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By

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This article examines two principles that settle temporal and jurisdictional conflicts between evidentiary rules: the trial-time principle and the forum principle. Under the trial-time principle, evidentiary rules that exist at the time of the trial override rules that existed before trial, when the relevant action or transaction took place. Under the forum principle, evidentiary rules of the court's jurisdiction override rules applicable in the jurisdiction in which the relevant action or transaction took place. These principles control the application of rules categorized as strictly evidentiary, as opposed to substantive. The article explains, criticizes and refines this categorization

INTRODUCTION

Eliahu Harnon was the first to introduce me to the limits of analytical method as a tool for understanding evidentiary rules. His lectures and two-volume evidence treatise[1]

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underscored the dominance of the pragmatic in this area of the law. Evidentiary rules, he taught us, embody multiple goals and tradeoffs, formulated into a long series of short prescriptions that trial judges can work with under severe time constraints. In the pages ahead, I use these insights to advance the understanding of the Trial-Time/Forum Principle.

This principle encompasses two evidentiary rules that are quite fundamental. First, rules that control evidentiary matters in both civil and criminal trials are those that stay in force at the time of the trial; unlike the situation with substantive law, the evidentiary regime that existed before trial is inapplicable. Second, evidentiary matters, both civil and criminal, are decided by the rules of the forum: an outside law that sometimes determines the litigated substantive liabilities and entitlements has no control over those matters. These rules are easy to state but – despite the rules' straightforward appearance – not always easy to apply. This article identifies the problems that arise in the rules' application and suggests how to resolve those problems pragmatically.

The article proceeds in the following order. Part I describes the Trial-Time/Forum Principle. Part II analyzes the difficulties that stand in the way of the principle's application. Part III advances this analysis by criticizing the "substantive in nature criterion" that courts often use to identify evidentiary rules not governed by the Trial-Time/Forum Principle. Part IV identifies a distinct category of "enforcement-fixing" evidentiary rules, also excluded from the principle's ambit. Together with what I call "pure privileges," these rules are the only ones that merit this special treatment. Part V sums up.

I. THE "TRIAL-TIME/FORUM" PRINCIPLE

Evidence rules generally apply in accordance with the "trial-time/forum" principle – TTF, for short. Under TTF, controversies about evidence are resolved by the rules of the forum that are in force at the time of the trial.

To see how TTF works, consider a breach-of-contract action filed by Peter against David in a Tel-Aviv court. The parties' contract was made in New York and is governed

1 See ELIAHU HARNON, THE LAW OF EVIDENCE – Volume I (1970); Volume II (1977).

by the New York law, but David – the defendant – resides in Tel-Aviv; and so the Tel-Aviv court has jurisdiction over this matter. Peter's allegations, vehemently denied by David, are supported by Peter's testimony alone. In New York, the "one witness" rule obtains: if the fact-finders were to find Peter's testimony more probable than not, he would have prevailed. In Israel, things are different. Under Section 54 of the Evidence Ordinance [New Version], 1971, Peter's testimony needs to exhibit indicia of reliability (an "informal corroboration") which the trial court must specify in its decision.[2] If such indicia are not present, Peter's testimony would have to be corroborated by other evidence. Peter offers no corroboration, formal or informal. Instead, he argues that, since the contract is governed by the New York law, the Tel-Aviv court should apply the "one witness" rule of New York.

This argument fails. Corroboration requirements and all other evidential matters are controlled by the law of the forum, and so the Israeli law applies. All this happens at a pretrial session, and the judge decides against Peter. Her decision tells Peter "Furnish corroboration or drop the lawsuit." The trial is scheduled to take place six months later. Peter uses this time to consider his options. Presently, his trial prospects look gloomy indeed.

The recess turns out to be unexpectedly good for Peter. He gets a legislative windfall. Two months after the pretrial session, the widespread practice of ignoring the civil corroboration requirement turns (hypothetically) into law. The corroboration requirement is abolished. The enemies of formal evidence rules celebrate yet another freedom of proof.

Will the new rule apply in *Peter v. David*? In all likelihood, it will – subject to adjustments necessary for David, who may now need to put more effort into discrediting Peter's testimony.[3]

Does it all make sense? Yes, it does. The forum rule has a straightforward rationale. For an Israeli court, applying Israeli evidence rules (or discretions, as realistically inclined lawyers prefer to call them nowadays) is much easier than dealing with foreign

2 There are no jury trials in Israel. A judge's decision in a bench trial, including factual findings, must be reasoned.

3 See, e.g., Twyman v. Schlumberger, 93 P.3d 51 (Ok. Civ. App. 2004) (applying the Daubert multifactor test for admitting expert testimony – that replaced the old Frye rule – in a proceeding initially controlled by Frye).

rules of evidence. Apart from being better known than foreign evidentiary rules, Israeli rules of evidence are tailored to the Israeli courts' capacities and working habits.

The trial-time rule is also justified. Unlike people's substantive entitlements, evidentiary rules do not merit protection against retroactive changes. Application of evidence rules can virtually never be retroactive. These rules are designed for trials rather than for guiding people's primary conduct, that takes place out of court and before trial. Evidentiary rules and the corresponding rights therefore attach to a person only at a trial in which he can activate them. Before trial, a person has no evidential rights that can be coupled with meaningful correlative duties. There are also no identifiable duty-holders upon whom the duty to respect a person's evidential rights might fall. At his trial, therefore, a person can only capture those evidential rights existing at that time.[4] In the present example, David does not capture the corroboration requirement as part of his package of trial rights. He could capture it only if the trial were conducted before the requirement's abolition.

II. PUZZLING CASES

Things, however, are not always that simple. The appealing simplicity of TTF is far from being present in all cases. Many evidentiary rules are not governed by this principle, or call for a different treatment. Consider the United States Supreme Court's decision in *Guillen*[5] that examined the evidentiary privilege under 23 U.S.C. § 409. This privilege protects from disclosure and use as evidence any "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites [...] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal aid highway funds" anywhere in the United States. Guillen was a plaintiff in a wrongful death action before Washington court. He tried to compel the production of information protected by the federal privilege. Guillen claimed that this information is both disclosable and admissible into evidence under Washington law – the law of the forum. He argued that the federal privilege is unconstitutional to the extent it

4 See ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 17-25 (2005).
5 Pierce County, Washington v. Guillen, 537 U.S. 129 (2003).

attempted to override this law. "23 U.S.C. § 409" – he contended – "is only good for Washington, D.C. and for federal courts generally; in the courts of the State of Washington, this privilege has no application."

Under the United States Constitution, state evidence rules are, indeed, a distinctly local matter; it is axiomatic that Congress cannot dictate evidentiary rules to a state. The Supreme Court, nonetheless, ruled against the plaintiff and upheld the constitutionality of 23 U.S.C. § 409. The Court rationalized this decision by holding that this provision is evidentiary in form, but substantive in nature. The privilege under 23 U.S.C. § 409, explained the Court, protects the state against disclosure of information that might reveal a neglect in a road's maintenance and expose the state to liability in torts. This prospect would induce the state not to generate such information to begin with. Hazardous conditions on the state's roads consequently would not be fixed. There would be more accidents than under the privilege, and more people would lose their lives and limbs. Crucially for establishing Congress's authority to legislate the privilege, the safety of state roadways is instrumental to interstate commerce. For that reason, the Commerce Clause[6] allows Congress to step in and do what it did.

The Israeli Supreme Court's decision in *Aflalu v. State of Israel*[7] exhibits a similar logic. There, the Court dealt with the exclusionary rule set in Section 13 of the Clandestine Surveillance Law of 1979. This rule renders inadmissible any recording obtained in a way that is "against this [Clandestine Surveillance] Law." In *Aflalu*, the police eavesdropped and recorded the defendants' incriminating conversations without obtaining a court's warrant required by the Law. The police had a good reason for that: they did what they did before the 1979 Law came into effect. But the defendants claimed that Section 13 is an evidence rule that "kicks in" at the trial. This claim rested on TTF. Arguably, it aligned with the Supreme Court's important decision about a hearsay exception that did not exist when the disputed hearsay statement was made to the police.[8] This decision ruled that such statements are admissible.[9] The defendants in *Aflalu* requested a similar application of Section 13. They claimed that, at the time of the trial, this section mandated the recordings' suppression.

6 See U.S. CONST. art. I, § 8 (authorizing Congress to regulate interstate commerce).
7 Case no. 639/79, PISKEY DIN 34(3) 561 (1980).
8 Case no. 735/80 Cohen v. State of Israel, PISKEY DIN 35(3) 94 (1981).
9 Id.

The Supreme Court could dismiss this claim quite easily. Under Section 13, a recording becomes inadmissible only when the police acts "against the [Clandestine Surveillance] Law" in obtaining it. In *Aflalu*, the police did not act against the law when they eavesdropped and recorded the defendants' conversations. At that point in time, the Clandestine Surveillance Law was yet to come into effect; and so the police could not break it even if they wanted to. Section 13 therefore should be read as not preventing the recordings' admission into evidence. Its application could not help the defendants in *Aflalu*.

The Supreme Court, however, preferred a less formalistic line of reasoning. It held that the exclusionary rule under Section 13 is essentially a remedy that attaches to a person's right to conversational privacy. The remedy is due to a person when the right is violated. Because the defendants' right to conversational privacy did not exist at the time of the eavesdropping – it had been established only when the 1979 Act came into effect – the defendants cannot claim the remedy. The Supreme Court described this right-remedy mechanism as an intertwinement of evidential and substantive rights. According to this reasoning, Section 13 of the Clandestine Surveillance Law is evidential in form, but substantive in nature.

III. THE ELUSIVENESS OF THE "SUBSTANTIVE IN NATURE" CRITERION

A. Hard cases

Under both *Guillen* and *Aflalu*, when a facially evidential rule is substantive in nature, TTF does not apply. But what makes a facially evidential rule "substantive in nature"? Consider *Flaminio v. Honda*, an American case with a factual pattern that appears identical to *Guillen*'s.[10] A severely injured motorcyclist sued the manufacturer for a "wobbling defect" – allegedly, this defect made his motorcycle unsafe to ride. The motorcyclist alleged that the motorcycle's substandard safety was responsible for his accident and resulting injury. To substantiate this allegation, he attempted to adduce evidence of the motorcycle's new design that partly eliminated the "wobbling defect".

10 Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir.1984).

The manufacturer objected to this evidence by invoking Federal Rule of Evidence 407. Under this rule, "subsequent remedial measures" – safety enhancements that the manufacturer introduces after the occurrence of an accident – are not admissible to prove the manufacturer's negligence or a defect in the product. The motorcyclist responded (inter alia) by relying on the law of Wisconsin – the state in which the relevant events took place. Wisconsin's privilege for "subsequent remedial measures" did not extend to actions for unsafe mass products, such as vehicles that allegedly fail to satisfy the crashworthiness standards.[11] The motorcyclist contended that the "subsequent remedial measures" privilege is substantive in nature (or "outcome-determinative," under the relevant doctrinal taxonomy[12]). For that reason, the law of Wisconsin controls the issue, as appropriate in diversity cases.[13]

The Court of Appeals for the Seventh Circuit disagreed. The court held that Federal Rule of Evidence 407 is evidential rather than substantive. This rule, explained Judge Posner, indeed pursues a substantive objective of inducing manufacturers to take remedial measures. If those measures could evidence the manufacturer's self-admitted fault or defect in its product, manufacturers would avoid taking them. This chilling effect would be detrimental to safety. Federal Rule of Evidence 407 therefore is instrumental to safety-enhancement, similarly to the privilege established by 23 U.S.C. § 409. If so – since 23 U.S.C. § 409 is substantive in nature – why not consider Federal Rule of Evidence 407 substantive as well? Under this categorization, the issue would be controlled by the law of Wisconsin. The Seventh Circuit had good reasons for distrusting the economic analysis animating that law, but these reasons hardly make Rule 407 non-

11 See Wis. Stat. § 904.07, as construed in Chart v. General Motors Corp., 258 N.W.2d 680, 684 (Wis. 1977) and in D.L. v. Huebner, 329 N.W.2d 890, 903-05 (Wis. 1983).

12 See Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. (2008) (discussing outcome-determinativeness of evidentiary rules that defeat the lex forum principle); see also Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939) (holding that, in diversity cases, state law allocating burdens of proof trumps the law of the forum); Palmer v. Hoffman, 318 U.S. 109, 116-17 (1943) (same); Dick v. New York Life Ins. Co., 359 U.S. 437, 446-47 (1959) (same); Monger v. Cessna Aircraft Co., 812 F.2d 402, 404-05 (8th Cir. 1987) (same); see also Federal Rule of Evidence 302 (providing that state law controls presumptions whenever it supplies a rule of decision for the case).

13 See, e.g., GRAHAM C. LILLY, PRINCIPLES OF EVIDENCE 324-25 (2006) (explaining that, in diversity cases, evidentiary privileges track the substantive law of the state).

substantive. And if it is substantive rather than evidential, then the Wisconsin law – good or bad – should decide the issue. The Seventh Circuit, however, found a difference between Rule 407 and pure privileges such as 23 U.S.C. § 409. Evidence suppressed under Rule 407 could only function as an ambiguous admission of fault. The evidence's ambiguity reduces its probative worth – an important, and perhaps even crucial, factor that explains the rule's underlying tradeoff. This factor is not present in the evidence suppressed by 23 U.S.C. § 409. This evidence is not – or doesn't have to be – ambiguous at all; and so 23 U.S.C. § 409 is a pure privilege.

Judge Posner took an opportunity to explain this distinction in another decision.[14] According to him,

> The difference is this. A pure rule of evidence, like a pure rule of procedure, is concerned solely with accuracy and economy in litigation and should therefore be tailored to the capacities and circumstances of the particular judicial system, here the federal one; while a substantive rule is concerned with the channeling of behavior outside the courtroom, and where as in this case the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court.[15]

This test focuses on the presence or absence of a significant fact-finding policy in (or behind) the rule. If such a policy is present, then you get what you see. A rule that is facially evidential, but possibly substantive-in-nature, remains evidential. The rule's significant fact-finding policy keeps it within the family of evidence rules, governed by TTF.

These criteria, however, complicate the law's conceptual apparatus. I began this discussion with the rules that can be nothing but evidential. These rules are surely governed by TTF. Subsequently, I demonstrated that some rules that deal with evidence and appear "evidential" are infused with substantive purposes. Evidentiary privileges are their prime example. For that reason, pure privileges (such as attorney-client and doctor-

14 Barron v. Ford Motor Co. of Canada Ltd., 965 F.2d 195 (7th Cir. 1992).

15 Id., at 199 (citing Massachusetts Mutual Life Ins. Co. v. Brei, 311 F.2d 463, 465-66 (2d Cir. 1962)).

patient) are unquestionably "substantive" and escape TTF.[16] But why not treat Federal Rule of Evidence 407 and its state parallels as pure "substantive" privileges? These rules go beyond – and sometimes run against – fact-finding. Arguably, the time-forum criteria for applying these rules must be similar to those that control the application of substantive rules generally.

B. "Substance" vs. "evidence" reconsidered

There is one cogent reason for separating these rules from pure privileges. The general category of privilege-like rules splits into two subcategories: "totally substantive" and "significantly evidential." The "totally substantive" subcategory contains pure privileges and similar rules that promote no fact-finding policies whatsoever. This subcategory is "substantive in nature" and is not governed by TTF. The "significantly evidential" subcategory accommodates rules driven by a significant fact-finding policy (as with Federal Rule of Evidence 407 and, presumably, with Federal Rules of Evidence 408, 409 and 410[17] as well). Rules falling into this subcategory fall under TTF as well.

These categorizations are rather complex, but is it a big problem? Arguably, not. The emerging doctrine is conceptually untidy, but still not a hopeless mess. Courts can find their way through, as Judge Posner did. Besides, many other doctrines are conceptually

16 See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724-27 (1974); Jack Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 373 (1969); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 133 (2002).

17 Rule 408 provides that evidence about settlement negotiations is generally "not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount or to impeach through a prior inconsistent statement or contradiction". Rule 410 provides roughly the same for plea bargain discussions in criminal cases. Under Rule 409, "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." Each of those rules eliminates the chilling effect on the conduct it deems socially desirable (settlement, plea bargaining, and acting as a Good Samaritan). This feature makes the rule function as a privilege. The rules, however, also facilitate fact-finding by suppressing ambiguous admissions of liability (that are likely to be more prejudicial than probative: *Cf.* Federal Rule of Evidence 403). This feature supports the rules' categorization as evidential.

untidy as well. Conceptual untidiness is something that we – lawyers – are accustomed to live with (and make our living from).

So let's try. Consider a Maine statute providing that "In an accident involving a motor vehicle, the nonuse of seat belts by the operator or passengers or the failure to secure a child is not admissible in evidence in a civil or criminal trial, except in a trial for violation of this section."[18] This provision is quite common: beside Maine, several jurisdictions have adopted it in one form or another.[19] The provision suppresses evidence pointing to a possible comparative negligence of the car accident's victim. The underlying purpose of this provision was held to be an imposition of full liability (civil and criminal) on the defendant whose negligence (or defective product) was responsible for the accident. This understanding led a number of courts to categorize the provision as substantive rather than evidential.[20] Based on this categorization, the courts held that the provision trumps federal evidence law in diversity cases.

But does this understanding reflect the only way in which the suppression of "no seatbelt" evidence can be understood? Probably not. Arguably, the inadmissibility rules here deem the "no seatbelt" evidence not sufficiently probative of the victim's fault. That is to say, as far as the victim's comparative negligence is concerned, the "no seatbelt" evidence – in the legislator's eyes – is more prejudicial than probative and should consequently be excluded. This evidential policy tracks Federal Rule of Evidence 403, under which "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Under this understanding, Maine's seatbelt statute and similar provisions are as evidential as they sound. Assuming, moreover, that these provisions also have a substantive goal – a flat rejection of the comparative negligence defense – they would still be classified as "evidential" under *Flaminio*. These provisions

18 29-A M.R.S.A. § 2081 (5) (West 2007).

19 See, e.g., Kan. Stat. Ann. § 8-2504(c) (Rev. Stat. Kan. 2005); N.C. Gen. Stat. § 20-135.2A(d) (West 2006).

20 For Maine, see Morton v. Brockman, 184 F.R.D. 211, 213-16 (D. Me. 1999). For other jurisdictions, see Sours v. General Motors Corp., 717 F.2d 1511, 1519 (6th Cir. 1983); Potts v. Benjamin, 882 F.2d 1320, 1324 (8th Cir. 1989); Dillinger v. Caterpillar, Inc., 959 F.2d 430, 434 n. 1 (3rd Cir. 1992); Barron v. Ford Motor Co. of Canada, Ltd., 965 F.2d 195, 200 (7th Cir. 1992), cert. denied, 506 U.S. 1001 (1992); Gardner v. Chrysler Corp., 89 F.3d 729, 736 (10th Cir. 1996).

are not "totally substantive" because they have a significant fact-finding motivation as well. The admissibility of "no seatbelt" evidence, therefore, should arguably be decided under TTF. There seems to be no principled difference between this and "subsequent remedial measures" evidence that falls under TTF and triggers the application of Federal Rule of Evidence 407 in diversity cases.

Judge Posner anticipated this problem in deciding *Barron*.[21] There, he held that

> "The nonuse of seatbelts is so widespread that the North Carolina courts, bearing in mind that the law rarely requires a person to exercise more than average care, refuse to pronounce that nonuse unreasonable. […] Therefore, as a matter of state substantive law, evidence that the plaintiff had failed to fasten his seatbelt would be irrelevant to show that his damages should be cut down as a penalty for unreasonable behavior, and irrelevant evidence is not admissible under the federal rules of evidence. See Fed. R. Evid. 402."[22]

But why call this evidence "irrelevant" and consequently inadmissible under Rule 402, as opposed to "preponderantly prejudicial" and consequently inadmissible under Rule 403? The difference is obvious: it is the controlling substantive law that makes a piece of evidence "irrelevant" or, under the all-or-nothing taxonomy of Rule 401, of no "consequence to the determination of the action." An evidence-suppressing rule becomes "substantive" and escapes TTF when the court interprets it as replicating the relevancy principle and Rules 401 and 402. However, when the rule in question suppresses evidence that does have some probative value – just a "scintilla," as courts often put it – then it can only be analogized to Rule 403. This analogy has a far-reaching consequence: if the court finds that the rule tracks Rule 403, it would classify the rule as "evidential" and TTF would apply.

Is the distinction between "irrelevant" and "preponderantly prejudicial" as stable as Judge Posner assumes it to be? Why not say with respect to *Barron* that the "no seatbelt" evidence, rendered inadmissible by the North Carolina statute, does have a scintilla of probativity? After all, North Carolina's statute says that, *now*, wearing a seatbelt is a

21 *Barron*, id.
22 Id, at 199.

normative behavior and not wearing it – when one's car is in motion – is not. Presumably, therefore, some drivers and passengers in North Carolina align with the norm. Alternatively, why not say in *Flaminio* that, under Wisconsin's substantive law, a manufacturer's need to introduce a substantial enhancement in its product's safety makes the product defective per se?

My point here is not to oppose distinctions that are difficult to make. Rather, it is to oppose distinctions that are not real. *Any rule of evidence has substantive consequences* – a crucial point that needs to be expressly acknowledged. By and large, evidentiary rules produce those consequences by allocating the risk of error in fact-finding.[23] Some evidentiary rules produce those consequences directly; other rules do so indirectly. Some of those consequences are category-specific; other consequences are more general. North Carolina's rule that suppresses "no seatbelt" evidence minimizes the ability of tort defendants to rely on their victims' comparative negligence. This substantive consequence is both direct and category-specific. Federal Rule of Evidence 407 limits a tort plaintiff's ability to prove his case by the defendant's subsequent remedial measures. By this, the rule motivates defendants to take such measures and reduce the incidence of accidents. This substantive consequence is direct, but general, rather than category-specific. How does it all differ from general evidentiary rules that govern the admission of, say, expert testimony? Arguably, by extending to road accident experts, these rules help society to deter negligent driving. They do so by making fact-finding more accurate, thereby increasing the likelihood of liability for negligent drivers. This substantive consequence is general and indirect, but why should it matter?

Sharp analytical distinctions cannot define the scope of TTF. I therefore propose a pragmatic approach as a substitute. This approach identifies two categories of evidentiary rules that should not fall under TTF. The first category includes pure privileges, already identified as rules that suppress evidence in order to promote goals altogether unrelated – and usually inimical – to fact-finding. The attorney-client, doctor-patient and other professional confidentiality-based privileges are paradigmatic examples of these rules. Even this category is not as conceptually tidy as it appears at first glance. Take the privilege against self-incrimination, for example. This privilege – widely known as the right to silence – appears pure, but it is not. The right to silence is commonly understood

23 See STEIN, supra note 4, at 107-40.

as protecting a person's autonomy at the expense of fact-finding. Specifically, it does not allow the government to force a person into choosing between punishable silence, perjury and self-incrimination.[24]

But the right also has a fact-finding justification. The right to silence helps fact-finders to distinguish between innocent and guilty defendants. A guilty suspect's self-interested response to questioning can impose externalities, in the form of wrongful conviction, on innocent suspects and defendants who tell the truth but cannot corroborate their stories. Absent the right to silence, guilty suspects and defendants would make false exculpatory statements if they believed that their lies were unlikely to be exposed. Aware of these incentives, fact-finders would rationally discount the probative value of uncorroborated exculpatory statements at the expense of innocent defendants who could not corroborate their true exculpatory statements. Because the right to silence is available, innocent defendants tell the truth, while guilty defendants rationally exercise the right when they fear that lying is exceedingly risky. Thus, guilty defendants do not pool with innocents by lying; and as a result, fact-finders do not erroneously convict innocent defendants that otherwise could be found guilty.[25]

This dual functioning of what appears to be a pure privilege is quite exceptional, though. By and large, pure privileges make a stable conceptual category that courts can conveniently work with. Positive law therefore properly categorizes such privileges as "substantive" and exempts them from TTF.[26] As stated earlier, however, this is not the only category of evidentiary rules that escape TTF. The second, less familiar and consequently more contentious category, is that of "enforcement-fixing rules."

IV. ENFORCEMENT-FIXING RULES

Evidentiary rules often perform an enforcement-fixing role. They attenuate overenforcement by reducing the likelihood of liability, civil or criminal.[27] They also

24 Schmerber v. California, 384 U.S. 757 (1966).

25 See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000).

26 See LILLY, supra note 13.

27 See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743 (2005).

mediate between the substantive law's competing objectives.[28] Throughout the criminal law, for example, special rules of evidence work to mediate conflicts between the law's deterrence and retributivist goals. They do this by skewing errors in the actual application of the substantive criminal law to favor whichever theory has been disfavored by the substantive rule itself.[29] An evidentiary rule that falls into either of these two categories must be – and often is – exempted from TTF.

I begin with the overenforcement issue. I link it to the Ex Post Facto Clause that appears in the United States Constitution.[30] This clause is generally perceived as protecting "substantive" rights. As has long been understood, however, these rights include burdens of proof.[31] In *Carmell*,[32] the United States Supreme Court extended this understanding to a corroboration requirement. Specifically, it held that a corroboration requirement for a rape complainant's testimony against the defendant attaches to the prosecution's burden to prove the defendant's guilt beyond all reasonable doubt.[33] This attachment heightens the prosecution's burden of proof and turns the corroboration requirement into "substantive." The lawmaker consequently cannot abolish the corroboration requirement retroactively. Any such law will be voided as unconstitutional under the Ex Post Facto Clause.[34]

This decision is flawed. Evidentiary rules never attach to substantive entitlements by themselves. There is always a decision that creates such an attachment on normative grounds. These grounds must be in some way special. They need to identify and defend some special synergy between an evidentiary rule and the substantive entitlement to which the rule attaches. Otherwise, any evidentiary rule upon which an entitlement's enforcement depends – for example, a party's ability to call witnesses or to object to an

28 See Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197 (2007).

29 Id., at 1212-17.

30 U.S. CONST. art. I, § 9.

31 See Calder v. Bull, 3 U.S. 386 (1798).

32 Carmell v. Texas, 529 U.S. 513 (2000).

33 Id., at 529-53.

34 Id., at 530. In Israel, the law is different: see case no. 25/80 Katashvili v. State of Israel, PISKEY DIN 35(2) 457 (1981) (holding that the corroboration requirement for accomplice testimony is not a substantive right, and its abolition therefore applies in a trial for a crime allegedly perpetrated prior to the abolition).

unfavorable hearsay statement – will attach to that entitlement and classify it as "substantive."[35] Burdens of proof can plausibly be perceived as attaching to the underlying substantive entitlements. For example, a person's right not to be convicted if innocent can plausibly be understood as including the right to be acquitted when the allegations are not proven beyond all reasonable doubt. The requirement that allegations of fraud raised against a litigant in a civil case be proven by "clear and convincing" evidence, rather than by mere preponderance, can equally be understood as a substantive protection against reputational harm. Furthermore, the preponderance standard that applies in civil litigation can be rationalized as effectuating a person's right to be treated as equal to his trial opponent.

These rationalizations, however, do not fit the garden-variety evidentiary rules, such as hearsay, opinion, and character. Nor do they fit the corroboration requirements that attach, on credibility grounds, to testimonies of certain witnesses. Technically, all these rules can be perceived as attaching to the burden of proof; and because the controlling proof burden classifies as "substantive," all evidentiary rules would fall into the "substantive" category as well. Any such rule would consequently be protected against retroactive repeal or modification. The forum principle would not apply either. All evidentiary rules would track the substantive law that controls the case, which need not necessarily be the law of the forum. In *Peter v. David*, for example, an Israeli court would have to apply the evidentiary rules of New York because the adjudicated agreement is governed by the laws of New York. All this, of course, is both counterintuitive and has never been the law in the United States or Israel. The attachment of an evidentiary rule to the underlying substantive entitlement therefore cannot be understood as merely technical. To escape the application of TTF, an evidentiary rule needs to attach to the underlying substantive entitlement in some special way. This special attachment was not present in *Carmell*. I can see no reason that could connect the substantive definition of rape (or sexual assault) to an evidentiary prescription which says that "uncorroborated complainant's testimony will not do."

Such a connection is present in other cases, though. Take a jurisdiction, such as Tennessee, in which medical malpractice allegations are adjudicated under the so-called

35 See Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 LAW & PHIL. 19 (1998).

"locality rule."[36] This rule holds that a physician needs to treat her patients according to the standards accepted by similar doctors in her locality. To effectuate this rule's application, Tennessee law provides that, subject to a narrow necessity-based exception, only Tennessee physicians or doctors from a "contiguous bordering state" can testify as experts in medical malpractice actions before Tennessee courts.[37] The locality rule protects Tennessee doctors against malpractice lawsuits and (arguably) reduces the cost of medical care for the people of Tennessee. The "local expert" rule aims at attaining the same enforcement-fixing goal. The two rules are intertwined; and so the special attachment is present. The "local expert" rule consequently escapes TTF.

This analysis has been followed by a federal court in a diversity action filed against Tennessee-based doctors.[38] The court ruled that Tennessee's "local expert" rule trumps the broad admissibility standard for expert witnesses testifying before federal courts under Federal Rule of Evidence 702. The court explained this ruling by the fact that the Tennessee law of medical malpractice "reflects the intimate relationship between the standard of care and the qualification requirements of the medical expert who will establish that standard."[39] This "intimate relationship" creates what I call a "special

36 See Tenn. Code Ann. § 29-26-115(a) (West 2006) ("In a malpractice action, the claimant shall have the burden of proving […] (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred; (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred").

37 See Tenn. Code Ann. § 29-26-115(b) (West 2006); see also Hartsell ex rel. Upton v. Fort Sanders Reg'l Med. Ctr., 905 S.W.2d 944, 950 (Tenn. App. 1995), appeal denied, cert. denied, 517 U.S. 1120 (1996) (upholding trial court's exclusion of the American Medical Association rules pertaining to disputed treatment because under Tennessee law, doctors' standard of care must "be proven by testimony of experts […] licensed and practicing in Tennessee or a contiguous bordering state […]").

38 See Legg v. Chopra, 286 F.3d 286 (6th Cir. 2002).

39 Id., at 291. The court also reasoned that, because an expert witness needs to be well-versed in the subject-matter of his testimony, there is no contradiction between Tennessee's "local witness" requirement and Federal Rule of Evidence 702, given the substance of Tennessee's medical negligence standard. This reasoning is unconvincing.

attachment." The locality rule and the "local expert" requirement operate jointly to delimit the grounds upon which Tennessee doctors can be found liable for malpractice. These rules practically guarantee that a doctor will not be adjudicated liable for malpractice, except in cases in which his negligence is particularly serious, unequivocal and harmful to the patient (in such cases, a local expert would normally support the plaintiff in order to maintain his own credibility as a witness and – one should hope – to root out bad medicine). For contestable medical malpractice issues, plaintiffs would find it hard, if not altogether impossible, to draw an eligible expert witness from the pool of Tennessee doctors.[40] The "local expert" rule generates an anti-competitive environment for medical experts – the key witnesses in virtually every medical malpractice case. Under this rule, the "expert" status belongs exclusively to local insiders, which enables those insiders to maintain a "conspiracy of silence." Typically, this conspiracy assumes the form of an implicit agreement that stipulates "You won't testify against me, and I won't testify against you."[41] As already indicated, this conspiracy can be broken only in particularly egregious and unequivocal cases of medical malpractice which are

Under Tennessee law, a distinguished medical professor with years of practice in Tennessee loses her expert witness qualifications after moving from the Vanderbilt School of Medicine (situated in Nashville, Tennessee) to Harvard. The "local witness" rule has a special purpose: to reduce the local doctors' exposure to medical malpractice lawsuits. This is not the purpose of Federal Rule of Evidence 702 that facilitates ascertainment of the truth.

40 Tennessee is not the only jurisdiction to employ the locality rule: see Nestorowich v. Ricotta, 740 N.Y.S.2d 668, 671 (2002) ("The prevailing standard of care governing the conduct of medical professionals has been a fixed part of our common law for more than a century (see generally Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 [1898]). The *Pike* standard demands that a doctor exercise "that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where [the doctor] practices."); see also, e.g., Perry v. Magic Valley Reg. Med. Ctr., 995 P.2d 816, 821 (2000) (same); Shane v. Blair, 75 P.3d 180, 183-85 (Idaho 2003) (same); Mercado v. Leong, 50 Cal.Rptr.2d 569, 574 (1996) (same); Kernke v. Menninger Clinic, Inc., 172 F.Supp.2d 1347 (D. Kan. 2001) (under Kansas law, a physician has a duty to use reasonable and ordinary care and diligence in the diagnosis and treatment of his or her patients, to use his or her best judgment, and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other physicians in the same or similar locations under like circumstances).

41 As acknowledged, e.g., in Sheeley v. Memorial Hospital, 710 A.2d 161 (R.I. 1998).

impossible to hide.[42] The "local expert" rule thus blocks away many meritorious lawsuits that could otherwise be successfully prosecuted. Negligent doctors consequently go scot-free.

Arguably, however, the rule also has benefits. The rule's primary benefit lies in its sorting of the medical malpractice lawsuits. Under this rule, lawsuits involving contestable allegations of medical negligence, controversial damage-claims, and speculative theories of causation are doomed to failure. Such lawsuits are not likely to be filed and therefore do not constitute a liability threat for Tennessee doctors. These doctors' expected payouts thus become lower than under a regime in which any adequately qualified doctor can testify in support of the plaintiff's case. Some of the lawsuits that the "local expert" rule blocks away are meritorious. The rule sacrifices those lawsuits along with their social benefits to prevent the filing of unmeritorious actions against doctors. Unmeritorious actions unjustifiably increase doctors' liability payouts (by posing a threat of liability and inducing settlements, and by actually producing erroneous verdicts against doctors). This increase raises the costs of doctors' liability insurance. Medical care consequently becomes more expensive and less affordable to patients. Blocking such actions is socially beneficial when their harm exceeds the social benefit that the meritorious lawsuits, blocked away by the "local expert" rule, could produce. The rule's enforcement-fixing goal makes it substantive and exempted from TTF.

Consider now the special corroboration requirement that common law attaches to its prohibition of perjury.[43] This enforcement-fixing requirement falls into the "mediating rules" category. The requirement bars conviction for perjury on the uncorroborated testimony of a single witness. Any such testimony must be corroborated by additional testimony or other evidence. In the absence of corroboration, the jury must acquit the

42 The exclusive contingent of eligible experts may also limit its output and raise prices. The anti-competitive environment that the "local expert" rule creates enables experts to extract high fees for a relatively small amount of work. See STEIN, supra note 4, at 7-8.

43 See Weiler v. United States, 323 U.S. 606 (1945) (upholding the common law corroboration requirement for cases in which a single prosecution witness accuses the defendant of perjury); Section 13 of the Perjury Act, 1911 (England).

defendant.[44] This requirement is special because it constitutes an exception to the general rule under which "the touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact [...] are, with rare exceptions, free in the exercise of their honest judgment, to prefer the testimony of a single witness to that of many."[45] Despite this general rule, the corroboration requirement for perjury prosecutions holds ground firmly as "deeply rooted in past centuries."[46] This requirement applies in several jurisdictions across the United States[47] that follows English law. In England, Section 13 of the Perjury Act 1911 provides that[48] "a person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

44 See *Weiler* id.; United States v. Chaplin, 25 F.3d 1373, 1378 (7th Cir. 1994) (holding that "although criticized by some, the two-witness rule remains viable in perjury prosecutions, at least in those perjury prosecutions brought under a statute in which the rule has not been expressly abrogated").

45 *Weiler*, supra note 43, at 608.

46 *Weiler*, id., at 608-9.

47 See, e.g., *Weiler*, id., at 610-11; United States v. Chaplin, supra note 44, at 1376; Hammett v. State, 797 So.2d 258 (Miss. App. 2001); People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000); Watson v. State, 509 S.E.2d 87 (Ga. App. 1998); Murphy v. U.S., 670 A.2d 1361 (D.C. 1996); State v. Barker, 851 P.2d 394, 396 (Kan. App. 1993) (each jurisdiction requires corroboration for a single witness whose testimony accuses the defendant of perjury); Hammer v. United States, 271 U.S. 620, 626 (1926) ("The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal."); Ky. Rev. Stat. Ann. § 523.060 (Banks-Baldwin 2004) ("In any prosecution for perjury or false swearing [...] falsity of a statement may not be established solely through contradiction by the testimony of a single witness."); Cal. Penal Code § 118(b) (West 1999) ("No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant [...]"); N.Y. Penal Law § 210.50 (McKinney 1999) ("In any prosecution for perjury [...] or in any prosecution for making an apparently sworn false statement, or making a punishable false written statement, falsity of a statement may not be established by the uncorroborated testimony of a single witness.").

48 This section codified the common law: see *Weiler*, supra note 43, at 610 n.4.

This requirement aims to avoid chilling prospective witnesses with the prospect of easy prosecution for perjury.[49] More fundamentally, it curbs the prospective overenforcement of the law that the broad definition of perjury would otherwise produce. Under its common law definition, perjury is any false statement regarding a material matter that a witness makes knowingly and under oath in a judicial proceeding.[50] From a retributivist perspective, what makes perjury deserving of its particular degree of condemnation and punishment is that it involves an especially onerous type of deception, namely, an intentional lie that affirmatively misleads the court. A well-tailored definition of perjury which tracks this view should extend the crime's prohibition and punishment only to outright liars who harbor an intent to mislead the finder of fact. It should not cover reticent non-acknowledgment of the truth, merely evasive testimony, or, arguably, even technically false testimony accompanied by signals from the witness that the court should place little weight in what he is saying. From the standpoint of desert and blame, these acts, while condemnable, are less blameworthy than are affirmative attempts to bring about an injustice.[51] A few jurisdictions indeed have adopted narrowly-focused perjury statutes.[52] This definition requires a prosecutor to prove falsity and intent to mislead beyond all reasonable doubt. As a result, many witnesses have an "easy out" by leaving space for too many self-exonerating excuses that are easy to fabricate but difficult to refute. The prospect of an easy-out means a lower expected punishment,

49 See *Weiler*, supra note 43, at 609 ("The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted").

50 Under Section 1 of the Perjury Act of 1911, "If any person lawfully sworn as a witness [...] in a judicial proceeding wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to imprisonment for a term not exceeding seven years, or to a fine or to both such imprisonment and fine." The federal definition of perjury in the United States, U.S.C.A. 1621, is similarly broad.

51 See Bierschbach & Stein, supra note 27, at 1769-70.

52 See Mo. Ann. Stat. § 575.040 (West 2003) (requiring that a person "knowingly testif[y] falsely" with "the purpose to deceive" the court); Tenn. Code. Ann. § 39-16-702 (2006) (requiring an "intent to deceive"); Tex. Penal Code Ann. § 37.02(a) (Vernon 2003) (requiring an "intent to deceive" and "knowledge of the statement's meaning").

which means that more people would be willing to take the risk of lying on the stand as an alternative to revealing an unpleasant truth. This consequence undermines deterrence.

To avoid this dilution of deterrence, most jurisdictions have adopted a broader rule. Generally, a perjury conviction can rest upon proof of mere awareness of falsity, without more.[53] A witness need not be aware of how his false statement might affect the trial, nor must he act out of malice or an intent to mislead.[54] From the deterrence perspective, broadly defining perjury in this way keeps witnesses in line by creating a credible threat of a successful prosecution in cases in which witnesses have in fact lied.[55] But it also deviates from the retributivist "just deserts" requirement by criminalizing people not deserving full punishment for perjury under the narrower retributive view.

To counterbalance this retributively overbroad definition of the crime, most jurisdictions impose a special corroboration requirement upon prosecutors seeking convictions for perjury.[56] This enforcement-fixing function is the requirement's best rationale.[57] The corroboration requirement for perjury convictions forces prosecutors to provide additional, independent proof of the alleged perjury – for example, a document or a wiretap recording revealing that a witness clearly lied in his testimony. Typically, prosecutors will have an easier time producing such evidence for outright liars falling within the heartland of perjury's prohibition than they will for merely evasive witnesses who approach the prohibition's border.[58] The corroboration requirement therefore focuses the application of the perjury statute upon truly blameworthy perjurers.

53 See, e.g., Model Penal Code § 241.1 ("A person is guilty of perjury [...] if in any official proceeding he makes a false statement under oath or equivalent affirmation [...] when the statement is material and he does not believe it to be true."); Jared S. Hosid, Perjury, 39 AM. CRIM. L. REV. 895 (2002) (analyzing this definition).

54 See, e.g., United States v. Giarratano, 622 F.2d 153, 156 (1980); United States v. Williams, 874 F.2d 968, 980 (5th Cir. 1989); United States v. Lewis, 876 F. Supp. 308, 312 (D. Mass. 1994); Alan Heinrich, *Note: Clinton's Little White Lies: the Materiality Requirement for Perjury in Civil Discovery*, 32 LOY. L.A. L. REV. 1303 1311-16 (1999) (discussing courts' practice of interpreting perjury statutes in very broad terms).

55 See Robert Cooter & Winand Emons, *Truth-Bonding and other Truth-Revealing Mechanisms for Courts*, 17 EUR. J. LAW & ECON. 307 (2004).

56 See supra note 47 and accompanying text.

57 See STEIN, supra note 4, at 20-24; Bierschbach & Stein, supra note 27, at 1765-71.

58 See Bierschbach & Stein, supra note 27, at 1770-71; Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537,

These, of course, are not the only examples of enforcement-fixing rules. There are many such rules, and all of them are essentially substantive in nature.[59] These rules typically deal with the burden of proof. For example, there are special rules that require criminal defendants to prove excusatory defenses (as opposed to justifications that the prosecution needs to disprove beyond all reasonable doubt) by a preponderance of the evidence.[60] Other special rules allow the jury to treat certain evidence of crime-preparation as proving an attempt to commit the underlying crime.[61] These rules make it easier for the prosecution to discharge its production burden and move the case to the jury.[62] By doing so, the rules promote deterrence and avoid a one-sided pursuit of retributivist "just deserts." These and similar evidentiary rules should generally escape TTF.[63]

From a rights-based perspective, this conclusion is inevitable. An enforcement-fixing rule shapes the contours of the underlying substantive entitlement on the definitional level: the entitlement is designed and conferred upon people as limited or, alternatively, expanded ab initio by the accompanying enforcement-fixing rule. This is the entitlement's original shape in which a person captures it. From the deterrence perspective, the utility of an enforcement-fixing rule depends on the incentives it projects to potential violators. If, as in most cases, the rule's goal is to fix the appropriate expected penalty, then it should certainly be exempted from TTF.

V. CONCLUSION

There is no analytical way by which to identify evidentiary rules that merit protection against retroactive repeal and modification. Nor is it possible to identify analytically evidentiary rules that, under the relevant choice-of-law principles, trump the rules of the

1577 (2000) (acknowledging, while criticizing, courts' and prosecutors' tendency to penalize and provide remedies for clear perjury, as opposed to merely misleading testimony).

59 For details, see Bierschbach & Stein, supra note 27; Bierschbach & Stein, supra note 28.

60 See Bierschbach & Stein, supra note 28, at 1241-52.

61 Id., at 1234-41.

62 Id.

63 A rule's identification as enforcement-fixing is important for other reasons as well.

forum. Each of those endeavors implicates an analytically untidy – but pragmatically plausible – policy analysis. This understanding leads to the identification of two categories of evidentiary rules that should generally be protected against TTF. One of these categories is formed by pure privileges. These are evidence-suppressing rules that promote objectives altogether extraneous to fact-finding at the expense of fact-finding. These rules' exemption from TTF is uncontroversial. The second category accommodates a wide variety of enforcement-fixing rules. Identification of these rules can be controversial, but their presence can hardly be disputed. The need to exempt these rules from TTF is fairly straightforward as well.