to the exclusionary rule is not weakened but strengthened, because the violation of the defendant's right is more harmful when it leads to a conviction for a serious offence, which probably results in a severe punishment. Indeed, the South African Constitutional Court pointed out that in this respect, "[t]here is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing the convictions of the guilty, the more important do constitutional protections of the accused become[s]." See *State v Coetzee and Others*, [1997] 2 LRC 593 (South Africa) (Sachs J). This statement was endorsed in *R v Johnstone*, [2003] 1 WLR 1736. However, in the context of probative, reliable evidence that was illegally obtained, this analysis seems to reflect a non-consequentialist constraint of fairness against convicting a person on the basis of illegal evidence, and thus is incompatible with the stipulation that the justification of the exclusionary rule is grounded in its good consequences (e.g., in terms of minimizing future violations of rights).

55. The dilemma between the two perspectives arises because of the lack of 'acoustic separation': a hypothetical state of affairs in which 'decision rules,' which are directed to the decision maker, are screened from the general public. See Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97 Harv L Rev 625. In the context of exclusionary rules, there is no acoustic separation between 'conduct rules' that are addressed to the police and designed to guide its behaviour and decision rules that are addressed to the courts.

seized in violation of rights, assuming that the *only* justification for an exclusionary rule is the consequentialist reason of guiding police behaviour in future cases, one could argue that a similar solution is called for: creating significant incentives to avoid the violation of rights without making the substantive outcome of trial *strictly* conditional on the legality or constitutionality of the (probative) evidence. Indeed, on the view that the rationale of the exclusionary rule is deterrence against rights' violations, the justification of the acquittal outcome does not relate to the actual parties to the proceeding, and is in fact *unjustified* in the realm of the parties.

It seems, then, that if the *only* justification for excluding the evidence is deterring enforcement officials, there is room for allowing judicial discretion to deviate from the exclusionary rule in certain circumstances. In particular, if the end result of deterring unlawful police conduct can be achieved by means other than acquittal, it might be appropriate to deviate from the exclusionary rule.[56]

To summarize this point, assuming that the exclusionary rule does not have pure justificational priority, but rather is justified in virtue of its leading to a certain desirable outcome (such as minimizing future violations of rights), a deviation from that rule in certain circumstances might be appropriate.

A different conclusion may be reached if the exclusionary rule does have *pure* justificational priority over the outcome. An interesting question is (putting aside 'external' consequentialist reasons, such as deterring enforcement officials from violating rights or securing public confidence in the fairness of legal proceedings[57]), is it morally required to suppress illegally obtained (probative) evidence due to 'internal' reasons that touch on the realm of the actual parties to the criminal proceeding?

It could be argued that illegally obtained evidence should be excluded in order to vindicate the relevant rights, or that exclusion is the *only* appropriate remedy for such violation of rights—as opposed to the view that the defendant can be compensated for the violation of his rights in a different way than acquittal.[58] Intuitively, there seems to be something unfair about convicting a defendant on the basis of evidence that could not be obtained unless the police violated his rights, even if his guilt can be proven beyond a reasonable doubt. In such a case the defendant seems to have a kind of *estoppel* claim: the prosecution is 'estopped' from prosecuting on the basis of evidence that the state itself defines as unlawfully seized.[59] On this view, the exclusion of probative evidence seized in

56. This view is reflected, for example, in the US Supreme Court decision *Hudson v Michigan*, *supra* note 50 at 595. The court held that a violation of the 'knock and announce' requirement does not require suppression of all evidence found in the search. Justice Scalia stated that that internal discipline, which can limit successful careers, may have a deterrent effect, while "suppression of all evidence, amounting in many cases to a get-out-of-jail-free card."

57. It is doubtful that public confidence in the legal system, or even in the fairness thereof, would be improved if persons whose guilt has been proven beyond a reasonable doubt would be acquitted due to the inadmissibility of a reliable (albeit illegally seized) evidence.

58. See, for example, Andrew Sanders, Richard Young & Mandy Burton, *Criminal Justice* (Oxford: Oxford University Press, 2010) ch 12; Sonja B Starr, "Sentence Reduction as a Remedy for Prosecutorial Misconduct" (2009) 97 Geo LJ 1509.

59. A different, though perhaps related, deontological consideration might be formulated in terms of the 'moral integrity' of the legal system or the 'rule of law' (see Roberts & Zuckerman,

violation of rights is not justified by the consequences thereof—for example, in terms of minimizing future violations of rights or protecting public confidence in the legal procedure—but rather reflects a deontological constraint of fairness. This view, if sound, generates a counter-example to the proposition that evidence rules are *always* justified in virtue of their leading to desirable consequences, such as guaranteeing a low frequency of erroneous convictions or minimizing violations of rights.

It is doubtful, however, that such estoppel-like deontological consideration (even if valid) is absolute. A *moderate* deontological constraint—which can be defeated if the consequences of applying it are too harsh—seems more plausible than an absolute one. It could be argued, then, that exclusionary rules that exclude probative and reliable evidence seized in violation of rights (such as the right to privacy) are different than inadmissibility rules that exclude epistemically defective or misleading evidence.[60] The latter rules have pure justificational priority over the concrete outcome (which entails lexical normative priority), because the factual decision is epistemically justified solely in virtue of the epistemic status of the evidence. On the other hand, the former exclusionary rules that exclude probative and reliable evidence reflect only one consideration of justice that should be weighed against other considerations. That is to say, inadmissibility rules that exclude illegally obtained probative evidence do not display lexical normative priority over the outcome.[61]

In response, a proponent of the view that such exclusionary rules *do* have lexical normative priority could still insist that, even if the above analysis is correct with regard to the moral justification of the exclusion, it fails nonetheless with regard to the legal justification thereof. Thus, even if the convicting outcome is morally justified despite the illegality in obtaining the evidence, that outcome cannot be legally justified. This state of affairs could be compared to a case in which the judge herself saw the accused committing the crime. Even assuming that the judge is extremely reliable and thus epistemically justified in her (almost one hundred percent) certainty that the accused is guilty, a conviction on the basis of such personal knowledge of the judge is still obviously illegal, regardless of the existence of valid moral reasons against acquittal (e.g., protecting the public from a dangerous criminal).

---

supra note 14 at 188-91). This consideration is distinguished from the consequentialist consideration of protecting public trust in the fairness of the legal proceedings. However, it is not exactly clear what the rationale of 'moral integrity' means in this context. After all, moral integrity depends on what the morally right thing to do in the circumstances is, so it does not seem to add something to the discussion of the particular moral considerations. Similarly, the reference to the 'rule of law' seems also redundant. Presumably, there is no non-consequentialist 'rule of law' consideration against the admission of probative and reliable evidence that was illegally obtained, which is independent of the particular moral considerations (such as the ones discussed in the text). See, however, Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014) for the idea that law matters as such.

60. At least when the misleading potential of the evidence is greater than its probative value.

61. This is the prevalent view in English evidence law. An exception to this non-lexical approach taken by the English courts is evidence obtained by *torture* which is automatically inadmissible. See *A v Secretary of State for the Home Department* (No 2) [2005] UKHL 71, [2005] 3 WLR 1249.

Indeed, there might be cases in which an absolute deontological constraint can generate pure justificational priority of a procedural norm. The above example and the case of evidence obtained by torture might be such cases. However, a general absolute constraint against the admissibility of illegally obtained probative evidence seems morally and legally implausible. Even if there is a general fairness consideration against the admissibility of such evidence which is *prima facie* valid, there could be other normative considerations that would render the admissibility of illegally obtained evidence all-things-considered justified.

B. Statistical Evidence and Character Evidence

The hypothesis that criminal procedure in general, and criminal evidence rules in particular, cannot be explained solely by referring to the desirable consequences of their application—for example, in terms of accuracy in fact-finding, minimizing erroneous convictions, or minimizing violations of rights—receives support from the distinction between statistical and individual evidence, and the long-standing resistance of courts and legal scholars to use statistical evidence as a basis for criminal conviction.[62] If evidence norms were justified solely in virtue of their likelihood to bring about accurate outcomes, then even mere statistical evidence would presumably not be considered problematic. Indeed, in scientific disciplines such as medicine, reliance on statistical evidence is quite common, and such evidence is perceived as no less legitimate than individual evidence.

Consider, for example, the 'gatecrasher case,'[63] where a stadium's gate was crashed and many people entered the stadium without purchasing tickets. Even if it is known that, say, one thousand people attended the game and only ten of them purchased tickets, in the majority of legal systems it would not be possible to convict someone from the crowd based on the statistical evidence that 99 per cent of the audience had not purchased a ticket. In contrast, it is clearly permissible to convict someone from the crowd based on a 99 per cent reliable eyewitness.

The puzzle is why it is justified to distinguish between these two types of evidence, when the probabilities are exactly the same. If, from an epistemic point of view, there is no difference between statistical and individual evidence—or even if there is an epistemic difference between them (for instance, because statistical evidence cannot ground knowledge) but this difference is not legally relevant, since what is important in terms of accuracy in fact-finding are the probabilities (which are assumed to be exactly the same)[64]—then what can justify the different attitudes of the law towards these two types of evidence?

---

62. For a discussion of this distinction and its proposed explanations see, for example, Alex Stein, *Foundations of Evidence Law* (Oxford: Oxford University Press, 2005); Hock Lai Ho, *A Philosophy of Evidence Law* (Oxford: Oxford University Press, 2008).

63. See L Jonathan Cohen, *The Probable and the Provable* (Gloucestershire: Clarendon Press, 1975) at 74.

64. For this view, see David Enoch, Levi Spectre & Talia Fisher, "Statistical Evidence, Sensitivity, and the Legal Value of Knowledge" (2012) 40 Philosophy & Public Affairs at 197, 212: "to insist that the law should after all care about knowledge is [pretty much] to be willing to pay a price in accuracy. Indeed, excluding statistical evidence amounts to excluding [what is often] good, genuinely probative evidence."

One recently suggested type of vindicating explanation is based on practical-instrumental considerations. It was argued that excluding statistical evidence may have better effects in terms of incentives. In a legal system in which statistical evidence is admissible, a person has less incentive to avoid criminal activity. This is because a court's belief in his guilt, which is based on statistical evidence, is 'insensitive' to the truth:[65] had it not been the case that the defendant actually committed the offence, a court which bases its decision on statistical evidence would still find the defendant guilty. Returning to the gatecrasher case as an example, the potential offender's decision of action would have almost no influence on the statistical evidence, and he knows that he will be convicted based on that evidence regardless of whether he purchases a ticket or not.[66] In contrast, a court's belief based on eyewitness evidence is sensitive to the truth: had it not been the case that the defendant committed the offence (i.e., if he did not gatecrash) the court most probably would not have found him guilty on the basis of eyewitness testimony. Therefore, excluding statistical evidence and relying only on individual evidence creates more efficient incentives to avoid criminal activity.[67]

A similar incentive-based, instrumental explanation was suggested for the rule which defines character evidence as inadmissible for proof of conduct (as opposed to its admissibility in the sentencing stage). It was argued that since character evidence can be of probative value, the inadmissibility of such evidence cannot be explained if evidence law is perceived as exclusively aimed at finding the truth. However, a different kind of explanation, based on incentives, is available. The optimal incentive structure is the one that maximizes, from the agent's perspective, the correlation between the actual decision to commit a crime and the likelihood of being convicted. Admissibility of character evidence reduces this correlation since the existence of that evidence does not depend on the decision of whether or not to commit the crime.[68]

The problem with such explanations is that even if they provide an adequate justification for the normative judgements against the admissibility of statistical and character evidence, they do not explain their phenomenology: the pre-theoretical intuitions against relying on such evidence. It seems that the intuition against relying on statistical and character evidence remains intact, even in a hypothetical world in which acoustic separation exists and people's behaviour is not affected by evidentiary rules (which are selectively addressed only to the judicial and enforcement authorities). In such a hypothetical world of acoustic separation, evidentiary rules do not create any incentive, and therefore the

65. *Sensitivity* is defined as follows: "S's belief that p is sensitive $=_{df}$ Had it not been the case that p, S would (most probably) not have believed that p." *Ibid* at 204.

66. In reality, of course, incentive structures are more complicated than in this toy-example. The admissibility of statistical evidence might not deform a potential gatecrasher's incentive not to buy a ticket if he could produce additional individual evidence for his innocence (e.g., to keep the ticket).

67. See David Enoch & Talia Fisher, "Sense and Sensitivity: Epistemic and Instrumental Approaches to Statistical Evidence" (2015) 67 Stan L Rev 557.

68. See Chris Sanchirico, "Character Evidence and the Object of Trial" (2001) 101 Colum L Rev 1227.

incentive-based practical considerations for excluding statistical evidence and character evidence are no longer valid.[69]

If the epistemic and the practical-instrumental explanations of these evidentiary rules should be denied,[70] then what remains? Assuming that these rules are indeed justified,[71] we are left with a non-consequentialist explanation that is somehow related to a deontological requirement of 'procedural fairness.'[72] If this is true, then perhaps we have here additional examples for pure justificational priority of procedural norms. As already discussed, pure justificational priority of a procedural norm implies lexical normative priority of that norm, which leaves no room for judicial discretion to deviate from it. The fact that in many legal systems the inadmissibility of character evidence at the trial stage has normative priority, and courts usually do not balance between the considerations in favour of their inadmissibility and other considerations,[73] such as accuracy in fact finding, is indeed compatible with the hypothesis that these inadmissibility rules reflect a deontological consideration of fairness rather than consequentialist, instrumental considerations.[74]

Similarly, the fact that in many legal systems defendants are rarely convicted on the basis of mere statistical evidence (of the type described in the gatecrasher example)[75] is more compatible with the view that this exclusionary rule reflects a deontological consideration rather than with the view that it reflects consequentialist (e.g., incentive-based) considerations. Indeed, if the distinction between statistical and individual evidence is vindicated by a practical-instrumental

---

69. The plausibility of the incentive-based vindication can be challenged also on empirical grounds. Even with the lack of acoustic separation, it is not clear to what extent potential offenders actually consider the inadmissibility of statistical and character evidence when deliberating about whether to break the law. If the impact of these inadmissibility rules on the incentive structure is minor, the incentive-based consideration should be defeated by the accuracy consideration.

70. An epistemic explanation of the inadmissibility of *character* evidence, which seems plausible, rests on the prejudicial effect of such evidence. For a critical discussion of the epistemic accounts of the distinction between *statistical* and *individual* evidence see, for example, Amit Pundik, "The Epistemology of Statistical Evidence" (2011) 15 Int'l J Evidence & Proof 117.

71. If epistemic and instrumental explanations of the intuition that there is something wrong in a conviction based on mere statistical evidence are unavailable, perhaps scepticism regarding the existence of any vindicating explanation of the distinction is the appropriate way to go. For similar conjuncture, and a discussion of possible debunking explanations of the distinction (which refer to cognitive biases), see Ferdinand Schoeman, "Statistical vs Direct Evidence" (1987) 21 Noûs 179.

72. We are not arguing that we have such a non-instrumental explanation. Actually, it is not clear what is exactly unfair in the use of statistical evidence. We are just signifying a non-consequentialist intuition that many people share. For an attempt to explain the distinction in terms of justice and fairness, see, for example, Daniel Shaviro, "Statistical-Probability Evidence and the Appearance of Justice" (1989) 103 Harv L Rev 530.

73. This rule has global normative priority which is non-lexical, namely, there are exceptions to the inadmissibility of character evidence, such as the admissibility of evidence of similar offences in sexual assault and child molestation cases. See *Sopinka*, *supra* note 13 at 633-34. For a discussion of the transformation of the English doctrine of 'bad character' evidence by the *Criminal Justice Act, 2003*, see Mike Redmayne, *Character Evidence in the Criminal Trial* (Oxford: Oxford University Press, 2014).

74. This is a descriptive claim. The fact that such a deontological consideration better explains the legal practice does not entail that it is morally valid.

75. See, for example, Rebecca Haw, "Prediction Markets and Law: A Skeptical Account" (2009) 122 Harv L Rev 1217-29.

explanation, such as that relying on statistical evidence will render the behaviour incentives the law provides less efficient than they would otherwise be, then we should expect to encounter a somewhat 'softer' rule, that would balance between the consideration of creating efficient incentives and the consideration of accuracy in determining the facts (that supports the potential admissibility of any reliable evidence, statistical evidence included).

We thus contend that the fact that courts have traditionally refrained from weighing the considerations underlying the restrictions on the admissibility of statistical evidence and character evidence against other normative considerations (such as accuracy in fact-finding) lends some support to the hypothesis that these evidentiary rules are not vindicated by consequentialist (e.g., instrumental) explanations. The current trend of softening the traditional exclusionary rules against statistical and bad character evidence[76] can thus be considered as another example for the departure from the lexical dichotomy approach and for the modern trend to blur the distinction between substance and procedure.

C. The Reasonable Doubt Standard

The standard of proof beyond a reasonable doubt is a paradigmatic example of a procedural norm which is perceived to have global normative priority.[77] Notwithstanding this legal truism, developments in evidence law during the last century, associated with the tendency to relax the lexical dichotomy approach, might be considered as erosion of the global normative status of the reasonable doubt standard and evidentiary rules that are related to it, and accordingly as a derogation from the presumption of innocence.[78] In Canada, for instance, courts chipped away at common law exclusionary rules that used to be perceived as safeguards against conviction on the basis of problematic (unreliable, misleading, prejudicial, etc.) evidence. Examples are the elimination of corroboration requirements,[79] the relaxation of the hearsay rule,[80] and the gradual erosion of the constraint on the admission of character evidence.[81] Another example for

76. In the English context, this trend was exemplified by the *Criminal Justice Act, 2003*. See Redmayne, *supra* note 73 at ch 7; Roberts & Zuckerman, *supra* note 14 at 700.

77. This standard of proof is "inextricably linked" to the presumption of innocence protected by s 11(d) of the Canadian *Charter*. See, for example, *R v Lifchus*, [1997] 3 SCR 320 (Cory J); Kent Roach, *Criminal Law* (Toronto: Irwin Law, 2012) at 50. This view is also reflected in Viscount Sankey LC's famous statement in *Woolmington v DPP*, [1935] AC 462, 481-82: "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to … the defence of insanity and subject also to any statutory exception." Also in *In re Winship* (1970), 397 US 358, 380: the US Supreme Court held that *all* criminal defendants have a constitutional right to have their guilt (i.e., every key element of the prosecution's case) proved beyond a reasonable doubt.

78. See, for example, Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10 Int'l J Evidence & Proof 241.

79. *R v Vetrovec*, [1982] 1 SCR 811.

80. *Sopinka*, *supra* note 13 at 5-8, 267-68. For example, in *R v Khan*, *supra* note 13, the court admitted out-of-court statements made by children who were allegedly the victims of sexual abuse. Also, in *R v R*, [2007] 85 OR (3d) 481 the accused was convicted of sexual assault on the basis of unsworn video statement of his twelve-years-old daughter who recanted at trial.

81. *Sopinka*, *supra* note 13 at 618.

the recent developments is the constantly increasing number of statutes which include reverse onus clauses that impose a burden on the defendant to disprove an element of the offence or to prove a statutory defence.[82]

The debate over the appropriate interpretation of the presumption of innocence demonstrates nicely the abovementioned conflict between the traditional lexical dichotomy approach and the modern trends which blur the distinction between substance and procedure. The dispute is between those who defend a restrictive procedural interpretation of the presumption of innocence—according to which it applies only to the elements of the offence[83]—and those who opt for a substantive interpretation—according to which courts should be allowed to review not only reverse burden presumptions and defences, but also the substantive content of criminal law such as offences (i.e., strict liability) which do not require proof of *mens rea*.[84] The former account considers the presumption of innocence to be purely procedural: it concerns merely the epistemic (uncertainty) threshold for criminal liability, which is independent of the content of the particular offence that needs to be proven. This account thus fits well with the view that ascribes lexical global normative priority to the reasonable doubt standard, and rejects the idea of a context-sensitive criminal standard of proof. In contrast, the substantive interpretation denies the sharp distinction between substance and procedure: it is not concerned (merely) with the epistemic threshold for conviction, but rather with the broader substantive issue of the moral wrongness of criminalizing persons who are not blameworthy. Accordingly, it does not find a real difference, in this respect, between convicting a person whose guilt was not proven beyond reasonable doubt and convicting a person in the absence of *mens rea*.[85]

If our concern is with the general issue of the moral wrongness involved in convicting and punishing persons who might be morally innocent, there seems to be no reason to refrain from considering any moral consideration which is relevant to the all-things-considered conclusion: the gravity of the crime, the severity of the potential punishment, the potential danger to the public safety, the psychological effect on the victim, and so on. In other words, the substantive account of the presumption of innocence fits well with a context-sensitive criminal standard of proof—namely, with the view that the reasonable doubt standard does not have lexical global normative priority over the substance. In this respect, this account has the potential to pull in opposite directions: on the

82. In England, for example, *Homicide Act, 1957*, s 4 (suicide pacts); *Misuse of Drugs Act, 1971*, s 28 (lack of knowledge of identity of drugs); *Sexual offences Act, 2003*, s 75 (presumptions about consent).

83. See Paul Roberts, "Strict Liability and the Presumption of Innocence" in AP Simester, ed, *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) at 195. The 'procedural' account was endorsed, for example, by Lord Hope in *R v G* [2008] UKHL 37, 1 WLR 1379-88.

84. Victor Tadros & Stephen Tierney, "The Presumption of Innocence and the Human Rights Act" (2004) 67 Mod L Rev 402 at 413-16. A similar 'substantive' approach—which relates to affirmative defense as if it were an element of the offence—was taken, for example, by the House of Lords in *Regina v Lambert* [2001] UKHL 37, [2002] 2 AC 545.

85. One worry is that the legislature can always find (substantive) ways to bypass the (procedural) presumption of innocence. See John C Jeffries & Paul B Stephan, "Defenses, Presumptions, and Burden of Proof in the Criminal Law" (1979) 88 Yale LJ 1325 at 1347.

one hand, broadening the protection against morally wrong conviction by allowing judicial scrutiny of the content of criminal offences, but on the other hand, providing courts with the discretion to consider any moral consideration which is relevant to the dilemma about the degree of certainty required for criminal conviction and balance between the conflicting considerations.[86]

It could be argued further that the derogation from the presumption of innocence is reflected not only in evidentiary rules that refer directly to burdens of proof, such as reverse onus clauses, but also in the constant softening of other traditional evidentiary rules. A possible argument for this claim is the following. An adequate meaning of the reasonable doubt standard of proof cannot refer merely to the fact-finder's high subjective probability (or confidence) about the defendant's guilt. This is because the firmness of a belief does not entail whether that belief is rational or well founded on the evidence. Therefore, a more objective sense of 'beyond reasonable doubt,' which is not in terms of the fact-finder's mental state, is required.[87] Such interpretation of the reasonable doubt standard may require a rational high degree of belief in the defendant's guilt. The traditional common law admissibility rules might be perceived as safeguards against conviction on the basis of problematic (unreliable, misleading, prejudicial, etc.) evidence, such as bad character evidence. The considerable relaxation of these admissibility constraints, the argument concludes, allows conviction on the basis of evidence that is not sufficient for granting a rational high confidence about the defendant's guilt.[88]

This argument gets further support from empirical studies that show that there are substantial differences in the way different fact-finders perceive and apply the concept of 'reasonable doubt.'[89] These findings suggest that the outcomes of criminal procedure which eliminates evidentiary constraints and guides fact-finders only by asserting that a defendant should not be convicted unless found guilty beyond a reasonable doubt heavily depend on who is the fact-finder, and therefore such criminal procedure is highly unreliable.[90]

The abandonment of the 'one-size-fits-all' approach in favour of a more flexible approach to evidence law also made room for a dependency on substance,

---

86. For the normative considerations in favor of each account see, for example, Tadros & Tierney, *supra* note 84; David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act" (2007) 66 CJL 142. Among other issues, the debate is concerned with the appropriate division of responsibility between state legislators and the European (or federal) court (regarding the content of substantive criminal law), as well as with pragmatic considerations regarding the strategic response of the relevant players to each interpretation of the presumption of innocence. We cannot, of course, discuss these issues here.

87. See Larry Laudan, "Is Reasonable Doubt Reasonable?" (2003) 9 Legal Theory 295 at 304.

88. In a similar fashion, Laudan, *ibid* at 320, argues that "[t]he bar for conviction would be better defined in terms of the features of the case needed to convict rather than in terms of the jurors' inner states of mind, especially since the latter—if not disciplined by certain guidelines about the appropriate logical connections between evidence and verdict—are apt to be ill-founded, prejudicial, and irrational, however powerfully they may lead to a firm belief in guilt."

89. See, for example, Geoffrey P Kramer & Dorean M Koenig, "Do Jurors Understand Criminal Jury Instructions?: Analyzing the Results of the Michigan Juror Compensation Project" (1990) 23 U Mich LJ Reform 401.

90. See Laudan, *supra* note 87 at 296.

as it allows courts to accommodate the particular content of evidentiary norms to the specific substantive legal context and the particular circumstances of the case. These trends allowed legislature and courts to weigh the considerations that lie behind the traditional evidence rules against other policy considerations that are related to the particular substantive matter—the severity of the crime, the unavailability of other evidence, the victim's right to privacy, and so on.[91]

It is disputed whether this flexible approach in fact erodes the reasonable doubt standard and the ability of the accused to make full answer and defense[92] or if rather it is nothing more than being true to the rationales of evidence law (including the presumption of innocence) and sensitive to the circumstances of the particular case.[93] At a more fundamental, moral level, the question is whether the standard of proof beyond a reasonable doubt *should* have global priority. Should the same standard apply uniformly to all criminal offences, or should it depend on the type of the offence, and take into consideration the seriousness of the offence and the degree to which offences of its type are difficult to prove? This formulation of the question presupposes that the reasonable doubt standard is a context-independent epistemic standard. Put differently, the question is whether the legal concept of 'reasonable doubt' should have a context-dependent content.[94] Full discussion of this normative question is beyond the scope of this article. Nevertheless, let us make the following general remark.

From the perspective of a consequentialist moral theory, it might be justified to deviate from the standard of proof beyond a reasonable doubt (assuming now that it is context-free) in certain circumstances.[95] For example, in cases of serious-but-hard-to-prove crimes, the consequences of applying the reasonable doubt standard of proof (e.g., in terms of social utility) might be worse than the

---

91. See, for example, David P Bryden & Roger C Park, "'Other Crimes' Evidence in Sex Offence Cases" (1994) 78 Minn L Rev 529, who argue that certain substance-dependent exceptions to the rule against uncharged misconduct evidence in the context of sex offences cannot be vindicated by procedural or epistemic explanations but only by substantive ones.

92. See Stein, *supra* note 14 at 287, for the view that the doctrine of free proof, which underlies the current flowering of discretion in judicial fact-finding, "allows judges to enforce their own privately devised criteria for allocating the risk of error, if not to allocate risk whimsically," and thus is incompatible with the idea that a defendant should be provided with appropriate immunities from the risk of error. In a similar fashion, Roach, *supra* note 77 at 55, notes that courts have on their own initiative imposed persuasive burdens on the accused, and that "in many recent cases, the presumption of innocence seems to be honoured more in its breach. This makes it easier for the Crown to obtain a conviction, but it also opens the possibility for a conviction even though there may be a reasonable doubt that the accused was not guilty."

93. *Sopinka*, *supra* note 13 at 10.

94. Some experimental studies suggest that the standard of proof applied by judges and jurors (in terms of threshold probabilities) vary with their perceptions about the severity of the crime. See, for example, Rita James Simon & Linda Mahan, "Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom" (1971) 5 Law & Soc Rev 319.

95. Such perspective is suggested by Lillquist who argues that the reasonable doubt standard—being vague and flexible and thus allowing the fact-finder to apply the level of certainty that is most appropriate to a particular case—is preferable to a rigid standard that requires a single, fixed level of certainty. See Erik Lillquist, "Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability" (2002) 36 UC Davis L Rev 85. For a similar flexible approach to the presumption of innocence, see David Hamer, "A Dynamic Reconstruction of the Presumption of Innocence" (2011) 31 Oxford J Legal Stud 417.

consequences of applying a lower standard.[96] This is so because a defendant who committed a serious crime might create a risk to the public if mistakenly acquitted that exceeds the risk that would be created by an acquittal of a defendant who committed a minor crime. In addition, the harder it is to prove an offence, the greater the probability of acquittals of blameworthy (and presumably dangerous) defendants.

This conclusion is mitigated, however, by the fact that a wrongful conviction for a serious offence is costlier (in terms of disutility to the convicted person) than a conviction for a less severe offence. In particular, if we take into account also the dependence of the punishment on the severity of the crime (assuming it is fixed),[97] there might be circumstances in which the severity of the crime (and, accordingly, the punishment) would be a reason for raising the standard of proof. Similarly, in case of minor crimes that carry mild punishments, the cost of mistaken conviction is low and this should count in favor of applying a lower standard of proof.[98]

It seems therefore that the global character of the reasonable doubt standard is more compatible with a deontological moral theory than with a simple consequentialist theory.[99] Recalling the connection between pure justificational priority of procedure and the existence of deontological consideration, this conclusion stands in line with the view that the procedure has justificational priority over the concrete outcome of a criminal trial, namely, a conviction of a specific defendant is justified in virtue of the fact that he was convicted under a fair and reliable criminal process.

In principle, a departure from the reasonable doubt standard can be justified also from the perspective of a moderate deontology, according to which

---

96. It is difficult to see how the reasonable doubt standard can have lexical global normative priority from the perspective of *utilitarian* moral theory. One can imagine circumstances in which the general social utility (e.g., in terms of well-being) would be greater if a probably guilty person—who the court could not convict under the reasonable doubt standard—would nonetheless be convicted using a lower standard. Indeed, a state of affairs in which, say, one hundred guilty defendants go free is not necessarily better (in terms of utility) than a state of affairs in which one innocent person is convicted.

97. One may suggest to adjust the punishment to the standard of proof, namely, to apply a lower standard of proof but also a milder punishment in cases of serious-but-hard-to-prove crimes. This suggestion contradicts the lexical dichotomy approach, which requires independence between procedural norms, such as standards of proof, and substantive norms, such as norms that determine the appropriate punishment for a certain criminal conduct.

98. See Laudan, *supra* note 87 at 326-27. The view that the standard of proof should increase with the gravity of the crime is reflected, for example, in Lord Denning's statement in *Bater v Bater*, [1950] 2 All ER 458, 459: "In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear." This view was later endorsed in *Khawaja v Secretary of State for the Home Office*, [1984] AC 74, 112-13.

99. Perhaps the global normative priority of the reasonable doubt standard can be justified by a rule-consequentialism (as opposed to act-consequentialism), or by a consequentialist theory that employs a more complex conception of the good (e.g., than that of simple versions of utilitarianism) according to which the consequence that an innocent person is convicted is extremely bad. See Ronald Dworkin's scepticism about whether consequentialist justifications of this kind are not begging the question by inferring backward "from the fact that our moral intuitions condemn convicting the innocent to the conclusion that such a disability must be in the long-term utilitarian interests of any society" in *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 82.

deontological constraints can be overridden if the 'good' resulted (or the 'bad' avoided) by infringing it exceeds a certain threshold. In cases in which the consequences of applying the reasonable doubt standard are extremely bad, that threshold might be met.

One may ask whether it is more plausible to understand the reasonable doubt standard as reflecting an absolute deontological constraint or a moderate one. Seemingly, it is more plausible to interpret this standard of proof as reflecting a moderate deontological constraint, since an absolute constraint on convicting innocents would arguably necessitate the acquittal of each and every defendant. However, it can also be argued that the absolute constraint is not against convicting innocents, but about convicting a person (or, perhaps, an innocent person) whose guilt was not proved beyond a reasonable doubt. That is, every person (or perhaps every innocent person) has a right to be protected against conviction if his guilt was not proved beyond a reasonable doubt. If so, the standard of proof should not be affected by the seriousness of the crime.

Indeed, from a deontological point of view, there is a need to distinguish between the 'frequency threshold' and the 'probability threshold' for convicting innocent persons, meaning that there is a normative difference between a state of affairs in which for achieving a certain good outcome, ninety-nine guilty defendants and one defendant who is certainly innocent are convicted; and a different state of affairs, in which for achieving the same outcome, a hundred defendants whose probability of innocence is that 0.01 are convicted.[100] We thus have here an additional counter-example to the claim that the standard of proof beyond a reasonable doubt is normatively justified in virtue of the fact that it leads to an outcome of low frequency of wrongful convictions, for the relative frequency of wrongful convictions is identical (1 per cent) in both cases.[101]

The lack of equivalence between the frequency threshold, which is concerned merely with consequences, and the probability threshold means that one can coherently hold an absolute deontological position with regard to the reasonable doubt standard. However, it is still unclear what the rationale of such an absolute deontological constraint is. Arguably, the justification for occasionally convicting an innocent defendant (who was found guilty beyond a reasonable doubt) is related, one way or another, to the severe outcomes of demanding an absolute certainty for conviction. It seems, then, that the best account of the reasonable doubt standard is in terms of moderate deontology, and therefore it may

100. Dworkin, *ibid*, distinguishes in this context between accidentally and deliberately wrongful convictions; Similarly, Ron Aboodi, Adi Borer & David Enoch, "Deontology, Individualism, and Uncertainty: A Reply to Jackson and Smith" (2008) 105 Journal of Philosophy 259 at 267, propose that the normative difference between cases such as the two scenarios described in the text can be explained in terms of the intending-foreseeing distinction.

101. One can argue that the proposed deontological account of the reasonable doubt standard, which normatively distinguishes between the two scenarios (which are similar in terms of the frequency of wrongful convictions) by referring to differences in the agent's mental state (e.g., her intention) is not compatible with the previous claim against defining 'beyond a reasonable doubt' in terms of the fact-finder's mental state. However, this claim was not that the juror's (or judge's) abiding confidence about the defendant's guilt is not necessary, but only that it is not sufficient for conviction.

be permissible, in principle, to deviate from this standard in cases in which the consequences of adhering to it are extremely harsh.

5. Conclusion

Current legal trends tend to obscure the distinction between procedural and substantive law. This tendency manifests itself as a growing dependence of procedural norms on substantive law; greater flexibility of procedural rules; and reducing procedural weight in legal proceedings. The tendency to obscure the distinction between procedure and substance and even devalue the status of procedural norms more generally is manifested also in the academic study of legal procedures that takes place mainly within the discourses of human rights; public policy; and law and economics.[102]

In this article we took, in a sense, one step backward, and returned to an analytical discussion of the relationship between procedure and substance. We developed a theoretical framework that enables us to evaluate the contemporary jurisprudential developments and reveal the fundamental moral commitments underlying the dispute over the flexibility and substance-dependency of procedural norms. Our analysis distinguished between two notions of priority relationships that may exist between substance and procedure: justificational priority and normative priority. These two notions are however related. It was argued that if a procedural rule has (pure) justificational priority over the substantive outcome—that is, if the procedure has justificational priority over *all* its consequences, or the *ultimate* justification of the legal outcome rests upon its being the result of the procedural rule—then this procedural rule has lexical normative priority over the substance, and the court should not be allowed any discretion to deviate from it.

The theoretical analysis was then demonstrated by applying it to some normative debates about criminal evidence law, such as about the normative status of reliable evidence seized in violation of rights; the inadmissibility of statistical and character evidence; and the question of the global normative priority of the reasonable doubt standard of proof. It was suggested that the traditional legal practice with respect to these issues is better explained by the view that assigns justificational priority to the procedure rather than to the substance. Modern legal trends deviate, however, from this approach and relax at least to some extent the deontological constraints that lie at the root of traditional legal procedure, marching towards a more consequentialist legal jurisprudence.

102. See Robert G Bone, "The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy" (1999) 87 Geo L J 887; Lawrence B Solum, "Procedural Justice" (2004) 78 S Cal L Rev 181; Tidmarsh, *supra* note 18 at 883.