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The Ethics of Trial Deliberation: Moral Agency in Legal Fact-Finding

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Abstract

Section I explicates the building blocks of Ho's legal epistemology: the distinction between the internal and the external point of view, the belief account of legal fact-finding, and the claim that considerations of truth and justice are intertwined in evidence rules. Section II examines the applications of Ho's normative framework to the analysis of the standard of proof, the hearsay rule, and similar facts evidence. Part III subjects Ho's distinction between the internal and external point of view to close analysis in light of contemporary debates over the nature of epistemic justification. Part IV suggests that a turn towards virtue epistemology may provide a good way for extending Ho's approach to evidence law. Part V sheds doubts upon whether Ho's epistemology provides a justification of current evidentiary arrangements and argues that carrying out Ho's internal analysis would, in fact, lead to a substantial revision of those arrangements. The normative arguments of this book lend support to a conception of the law of evidence built around the notion of moral agency which constitutes a valuable normative ideal against which current rules of evidence may be assessed.

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A Philosophy of Evidence Law: Justice in the Search for Truth, by Ho Hock Lai. Oxford University Press, 2008, 300 pages.

Review by Amalia Amaya, National Autonomous University of Mexico.

The philosophy of law has been mostly concerned with questions regarding the nature of law and adjudication, the relation between law and morality, as well as issues of political philosophy such as the authority of law or the justification of rights. Questions about facts, that is, problems concerning the epistemology of law, have been mostly neglected in the literature on legal theory.¹ Recently, there has been an increasing interest among legal theorists on issues related to evidence and proof. Legal theorists of both common law and civil law traditions have turned their attention to the analysis of evidentiary problems.² Epistemologists and philosophers of science have joined legal philosophers in this enterprise.³ Ho's book *A Philosophy of Evidence Law* is an important contribution to this emerging body of literature at the interface between evidence scholarship and philosophy.⁴ This monograph is an excellent exemplar of this kind of interdisciplinary work, as it combines a deep understanding of the law of evidence with rigorous philosophical analysis, and it succeeds in showing the relevance of abstract theory to the detailed study of evidence rules and legal problems. The book is also to be commended for its breath of analysis, for it examines evidence rules of both criminal and civil law in several common law jurisdictions, with a foray into international law and continental law.

This review shall proceed as follows. Part I explicates the main building blocks of Ho's legal epistemology: the distinction between the internal and the external point of view, the claim that considerations of truth and justice are

¹ See WILLIAM TWINING, *RETHINKING EVIDENCE* 15 (2006).

² See, for example, Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make Good Philosophy of Evidence*, 1997 B. Y. U. L. REV. 803; WILLIAM TWINING, *THE GREAT JURISTIC BAZAAR* (2003); FREDERICK SCHAUER, *PROFILES, PROBABILITIES AND STEREOTYPES* (2003); NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* (2005); Jordi Ferrer, *Legal Proof and Fact Finders' Beliefs*, 12 LEGAL THEORY 293 (2006); LEGAL EVIDENCE AND PROOF: STATISTICS, STORIES, LOGIC (Hendrik Kaptein, Henry Prakken & Bart Verheij eds., 2009)

³ For prominent examples see LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* (2006); ALVIN GOLDMAN, *KNOWLEDGE IN A SOCIAL WORLD* (1999); Susan Haack, *Truth and Justice, Inquiry and Advocacy, Science and Law*, 17 RATIO JURIS 15 (2004); Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 A. J. JURIS. 43 (2004); and Susan Haack, *Warrant, Causation, and the Atomism of Evidence Law*, 5 J. SOC. EPISTEMOLOGY 253 (2008).

⁴ HO HOCK LAI, *A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH* (2008).

intertwined in evidence rules, and the belief account of legal fact-finding. Part II examines the applications of Ho's normative framework to the analysis of the standard of proof, the hearsay rule, and character evidence. Part III examines Ho's distinction between the internal and the external perspectives for analyzing evidence law in the light of contemporary debates over the nature of epistemic justification. Part IV suggests that a turn towards virtue epistemology may provide a good way for extending Ho's approach to evidence law. Part V sheds doubts upon whether Ho's epistemology provides a justification of current evidentiary arrangements, as he contends, and argues that carrying out Ho's internal analysis would lead to a substantial revision of these arrangements. It will be argued that the normative arguments of this book lend support to a conception of the law of evidence built around the notion of moral agency which constitutes a valuable normative ideal against which current rules of evidence may be assessed.

I. Ho's Legal Epistemology

There are three main elements in Ho's approach to legal epistemology: the distinction between the external and the internal point of view; the claim that the law of evidence reflects both epistemic and moral values; and a belief account of legal fact-finding. Let us examine each of these elements in turn.

(i) The Internal Point of View

Ho distinguishes between two different ways in which legal fact-finding may be studied: the external and the internal.⁵ This distinction is the backbone of Ho's legal epistemology. Ho contends that the dominant approach to issues of evidence and proof in law is the external one. However, claims Ho, the full value of evidence law may only be viewed if one adopts the internal point of view.

The external perspective is the perspective of the system engineer, that is, the perspective of a "detached observer of the trial system."⁶ From this standpoint, the primary concern is that the trial be regulated so that it best achieves its goals, most importantly, the discovery of truth. Reliability and accuracy are the key notions in this approach to evidence law. A verdict's reliability depends on the accuracy of the trial system, which is a matter of the frequency with which it produces correct findings of fact. Rules of evidence are then evaluated by evidence scholars in terms of the consequences of their application, particularly, in terms of their effectiveness in guiding the court towards correct outcomes. Truth, on this approach, is pursued for the sake of

⁵ See HO, *supra* note 4, at 46-50.

⁶ *Id.* at 46.

justice, where justice is understood as “the correct application of law to true findings of fact.”⁷

In contrast, the internal perspective is not the perspective of an outside observer, but rather that of a “role-player,” namely, the fact-finder. Whereas the external approach is outcome or goal oriented, the internal approach focuses on the responsibilities of legal fact-finders as moral agents. Instead of assessing rules of evidence in terms of their consequences, it takes the rightness of these rules to be a matter of the intrinsic values they express. Unlike the external evaluation, which is contingent on empirical assumptions about the relationship between means and ends—that is, on empirical claims about the likely impact of a rule on the reliability of the trial system—the internal evaluation is grounded on normative arguments. The internal perspective embraces a different conception of justice as well as of its relationship with truth. From the internal standpoint, a party does not merely have a right that the substantive law be correctly applied to true findings of fact but, more broadly, a right to a just verdict, where justice is understood as imposing ethical demands on the process of deliberation whereby the verdict is reached. It is not only that the court must find the truth in order to do justice, but that justice must be done in the search for truth. On this view, justice is not located “outside” fact-finding, but ethical and epistemic constraints are jointly enshrined in the law of evidence.⁸ Let us now examine in more detail Ho’s claim that most evidence rules reflect both epistemic and ethical concerns.

(ii) *The Inner Morality of Evidence Law*

The internal approach to evidence law, claims Ho, reveals the extent to which both epistemic and moral values are embedded in many legal rules regulating fact-finding. From an internal viewpoint emerges a different conception of justice and its place in the trial process. First, justice is not merely a matter of “rectitude,” that is, a matter of correctly applying the law to true findings of fact; it also demands that such findings be reached by a process which is both epistemologically sound and morally defensible. Let us bracket for the moment the issue of the conditions under which findings of fact, in Ho’s view, are epistemically justified (we shall examine this problem in the next section) and focus here on the requirement that findings of fact be morally justified. According to Ho, beyond rectitude, justice requires that deliberation at trial be conducted in a way that expresses adequate concern and respect for the person standing before the court. Ho appeals to some theories of justice which explain justice in terms of “care,” “empathy,” and “humanity” to give an account of what

⁷ *Id.* at 49.

⁸ For a different view about how moral and epistemic values relate to each other in the context of legal fact-finding, see ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* (2005).

justice requires in the context of legal fact-finding.⁹ According to Ho, justice at trial requires that fact-finders acknowledge the humanity of the person facing an adverse finding; that they exercise a sense of justice, understood as a capacity to recognize the person whose case is being disposed as a fellow human being, and that they respond to her with empathic care. In short, justice in trial deliberation requires that the fact-finder as a moral agent respect and care for the person who is the target of an adverse finding. In this sense, as Ho nicely puts it, “the trial is not only about accuracy; it is, more importantly, about affirming a common humanity.”¹⁰

Secondly, the conception of justice that emerges if we place ourselves in the role of the fact-finder as a moral agent, that is, if we adopt the internal point of view, is located “inside” fact-finding. In the external approach, values other than truth, among them, moral values, are conceived as “external to proof,” that is, as values that constrain the pursuit of the primary aim of trial, namely, the ascertainment of truth.¹¹ Justice is thus understood as qualifying or opposing the trial’s truth-seeking function. On this view, the demand that justice imposes upon the way facts are ascertained is satisfied by putting in a number of evidentiary rules (such as privileges), but truth, rather than justice, is the value that is at the center of the fact-finding enterprise. In contrast, from the perspective advocated by Ho, “values other than truth have to be respected, not simply as subsidiary considerations, but as values which are *internal* to the nature and purpose of fact-finding.”¹² As will be shown later, Ho contends that even the rules which lie at the center of the trial’s truth-seeking function embody moral values. Thus, most evidence rules—and not merely the so-called “extrinsic” rules of exclusion—are responsive to moral concerns. In short, as Ho sees it, the rules of evidence law cannot be adequately explained or justified as rules meant to enhance the reliability of trial findings, for there is an important moral dimension to these rules. Justice and truth, on this view, are not values pulling in opposite directions, but rather act in concert to ensure the legitimacy of legal fact-finding.

The different conception of justice and its relationship with truth involved in the internal approach of evidence law brings in a shift in the focus of analysis. Whereas from an external standpoint, the relevant criterion is the reliability of the trial process, and therefore, the accuracy of the verdict, from an internal viewpoint, the focus is on the deliberative process, rather than on the outcome of the process. It does not suffice for the demand for rationality in legal fact-finding to be satisfied that findings of fact be accurate, but they should also be morally and epistemically justified. The central issues within an internal analysis of

⁹ *Id.* at 78-84.

¹⁰ *Id.* at 84.

¹¹ *Id.* at 69.

¹² *Id.* at 78.

evidence law are thus issues of justification. As we have seen, findings of fact are morally justified if they result from a deliberative process which is conducted with justice, conceived as emphatic care for the parties. Having explained what it takes for a finding of fact to be morally justified, I proceed now to explain the conditions under which, according to Ho, findings of fact are epistemically justified.

(iii) *A Belief Account of Legal Fact-Finding*

Ho's account of legal fact-finding is centered on the notion of belief. He starts by providing an analysis of the verdict as a speech act with multiple illocutionary forces. A verdict "declares" legal institutional facts of (non-)guilt or non-(liability); it "asserts" propositions of facts constitutive of guilt or liability; it "ascribes" legal character to the facts found; and it "expresses" a psychological state and, in some cases, a negative attitude towards the defendant's past conduct. It is the assertive aspect of verdicts that is most relevant to the development of a belief account of legal fact-finding.¹³ According to Ho, to find that *p* is, among other things, to assert that *p*:

FA: In finding that *p*, the fact-finder asserts that *p*.¹⁴

It is important to notice that only a subset of findings have a corresponding asserting force. Ho distinguishes between two different kinds of findings: "positive" and "negative" findings. A finding that *p* is "positive" when it is in favor of the party who has the burden of proving *p* and "negative" when it is against her.¹⁵ In FA "finding" refers to a positive finding. Negative verdicts are not necessarily accompanied by a corresponding assertion of fact. This kind of verdict can be entered either affirmatively or by default. In the former case, the verdict is based on the belief that *p* is in fact true or in fact false. In the latter case, the verdict is the result of the fact-finder being unable to come to a determinate conclusion as to the truth or falsity of *p*. Hence, in civil trials, a verdict of "not liable" does not imply any assertion that one or more of the material propositions on which the claim rests are false. After all, the fact-finder must declare the defendant "not liable" if she is not persuaded on the balance of probabilities that any of the material propositions of fact essential to the claim is

¹³ For a thorough account of Ho's speech-act analysis of legal fact-finding, see HO, *supra* note 4, at 12-32 as well as Ho Hock Lai, *What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict*, 4 INT'L COMMENTARY ON EVIDENCE (2006).

¹⁴ *Id.* at 86. In FA, "F" stands for "finding" and "A" for assertion. Here (and in the next pages), I am following Ho's abbreviation system.

¹⁵ *Id.* at 11.

true and this is compatible with entertaining doubts as to whether they are, in fact, false. Similarly, in criminal cases, a “not guilty” verdict does not amount to an assertion that the defendant is innocent, as such a verdict may be either affirmative—the trier of fact believes that the defendant is in fact innocent—or default—she may have doubts as to whether he is innocent.¹⁶ Thus, it is only findings of guilt or liability—that is, affirmative verdicts—that imply an assertion of propositions of fact, as FA states.

In order to unpack the implications of the claim that (positive) findings of fact have a corresponding assertive force, Ho employs Lackey’s analysis of the norms regulating assertion.¹⁷ Lackey proposes the following “reasonable to believe norm of assertion”:

RTBNA: One should assert that *p* only if (i) it is reasonable for one to believe that *p*, and (ii) if one asserted that *p*, one would assert that *p* at least in part because it is reasonable for one to believe that *p*.

According to Lackey, the standard of reasonableness in RTBNA should be explained in terms of justified belief, such that “it is reasonable for one to believe that *p* only if S has epistemic support that is adequate for S’s justifiedly believing that *p* were S to believe that *p* on that basis.”¹⁸ We may therefore revise RTBNA, says Ho, so that it reads as follows:

RTBNA*: One should assert that *p* only if (i) one would be justified in believing that *p*, and (ii) if one asserted that *p*, one would assert that *p* at least in part because one would be justified in believing that *p* under (i).¹⁹

Applying this account of assertion to legal fact-finding yields what Ho calls the “belief account of fact-finding”:

BAF: The fact-finder must find that *p* only if (i) one would be justified in believing that *p*, and (ii) if one found that *p*, one would

¹⁶ *Id.* at 24.

¹⁷ See Jennifer Lackey, *Norms of Assertion*, 41 *NOUS* 594 (2007). Lackey proposes this rule of assertion as an alternative to the view that assertion implies a claim to knowledge, which, in Ho’s view, is too strong for legal fact-finding. See HO, *supra* note 4, at 88-9.

¹⁸ See HO, *supra* note 4, at 92.

¹⁹ *Id.* at 92.

find that p at least in part because one would be justified in believing that p under (i).²⁰

According to BAF, the fact-finder ought to make findings of fact on the basis of her judgment about what “one would be justified in believing.” There might be cases in which there is a divergence between what the fact-finder believes one would be justified in believing, i.e., “selfless belief,” and what the fact-finder personally believes, i.e., “personal belief.” There are, says Ho, two potential causes of divergence between selfless and personal belief. Firstly, in deciding what to believe, the trier of fact must ignore inadmissible evidence. Secondly, the fact-finder is prohibited by the law from applying certain lines of evidential reasoning to particular types of evidence. In order to take into account these constraints on legal deliberation, Ho revises BAF as follows:

BAF*: The fact-finder must find that p only if (i) one would be justified in believing sufficiently strongly that p if one were to take into account only the admitted evidence, ignore any inadmissible evidence to which one might have been exposed, and avoid reliance on any line of evidential reasoning that the law might forbid in the case at hand; and (ii) if one found that p , one would find that p at least in part because one would be justified in believing that p under (i).²¹

Some clarification of this definition is required. First, since only positive findings of fact have assertive force, BAF* is meant to apply only to verdicts that the claimant is liable on the claim that has been brought against her or that the defendant is guilty as charged. The scope of application of BAF* is further restricted in that it does not apply to cases in which the law renders irrelevant the fact-finder’s doxastic judgment (for instance, laws requiring corroboration or rebuttable presumptions). It does not apply either when there is no need for trial deliberation, that is, where a conviction follows a guilty plea or when a civil judgment is entered by default.

Second, the belief that figures in BAF* is of a categorical kind. Two kinds of belief are commonly distinguished in epistemology: categorical belief and partial belief.²² Either one believes categorically that p or one does not—more precisely, three doxastic positions are possible: to believe that p , to believe

²⁰ *Id.*

²¹ *Id.* at 93.

²² Ho discusses in detail the distinction between categorical and partial belief, see HO, *supra* note 4, at 124-35. On this distinction see, also, DAVID CHRISTENSEN, PUTTING LOGIC IN ITS PLACE: FORMAL CONSTRAINTS ON RATIONAL BELIEF (2004).

that p is false, or to suspend judgment about p . In contrast, when one partially believes that p , one believes that p to a certain degree. The attitude of partial belief, says Ho, is closely related to an attitude of suspicion: believing to a greater or lesser degree that p is suspecting (more or less strongly) that p . Whereas categorical belief is the kind of belief necessary for knowledge, partial belief is preclusive of knowledge. Categorical belief that p justifies the assertion that p . By so doing, one implies knowledge that p and thus makes oneself responsible for the truth of p . Partial belief in p , on the contrary, merely justifies assertion that ‘probably’ p . In saying “probably p ,” one denies any claim to knowledge of p , and thus one does not commit oneself to the judgment that p is, in fact, true. It is crucial to notice that the difference between categorical and partial belief does not have to do with the strength of believing a proposition. Both categorical and partial belief may vary in strength, although different notions of strength apply to each of them. Whereas the strength of categorical belief in p is “the degree of tenacity to which one holds on to the view that p is in fact true,” i.e., it is a matter of how difficult it is for one to abandon that belief, the strength of a partial belief in p refers to “how strongly one suspects that p is in fact true.”²³ While the notion of belief strength which applies to categorical belief is not numerically quantifiable, the strength of a partial belief is measured by means of probability calculus.

Ho uses Shackle’s model of categorical belief to further specify how the kind of belief that figures in BAF* can vary in strength.²⁴ Shackle’s theory is based on the notion of “possibility” as opposed to “probability.” The degree of possibility is expressed in terms of “potential surprise,” i.e., the surprise which runs counter to our expectations, and it ranges from perfect possibility to impossibility. Between these extremes, there are degrees of possibility and of potential surprise which may be ranked as “mild,” “moderate,” “considerable,” and so forth. To believe categorically that p is, in fact, true two conditions must obtain: first, one must judge that p is perfectly possible, and, second, one must judge that none of its contradictories is also perfectly possible. The strength of one’s categorical belief that p is inversely proportional to the degree of possibility one attributes to the strongest of those contradictories. Thus, a categorical belief that p is not acquired in the abstract but in the context of a set of propositions which instantiates not- p . Ho calls the theory which results from integrating BAF* with Shackle’s model of categorical belief SMCB-BAF*.

Third, the categorical belief that figures in BAF* must be strong enough to satisfy the applicable standard of proof. As we will see in detail in the next section, Ho provides an internal analysis of the standards of proof, according to

²³ Ho, *supra* note 4, at 131.

²⁴ Ho provides a detailed discussion of Shackle’s model of categorical belief, see Ho, *supra* note 4, at 143-51.

which the standard of proof varies with context. In a nutshell, Ho claims that the strength of the categorical belief in the truth of the disputed allegation required for the standard of proof to be satisfied is a function of the seriousness of both the content of the allegation and the consequences of accepting that it is true.

Fourth, BAF* establishes two conditions for a correct finding of fact: (i) the fact-finder must judge that one would be justified in believing sufficiently strongly that p if one were to take into account only the admissible evidence and avoid reliance on lines of evidential reasoning forbidden by law; and (ii) the fact-finder finds that p partly because she judges that one would be justified in believing that p sufficiently strongly given the legal constraints on both admissible evidence and legitimate lines of evidential reasoning. The first condition rules out as wrong findings of fact that are irrational (for example, says Ho, a belief which is acquired from reading tea leaves) as well as findings that are based on inadmissible evidence or arrived at by legally forbidden reasoning. Condition (ii) rules out as unjustified any belief which, although justifiable under condition (i), is not motivated by the belief that it was so justifiable. For example, under condition (ii) a guilty verdict is wrong if it is not based on the evidence, but rather on a feeling of revulsion or disgust for the defendant, even if there is strong rational support for the belief in guilt on the evidence admitted in court. In this sense, the kind of justification which figures in BAF* is, as Ho calls it, a “strong-subjective” kind of justification.

According to Ho, it is subjectively justified, in the strong sense, for the fact-finder to believe a proposition if (a) a good enough rational argument concluding in the proposition believed exists on the evidence that she has, and (b) she has come to believe the proposition by that argument. Ho contrasts this kind of justification with “weak-subjective” justification as well as with an “objective” sort of justification. For the fact-finder to be subjectively justified, in the weak sense, in believing a proposition it is not required that the argument must have actually influenced her belief but only that she would accept it as justification for her belief if her attention were drawn to it. It is objectively justified for the fact-finder to believe a disputed proposition if a good enough rational argument exists on the evidence, even if the argument is beyond her grasp and it had neither led her to the belief nor is an argument she would accept as a justification for her belief. Ho claims that a fact-finder must aim at findings that are justified in the strong subjective sense. That is to say, a fact-finder must aim at findings for which there is a good rational argument on the evidence available—i.e., condition (i) of BAF*—and which are actually influenced by such argument—as stated by condition (ii).

Fifth, it is worth emphasizing that the kind of belief that is relevant in BAF* is not “personal” belief but rather “selfless” belief. BAF* requires the fact-finder to make a detached first-personal statement (i.e., I judge that one would be

justified in believing that *p*) instead of a subjective first-personal statement (i.e., I judge and therefore believe that *p* is true). More specifically, BAF* requires that (i) the fact-finder form a meta-belief that one would be justified in believing that *p* on the evidence available, and (ii) such meta-belief lead, at least in part, the fact-finder to find that *p*. BAF* does not require that the fact-finder hold the personal belief that *p*, but merely that she hold the meta-belief that one would be justified in believing *p* (i.e., that she make a selfless assertion that *p*) and that such meta-belief partly produce the finding that *p*.

Last, BAF*, by taking justified selfless belief—in a strong subjective sense—as the aim of a finding of fact, it makes explicit that truth is not all that matters in adjudication. Ho illustrates that truth cannot be the only epistemic aim of trial deliberation by means of the following example: “If I flip a coin to decide a verdict, there is a 50 per cent chance of hitting the truth. Suppose I do hit the truth. I find and assert that the accused is guilty and it is true that the accused is guilty. No one could reasonably regard my assertion as proper since it was based on nothing more than a lazy and irresponsible guess.”²⁵ However, claims Ho, justified belief is not all that trial deliberation aims at either. We want findings of fact that are both justified and correct. He writes: “Suppose the defendant was convicted on evidence which was such that it was reasonable for one to believe, and hence one would be justified in believing, that she is guilty, thus satisfying condition (i) of BAF*, and suppose further that condition (ii) was also satisfied. As it turns out, the evidence against the defendant was fabricated and she is innocent. She was wrongfully convicted.”²⁶ BAF* seems to lack the resources to explain why, in the foregoing case, the conviction was wrongful. However, claims Ho, this is only apparently so, for truth may be shown to be presupposed in BAF* as a standard of correctness. Ho builds an argument to the effect that truth as a normative standard is already embedded within BAF* by relying on Shah and Velleman’s theory of doxastic deliberation.²⁷

According to Shah and Velleman, truth figures descriptively and normatively in the concept of belief.²⁸ On the one hand, a cognitive attitude can be properly described as a belief only if it is regulated by truth. On the other hand, truth is the normative standard governing the concept of belief, that is to say, it is correct to believe that *p* if and only if *p* is correct. Truth, argues Ho, is contained in BAF* through the concept of belief. The argument to the effect that a

²⁵ *Id.* at 98.

²⁶ *Id.*

²⁷ Although Ho explicitly acknowledges that it is unclear that the argument fully succeeds. See HO, *supra* note 4, at 99.

²⁸ See Nishi Shah and David J. Velleman, *Doxastic Deliberation*, 114 PHIL. REV. 497 (2005). For Ho’s discussion of this work, see HO, *supra* note 4, at 99-106.

finding that p is correct only if and only p is true could be reconstructed as follows:

- (i) One must find that p only if one is justified in believing that p ;
 - (ii) It is correct to believe that p if and only if p is true;
- Therefore, it is correct to find that p if and only if p is true.

That is, from BAF* (i.e., premise (i)) and Shah and Velleman's claim that a belief is correct if and only if it is true (i.e., premise (ii)), it follows that it is correct to find that p if and only if p is true. Truth is thus the standard of correctness for a finding of fact. Ho calls this thesis TSC. He contends that the standard of correctness in TSC is independent of the standard of justification required by BAF*. A finding that is justified under BAF* may be incorrect or false, and an incorrect or false finding may nonetheless be justified within the terms of BAF*. TSC and BAF* serve different functions. Whereas TSC evaluates the outcome of trial deliberation from a third person perspective, BAF* is a regulative rule which guides the fact-finder in the process of deliberation, setting a standard of justified belief that operates from a first-person perspective. The *ultimate* aim of trial deliberation is to obtain truth through justified belief, that is, to produce a finding of fact that satisfies both BAF* and TSC or, in other words, knowledge. To the extent that knowledge is obtained *via* justified belief, one could say—claims Ho—that the *immediate* aim of trial deliberation is justified belief of the sort required by BAF*. ²⁹

Now, how does one reach justified beliefs, and eventually knowledge, in the course of trial deliberation? According to Ho, a fact-finder settles on a categorical belief about the case by comparing and eliminating hypotheses. Cases are disposed, on this view, not on probability assessments but rather on assessments of plausibility or possibility.³⁰ Many factors, says Ho, are relevant to assessing the plausibility of a hypothesis, among others, internal consistency, consistency with the evidence, coverage, coherence, and the degree to which the hypothesis is supported by the evidence. Ho endorses a holistic approach to evidential support according to which the extent to which evidence supports a hypothesis depends on how credible the evidence is, the sufficiency of the reason it gives for believing the hypothesis, the extent to which the key features of the

²⁹ For a similar position, see Pardo, who writes: “the generation of non-accidentally true conclusions is a fundamental goal of the proof process, and the path to that goal is through factfinders as potentially justified believers.” See Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 L & PHIL. 321, 361 (2005).

³⁰ Ho compares SMCB-BAF* with other theories of trial deliberation that appeal to explanatory considerations rather than probabilities, more specifically, the relevant alternative theory of knowledge, Allen's relative plausibility theory, and narrative models of trial deliberation. See *id.* at 151-65.

hypothesis are anchored in the evidence, the comprehensiveness of the evidence, and the extent to which the hypothesis is capable of providing a causal or explanatory account of the events being litigated.

Ho's approach to legal proof is meant to be an alternative to probabilistic analyses of legal fact-finding.³¹ First, it is grounded on an interpretation of verdicts according to which verdicts express beliefs, rather than propositions of probability or proof.³² Second, the kind of belief that figures in this belief-account of fact-finding is categorical belief, instead of partial belief, which is employed in probability theory. Last, such categorical belief is arrived at by a process of comparison and elimination of competing propositions which are inconsistent with the proposition believed.³³ This view of the structure of trial deliberation stands in sharp contrast with the probabilistic approach to evidential reasoning in law.

To review, we have seen how an internal analysis of evidence law reveals that the purpose of trial deliberation is to figure out truth through justified belief. Thus, this perspective offers a different picture of the epistemic function of trials. Ho claims that an analysis of evidence law from an internal point of view also gives important insights with regard to the moral underpinnings of evidence rules. In order to make good on this claim, he provides an internal analysis of the standard of proof, the hearsay rule, and the similar fact evidence rule, which I turn now to examine.

³¹ Nonetheless, Ho does give probabilities a role in trial deliberation, see HO, *id.*, at 118-20.

³² See *id.* at 16-17 and 121-24.

³³ In this respect, even though Ho does not compare his belief account of legal fact-finding with models which explain factual reasoning in law as involving first and foremost the generation and selection of explanatory hypotheses about the facts being litigated, there are obvious similarities between Ho's views on the structure of trial deliberation and these approaches. See Joseph R. Josephson, *On the Proof Dynamics of Inference to the Best Explanation*, in THE DYNAMICS OF JUDICIAL PROOF: COMPUTATION, LOGIC, AND COMMON SENSE 287 (Peter Tillers & Marilyn MacCrimmon eds., 2002); Kola Abimbola, *Abductive Reasoning in Law: Taxonomy and Inference to the Best Explanation*, in THE DYNAMICS OF JUDICIAL PROOF, *supra* at 337; DOUGLAS WALTON, LEGAL ARGUMENTATION ABOUT EVIDENCE (2002); Paul Thagard, *Why Wasn't O.J. Convicted? Explanatory Coherence in Legal Inference*, 17 COGNITION & EMOTION 361 (2003); Paul Thagard, *Causal Inference in Legal Decision-Making: Explanatory Coherence vs. Bayesian Networks*, 18 APPLIED ARTIFICIAL INTELLIGENCE 231 (2004); Paul Thagard, *Evaluating Explanations in Law, Science, and Everyday Life*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 141 (2006); Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 L. & PHIL. 223 (2008); and Amalia Amaya, *Inference to the Best Legal Explanation*, in LEGAL EVIDENCE AND PROOF 135, *supra* note 2.

II. Applications: Standards of Proof, Hearsay, and Similar Facts Evidence

Ho contends that the full value of evidence law can be viewed only if we adopt the perspective of the fact-finder as a moral agent. He selects three aspects of evidence law in order to demonstrate the indispensability of the internal perspective: the standard of proof, the hearsay rule, and the similar fact evidence doctrine.

(i) *Standard of Proof*

The traditional approach to the standard of proof is the external one. According to Ho, this approach has three key features. First, it focuses on the “end-state of evidence evaluation”, i.e., the degree of the fact-finder’s belief or confidence in the factual hypothesis after she has evaluated the evidence. Secondly, the external analysis views standards of proof as decisional thresholds so that if the fact-finder’s degree of belief crosses a certain level, she must accept it; otherwise, she must reject it. Thirdly, the standards of proof are evaluated as instruments of social policy, that is, as instruments for achieving some social ends. Most importantly, standards of proof are viewed as means for attaining an optimal trade off between the goal of convicting the guilty and the desire to avoid convicting the innocent.

Ho argues that each of these features of the traditional model of analysis poses difficulties. First, the external approach to the standard of proof focuses exclusively on the end-state of evidential evaluation and unduly neglects how such a state of belief came to be. However, the justification of a finding of fact is a function not only of the end-state of deliberation, but also of the rationality of the reasoning which led to that end-state. Otherwise, one would have to admit that a fact-finder who is genuinely sure that the defendant is guilty as a result of consulting an ouija board may justifiably find the defendant guilty beyond a reasonable doubt. The standard of proof is best understood as imposing a rationality requirement on the process whereby a verdict is reached. It contains the demand, in virtue of its rationality requirement, to be appropriately cautious when judging a dispute of fact. In short, the standard of proof is best read, claims Ho, as a standard of caution.

Second, the traditional understanding of the standard of proof as a decisional threshold is fraught with problems. An interpretation of the civil standard of proof according to which any probability that exceeds 0.5 satisfies the standard leads to unacceptable conclusions. It is not enough for a fact-finder to believe that it is more likely than not that the allegation is true; he must believe that the allegation is, in fact, true. More precisely, according to the belief account of legal fact-finding, the fact-finder must find that p only if one would be justified

in believing that p within the terms of BAF*. The criminal standard of proof is also problematic. There is no consensus as to what the minimum degree of confidence required for a conviction should be. Further, it is not even generally accepted that the standard should admit of a probabilistic quantification. Ho claims that the problem of fixing the threshold is a false one: it is a problem that cannot be solved but that must be “dissolved.”³⁴ The standard of proof should not be interpreted as a decisional threshold, but rather as an instruction to the fact-finder on the “attitude” that she must adopt in the course of deliberating about the verdict.

Third, the understanding of the standard of proof as an instrument of social policy involves the risk of overlooking the injustice of a false conviction, whatever the social benefits it might produce. Even if, undoubtedly, there is a limit to the efforts that may be made to increase the accuracy of the legal fact-finding system, given competing demands for limited resources, still the point remains that the conviction of an innocent is never intentional, but a consequence of institutional imperfection. Instead of conceiving the standard as a means to achieve some social end, Ho proposes that it be understood as an “expression of epistemic principles, rooted in a view of justice as emphatic care.”³⁵

In light of the problems with the external analysis of the standard of proof, Ho invites us to rethink and revise our understanding of these standards from an internal perspective. Ho advances two proposals: first, the standard of proof should be interpreted as a “standard of caution,” and, second, the distribution of caution varies with the kind of dispute—civil or criminal—presented by the case at hand. I shall briefly present both proposals.

The first proposal, i.e., an interpretation of the standard of proof as a standard of caution, builds upon the rule of fact-finding which is the cornerstone of Ho’s epistemology, namely, the rule that the fact-finder must find that p only if one would be justified in believing that p within the terms of BAF*. According to BAF*, the belief in the truth of the disputed allegation must be sufficiently strong. Ho claims that whether a belief is strong enough to satisfy BAF* depends on the caution that the fact-finder must exercise in the context of the particular case. Such caution is defined by Ho as “a propositional attitude, a critical frame of mind that comes in shades of resistance to persuasion on the truth of a disputed allegation.”³⁶ The standard of proof, understood as a standard of caution, is a variant standard, for caution is a context-dependent notion. That is to say, the demands of caution vary with the circumstances of the case. Ho highlights two contextual features which are relevant to determining the appropriate level of caution, to wit, the seriousness of the allegation and the gravity of the

³⁴ HO, *supra* note 4, at 182.

³⁵ *Id.* at 185.

³⁶ *Id.* at 186.

consequences of judging it true. The greater the stakes and the consequences, the higher the degree of resistance must be to accept the allegation as true.³⁷ According to Ho, the import and consequences which bear on the standard of caution must be appreciated through empathy with the person who stands to be affected by the verdict. Justice requires the fact-finder to discharge her function with emphatic care. A lack of concern and respect for the person whose case is being disposed is expressed by want of caution in reaching a finding adverse to him. Injustice occurs when the evidence is not adequate to meet the epistemic standards that ought to apply, given the degree of harm that the defendant is likely to suffer from that finding. In sum, says Ho, “justice demands that the epistemic standard at a trial varies with the gravity of the particular case.”³⁸ There seem to be no reason why—argues Ho—such variant standard should be different for civil and criminal law cases. A categorical distinction between the civil and the criminal standard of proof could only be justified if it could be shown that every criminal case is more serious than any civil case. This is difficult to accept, given that a civil verdict may also convey a grave censure and carry serious consequences. Thus, Ho claims that there should be only one standard, albeit a variant one, depending on the significance and consequences of the finding in the particular case.

There is, however—and this is Ho’s second proposal—a difference between the standard of proof, i.e., the standard of caution, that is applicable to civil and criminal cases. The difference lies in the way in which the caution is distributed. Whereas in a criminal trial caution ought to be weighed in favor of the accused, in a civil trial the court ought to be equally cautious in accepting an allegation in favor of either party. Thus, there is an important difference in the deliberative attitude that is required in a criminal case and that which is expected in a civil case. In a criminal case, the standard of proof instructs the fact-finder to adopt a “protective” attitude towards the defendant when deliberating on his guilt. This attitude requires that the fact-finder adopt a deliberative posture of skepticism towards the prosecution’s case, that is to say, she should be much more reluctant to accept a proposition which supports a guilty verdict than to accept a factual hypothesis which undermines conviction. This asymmetry in the distribution of caution is based on the value judgment that it is a greater wrong to convict the innocent than to acquit the guilty. In contrast, in a civil case, the standard of proof instructs the fact-finder to be “impartial,” that is, to exercise the same degree of caution in finding a hypothesis put forward by either party. The

³⁷ Hence, according to Ho, even though fact-finding is essentially an epistemic endeavor practical factors, i.e., the importance and the consequences of the allegation, impinge on trial deliberation. For Ho’s views on the relations between practical and theoretical reasoning in the trial context, see, HO, *supra* note 4, at 196-98.

³⁸ *Id.* at 211.

principle of equality, which structures civil trials, requires that the same epistemic standards be used to assess the case of both parties.

To sum up, the internal analysis of the standard of proof leads to an understanding of the standard of proof as a standard of caution and brings to light the moral dimension of the standard: justice requires that the fact-finder employ an epistemic standard that is commensurate with the gravity and consequences of what is at stake. The standard of proof, understood as a standard of caution, is thus a variant one. Even though one and the same standard is applicable to both criminal and civil cases, there is, nonetheless, a difference between both kinds of cases, which concerns the distribution of caution. Whereas in criminal cases, the standard instructs the fact-finder to assume a protective attitude towards the defendant, in civil cases the fact-finder ought to be impartial. A different deliberative attitude is thus appropriate to determining facts in civil and criminal trials.

(ii) *Hearsay*

Ho claims that the hearsay rule, like the standard of proof, has been typically analyzed from an external perspective. In this kind of analysis, the rule of hearsay is viewed as a rule that protects against fact-finding errors. Two arguments are given in support of the hearsay rule. First, it is argued that the rule is necessary because there is a real risk of the jury giving hearsay evidence more weight that it objectively deserves. Secondly, the rule is justified on the grounds that hearsay statements cannot be tested by cross-examination. The soundness of both of these arguments depends on the validity of empirical assumptions about the impact of regulating trial by the hearsay rule on the accuracy of verdicts. None of these arguments, claims Ho, succeed in justifying the exclusion of hearsay evidence. On the one hand, the empirical assumption that jurors are generally incompetent in handling hearsay evidence is highly controversial. On the other hand, that the lack of opportunity to cross-examine the original maker of the statement may have a negative impact on the reliability of trial verdicts is not a sufficient reason for justifying the exclusion of hearsay evidence, for it makes little sense to exclude evidence merely on the grounds that it is less than best. A positive reason is necessary to justify the exclusion of hearsay evidence. Ho contends that such reason may be found by subjecting the rule to an internal analysis.

From an internal perspective, the focus is not on whether the hearsay rule promotes the reliability of the trial system, but rather on whether hearsay evidence is such that it provides the fact-finder with a sufficiently strong justification for accepting the truth of the allegation. Ho gives two arguments which purport to show that there are problems with establishing such justification in connection with hearsay evidence and, therefore, that there are good reasons for excluding

this kind of evidence, i.e., the “testimonial argument” and the “defeasibility argument.” The testimonial argument runs as follows. In order to infer the truth of what *S* (the original source of the statement) said (*p*) from the fact that he said it, it is necessary to have information regarding the trustworthiness of *S* with respect to *p*. In the case of hearsay evidence, because of *S*’s absence from the trial, there is no evidence of her trustworthiness, and thus the trier of fact is not justified in believing that *p* through *S*’s testimony. The thrust of the defeasibility argument is that, even when such information regarding the trustworthiness of *S* is available, the non-availability of *S* for courtroom examination may leave the fact finder’s justification to believe that *p* from *S*’s word or conduct too vulnerable to defeat.

Ho claims that the demand for epistemic justification and for assurance of non-defeasibility is grounded on moral reasons. Justice requires that the fact-finder carries out his task with due respect and concern for the person who stands before the court. A degree of caution which adequately reflects such respect and concern should be exercised when deliberating at trial. With regard to hearsay evidence, the fact-finder may lack a positive justification for the belief that *p*, if there is no information about the trustworthiness of *S*, and even when there is, the fact-finder’s justification for believing that *p* faces a great risk of defeat. Under those circumstances, believing that *p* would be not only epistemically unsound but also morally wrong. In inferring that *p* is true from hearsay evidence, the fact-finder would fail to discharge his duty with the level of caution that justice demands. Thus, it is by analyzing the hearsay rule from an internal perspective that we may see that it embeds moral principles which are intrinsic to the legitimacy of legal fact-finding.³⁹

(iii) *Similar Fact Evidence*

Ho contends that the similar facts rule, like the hearsay rule, responds to both demands of justice and of truth, which act in concert to protect the legitimacy of legal fact-finding. The moral roots of the similar facts rule, however, can only be exposed by subjecting the rule to an internal analysis. Ho examines, from an internal perspective, the rule as it operates in both criminal and civil cases.

³⁹ Ho considers briefly whether the fact an exclusionary hearsay rule does not exist in either continental law systems or international tribunals undermines his argument to the effect that there are moral reasons for the exclusion of hearsay. He concludes that while these systems do not exclude hearsay as a rule, the concern about the epistemic justification of reliance on hearsay evidence is also present in these systems. See *id.* at 254-59. As I will argue later (see section V), the comparative analysis—contrary to what Ho claims—shows that while there might be moral reasons for being particularly critical towards hearsay evidence, such reasons fail to justify the exclusion of hearsay.

With regard to criminal law, the similar facts evidence rule is usually evaluated from an external perspective. On this approach, the rule is assessed in terms of its contribution to the reliability of the trial system. Two justifications are commonly offered for the belief that excluding evidence whose prejudicial effect outweighs its probative value will facilitate the pursuit of truth. First, there is the “risk of cognitive error,” that is, there is a danger that the fact-finder will overestimate the probative value of evidence of previous misconduct. Second, there is a “risk of emotivism,” in that evidence of the defendant’s bad character might sway the fact-finder unduly against him. Ho argues that both justifications are wanting, as they are based on empirical assumptions which are contestable, vague, and difficult to verify. A deeper explanation, which does not appeal to psychological weaknesses but to our commitment to moral values, is needed for the rule. We may find such explanation, claims Ho, by subjecting the rule to an internal analysis.

From an internal perspective, two moral constraints on the ascription of criminal responsibility stand out as essential for the purposes of justifying the rule: the principle that “the court ought not, because it is unfair, hold a person responsible for his action if he lacks the capacity of reflective self-control” and the principle that “the accused is to be tried specifically on his responsibility for the criminal act the prosecution alleges he has committed.”⁴⁰ The similar facts rule forbids reliance on reasoning in support of a conviction that violates either of these two principles. Therefore, it is moral values which ultimately justify the similar facts rule.

The similar facts rule does not forbid, however, any kind of reasoning from the evidence of bad character. Two main ways of using bad character evidence may be distinguished. One could hold bad character as the direct cause of the defendant’s behavior. Ho argues that this way of understanding the role that character plays in influencing behavior does not acknowledge the defendant as an autonomous moral agent, with a capacity to revise or act against his bad character. There is, however, an alternative way of using bad character evidence which is not morally objectionable. The alternative view adopts an internal perspective and conceptualizes character in terms of a set of stable but revisable motivational structures. On this view, while this set of motivations informs a person’s character, it does not determine his action. Given that action is underdetermined by character, similar facts evidence may support an inference of guilt only indirectly by offering an explanation for the alleged action which is based on the specific situational factors of the action and the reasons which motivated the agent. Evidence of bad character may only be used, claims Ho, to support an

⁴⁰ *Id.* at 295-6.

interpretation of the body of evidence, that is, it may only be allowed to play a “corroborative” function.⁴¹

According to Ho, an understanding of the moral reasons which justify the exclusion of similar facts evidence—as revealed by an internal analysis—leads to a re-interpretation of the test of admissibility. Traditionally, the determination of admissibility is the result of balancing the competing considerations of fairness and truth. In contrast, viewed from an internal perspective, the exclusion of previous misconduct expresses the law’s concern about the moral legitimacy of the reasoning which might result in a conviction. It conveys the importance attached to finding the truth while, at the same time, doing justice to the accused.⁴²

Ho claims that the internal perspective also allows us to see the moral value of the similar facts doctrine in civil law. In this area of the law, there is ambivalence about the proper role of the rule; there is a desire to apply the rule as it applies in criminal cases, yet, at the same time, civil judges are reluctant to exclude similar fact evidence. Once it is appreciated that there are moral reasons for the rule, we may come to see why there is such ambivalence in civil law. On the one hand, given that the rule protects the moral legitimacy of evidential reasoning, it is sensible that judges should feel that the similar facts rule has a role to play in both criminal and civil law cases; after all, reliance on that evidence may undermine the moral legitimacy of verdicts in both kinds of cases. On the other hand, from a moral point of view, it is also understandable that judges are more reluctant to exclude similar facts evidence in civil law cases than in criminal law cases. Given that moral prejudice is much less of a problem in civil trials than in criminal trials and that equality, rather than the protection of the accused, is the main governing principle of civil trials, there is indeed a moral reason for admitting more readily similar facts evidence in civil proceedings than in criminal proceedings. It is a difference in the “value orientation” of civil and criminal law that allows us to explain the dissimilarity in the operation of the similar facts rule in both kinds of cases.⁴³

To recapitulate, Ho claims that the internal approach unveils the moral foundations of rules of evidence that conventional approaches traditionally justify in exclusively epistemic terms, such as the hearsay rule and the similar facts

⁴¹ *Id.* at 303-5.

⁴² Ho claims that while there is no exclusionary rule of similar facts evidence in either continental systems or international law, this does not undermine his argument to the effect that a rule of similar fact evidence is a demand of justice, for these systems also show a concern about the legitimacy of relying on previous offenses. *Id.* at 311-14. The non-existence of this rule—on the plausible assumption that continental legal systems as well as international law have adequate systems of criminal justice—does, however, pose a threat to Ho’s argument, as I will argue in section V.

⁴³ *Id.* at 332.

evidence rule. In the previous sections, I have introduced the main elements of Ho's legal epistemology as well as its applications to three core issues in evidence law. The plan for the next three sections is as follows. First, I shall attempt to clarify the epistemic commitments involved in Ho's proposed internal framework for analyzing evidence law. Then, I will suggest some lines along which such a framework may be further developed. Last, I will explore some of the (possibly unintended yet far reaching) implications of Ho's internal analysis.

III. Internalism vs. Externalism in Legal Fact-Finding

The centerpiece of Ho's legal epistemology is the distinction between the internal and the external approaches to evidence law. According to Ho, the mainstream discourse in evidence scholarship endorses an "external point of view." However, as explained above, he claims that it is only by adopting an "internal point of view" that we may see the full value of evidence law. Given the centrality of the concept of the internal point of view to Ho's proposal, this notion and the role it plays in his theory are worth examining in detail.

The term "internal point of view" immediately brings to mind Hart's concept of the internal point of view. This concept, generally recognized as being one of Hart's greatest contributions to jurisprudence, has been exceedingly influential in contemporary legal theory.⁴⁴ Thus, the first issue which stands in need of clarification is whether Ho's concept of the internal point of view is similar to Hart's.⁴⁵ Hart introduces the distinction between the internal and the external point of view as follows:

When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to

⁴⁴ H. L. A. HART, *THE CONCEPT OF LAW* 88-91 (2nd ed. 1994). See also H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 14-5, 166-67 (1983). For commentary, see P. M. S. Hacker, *Hart's Legal Philosophy, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H. L. A. HART* 1 (1977); NEIL MACCORMICK, *H. L. A. HART* (2nd ed. 2008); Dennis Patterson, *Explicating the Internal Point of View*, 52 S. M. U. L. REV. 67 (1999); Verónica Rodríguez-Blanco, *Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View*, 20 CAN. J. L. & JURIS. 453 (2007); Stephen Perry, *Interpretation and Methodology in Legal Theory, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 97 (Andrei Marmor ed., 1995); and Scott J. Shapiro, *What is the Internal Point of View?* 75 FORDHAM L. REV. 1157 (2006).

⁴⁵ As one commentator has suggested, see Andrew C. Stumer, Book Review, 6 INT'L COMMENTARY ON EVIDENCE (2008).

conduct. We may call these respectively the ‘external’ and the ‘internal’ point of view.⁴⁶

Thus, according to Hart, the internal point of view is the point of view of a speaker who accepts the rules of the system from which she is speaking. Central to Hart’s conception of the internal point of view is the notion of “acceptance.”⁴⁷ As Shapiro has argued, the internal point of view is a “practical attitude of rule acceptance,”⁴⁸ that is, a disposition to guide one’s behavior and to evaluate conduct in accordance with the rules. It is thus best interpreted as an “internalized” perspective for it refers to a specific kind of attitude held by those who accept the rules of the system as a standard of conduct. It is important to notice that the acceptance required by the internal point of view is not of a moral kind. The internal point of view does not require that one accept the moral legitimacy of the rules, but only that one be disposed to guide one’s conduct by the rules and to use the rules as standards of criticism—a disposition one need not adopt for moral reasons.

This point of view is, I believe, crucial in a theory of legal fact-finding.⁴⁹ Legal fact-finders ought to endorse the internal point of view in Hart’s sense, in that they must accept the legal rules which apply over and above epistemic rules and be disposed to guide their conduct in accordance with them. Determining facts in the legal context is, to be sure, a form of evidential reasoning, but of a rule-based and highly institutionalized kind. Legal fact-finders ought to carry out their task with the attitude of someone who is situated within an institution and committed to abide by its rules. Schauer’s explanation of the “internal point of view” is very illustrative of the kind of attitude we may expect of fact-finders as participants in a legal system:

What is it to have an internal point of view? It would be a mistake to believe that an agent has or does not have an internal point of view simpliciter. Rather, an agent has an internal point of view vis-à-vis some system, institution, or practice. And that internal point of view is manifested when an agent’s position within an institution affects the presuppositions of the agent’s statements and actions, presuppositions that would be different were the agent not so internally situated.⁵⁰

⁴⁶ See HART, *THE CONCEPT OF LAW*, *supra* note 44, at 89.

⁴⁷ Fred Schauer, *Fuller’s Internal Point of View*, 13 L & PHIL. 285, 287 (1994).

⁴⁸ Shapiro, *supra* note 44, at 1157.

⁴⁹ See Amalia Amaya, *Justification, Coherence, and Epistemic Responsibility in Legal Fact-Finding*, 5 EPISTEME 306, 319 (2008). See note 12 and accompanying text.

⁵⁰ See Schauer, *supra* note 47, at 286.

We expect fact-finders' "presuppositions" and "actions" to be affected by the fact that they are situated within a legal institution. This entails, first, that the fact-finding activity should be done with an attitude of acceptance of the rules, that is, with a disposition to guide one's epistemic behavior by the rules. Second, it requires that the legal fact-finder conduct his epistemic behavior with full awareness of the importance of the task that the law has assigned to him. Not only does legal reasoning about facts in law differ from other kinds of evidential reasoning in that it is rule-based and highly institutionalized, but there is also an important practical dimension to evidential reasoning in law which sets it apart from other forms of fact-reasoning. Fact-finders form beliefs about the disputed facts upon which they base a decision about whether to find for or against the defendant. It is thus crucial that fact-finders approach their task with an understanding of the import and legal consequences of their determinations. Hart claimed that the "internal point of view" constituted one of the main existence conditions for social and legal rules. While it is likely that there would always be a tension in a society that has a legal system between those who take the internal point and those who take an external point of view, it is impossible for everyone to take the external point of view, for such society to have a legal system at all. In a similar vein, albeit less drastically, one could say that a trial system cannot accomplish its goals as a legal institution if most fact-finders do not hold an internal point of view with respect to this system.

Hence, Hart's point of view is essential for understanding the conditions necessary for a properly working trial system as well as the special demands that it imposes on fact-finders. However, this conception of the internal point of view does not seem to be what Ho has in mind. When explicating what it means to endorse the internal perspective, Ho does not refer to legal fact-finding as a rule-regulated activity. As Ho describes the internal analysis, there is no indication that such analysis involves an attitude of acceptance of the rules which govern legal fact-finding, which is the crux of Hart's conception of the internal point of view.

In order to better understand Ho's views on the nature of the internal perspective, one may also try to connect it up with another well-known conception of the "internal point of view," to wit, Dworkin's.⁵¹ He writes:

Legal practice, unlike many other social phenomena, is argumentative This crucial argumentative aspect of legal practice can be studied from two ways or from two points of view.

⁵¹ See RONALD DWORKIN, *LAW'S EMPIRE* 13-14 (1986). For commentary, see Perry, *supra* note 44; Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociological Studies*, 30 L. & SOC. REV. 163 (1996); and ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 45-51 (1992).

One is the external point of view of the sociologist or the historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others, for example. The other is the internal point of view of those who make the claims.⁵²

Dworkin claims, in *Law's Empire*, that his approach to law endorses the internal point of view:

This book takes up the internal, participant's point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth that participants face.⁵³

Dworkin's internal point of view is thus the "participants" point of view, i.e., the point of view of those who make legal claims and face problems of soundness and truth. It is the "insider" point of view, the point of view of someone who makes arguments about what the law requires from within the legal practice.

One might be tempted to assimilate Ho's internal point of view into Dworkin's framework. Indeed, there are some interesting similarities between Ho's and Dworkin's conception of the internal point of view. First, Dworkin is not so much interested in the *internal vs. external* aspect of rules, as Hart is, but rather in the *internal vs. external* aspects of legal argument. He associates the internal point of view with that of the actor who, within the practice, has to make and defend claims about soundness and truth by way of argument. Similarly, Ho identifies the internal point of view with that of the role-player within the legal system who has to settle by deliberation on the truth of some claim the determination of which has the potential to inflict harm to the parties. Thus, like Dworkin, Ho emphasizes the argumentative nature of legal decision-making. Secondly, Dworkin's internal point of view is the point of view of the participant, that is, the "insider's" point of view, more specifically, the judge's perspective. In this respect, Ho's conception of the point of view also seems to be similar to Dworkin's, as Ho's internal perspective is also the perspective of the role-player, in particular, the fact-finder. Thirdly, Dworkin claims that both the theorist and the judge should adopt the same point of view, that is, that theory and practice, jurisprudence and adjudication, are to be done from the same perspective, that is, from the insider's perspective.⁵⁴ Dworkin contends that legal theorists should

⁵² DWORKIN, *supra* note 51, at 13.

⁵³ *Id.*

⁵⁴ This position differs importantly from Hart's. For Hart, a jurisprudential theory must refer to the point of view of some of the participants, that is, it must take into account how the practice

look at legal practice with a participant's eyes. Likewise, Ho urges the theorist—that is, the evidence scholar—to look at the practice of legal fact-finding by adopting the participant's point of view, or, as he puts it, “through the eyes of the fact-finder.”⁵⁵

However, despite similarities, there is an important difference between Ho's internal point of view and Dworkin's. Even though both Dworkin and Ho endorse the internal perspective with a view to showing the law to be morally justified, the strategies they use in order to uncover the moral foundations of the law are strikingly different. Dworkin's conception of the internal point of view as a perspective which brings to light the moral value of the law follows from his views on interpretation. According to Dworkin, participants in social practices, such as the law, develop a complex interpretative attitude which consists of two elements. The first element is the assumption that the practice has a value or purpose, and the second is the assumption that the requirements of the practice are sensitive to its point, so that the rules must be applied, modified, or qualified by this point.⁵⁶ Dworkin contends that interpretation in the social practices, such as law, is first and foremost concerned with “purpose.” It consists, roughly, in imposing purpose on the practice in order to make it the best possible example of the genre to which one takes it to belong.⁵⁷ Thus, from the interpreter's viewpoint, the practice ought to be seen as justified. Participation in the legal practice requires that participants view the legal system as a system which serves some moral principle or value, in other words, that “they try to show legal practice in its best light, to achieve an equilibrium between the legal practice as they find it and the best justification of that practice.”⁵⁸ Dworkin's internal point of view is, unlike Hart's, a normative point of view in a strong sense, that is, the point of view of a participant in an interpretative practice who assumes the moral value of the practice, i.e., law, and is committed to making it the best it can be. Such an attitude is part and parcel of what it means to participate in an interpretative practice such as law. Hence, the conceptualization of the internal point of view as a normative point of view is a consequence of Dworkin's theory of interpretation and of his conception of law as an interpretative practice.

Moral reasons also enter into Ho's explanation of the internal point of view, but in a rather different way. For Ho, the internal point of view is also a normative one, for it is only by endorsing such viewpoint, that we may come to see the moral foundations of evidence rules. Thus, like Dworkin, Ho is assuming

looks from the point of view of some participants, but he rejects the claim that the theorist's point of view must be the same as that of the participants. See Perry, *supra* note 44, at 99-100.

⁵⁵ HO, *supra* note 4, at 50.

⁵⁶ DWORKIN, *supra* note 51, at 47.

⁵⁷ *Id.* at 52.

⁵⁸ *Id.* at 90.

that (evidence) law has moral value. However, while for Dworkin the moral value of the law results from a particular view about the interpretative theory that best fits legal practice, Ho seeks to show the moral value of evidence law on the basis of a particular view about the epistemological theory which is most appropriate for analyzing evidence law. Whereas for Dworkin, the internal point of view is the point of view of the participant, understood as the insider to a creative interpretative practice, Ho's internal point of view is the point of view of the epistemic agent, as conceived, I shall argue, from an internalist perspective. It is Dworkin's views about the kind of interpretative theory that best explains legal practice that lead to an understanding of the internal point of view as a normative viewpoint, and thus to attributing moral value to the law. In the case of Ho, as I will argue below, it is a particular view on the kind of epistemic theory that is adequate for explaining legal fact-finding that leads to a conception of the internal point of view as a normative point of view, and to investing the law of evidence with moral value. Ho's internal point of view is neither Hart's "internalized" viewpoint nor Dworkin's "insider's" point of view, but rather, I would argue, an "internalist" point of view. My suggestion is that Ho's claim that we should analyze evidence law from an internal point of view should be interpreted as a call to endorse "internalism" as an epistemological framework for analyzing issues of evidence and proof in law.

Internalism requires that all the factors needed for a belief to be epistemically justified be "internally available" (or "cognitively accessible") to the believer, that is, knowable on the basis of introspection and reflection. In contrast, externalism claims that justifying factors need not be so available, but that they can be external to the believer's cognitive perspective. In this view, a belief is justified if the appropriate relation between such a belief and an appropriate set of facts obtains, regardless of the believer's conception of the situation.⁵⁹ The most prominent version of externalism is "reliabilism." According to reliabilism, a belief is justified if it is produced by a process which leads to a high proportion of true beliefs, with the degree of justification

⁵⁹ On the debate between internalism vs. externalism in epistemology, see L. BonJour, *Internalism and Externalism*, in THE OXFORD HANDBOOK OF EPISTEMOLOGY 234 (P. K. Moser ed., 2002); Richard Fumerton, *The Internalist/Externalist Controversy*, 2 PHIL. PERSPECTIVES (1988); Kihyeon Kim, *Internalism and Externalism in Epistemology*, 30 AM. PHIL. Q. (1993); John Greco, *Justification is not Internal*, in CONTEMPORARY DEBATES IN EPISTEMOLOGY 251 (Matthias Steup & Ernest Sosa eds., 2005); Richard Feldman, *Justification is Internal*, in CONTEMPORARY DEBATES IN EPISTEMOLOGY, *supra* at 270; and LAURENCE BONJOUR & ERNEST SOSA, EPISTEMIC JUSTIFICATION: INTERNALISM VS. EXTERNALISM, FOUNDATIONS VS. VIRTUES (2003).

depending on the degree of reliability.⁶⁰ Externalism is quite a novel view. Traditional accounts of justification are internalist in that they make the justificatory status of a belief depend on factors internal to the believer's perspective. Externalism radically departs from traditional epistemology by claiming that a belief's justificatory status depends on the reliability and accuracy of the psychological processes which cause it, which are paradigmatically external factors.⁶¹

Unlike in epistemology, in the context of law, externalist approaches were not proposed as an alternative to any established traditional analysis. An interest in epistemic problems in law is relatively new. Traditional research on evidence and proof was not primarily concerned with issues of epistemic justification.⁶² It is only in the last decades that problems of legal epistemology have become prominent in both legal theory and evidence scholarship.⁶³ The study of issues of evidence and proof in law was initially dominated by a debate over the nature and role of probabilistic reasoning in law, which paved the way for the serious study of other aspects of legal epistemology. By the time legal scholars turned to epistemology with a view to applying it to their own field, externalism had become a strong alternative to the more traditional internalist views. Moreover, prominent advocates of externalism were interested in the law of evidence.⁶⁴ This, together with the fact that some notable aspects of traditional evidence law—such as the understanding of truth as the main purpose of trials and the unquestioned acceptance of the generality of fact verdicts—were congenial to an externalist approach made it possible for externalism to gain currency in evidence scholarship.⁶⁵ In a sense, externalism in law—in sharp contrast with the situation

⁶⁰ See Alvin Goldman, *What is Justified Belief?* in JUSTIFICATION AND KNOWLEDGE (Gregory Pappas ed., 1979); Alvin Goldman, *Discrimination and Perceptual Knowledge*, 73 J. PHIL. (1976); and ALVIN GOLDMAN, EPISTEMOLOGY AND COGNITION (1986).

⁶¹ Externalism's departure from traditional epistemological concerns is criticized by BonJour. See Laurence BonJour, *Externalist Theories of Empirical Knowledge*, 5 MIDWEST STUD. IN PHIL. 53 (1980).

⁶² Traditional evidence scholarship has been mostly concerned with the analysis of rules, rather than with the study of the process of proof. See William Twining and Alex Stein, *Introduction*, in EVIDENCE AND PROOF xv (William Twining and Alex Stein eds., 1992).

⁶³ As is well-known, with the advent of the so-called "new evidence scholarship." See Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B. U. L. REV. (1986). See also John Jackson, *Analyzing the New Evidence Scholarship: Towards a New Conception of the Law of Evidence*, 16 OXFORD J. LEGAL STUD. (1996).

⁶⁴ Most prominently, Alvin Goldman. For references, see *supra* note 3.

⁶⁵ Whereas Ho might perhaps overestimate the extent to which evidence scholarship has an externalist orientation, externalism seems to be a very influential approach to issues of evidence and proof in current legal scholarship. Naturalized approaches to legal epistemology take an externalist stance. See Ronald Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 V. A. L. REV. 491 (2001); GOLDMAN, *supra* note 64. Ho also takes Larry Laudan's approach to legal epistemology to be an externalist one. See LAUDAN, *supra* note 3.

in epistemology—has been the central epistemological framework for addressing problems of evidence and proof.

Ho's claim that we should approach issues of evidence and proof from an internal perspective might thus be seen as an invitation to rehabilitate the relevance of the traditional epistemological questions in the legal context, namely, the problems concerning the first-person justification, that is, the issues which believers face when they ask what reasons they have for believing something and how good those reasons are. The internal perspective that Ho advocates is thus best interpreted as the perspective of the first-person, that is, the fact-finder who needs to consider whether he has good reasons to believe the truth of the allegations under dispute. This interpretation of the internal point of view allows us to make sense of Ho's description of the two kinds of perspectives—internal and external—from which the law of evidence may be analyzed.

The external perspective, as Ho portrays it, may be succinctly characterized by the following features: (1) it endorses the point of view of the observer of the trial system; (2) it is outcome- or goal-oriented; (3) it takes the discovery of truth to be the chief goal of the trial system; (4) it focuses on the reliability of the trial system; (5) it assesses rules of evidence by means of consequentialist arguments; and (6) it conceives legal epistemology as closely connected with the empirical sciences, most importantly, psychology. All these features are indeed crucial in an externalist epistemology, as externalism answers questions of justification from a third-person perspective. Externalism assesses processes of belief formation in terms of the ratio of true outcomes they yield, that is, in terms of their reliability, it takes truth to be the primary epistemic value, and it endorses a consequentialist and empirical approach to epistemic problems.

In contrast, Ho's internal perspective: (1) endorses the fact-finder's perspective; (2) focuses on the rationality of the fact-finder's process of belief formation; (3) takes justification to be an important epistemic value in addition to truth; (4) is primarily concerned with issues of responsibility rather than reliability; (5) assesses rules of evidence by means of deontological arguments, instead of consequentialist arguments; and (6) conceives legal epistemology as closely connected with normative disciplines, such as ethics. All six features are distinctive of the traditional, internalist, approach to epistemological issues.

Hence, Ho's contrast between the internal and the external modes of analysis of evidence law is a contrast between an internalist, first-person, investigation and an externalist, third-person, investigation.⁶⁶ Now, Ho's main rationale for advocating an internal(ist) analysis of evidence law is to expose the moral values which, in his view, underlie evidence law. Why does the internal

⁶⁶ That internalism addresses issues of first-person justification, whereas externalism deals with problems of justification from a third-person perspective has been argued by BonJour. See BonJour, *supra* note 59, at 257.

point of view provide a stance from where the moral value of law may be revealed? The internalist framework with its emphasis on the first-person justification is congenial to a view of epistemology according to which epistemic value and moral value are closely connected. There are, however, different versions of internalism, and not all of them carry the same implications with regard to the relations between epistemic and moral evaluations. There is no direct route from the claim that evidence law should be analyzed from an internal point of view to the claim that evidence law is morally valuable. Some further assumptions need to be made before one is in a position to infer the moral value of evidence law from a commitment to internalism about justification.

There are, I would argue, two main assumptions that underlie Ho's proposal to analyze evidence law from an internal perspective. The first assumption concerns the relationship between epistemic justification and epistemic responsibility. There are different views as to how judgments of epistemic justification and judgments of epistemic responsibility relate to each other. On a prominent view, commonly referred to as "responsibilism," or "deontologism," epistemic justification should be understood in terms of freedom from blameworthiness and epistemic responsibility. On this view, whether one is justified depends, at least in part, on how well one has met one's epistemic duties. Most importantly, it depends on whether the agent has done all he should to bring it about that she has true beliefs.⁶⁷

Deontologism and internalism are closely connected. In fact, deontologism is taken to provide a main rationale for internalism. Given that judgments of responsibility depend entirely on factors that are internal to the agent, if epistemic justification is a matter of epistemic responsibility, then epistemic justification also ought to be dependent upon internal factors.⁶⁸ Notwithstanding the important connections that link deontologism and internalism, they are arguably independent positions. There does not seem to be any uncontroversial entailment either from a deontological conception of

⁶⁷ On the notion of epistemic responsibility and its relationship to justification, see RODERICK CHISHOLM, *THEORY OF KNOWLEDGE* (2nd ed., 1077); CARL GINET, *KNOWLEDGE, PERCEPTION AND MEMORY* (1975); Hilary Kornblith, *Justified Belief and Epistemically Responsible Action*, 92 *PHIL. REV.* (1983); LAURENCE BONJOUR, *THE STRUCTURE OF EMPIRICAL KNOWLEDGE* 8 (1985); Richard Foley, *Justified Belief as Responsible Belief*, in *CONTEMPORARY DEBATES IN EPISTEMOLOGY*, *supra* note 59, at 313; Nicholas Wolterstorff, *Obligation, Entitlement, and Rationality*, in *CONTEMPORARY DEBATES IN EPISTEMOLOGY*, *supra* note 59 at 326; *KNOWLEDGE, TRUTH, AND DUTY: ESSAYS IN EPISTEMIC JUSTIFICATION, RESPONSIBILITY, AND VIRTUE* (Matthias Steup ed., 2001). For an examination of the relation between justification and epistemic responsibility in the context of legal fact-finding, see Amaya, *supra* note 49.

⁶⁸ See ALVIN PLANTINGA, *WARRANT: THE CURRENT DEBATE* 3-30 (1993). See also Matthias Steup, *A Defense of Internalism*, in *THEORY OF KNOWLEDGE: CLASSICAL AND CONTEMPORARY READINGS* 373 (Louis Pojman ed., 2nd ed., 1999).

justification to an internalist view or in the opposite direction.⁶⁹ Ho seems to be committed to both internalism and responsibilism about epistemic justification. Crucial to Ho's conception of the internal analysis is the idea that there are a number of duties associated with the role of fact-finder (e.g., a duty of deliberation, a duty of critical judgment) and that meeting those duties is necessary for the process that leads to the verdict to be rational and, ultimately, for the verdict to be correct.⁷⁰ A failure to discharge these duties results, in Ho's view, in an epistemically (and morally) wrong verdict. Thus, Ho seems to take epistemic responsibility to be, at least, a necessary condition of justification.

The second assumption upon which Ho's internal analysis rests has to do with the relation between epistemic appraisal and moral appraisal. More specifically, Ho seems to reject the thesis according to which epistemic and moral evaluation are "independent" in that where epistemic appraisal is relevant, ethical appraisal is inapplicable. To the contrary, Ho takes epistemic behavior to be the proper subject of moral evaluation.⁷¹ Whether one conducts trial deliberation in an epistemically sound way is, in his view, not morally neutral, but there is moral merit (or moral blame) in a fact-finder's believing justifiably (or unjustifiably) in the truth of an allegation.

There are different ways in which moral and epistemic appraisal may relate to each other, and the specific position that Ho is willing to hold in this respect is not clear. At various points in the monograph, Ho claims that it is moral reasons which oblige fact-finders to properly conduct their epistemic affairs.⁷² Thus, he seems to endorse the view that whenever there is a failure to meet the required epistemic standards, there is also a moral failure. In other words, he seems to accept what Haack has called the "special-case thesis," that is, the thesis that epistemic appraisal is a subspecies of ethical appraisal.⁷³ Ho's views seem to be, however, also compatible with a weaker thesis, namely, the thesis according to which there is a partial overlap between positive/negative epistemic appraisal and positive/negative ethical appraisal, i.e., "an overlap thesis," in Haack's terminology. In this view, negative epistemic appraisal is associated with negative moral appraisal only in some cases, to wit, the cases in which unjustified believing constitutes culpable ignorance, when the belief is both harmful and willful. Because of the great practical importance of fact-finders' beliefs about the events being litigated and their harmful consequences—which Ho repeatedly emphasizes—the trial is surely a context where (as the overlap

⁶⁹ See James Pryor, *Highlights of Recent Epistemology*, 52 BRIT. J. PHIL. SCI. 95, 114-18 (2001).

⁷⁰ See HO, *supra* note 4, at 61, 64, 71, 73, 248-252, and 334.

⁷¹ See HO, *supra* note 4, at 78.

⁷² *Id.* at 79 and 84.

⁷³ Susan Haack, *The Ethics of Belief Reconsidered*, in KNOWLEDGE, TRUTH, AND DUTY, *supra* note 67, at 21-33.

thesis holds) unjustified believing carries with it moral criticism. Thus, in this context, the difference between the special-case and the overlap thesis is of little if any consequence. In any event, whether Ho accepts either the special-case thesis or the overlap thesis, still the point remains that he takes epistemic behavior, at least in the context of the law, to be morally relevant.

We are now in a position to reconstruct an argument to the effect that taking the internal stance leads one to appreciate the moral value of evidence law:

- (1) A fact-finder's justification for a belief about a disputed proposition of fact *p* depends exclusively on factors which are internal to the fact-finder's perspective;
- (2) A belief about a disputed proposition of fact *p* is epistemically justified if the fact-finder's believing that *p* is epistemically responsible;
- (3) Whether a fact-finder's believing *p* is epistemically responsible is not morally neutral;
- (4) The rules of evidence regulate epistemic behavior;

Therefore,

- (5) The rules of evidence are not morally neutral.

Premise (1) states the internalist conception of epistemic justification. Whether a fact-finder is justified in believing a proposition of fact *p* depends entirely on factors which are available from her cognitive perspective. Factors which are "external" to her perspective, such as the reliability of the process that led to the belief, do not have any bearing on the justificatory status of *p*. This restriction of the factors upon which justification depends to internal factors is needed for the responsibilist conception of justification to get off the ground. Such conception is stated in premise (2), which says that a fact-finder is justified in believing that *p* if she has behaved in an epistemically responsible way. If the fact-finder falls short of the standards of epistemic responsibility, then, says premise (3), she deserves not merely epistemic criticism but also moral criticism. Premise (4) holds that the rules of evidence play a role in regulating epistemic behavior at trial, which is a main thesis of Ho's monograph.⁷⁴ From premises (1)-(5) it follows that the rules of evidence are not morally neutral. In other words, the rules of evidence have *potential* moral value insofar as they guide trial deliberation, which is a proper subject of moral evaluation. It is crucial to notice that whether the rules of evidence, in this argument, are morally justified will depend on whether they shape epistemic behavior in such a way as to make

⁷⁴ HO, *supra* note 4, at 32.

beliefs about guilt better justified. But the argument does not establish that the rules of evidence *are* morally justified. In other words, the argument establishes the moral relevance of the rules of evidence, i.e., that they may be the subject of negative/positive moral appraisal. But it does not establish that the rules of evidence have a positive moral value. In order to establish that, it is necessary to further show that the rules of evidence influence the epistemic behavior of legal fact-finders in a way that makes their beliefs about the disputed propositions of fact better justified. The merits of this claim will be examined in section V.

To sum up, Ho claims that we should endorse the internal point of view if we are to be in a position to appreciate the moral value of evidence law. Such point of view, I have argued, should not be confused with either Hart's or Dworkin's internal point of view, but it is best interpreted as an invitation to address issues of legal evidence and proof from within an internalist epistemic framework that factors considerations of epistemic responsibility as well as moral considerations into an account of justification. With a better understanding of Ho's epistemic commitments, namely, a commitment to an internalist-deontological conception of epistemic justification and a commitment to the view that there is a moral dimension to epistemic evaluation, we may now proceed to examine Ho's account of the justification of findings of fact in law.

IV. Justification, Responsibility, and Virtue

The keystone of Ho's legal epistemology is his belief-account of legal fact-finding. To recall, Ho proposes a rule for legal fact-finding which reads as follows:

BAF*: The fact-finder must find that *p* only if (i) one would be justified in believing sufficiently strongly that *p* if one were to take into account only the admitted evidence, ignore any inadmissible evidence to which one might have been exposed, and avoid reliance on any line of evidential reasoning that the law might forbid in the case at hand; and (ii) if one found that *p*, one would find that *p* at least in part because one would be justified in believing that *p* under (i).

This is a rich account of legal fact-finding which gives rise to a host of different questions, some of which were indicated in the brief explanation of this proposal in section II. Here, I shall exclusively focus on some problems concerning the notion of justification involved in this account of legal fact-finding. As explained above, the notion of justification involved in BAF* is of a strong-subjective kind. On this conception of justification, it is not only necessary

for a finding of fact that p to be justified that there be good reasons, in the evidence available, which support such finding, but it must also be the case that the fact-finder believes that p on the basis of these reasons. BAF* rules out as unjustified findings of fact which, although supported by the admissible evidence, are not properly based on such evidence. Cases of unjustified findings of fact include: cases in which the fact-finder's belief is the outcome of an irrational process of belief formation, e.g., a belief acquired by reading tea leaves or consulting an ouija board; cases where the fact-finder's belief is based on inadmissible evidence or is the result of legally forbidden lines of reasoning; and cases where the fact-finder's belief is not based on a meta-belief that the belief in question is justified, but rather on something else (for example, revulsion against the defendant). Ho thus makes "proper basing" a condition for the justification of findings of fact. Objective justification—which does not require the fact-finder's belief to be properly based on the evidence available, but merely that such evidence provide adequate support for the belief—is not, claims Ho, an appropriate standard for assessing the justificatory status of a finding of fact.

Ho's distinction between strong-subjective justification (subjective justification hereinafter)⁷⁵ and objective justification captures a well-known distinction in epistemology between having a good reason to believe something and believing something for a good reason. The following example by Turri illustrates this distinction fairly well:

Imagine two jurors, Miss Knowit and Miss Not, deliberating about the case of Mr. Mansour. Both jurors have paid close attention throughout the trial. As a result, both have good reason to believe that Mansour is guilty. Each juror goes on to form the belief that Mansour is guilty, which he in fact is. Miss Knowit believes he's guilty because of the evidence presented during the trial. Miss Not believes he's guilty because he looks suspicious. Miss Knowit knows that Mansour is guilty; Miss Not does not. Why the difference? Miss Knowit believes he's guilty on the basis of the good reasons she has, whereas Miss Not, despite having good reasons at her disposal, believes based on mere suspicion.⁷⁶

⁷⁵ To recall, Ho distinguishes two kinds of subjective justification, strong and weak. Whereas the former requires that the belief be actually motivated by the argument which justifies it, the latter merely requires that such argument be accessible to the believer. Only the strong variety is, in Ho's view, appropriate as a standard of justification for legal fact-finding. Cf. Pardo, *supra* note 29, at 365.

⁷⁶ John Turri, *On the Relationship between Propositional and Doxastic Justification*, PHIL. & PHENOMENOLOGICAL RESEARCH (forthcoming).

Even though both Miss Knowit and Miss Not have good reasons for believing that Mansour is guilty, only Miss Not believes that Mansour is guilty for a good reason. Epistemologists have tried to capture the difference between a believer having a justification for a belief and a belief being based on such justification in various ways.⁷⁷ Some take examples like the one just described to show that merely having good evidence for a proposition is not sufficient to make believing in that proposition justified.⁷⁸ This seems to be Pollock's view, when he distinguishes between "justifiable" and "justified" belief, to capture the distinction between having a good reason for believing something and believing something for a good reason.⁷⁹ From this point of view, Miss Not's belief that Mr. Mansour is guilty would be unjustified, even if it would be justifiable. In contrast, others prefer to distinguish between two different concepts of favorable epistemic appraisal: the concept of justification and the concept that involves the notion of the basis of belief. For instance, Feldman and Conee distinguish "justification," which is determined by the quality of the believer's evidence for the belief, from "well-foundedness," which characterizes an attitude that is both well-supported and properly arrived at.⁸⁰ Well-foundedness, they argue, is a second notion used to evaluate doxastic states, the application of which depends on two factors, namely, the evidence one has, and the evidence one uses in forming the attitude. From this perspective, Miss Not's belief in the foregoing example would be justified, but ill-founded. There are intermediate views between these two poles as well. For instance, Firth distinguishes between propositional justification and doxastic justification.⁸¹ Whereas propositional justification is a property of propositions, doxastic justification is a property of beliefs. Similarly, Foley distinguishes between epistemic rationality in a propositional sense and epistemic rationality in a doxastic sense.⁸² Both Miss Not

⁷⁷ For a survey of the literature on the basing relation, see Keith Korcz, *Recent Work on the Basing Relation*, 34 AM. PHIL. Q. 171 (1997).

⁷⁸ See, for example, Hilary Kornblith, *Beyond Foundationalism and the Coherence Theory*, 77 THE PHIL. 597 (1980); Kim, *supra* note 59, at 310; Goldman, *What is Justified Belief?* *supra* note 60, at 8-9.

⁷⁹ JOHN POLLOCK, *CONTEMPORARY THEORIES OF KNOWLEDGE* 81 (1986).

⁸⁰ Richard Feldman and Earl Conee, *Evidentialism*, in *EPISTEMOLOGY: AN ANTHOLOGY* 170 (Ernest Sosa & Jaegwon Kim, eds., 2000).

⁸¹ Roderick Firth, *Are Epistemic Concepts Reducible to Ethical Ones?* in *VALUES AND MORALS* 215 (Alvin Goldman & Jaegwon Kim, eds. 1978).

⁸² RICHARD FOLEY, *THE THEORY OF EPISTEMIC RATIONALITY* 180 (1987). For related distinctions of different senses of justification, see also Audi's contrast between "personal" vs. "impersonal" justification, in ROBERT AUDI, *THE STRUCTURE OF EPISTEMIC JUSTIFICATION* 275-79, 425-30 (1993). Alston distinguishes between two concepts of epistemic justification. The concept of having adequate grounds for the belief that *p* and a "motivational" concept of epistemic justification, which includes the former plus the requirement that *S*'s belief that *p* is based on

and Miss Knowit's beliefs would be justified (or rational) in a propositional sense, but only Miss Knowit's would also be justified (or rational) in a doxastic sense. For Haack, that a belief is not properly based affects its degree of justification. She writes, "if two people both believe the accused is innocent, one because he has evidence that she was a hundred miles from the scene of the crime at the relevant time, the other because he thinks she has an honest face, the former is more justified than the latter."⁸³ On Haack's view, Miss Knowit's belief would be more justified than Miss Not's.

Ho's position, as explained, is that while there might be two legitimate conceptions of justification (subjective justification, which requires proper basing, and objective justification, which does not), it is the subjective one that is appropriate for developing an account of the justification of findings of fact. I fully agree with Ho that subjective justification is an important concept in a theory of legal fact-finding. To be sure, we expect findings of fact to be justified in the sense that they be properly based on the evidence available, rather than being the result of prejudice, irrationality, or the fact-finder's incapacity to disregard inadmissible evidence or avoid an impermissible line of reasoning. Indeed, something has gone deeply wrong when a finding of fact is the outcome of a piece of irrational reasoning. However, the relevance of this notion should not cloud the importance of a verdict being justified in the objective sense that the evidence available supports the finding of fact better than alternative verdicts and to a degree sufficient to meet the applicable standard of proof, whether or not this is, in fact, the reason which motivated the fact-finder to give such a verdict.

The importance of the notion of objective justification for a theory of legal fact-finding is related to the "institutional" character of legal fact-finding. A consideration of the traditional distinction between the context of justification and the context of discovery, i.e., the distinction between the reasons given in support of a decision and the psychological process that led to such a decision, might be useful in clarifying why objective justification is a fundamental standard of evaluation of legal fact-findings. In the legal institutional context, it is crucial that legal decisions be justifiable on the relevant law and facts. While it is desirable that judges and other legal decision-makers reach their decisions on the basis of such reasons, we cannot ensure that the reasons which are given in support of those decisions are actually the reasons which motivated the decision; we may only aspire to control that those decisions are justifiable on the set of reasons deemed as acceptable by the law. This form of control is weaker, but, by no means, is it a minor form of control. It is, in fact, a powerful mechanism which

adequate grounds. See WILLIAM ALSTON, *EPISTEMIC JUSTIFICATION: ESSAYS IN THE THEORY OF KNOWLEDGE* 71-8 (1989).

⁸³ Susan Haack, *A Foundherentist Foundherentist? Theory of Empirical Justification*, in *EPISTEMOLOGY*, *supra* note 81, at 226, 228.

significantly diminishes legal decision-makers' discretion. It is also the basic tool for exercising control at the appellate level as, obviously enough, the specific train of reasoning which led to a verdict at the trial level is beyond what the court of appeals may examine. Hence, because of the institutional character of the law, objective justification is an exceedingly important kind of evaluation.

Thus, a theory of justification for legal fact-finding should provide an account of objective justification, alongside of an account of subjective justification. That is to say, it should provide both an account of the conditions under which findings of fact are objectively justified and an account of the conditions under which fact-finder's beliefs about the facts under dispute are subjectively justified or the conditions under which fact-finders are subjectively justified in holding a belief about the events being litigated.⁸⁴ Ho, however, seems to underestimate the relevance of assessments of objective justification in the trial context. BAF* is incomplete as a rule of legal fact-finding as it provides an account of subjective, but not of objective justification. It does not specify the conditions of justification of propositions such as, for instance, "the accused is guilty as charged," but rather it gives conditions of justification of the belief that the accused is guilty as charged or conditions under which fact-finders are justified in believing that the accused is guilty as charged. BAF* is thus best viewed as a piece of "regulative" epistemology, that is, as a guide for legal decision-makers as to how they should form beliefs about the events being litigated, rather than as rule which states the conditions under which findings of fact are justified.⁸⁵

As a rule which aims at guiding epistemic practice at trial level, BAF* has much to recommend it. This regulatory rule does capture essential conditions the satisfaction of which is required for a fact-finder to properly find that *p*, such as that the finding be based on admissible evidence and the result of permissible inferences. However, a concern arises as to whether the standard of subjective

⁸⁴ Since, as Kvanvig and Menzel have argued, assessments of "doxastic justification" (as in "S's belief that *p* is justified) are logically equivalent to assessments of "personal justification" (as in "S is justified in believing that *p*"), the conditions under which a fact-finder's belief that *p* is justified are the same as the conditions under which a fact-finder is justified in believing that *p*. See Johathan L. Kvanvig & Christopher Menzel, *The Basic Notion of Justification*, 59 PHIL. STUD. 235 (1990). Cf. Mylan Engel Jr., *Personal and Doxastic Justification*, 67 PHIL. STUD. 133 (1992) (arguing that while personal justification is a responsibilist notion, doxastic justification is an externalist one) and Kent Bach, *A Rationale for Reliabilism*, 68 THE MONIST 246 (1985) (arguing that whereas what makes a person justified in holding a belief resides in the quality of his epistemic action, what makes a belief justified is whatever property a true ungettiered belief must possess to qualify as knowledge).

⁸⁵ "Regulative" epistemology might be contrasted with "analytic" epistemology, which aims at giving definitions of the central concepts in epistemology, such as knowledge, rationality, warrant, or justification. See ROBERT C. ROBERTS & W. JAY WOODS, *INTELLECTUAL VIRTUES* 20-3 (2007).

justification set up by BAF* is sufficiently strong to regulate fact-finding in the legal context. BAF* requires that the fact-finder make a finding according to her judgment as to what “one would be justified in believing.” It thus asks fact-finders to make judgments of justification from a “detached” first-person perspective rather than from a “subjective” first-person perspective. It is still the case that what the fact-finder is justified in believing is taken to depend on the fact-finder’s perspective, not the perspective of some third party. This goes without saying if one is committed—as Ho is—to an internalist account of justification. Yet one might wonder whether it is not possible to respect the “perspectival” character of justification—that is, the internalist’s insight that epistemic justification crucially depends upon facts about the believer’s cognitive situation—while allowing some degree of idealization, so as to make justification a stronger normative standard.⁸⁶ For instance, one might argue that justification depends on the evidence and alternatives the fact-finder would have considered given reasonable epistemic effort. More precisely, the suggestion is that the detached perspective could be profitably understood as the perspective of the “responsible” fact-finder. On this view, the fact-finder must find that *p* if he judges that “one”, i.e., an “epistemically responsible fact-finder,” would be justified in believing that *p*.

An introduction of the notion of “epistemic responsibility” into the rule of legal fact-finding would not only make the standard of subjective justification stronger, but it may also make the regulative rule more effective, for it may give more detailed guidance to legal fact-finders as to how they should form beliefs about the events being litigated. Now, whether a rule of legal fact-finding which directly appeals to the notion of epistemic responsibility provides more specific guidance obviously depends on whether one has a sufficiently detailed account of the standards of epistemic responsibility. Ho does mention some duties compliance with which is required for responsible legal fact-finding, such as the duty to give a verdict according to the evidence, the duty of critical judgment, or the duty of deliberation. However, a thorough account of what epistemic responsibility entails in the context of legal fact-finding would be necessary in order to provide a more precise standard for guiding legal fact-finders’ epistemic behavior. Such an account, I would argue, could be developed by using the resources of virtue epistemology.

Virtue epistemology is one of the most important developments in contemporary epistemology. The central idea of virtue epistemology is that normative properties of beliefs should be understood in terms of the epistemic

⁸⁶ See Richard Feldman, *Subjective and Objective Justification in Ethics and Epistemology*, 71 THE MONIST 405, 418 (1988). See also Johathan L. Kvanvig, *Propositionalism and the Perspectival Character of Justification* 40 AM. PHIL. Q. 3 (2003)

virtues of agents, rather than the other way around.⁸⁷ On a virtue approach, epistemic responsibility is a matter of epistemically virtuous behavior. That is to say, one is epistemically responsible insofar as one exhibits the intellectual virtues, such as open-mindedness, intellectual sobriety, intellectual integrity, impartiality, perseverance, thoroughness, intellectual humility, etc.⁸⁸ A virtue approach to epistemic responsibility has some advantages over an account of epistemic responsibility in terms of duties. Most importantly, it has the advantage of greater richness; it need not understand good epistemic practice strictly in terms of rules; and it depicts the epistemically responsible agent as aiming at epistemic worth and not merely as aiming at epistemic blamelessness.⁸⁹

My claim is that an aretaic conception of the responsible fact-finder provides a valuable normative ideal for regulating legal fact-finding. An idealization of the perspective of the legal fact-finder of the sort proposed by virtue theory would be, I would argue, a good way of improving upon Ho's account of subjective justification. Incidentally, an aretaic approach to justification also seems to be a promising way of developing an account of objective justification, that is to say, an account of the conditions under which propositions of fact at trial are justified. I cannot argue for such an account here, but, in short, an aretaic approach to the standards of objective justification of findings of fact would crucially appeal not to what fact-finders judge that a virtuous person would believe but rather to what a virtuous person, who were similarly situated would, in fact, believe. Unlike its subjective counterpart, a virtue approach to objective justification does not make justification depend on the causal history of the belief: in other words, it allows for a proposition *p* to be justified, even if the fact-finder's belief that *p* had spurious—even perverse if you like—motivations. It provides a counterfactual, rather than a causal, account of justification, in that the justificatory status of a verdict depends on what a virtuous fact-finder *would* believe, not on whether the actual belief was virtuously motivated. In this sense, an aretaic approach to justification would also complement Ho's rule of fact-finding by providing an account of objective justification.

A turn towards virtue epistemology is not only a good way of expanding upon Ho's views on epistemic justification, but it might also prove very helpful in further developing other aspects of Ho's internal framework. As argued, this

⁸⁷ The literature on virtue epistemology is extensive. For an introduction, see John Greco, *Virtues in Epistemology*, in THE OXFORD HANDBOOK OF EPISTEMOLOGY, *supra* note 59, at 287.

⁸⁸ There are different views in the literature about which character traits count as intellectual virtues. See, among others: JAMES MONTMARQUET, EPISTEMIC VIRTUE AND DOXASTIC RESPONSIBILITY (1993); Neil Cooper, *The Intellectual Virtues*, 69 PHIL. 459 (1994); LINDA ZAGZEBSKI, VIRTUES OF THE MIND: AN INQUIRY INTO THE NATURE OF VIRTUE AND THE ETHICAL FOUNDATIONS OF KNOWLEDGE (1996); and ROBERTS & WOODS, *supra* note 85.

⁸⁹ See Amaya, *supra* note 49, at 312.

framework departs from the externalist one in that (i) it claims that epistemic values other than truth are crucial in adjudication; (ii) it takes these values to be intrinsically linked to moral values, rather than opposing considerations; and (iii) in contrast to the traditional understanding of justice as rectitude, it conceives justice in terms of empathic care. Virtue theory provides a promising way of extending all three aspects of Ho's proposal. First, as we have seen, it provides the basis for further developing a theory of justification—subjective as well as objective—as a crucial epistemic value at trial, in addition to truth. Secondly, it allows for a more detailed explanation of how epistemic and moral values are related in legal fact-finding. As explained above, a fundamental claim of this book is that epistemic and ethical considerations are intrinsically linked in the justification of findings of fact. It is not clear, however, how these two different kinds of values relate to each other so as to secure the legitimacy of legal fact-finding. Given the important work that has been done on the issue of how moral and epistemic virtues relate to each other, a turn towards virtue theory may provide important insights as to how to explain the way in which moral and epistemic evaluation are related in the context of a trial.⁹⁰ More specifically, it might turn out to be rather helpful in further developing an account of the standards against which one may evaluate fact-finders as moral and epistemic agents, which seems to be a (the?) main objective of Ho's project. Finally, virtue approaches to justice, such as Slote's—which Ho profitably uses—would be helpful in putting forward a conception of justice as a virtue of individuals, i.e., the legal fact-finders, rather than as a virtue of the legal system. Hence, virtue notions provide a unifying theme under which all three elements of Ho's internal framework could be further developed.⁹¹

V. Moral Agency and the Law of Evidence

Ho's project is a project in “reconstructive” jurisprudence the main aim of which is to show the structure of moral principle which explains and justifies the law of evidence. It thus differs from descriptivist approaches, which merely seek to explain the law as it is. It is also different from normativist approaches, for its main objective is not that of proposing law reforms (even though Ho does suggest some ways in which the law of evidence may be improved, particularly with regard to the standard of proof). His project is best understood as an attempt to uncover the moral rationale of the law of evidence, that is, as a project that seeks to justify current evidentiary arrangements by showing that they are morally motivated. Even those rules, claims Ho, which seem to serve paradigmatically

⁹⁰ See *MORAL AND EPISTEMIC VIRTUES* (Michael Brady & Duncan Pritchard, eds., 2003).

⁹¹ Aretaic elements have a natural place in Ho's framework, as his occasional references to “virtues” make clear. See HO, *supra* note 4, at 79, 188, 209, and 212.

epistemic purposes, are, however, morally motivated. Moral reasons, alongside with epistemic reasons, justify the edifice of evidence rules.

As argued, Ho claims that the full value of evidence law cannot be seen unless one endorses the internal point of view. From an external perspective one may only grasp the epistemic basis of evidence law, but not its moral basis. We need to undertake an internal analysis in order to realize that there are moral principles that are intrinsic to evidence rules. In section III, I suggested a way in which Ho might be able to derive a conclusion about the moral value of evidence law from a commitment to analyzing the law of evidence from an internal point of view.⁹² I gave some reasons why the internal point of view is best interpreted as a commitment to an internalist epistemology. I also offered some reasons in support of the claim that Ho seems to be committed to deontology as well as to the view that there is an ethical dimension to epistemic justification. Given these assumptions, I contended that an inference may be drawn from the acceptance of the internal point of view to the claim that the law of evidence has a potential moral value. However, the argument does not establish that the law of evidence has a positive moral value. For this to be shown, it would be necessary to demonstrate that the rules of evidence have a positive impact on the moral worth of legal fact-finders' epistemic behavior. In other words, it would have to be shown that conforming to these rules results in findings of fact that are better justified from an epistemic point of view and, consequently, which are also more valuable from a moral point of view.

My claim is that, while Ho has brilliantly brought to light that there is a moral dimension to evidence law, he has not shown that current evidentiary arrangements are morally justified. His analysis of both the hearsay rule and the similar facts evidence rule does demonstrate that these rules have a moral rationale, and not merely, as it is generally assumed, an epistemic one. In other words, it does succeed in showing that there are moral reasons to be concerned with both hearsay evidence and similar facts evidence. However, from this it does not follow that exclusion of these kinds of evidence is morally justified. In fact, I shall argue that Ho's arguments to the effect that we should view the law of evidence from the perspective of legal fact-finders as moral agents support the use of means of control other than exclusionary rules, such as advice, and mechanisms of post-control, such as the requirement that verdicts be reasoned. I shall claim that the use of these legal techniques in order to ensure that hearsay evidence and similar facts evidence is not used in a way that undermines the moral legitimacy of the process is more in tune with Ho's conception of legal epistemology than exclusionary rules are. This means, to be sure, the abandonment of a reconstructive approach to the jurisprudence of evidence and to

⁹² Of course, there might be some other way in which the inference might be drawn, although this seems to me to be the most plausible one.

thoroughly endorse a normative stance. Let me now explain in some detail how implementing mechanisms of control other than exclusion advances the project of developing a law of evidence from the point of view of legal fact-finders as moral agents.

I shall start with the *ex ante* mechanisms of control. According to Ho, there are moral reasons for excluding both hearsay and similar facts evidence. I shall focus on the hearsay rule, but a similar argument could be made with regard to similar facts evidence (and other intrinsic exclusionary rules). To recall, Ho contends that there are two problems with hearsay evidence. First, the trier of fact is justified in believing that *p* from the fact that *S* said it only if she possesses positive evidence that allows her to judge that *S* is trustworthy in relation to *p*. She may not be in a position to exercise that judgment when *S* is not called as a witness. Second, even when there is evidence of *S*'s trustworthiness, *S*'s non-availability for courtroom examination makes the belief that *p* too vulnerable to defeat. Ho argues that the demand for positive justification and for assurance of non-defeasibility is morally motivated, for the degree of confidence we require is reflective of the respect and concern we have for the person who stands to suffer the consequences of a verdict. The exclusion of hearsay evidence is thus justified as this kind of evidence does not provide enough assurance, given the degree of caution required at trial.

The "testimonial" argument and the "defeasibility" argument effectively show that there is a legitimate concern with hearsay evidence which is not related to the purported unreliability of hearsay evidence, but with the fact that hearsay evidence is not strong enough to justify a belief in an allegation in the context of a trial. As Ho argues, an especially stringent epistemic standard is in place in the courtroom, given the import and consequences of a legal finding of fact. Because of the harm that a finding of fact is likely to inflict on the defendant, a higher standard of caution is in order. There are, thus, not only epistemic but also moral reasons for being concerned with drawing an inference on the basis of hearsay at trial. However, these arguments do not succeed in showing that the "exclusion" of hearsay *is* justified on the basis of these reasons. The lack of the original source for cross-examination indeed makes the inference less strong than it would otherwise be. But this does not render its use completely illegitimate, from a moral point of view, any more than it makes it utterly useless, from an epistemic point of view. The demands of both justice and truth do require that hearsay evidence be treated with extreme caution, given its weakness as evidence, and used with full awareness of the momentous consequences that findings of fact have at trial. But from the fact that there is a legitimate concern about the epistemic deficiencies of hearsay evidence it does not follow that excluding such evidence is the best way to address this concern. Let me elaborate the point.

Ho claims that an internal analysis of the hearsay rule reveals that it is not apt for use at trial because of moral reasons. This kind of analysis justifies the exclusion of hearsay evidence in a way in which, he claims, the external analysis cannot. The external analysis fails to provide a “positive” objection to the admission of evidence. From an external point of view, hearsay evidence is excluded on the grounds that the fact-finder cannot evaluate it as well as evidence that has been exposed to examination. But this, says Ho, “makes little sense – almost as little sense as a hungry person refusing food for the reasons that it is not as nutritious as it could be.”⁹³ However, “if the food is harmful to one’s health, rather than merely being deficient in nutrition, this would be a positive reason for even a starving person to reject it.”⁹⁴ The internal analysis, unlike the external one, provides a positive reason for excluding evidence. To pursue Ho’s example, it shows that hearsay evidence is a kind of “poisoned” evidence in that it is fatal for the moral legitimacy of the verdicts. It is instructive to examine Ho’s reasons for so radically rejecting hearsay evidence.

The two arguments Ho gives in support of the exclusion of evidence, i.e., the testimonial and the defeasibility argument, point towards the inability of hearsay evidence to provide enough support to a finding of fact in the trial context. He writes:

In many of our ordinary dealings, we take what we are told at face value, and it is at least arguable that often we are justified in doing so. But it would be *irresponsible* of the fact-finder to do the same during trial deliberation in the face of a conflict of evidence on disputed facts. She owes a duty to the disputant who will be harmed if an allegation is accepted to exercise caution in accepting it. What caution requires is positive and sufficiently strong justification for accepting the truth of the allegation.

Hearsay evidence fails to provide enough of the necessary assurance.⁹⁵

At bottom, it is because of the special “responsibility” associated with the role of legal fact-finder that, according to Ho, an inference from hearsay evidence is forbidden at trial. That is to say, it is the requirement to comply with the standards of epistemic responsibility appropriate to legal fact-finding (which are in place because of moral reasons) that justifies the exclusion of hearsay evidence. The force of both the testimonial and the defeasibility argument seems to derive from a conception of what is required for responsible fact-finding. On the one

⁹³ HO, *supra* note 4, at 237.

⁹⁴ *Id.*

⁹⁵ HO, *supra* note 4, at 235. Emphasis mine.

hand, information about the trustworthiness of the source of the hearsay statement is necessary for the fact-finder to fulfill her “duty of deliberation,” as Ho calls it.⁹⁶ Such information must be provided by means of courtroom-examination of the original source, for accepting the truth of the statement on the basis of someone else’s testimony that the original source is trustworthy is a breach of her “duty of critical judgment.”⁹⁷ There are some cases though in which there is evidence available for the fact-finder to assess whether the witness’ views on the trustworthiness of the original source of the statement is itself trustworthy. In these cases, acceptance of the witness’ assessment does not constitute a breach of the duty of critical judgment. Still, the fact-finder is not justified in believing in the truth of the statement because, given the lack of availability of the original source for cross-examination, the statement is too vulnerable to defeat. Again the prohibition of reliance on hearsay evidence because of its defeasibility may be tracked down to a conception of what responsible fact-finding entails. The opponent has a “right,” says Ho, to a reasonable level of protection from the harm she stands to suffer from the finding of fact. This right is correlative to the “duty” of the court to “undertake deliberation on the verdict with the seriousness that does justice to her personal dignity.”⁹⁸ Hence, reliance on evidence which is highly defeasible constitutes a breach of the court’s duty to deliberate with the level of care owed to the defendant. The lack of opportunity to cross-examine the original sources deprives the fact-finder of “a level of fortification in the justification of her finding of fact” which is necessary for the responsible acceptance of the testimony.⁹⁹

Hence, Ho’s main reason for excluding hearsay evidence seems to be that reliance on such evidence would constitute a breach of the duties of legal fact-finders. Given Ho’s responsibilist conception of epistemic justification, a breach of such duties would result in a judgment that fails to satisfy the threshold of justification that is appropriate in the legal context. In order to assess Ho’s argument to the effect that the hearsay rule is morally justified, the question that needs to be answered is whether exclusion of hearsay evidence is indeed required for responsible fact-finding. Contrary to what Ho contends, my claim is that there are reasons for thinking that the hearsay rule hinders, rather than promotes, the responsible analysis of evidence. The duties of critical judgment and the duty of deliberation, as Ho calls them, are best discharged if one has access to the whole of the available evidence.¹⁰⁰ The hearsay rule, by depriving the fact-finder of

⁹⁶ *Id.* at 248.

⁹⁷ *Id.*

⁹⁸ *Id.* at 262.

⁹⁹ *Id.* at 270.

¹⁰⁰ Of course, there might be good reasons for excluding evidence. “Extrinsic” rules of evidence might make it necessary for the sake of values other than truth that the fact-finder be deprived of

relevant—sometimes vital—evidence, prevents the fact-finder from critically assessing the reasons for and against a finding of fact and deliberating about what to believe as an autonomous epistemic agent. Depriving the fact-finder of an important subset of the relevant evidence impedes the fact-finder from forming a belief in the truth of the allegations that enjoys as high a degree of justification as it is possible, given the evidence available.

As we have seen, in his defense of the hearsay rule, Ho invokes not only the duties of the fact-finder, but also the rights of the defendant. Ho claims that the person who stands to suffer the consequences of an adverse finding has a right of reasonable protection from the harm which might cause her a wrong verdict. This, he argues, supports the exclusion of hearsay evidence, insofar as this kind of evidence does not provide enough support for a finding of fact. But, arguably, given the import and consequences of such finding, one might say that the defendant also has a right to have her case disposed on the basis of as much evidence as is compatible with the protection of other important values trials are meant to advance. If, as Ho says, there are good reasons (indeed, moral reasons) to ensure that legal fact-finding is done in accordance with highly demanding epistemic standards, surely, among other things, this requires assessing one's belief in light of the body of relevant evidence. Thus, access to the relevant evidence is a condition for the exercise of the court's duty to deliberate about the verdict with a level of care that is reflective of the respect and concern due to the defendant.

To sum up, exclusion of hearsay evidence diminishes the extent to which fact-finders can undertake their task in an epistemically responsible way and thus impedes the fact-finder from reaching better justified beliefs about the truth of the allegations. Given that such responsibility, as Ho correctly argues, has an important moral dimension, there seem to be reasons to doubt that the hearsay rule has a favorable impact on the moral legitimacy of the verdicts. To be sure, this does not mean that a concern about the epistemic deficiencies of hearsay evidence disappears from consideration. Even though hearsay evidence is not irremediably "poisoned," the lack of availability of the original source for cross-examination does indeed have a negative impact on the goodness of the evidence. Hence, there is certainly a need to regulate hearsay evidence. However, a regulation by means other than exclusion seems to be more in line with the demand that epistemic fact-finding be done in accordance with epistemic standards which duly reflect care and concern for the defendant. Regulation by "advice" stands out as a form of control that squares rather well with the conception of trial deliberation that Ho defends. Advice (in the form of jury

some subset of the relevant evidence. Thus, considerations of epistemic responsibility might be trumped by other considerations. The argument is simply that an appeal to fact-finder's epistemic duties does not justify exclusions of evidence.

instructions) promotes the epistemically responsible analysis of evidence by giving fact-finders access to the evidence available so as to form as strongly justified a belief about the disputed facts as the epistemic situation permits, while guiding them as to how to best factor in evidence which is problematic, such as hearsay evidence. The court could warn the jury of the weaknesses of hearsay evidence and the need to have a especially critical attitude towards this kind of evidence, while still allowing the fact-finder to deliberate about the events being litigated as an autonomous moral and epistemic agent. This form of control over hearsay evidence would not be vulnerable to some of the objections which are directed against the rule of exclusion, most importantly, that it is over-inclusive in that it excludes evidence even when the fact-finder could have judged the trustworthiness of the hearsay statement. In this sense, it is more in tune with current trends towards relaxing the application of the hearsay rule.¹⁰¹

I have argued that, from within Ho's framework, there seem to be reasons to subject hearsay evidence to means of *ex ante* control other than exclusion. Ho's framework also supports putting in place mechanisms of *ex post* control, most importantly, a requirement that the fact-finder give reasons for her decision. Ho, to my view, seems to be sympathetic to the introduction of such requirement. His comments with regard to the value of explicitness in trial deliberation are telling in this respect:

Explicitness helps us to force out from obscurity fallacious reasoning, questionable assumptions, unsubstantiated conclusions, unfair prejudices, and other wrongs and defects that might otherwise go undetected in trial deliberation.¹⁰²

Ho's views on the nature of trials are also congenial to the requirement that jury verdicts be reasoned. He accepts a conception of the trial, defended by other authors, as "a process that seeks to justify an adverse decision to the person against whom is taken,"¹⁰³ one in which "the grounds for an adverse judgment is communicated to the person against whom it is made, with an invitation for dialogue on the justification of those grounds."¹⁰⁴ While this conception of trials is typically put forward in the criminal context, Ho claims that "there is a similar need for the civil court to justify its findings to the party they badly affect."¹⁰⁵ A requirement that fact-finders give reasons for their verdicts seems indeed not only congenial to this conception of trials, but almost, one would say, required by such

¹⁰¹ HO, *supra* note 4, at 255.

¹⁰² *Id.* at 76.

¹⁰³ *Id.* at 80.

¹⁰⁴ *Id.* at 328.

¹⁰⁵ *Id.* at 329.

a conception. For it is unclear that inscrutable verdicts could do much by way of justifying an adverse decision against the party who stands to suffer an adverse judgment and how a “dialogue” on the justification of the grounds for such a verdict could even get started. However, Ho does not argue for the establishment of such a requirement, perhaps because, as claimed, he is mainly interested in engaging in a reconstructive rather than a normative project.

There are several arguments one could make which support the requirement that verdicts be reasoned. Most importantly, the requirement seems to follow from the very conception of a democratic polity under the rule of law, where any exercise of political power ought to be justified on public reasons. The publicity of jury’s reasons for the verdict is not only desirable from the point of view of the political legitimacy of the institution of the jury in a democratic system, but it has also some momentous benefits. Firstly, it opens up the decision to public scrutiny, and thus it allows the control of the decision by the public at large, which is a basic requirement in a democracy. Secondly, it importantly facilitates the review of the decision by appellate courts. Thirdly, it might enhance the acceptability of the verdicts by the parties and the citizenry in general. Fourthly, it may prove to be a useful tool for making the normative bounds of reasoning imposed by the rules of evidence effective, for it might discourage jurors from pursuing lines of reasoning or evaluating evidence which cannot be later used to justify their findings. Last, it is likely to have a positive impact in jury deliberation, as the requirement to justify the verdict would provide an incentive for jurors to search for the best possible reasons for their decisions.¹⁰⁶

In addition to these arguments, Ho’s internal framework may be taken to provide further support for the requirement that jury verdicts be reasoned. First, if we place ourselves in the role of the fact-finder as a moral agent standing in a relation to a person who is to suffer the consequences of an adverse verdict, we may come to see that there is a moral reason for the requirement that jury verdicts be reasoned: we owe it to the person who stands to suffer the adverse consequences of a verdict that reasons be given for the verdict. The requirement of reasoned verdicts may thus be seen as a corollary of a conception of justice at trial according to which justice requires that the fact-finder manifests emphatic care for the parties whose case she is empowered to dispose. Yet Ho’s internal approach to evidence law provides another argument for the requirement of reasoned verdicts. In contrast to the external analysis, the internal analysis focuses on the process of deliberation: the justice of a verdict, in this view, does not only depend on the correctness of the outcome, but also on the moral legitimacy of the process whereby the verdict is reached. If, as I have claimed,

¹⁰⁶ For a discussion of the arguments in favor and against the requirement that jury verdicts be reasoned, see Amalia Amaya, “Jury Decision-making and the Space of Public Reason,” (unpublished manuscript, on file with author).

the requirement that the reasons for a verdict be public is likely to have a positive impact in the quality of jury deliberation as well as in the effectiveness of the rules of evidence, then it might make it more likely that jurors reason about the evidence with the appropriate level of care and within the limits imposed by the rules of evidence. Insofar as this is so, this requirement importantly advances the goal of doing justice in the search for truth and, thus, of reaching verdicts that are not only epistemically defensible but also morally legitimate. Hence, adopting Ho's internal framework leads us to see that there are also moral reasons which support the requirement that the jury give reasons for its decision.

To conclude, the acceptance of the internal point of view leads to thoroughly rethinking some aspects of the law of evidence and, probably, to more reform than perhaps Ho would be willing to accept. I have argued that far from justifying the (intrinsic) rules of exclusion, it sheds doubts upon whether they are the best way of ensuring the moral legitimacy of the process of legal fact-finding. This internal framework also supports the introduction of the requirement that jury verdicts be reasoned. Hence, Ho's internal stance towards evidence law, instead of providing a reconstruction of the law of evidence, puts forward a valuable normative ideal against which current evidentiary arrangements may be assessed.

VI. Conclusions

A Philosophy of Evidence Law is a notable book, which brilliantly combines philosophical theory and evidence law. This monograph significantly contributes to the philosophical analysis of issues of legal epistemology and thus to the literature in both jurisprudence and evidence law. Most importantly, this book brings to light the relevance of normative argument to evidentiary issues in law, and shows that there are important connections not only between legal epistemology and the empirical sciences, but also between legal epistemology and ethics.

The most significant contribution of this book is its proposal to analyze evidence law from an internal perspective, that is, from the perspective of the fact-finder as a moral agent who is responsible for a judgment which might inflict harm to the person whose case is being disposed. An internal analysis of evidence law gives rise to a different set of questions and problems than those considered as central in the predominant, external, analysis. Critically, it emphasizes the need to pay close attention to questions of epistemic justification and how these relate to questions of moral justification. Thus, the investigation of the law of evidence from an internal perspective significantly enlarges the field of legal epistemology by inviting us to explore the connections between epistemological theory and moral theory. This does not mean that one should

abandon or neglect the study of the issues which externalist approaches to evidence law prompt us to consider, such as questions regarding the impact of evidence rules in the accuracy of the verdicts or the reliability of the trial system. As Ho explicitly says, this book has no “imperialist ambition,” for it does not attempt to replace once and for all externalist analysis with internalist theory.¹⁰⁷ Just as externalism and internalism in epistemology have been recently viewed not as irreconcilable paradigms, but rather as complementary (in that each of them addresses some important epistemological questions which the other one is less suited to deal with)¹⁰⁸ internalism and externalism in legal epistemology need not be seen as incompatible, but as perspectives which illuminate different problems in the epistemology of legal proof. If so, then it is to Ho’s credit to have brought to light the relevance of a perspective which is most appropriate, perhaps indispensable, for addressing some of the interesting epistemological problems which arise in the field of evidence law.

¹⁰⁷ HO, *supra* note 4, at 314.

¹⁰⁸ See BonJour, *supra* note 59, at 256-60.