



School of Law

ECONOMICS OF EVIDENCE AND PROOF

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Evidence and Proof, Economics of

In the Anglo-American common law legal system, the law of evidence regulates the fact-finding phase of the adjudication process, primarily by specifying the content and form of information that a litigant (or anyone else, including a judge) may present to factual decision-makers, which is referred to as the “admissibility” question. There is no law of “proof” per se, but there are doctrines that specify burdens of proof in both of two senses. First, the burden of *production* identifies the party required to come forward with evidence on a particular fact in dispute. Second, the burden of *persuasion* is the degree of certainty by which the finder of fact must decide, ranging from a simple preponderance of evidence through various intermediate levels to “beyond a reasonable doubt.”

Outside of common law legal systems, there is no separate body of evidence law as such. In those nations following the civil law system, the fact-finding process largely is left to the discretion of the judge. This comparative distinction reflects deeper institutional differences across legal traditions.

Functions and Comparisons

Two major structural features distinguish Anglo-American adjudication. First, the adversary process requires the contesting parties to take the primary responsibility for both investigating facts and selecting information to present in court. Second, there is a strict separation of decisional powers between factual and legal questions, which is represented by (but not exclusively associated with) the use of lay juries to decide questions of fact. Civil law systems tend to differ in both

respects. These differences have motivated scholarship considering the comparative properties of the two models, in terms of both outcomes and the necessary content of rules of evidence and proof. Adversarial process is strongly associated with a right of in-person confrontation and cross-examination of opposing witnesses. In the United States, these rights are guaranteed to criminal defendants by both federal and state constitutions, and also are reflected in the rules of evidence applied in other types of cases.

In all legal systems, the analysis of evidence law must account for the instrumental function of legal adjudication, as the predominant method by which rules of substantive law are brought to bear upon specific individuals or organizations. Most of the law's effect is produced by the prospect rather than the actuality of trial adjudication; rules of evidence are designed in part to influence primary conduct, mostly in situations that never ripen into legal disputes or adjudications. Those few disputes actually presented for decision probably are not representative of the underlying population of disputes, and even less representative of routine legal transactions. Furthermore, the conventional view is that adjudication must possess a degree of finality, at least as to its specific facts. Thus, fact-finding in legal adjudication differs from most other forms of human factual inquiry. Science, and even history, remain open to revision in light of new data or improved analyses. Legal adjudication generally does not. At some point, finality overcomes accuracy, and the legal system refuses to correct error with continuing and sometimes fatal consequences to a litigant. This feature also implicates the content of ex ante evidentiary rules.

Economic Analysis

The economic analysis of evidence law remains an underdeveloped field in the literature, partly because of the complexity of the problems presented in seeking to work through the implications of costly and potentially erroneous adjudication for the efficacy of the underlying rules of substantive law and their optimal enforcement. Much of the work to date is positive rather than normative.

In characterizing the general problem of evidence law, the literature has borrowed from its parent discipline in the economics of procedural law, by developing a model that postulates a tradeoff between “error” costs versus “direct” costs, from both private and social perspectives, with the objective of minimizing the sum of all costs. This tradeoff resembles some evidence law doctrine, such as relevancy standards weighing probative value against “prejudicial” effect or “waste of time” (see Federal Rules of Evidence rule 403). Other economic analyses have focused on the functions of evidence rules as addressing problems of strategic behaviors or asymmetries of information and stakes between the parties, and the external effects of evidence rules. Some scholars have analyzed the burdens of production and persuasion as addressing problems of selection bias, asymmetric stakes and information, and asymmetric error costs.

Even the simple model of cost-minimization has generated some controversy. In particular, there is debate over what is meant by “accuracy” for purposes of assessing error costs, and the alignment of litigating parties’ incentives with the social interest in accuracy. The conception of *accuracy* as an ex post reconstruction of actual historical events has been challenged by

arguments that accuracy should be assessed by reference to optimal ex ante incentives for compliance with substantive law, and evidence rules drawn accordingly. Others have questioned whether there is substantial social interest in random factual error in particular cases, as opposed to legal error or systematically biased factual error. Differing features of the adjudicative framework and evidence doctrine support both points of view, and so it seems likely that both perspectives have some importance to the social functions of adjudication.

The mere existence of rules of evidence might suggest that litigants' incentives do not precisely align with social interests. Alternatively, the stakes in the immediate controversy (if symmetrical) may align the parties' incentives sufficiently with the social interest, and the rules may function primarily as a check on strategic behaviors between litigants. Like the problem of adversarial litigants' trial expenditures, economists have analyzed specific evidence rules in a game-theoretic framework, most notably the rule against "hearsay" evidence, again with differing points of view.

The hearsay rule and many other evidence rules functionally do not completely "exclude" any items of information, but only influence parties' incentives to internalize the cost of producing evidence in a preferred form. One may supplement this function by the view that the hearsay rule, like the "prejudice" rule, is designed either to conserve public resources, or perhaps to rectify cognitive deficiencies or biases in fact-finders. Scholars debate the cognitive deficiency hypothesis, and some papers suggest that even juror bias can be overcome by sufficiently adversarial presentation.

On the general properties of adversarial versus “magisterial” fact-finding, some early literature theorized that adversarial incentives degraded accuracy. However, later papers present both theory and experimental findings indicating that competition between the adversaries provides some of the same informational benefits to tribunals as in markets. This informational benefit is probably weaker in situations of strong asymmetries of access to evidence, or asymmetries of stakes between the litigants (as might exist, for example, in a criminal case or civil litigation where only one side is a repeat litigant). There seems little doubt that this debate will continue, and no one has yet demonstrated the tradeoff between error costs and direct costs in this context.

There is broader recognition that admissibility rules have external effects on the production and supply of information by both litigants and nonlitigants. This is in accord with traditional legal doctrine justifying the evidentiary privileges. Economic analysis has argued that some privileges (notably the attorney-client privilege) can also produce internal benefits to adjudicative accuracy, and has extended the external-effects model to newer applications, such as pretrial disclosure and scientific evidence.

Researchers have analyzed burdens of production and persuasion from several different points of view. They have analyzed burdens of production as mitigating either the adverse selection of cases for trial, or information asymmetries between opposing litigants. Some have explained enhanced burdens of proof in criminal cases, as in traditional legal doctrine, as redressing asymmetric error costs between false positives and false negatives, or addressing asymmetries of stakes or access to evidence as between the government and the

defendant.

Assessment

American evidence scholarship has a tradition of interdisciplinary approaches, and economic analysis is providing a useful additional dimension. As with economic analysis of law in general, it has both proponents and detractors.

Economic analysis of evidence and proof remains in the very early stages of development, and is tentative in most of its propositions. However, its relentless focus on the incentive effects of legal rules has the potential to elucidate, systematize, and test the implications of a belief long held by common law judges: that there is a vast difference between contested fact-finding in legal disputes and most other forms of human factual inquiry. We deprecate that distinction at our peril.

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Further Readings

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