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Knowledge-Norms in a Common-Law Crucible

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Abstract
Not only is the common-law standard of proof of mere likelihood in ordinary civil cases justifiable, but its justifiability supports the conclusion that there is no general norm that one must assert that *p* only if *p* is known. An argument by Voltaire is formalized to show that the mere likelihood standard is rational. It is also shown that no applicable norm preempts the common-law rule. An objection that takes the pertinent knowledge-norm to be honoured in the breach is rejected by appeal to the absence of blameworthiness in alleged breaches of interest. An objection that takes civil verdicts to be manifestations of acceptance, rather than assertoric, is considered and rejected.

Keywords:

Common-law reasonableness, epistemic norms, evidentiary standards, knowledge-norms.

0.

Law functions as a proving ground for philosophical theories, including (inter alia) accounts in ethics, metaphysics, and the philosophy of language.[1] I conduct a common-law test – using the standard *mere likelihood* standard of proof in private lawsuits – for the key knowledge-norms for permissible, as well as reasonable, assertion. That standard of proof states:

[1] See, e.g., Atiyah (1983), Williams (1995), Endicott (2000), Marmor & Soames (2011), Soames (2014: 281 – 342), Moss (2018: 201 – 229), Neale (forthcoming).

Mere Likelihood For a court to hold in favour of some claimant C, the (legally sufficient) statements of fact made in C's pleadings must be shown to be more likely (true) than not.

Not only is Mere Likelihood itself justifiable, but its justifiability militates strongly in favour of the view that there is no general epistemic norm that one must: assert that *p* only if *p* is known. Nor is there a perfectly general epistemic norm on which: it is reasonable to assert that *p* only if the probability of *p* is high.

Ethical norms are a commonplace. These rules govern moral agency; they state red lines not to be crossed if one is to conduct himself as a moral agent. Their violation is the occasion for social-distancing measures where one withdraws moral status from a contumacious offender; one might also criticize or sanction an offending party. For example, formulated as a directive, the Golden Rule enjoins moral agents to treat others as one would herself like to be treated by them. One who violates the rule is (to that extent) not a moral agent. Following the norm and being guided by it in one's affairs is supposed to be (partially) constitutive of being a moral person.

But there are other sorts of norms that regulate us in other, non-moral respects. The norms of a profession regulate members of that profession qua professionals in their dealings. An accountant must prepare his audits according to generally accepted accounting principles – conventions agreed upon by professional accounting bodies – and they must prominently note deviations therefrom. An accountant who derogates from generally accepted accounting principles, say, by accepting as an asset some loan whose principal and interest are certain not to be repaid, is subject to social-distancing measures, as well as social opprobrium and ostracism. In this paper, I am concerned with a philosophically motivated set of norms that are said to govern how we should act as epistemic agents – they govern what actions we should take, which assertions we are permitted to make, what beliefs we should possess, the circumstances in which blame is appropriate, and so on, qua our epistemic agency.[2] The genus of epistemic norms includes (inter alia) belief-norms, knowledge-norms, and justifiability-norms; these are agent-centered mental states that are valuable in inquiry and explanation. To illustrate, think of three species of epistemic norms that can govern us with

[2] This usage is standard, e.g., Osborne (2021: 1007) recently wrote, 'I understand 'epistemic' demands as those that apply to us in relation to the pursuit of knowledge, warrant, and true belief.'

respect to the circumstances in which we are permitted to assert some proposition *p*. A belief-norm for assertion has it, say, that only content believed by an agent is assertible. An example of a justifiability-norm for assertion is that one must: only assert propositions that are justifiable according to some evidentiary standard. A knowledge-rule regulates assertibility according to whether an agent knows the content to be asserted.[3]

Derived from linguistic considerations, the theory of knowledge-norms – for epistemically permissible action, assertion, belief, and blame – is formulated via absolute epistemic deontic injunctions forbidding agents from asserting that *p* without knowing that *p*, believing that *p* without knowing that *p*, blaming S for φ-ing in ignorance of whether S was φ-ing, and so on.[4] Williamson's explication of a knowledge-norm for assertion is exemplary: '[T]he fundamental rule of assertion is that one should assert *p* only if one knows *p*'.[5] A proposed knowledge-norm for action is, 'Treat...*p* as a reason for acting only if you know that *p*.'[6] Another, for blame, runs, 'One must: blame X for φ-ing only if one knows that it was wrong for X to φ.'[7]

The seminal knowledge-norm is the one for permissible assertion, and it shall be my focus:

Knowledge-Rule One must: assert that *p* only if *p* is known.

I concentrate on Knowledge-Rule because other knowledge-norms – such as for belief – are thought justified by analogy with Knowledge-Rule,[8] and because the assertoric speech-act is said to be governed by a constitutive rule,[9] such that Knowledge-Rule would be both a good abductive

[3] These norms can be combined, e.g., Bach (2008) argued that a knowledge-norm for assertion is derivable from the coupling of a knowledge-norm for belief and a belief-norm for assertion.

[4] See, e.g., Williamson (2000), DeRose (2002), Hawthorne & Stanley (2008), Moss (2018), Kelp (2020).

[5] Williamson (2000: 11); see also id. at 243.

[6] Hawthorne & Stanley (2008: 577).

[7] Kelp (2020: 258).

[8] See Williamson (2000: 238, 255 – 6).

[9] See id. at 238 – 242.

inference from assertion's constitutive regulation as well as a good explanation of certain linguistic data involving assertion.

Three kinds of linguistic data regarding other sorts of norms have been marshaled to support Knowledge-Rule, which Knowledge-Rule seems to explain well: (*i*) dialectical exchanges; (*ii*) non-assertion in lottery cases; and (*iii*) reticence related to Moore's paradox.[10] As to (*i*), consider dialectical exchanges where one who asserts that *p* may legitimately be held accountable for explaining how she knows that *p*. A speaker who cannot identify sources for her knowledge (such as testimony) is not in dialectically good stead. Knowledge-Rule sits well with this norm of dialectical responsibility. For (*ii*), examine data from lottery-cases; one does not know that his ticket in a very large fair lottery is a loser, even if it is exceedingly unlikely that he will win. This would be cleanly explainable via Knowledge-Rule; that, say, Pr(*p*) >> 99.999% in such a lottery does not permit one to (unqualifiedly) assert that *p*, given that one lacks knowledge that his ticket is a loser. Thus, our reticence to unqualifiedly assert that *p* when *p* is highly probable falls out of Knowledge-Rule. Regarding (*iii*), we are reluctant to assert Moore's paradox sentences regarding knowledge, where the general schema is: *p*, but I do not know that *p*.[11] To assert an epistemic Moore's paradox strikes us as incoherent; Knowledge-Rule can neatly explain why, since one ought not to assert that *p* when she is ignorant whether *p*.[12]

Distinguish permissible assertion – governed by Knowledge-Rule – from reasonable assertion:

> [Knowledge-Rule] makes knowledge the condition for permissible assertion, not for reasonable assertion. One may reasonably do something impermissible because one reasonably but falsely believes it to be permissible. In particular, one may reasonably assert *p,*

[10] See Williamson (2000: 249 – 255); see also Unger (1975: 250 – 71).

[11] See Adler (2002: 193 – 8).

[12] This is ignorance in the sense used by, e.g., Unger (1975) and Williamson (2000), which must be distinguished from doxastic ignorance, as in, e.g., Goldman (1999: 5), who took ignorance to be absence of true belief, or Mills (2017: 52), who used '*ignorance* to cover both false belief and the absence of true belief.' N.b., one can know that *p* while being (supremely) unconfident that *p* (as in Radford's (1966)), and still be counted as ignorant by Goldman and Mills, since one lacks belief that *p*.

> even though one does not know *p,* because it is very probable on one's evidence that one knows *p*.[13]

We can write the epistemic norm for reasonable assertion as:

> *Assertoric Reasonableness* To be reasonable, one must: assert that *p* only if *p* is highly probable on one's evidence.[14]

Knowledge-Rule and Assertoric Reasonableness are perfectly general deontic epistemic norms of an absolute and rather demanding character. Their generality derives from being exceptionless. For example, according to Knowledge-Rule, it is always epistemically wrong to lie to the murderer at the door, even if doing so is ethically required.[15] Per Assertoric Reasonableness, it is unreasonable to assert that *p* when *p* is merely more likely than not.[16] Many critics have complained to the effect that strict imperatives like Knowledge-Rule threaten much ordinary action as akratic,[17] which prompts calls for the overly demanding deontic requirement for knowledge in knowledge-norms to be thinned out to, say, mere reasonable belief or bare truth.[18] To be sure, though, such weaker

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[13] Williamson (2000: 256).

[14] Williamson (2000: 256 n. 10) sketched an epistemic logic that applied his maxim of (E = K), such that one's evidence is one's knowledge, which one need not assume to affirm Assertoric Reasonableness. One can apply Knowledge-Rule to Assertoric Reasonableness to yield:

> To be reasonable, one must: assert that *p* only if it is known that that *p* is highly probable on one's evidence.

I will not be concerned with this norm, since its normative force (plausibly) derives purely from the normative force – if any – possessed by Knowledge-Rule and Assertoric Reasonableness; it bears certain affinities to proposals made by Moss (2018: 210 – 14).

[15] Per Kantian accounts, one should (in)famously not lie – even to the murderer at the door. A Kantian ethical agent should even pursue (moderate) violence ahead of lying; Korsgaard (1996: 157) wrote, 'If you can do it without seriously hurting the murderer, it is, so to speak, cleaner just to kick him off the front porch than to lie. This treats the *murderer himself* more like a human being than lying to him does.'

[16] One might think that if φ-ing is not reasonable, that does not entail that φ-ing is unreasonable, since it seems to be conceivable that an action is neither reasonable nor unreasonable, but a consequence of this move is that while actions pertaining to Knowledge-Rule are governed by classical logic, those under Assertoric Reasonableness would answer to a non-classical logic.

[17] Take akrasia to be a synchronic phenomenon where an agent does φ in spite of her (all things considered) judgment that she ought not to φ. See Holton (2009: 83 – 86).

[18] See, e.g., Lackey (2007), Douven (2009), Neta (2009).

epistemic norms impose liability just as strictly as all-out knowledge-norms, and share many of their difficulties, while not accounting for the normative linguistic data that Knowledge-Rule does.

Schechter identified a set of assertions in which a speaker appears to be not only blameless for asserting that *p* when ignorant whether *p* – in violation of Knowledge-Rule – but in which he (positively) ought to assert that *p*.[19] While proponents of Knowledge-Rule and Assertoric Reasonableness can lodge the objection that this set is empty, I am able to describe a situation ubiquitous in the common-law, where it is both reasonable and rationally required that one violate Knowledge-Rule and Assertoric Reasonableness. This is methodologically of interest because it is a generalizable technique that is prima facie applicable to other sorts of philosophical analyses, so I describe it via using the illustration of Mere Likelihood.

In the next section, I will discuss a model of reasonableness. According to this model, a common-law rule is justified only if it is rationally permissible and there is no higher-order (exclusionary) norm that forbids it. The common-law norms are presumptively reasonable, since they are ubiquitously applied in common-law courts, but is that enough? No, but the way is clear for a stronger showing to be made that violating Knowledge-Rule is rationally obligatory.

I examine a response in § 2 that proponents of Knowledge-Rule and Assertoric Reasonableness can make, namely: Knowledge-Rule and Assertoric Reasonableness are not themselves breached because there is an all things considered judgment that overrides the relevant deontic epistemic modal. For example, this approach treats lying to the axe-wielding murderer at the door not as straightforward derogation from Knowledge-Rule but a matter of honouring Knowledge-Rule in the breach because a moral obligation to one's fellow is stronger – one lies (and thereby violates Knowledge-Rule) in order to save someone from a grisly fate.[20] After discussing reasonable responses – like blame – to norm-violation, I find that norms like Knowledge-Rule can be overbearing and overdemanding, since they demand blame-imposition in cases where it is inapposite. Thus, neither Knowledge-Rule nor Assertoric Reasonableness are or operationalize higher-order norms. But the case is not yet made that Mere Likelihood can be rationally obligatory.

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[19] See Schechter (2017).

[20] There is an analogy here to double-effect doctrine in the sense that while violation of the knowledge-norm is foreseen, it is not strictly intended; see also the discussion, infra, n. 66.

In § 3, following an insightful remark of Voltaire's, I provide a rigorous argument that Mere Likelihood is rationally obligatory in certain situations, namely: the ones used by common-law courts. I am now able to make the strong showing that § 1 identified. I also use these ideas to suggest limits on Mere Likelihood. For instance, Mere Likelihood is not properly used in criminal cases, damage to a party's reputation, or in terms of punitive damages. I elaborate upon the justification of Mere Likelihood in the context of private law, while also discussing historical justifications adduced in favour of Mere Likelihood.

I consider, in § 4, an objection based on the thought that verdicts reflect acceptance rather than assertion of their contents. Delving into the theory of speech-acts, I find this objection is either incorrect, or – if true – then such that it eviscerates the normative force of Knowledge-Rule and Reasonable Assertion.

1.

Following Gardner, a reasonable person is justified in his actions and mentality, such that his reasons therefor are neither (*i*) excluded (by higher-order (exclusionary) reasons) nor (*ii*) outweighed (by other (first-order) reasons).[21] The former covers 'any reason to act for a reason or to refrain for acting for a reason.'[22] A norm-reason is justified in this former sense only if no applicable norm displaces it. For example, after promising to meet at noon with a student to discuss her thesis, I might learn that it is the only feasible time within the next fortnight to grab lunch with my friend and discuss our potentially groundbreaking paper on Bayesianism that will locate a Goldilocks position between subjective views and objective ones, but I am simply not allowed to consider that justification as more forceful; its force is displaced by the promissory reason to keep my word. The latter idea, (*ii*), of some norm-reason being not unreasonable speaks to the issue of no stronger reason outweighing it.[23] In (*ii*) there is not an issue of the norm-reason being ruled out of bounds by

[21] See Gardner (2001, 2020: 271 – 303).

[22] See Raz (1999: 39).

[23] One way of working out which reasons are strongest is to evaluate whether the act-outcome associated with some reason has an expected utility such that no rival reason counseling another act-outcome has higher expected utility, but this is not the only way to weigh reasons; see, e.g., Taurek (1977), Scanlon (1998: 235 – 47).

a higher-order reason, but a same-order reason that exerts greater normative force upon us. A norm-reason will be reasonable in sense (*ii*) if it can be shown that it is in some (relevant) sense rationally required.

A proponent of Knowledge-Rule could claim that the knowledge-norm supplies us with an exclusionary reason not to judge cases according to Mere Likelihood, but this would only beg the question.[24] In the next section, I'll focus on showing that Knowledge-Rule does not supply epistemic agents with an exclusionary reason. Then, in the following section, I will speak to how Mere Likelihood is rationally required.

2.

That Mere Likelihood is the standard civil evidentiary standard places pressure on Knowledge-Rule (as well as Assertoric Reasonableness); violations of these epistemic norms must be conceded as a commonplace in common-law courts. Could it be, however, that they are honoured in the routine breach, 'not because the knowledge rule is no longer in force, but because violations of the rule have ceased to matter so much'?[25]

Kelp & Simion developed a proposal along these lines; they argued: breaches of Knowledge-Rule license criticism of a speaker for violations thereof, and this shows how Knowledge-Rule retains its normative force even when breached. Their idea was that criticism for breaching Knowledge-Rule remains a legitimate move, even when a violation is all things considered warranted.[26] But this seems unhelpful in routine civil litigation; there is no minority position in the literature that inveighs against the unreasonableness of Mere Likelihood. To be sure, though, that Mere Likelihood is not criticized

[24] Alternatively: the rationale for Knowledge-Rule is the pertinent exclusionary reason. In either event, it would appear that the putative exclusionary reason would have unlimited scope; it would apply universally – *come what may*. This runs counter to traditional uses of exclusionary reasons, e.g., if I have promised to meet with a student at noon to go over her draft, then I have an exclusionary reason to do so, such that I should decline alternative uses for my time that would be much more pleasant, like a free lunch at noon prepared by a restaurant with a surfeit of Michelin stars, but I need not decline some once-in-a-lifetime, immensely positive life-changing opportunity, where the pleasure is of an greater order and not merely magnitude. See, e.g., Adler (1996).

[25] Williamson (2000: 259).

[26] See Kelp & Simion (2017), Kelp (2020). I shall bracket certain issues concerning blameless norm-violation that Brown (2017) raised, e.g., possible divergence between epistemic and ethical norms.

in common-law courts does not prove that it is not criticizable for violating Knowledge-Rule. Kelp & Simion identified three blameless situations with respect to norm-violation: (*i*) a norm with lexical priority took precedence over Knowledge-Rule; (*ii*) the norm-violation was (blamelessly) involuntary; and (*iii*) the norm-violation occurred in (blameless) ignorance that it violated Knowledge-Rule. Otherwise, they held that criticism is appropriate rather than merely prima facie legitimate.[27]

Kelp & Simion considered what happens when a norm like Knowledge-Rule is violated for the sake of an overriding norm; we could say that the overriding norm has peremptory force qua exclusionary reason over relatively inferior norms like Knowledge-Rule.[28] They gave as example the case of a moral norm overriding the norm of your calling out 'Uno' in a card-game (Uno) when doing so would result in the death of your neighbour at the hands of another agent.[29] Further:

> [I]n our toy case, we can with prima facie legitimacy criticize Uno players who do not call 'Uno' when playing their penultimate card by saying, 'You didn't call 'Uno'!' or 'You didn't say anything!' Moreover, given that Norm-Specific Blamelessness holds, we may expect there to be a number of appropriate responses to 'You don't...!' criticisms [e.g., 'You don't know that *p*!]. For instance, the agent may disagree and maintain that she really does satisfy the relevant requirement and so her action is permissible....Alternatively, she may offer an explanation to the effect that the norm was overridden by another norm...such that the

[27] See Kelp & Simion (2017: 79). I see an analogy here with the notions of excuse and justification in criminal law. See, e.g., Ferzan (2011: 239 – 68).

[28] This assumes that values exist on different levels, and that there are principles of lexical priority (see Rawls (1999: 37 – 8)) between them, 'such that criteria [are] such that the smallest discernible difference on the first-ranking criterion offsets any amount of difference on the second-ranking criterion, and so on'. Barry (1973: 275). It may be that as between certain principles or values, none have lexical priority over others.

[29] See Kelp & Simion (2017: 78). This case is not quite clean, since it has ethically relevant features that complicate matters in a way Kelp & Simion are unlikely to have intended. In Williams' (1973: 98 – 100)) much-discussed case of 'Jim and the Indians', one is (arguably) permitted (or even required in some situations) for reasons of integrity that 'describe the relations between a man's projects and his actions' to commit himself to a Pareto-inferior act that results in 19 easily preventable deaths. Ibid. at 100. And taking a page from Kant's case of the murderer at the door (see n. 15, supra), if the murderer succeeds at eliminating his intended quarry, then that is plausibly on the murderer rather than on the Kantian who could not lie. We can patch up Kelp & Simion's case, though, and say that it is a law of nature that one's next-door neighbour will immediately die of extremely painful nervous spasms if he's over 183 centimeters in height during a full moon when one calls out 'Uno', and those conditions are met on the night in question, so as to eliminate the agency of another intervening. (The emendation to repair an absurd case should be at least as absurd as the original.)

> action is all-things-considered permissible. We may also expect excuses pointing out (blameless) lack of control...or ignorance...to be an appropriate form of response. And given that a norm was violated, it should come as no surprise that apologies constitute an appropriate form of response as well. [30]

I do not wish to dicker over the Uno case; my concern is whether this strategy to secure the prima facie legitimacy of criticizing violations of Knowledge-Rule works for uses of Mere Likelihood. Consider a case that Kelp & Simion took from Williamson, which involves Tim looking at fake snow outside his window, which was put there by a film crew he had no inkling of, such that Tim (falsely but justifiably) asserts that there is snow outside; there is actually only snow-like foam.[31] Kelp & Simion wrote, '[Tim's] assertion can prima facie legitimately be criticized by saying, 'That's false! What you are seeing is just foam. There's a film crew shooting outside."[32] They added, '[A]n apology and/or an excuse is entirely appropriate. It will be entirely appropriate [for Tim] to respond by saying, 'I'm sorry. I didn't know that."[33]

Tim could (instead) say, in response to the exclaim that he asserted a falsehood, 'So what? I sincerely asserted to you precisely what I actually and justifiably believed'. But if Kelp & Simion were correct that an apology or excuse by Tim was apropos, it is difficult to see his recalcitrance as epistemically permissible. How should one decide whether to blame Tim for neither apologizing nor offering an excuse?

A traditional response, associated with Strawson, would consist of answering that query by answering another: is Tim blameworthy?[34] And that response would then ask whether some reactive attitude like anger, indignation, or resentment is appropriate in the circumstances.[35]

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[30] Kelp & Simion (2017: 87).

[31] See id., quoting Williamson (2000: 257).

[32] Kelp & Simion (2017: 88).

[33] Ibid. It might be that Tim's belief – and most beliefs generally – are involuntary, and often blamelessly so, which embeds it – and them – in a blamelessness condition endorsed by Kelp & Simion (2017: 79), but I shall bracket this issue, since it seems like some version of moderate belief-voluntarism is plausible.

[34] One can conceive of an alternative grounded in legitimate agent-regret, but this seems unhelpful, since one can regret permissible – or even obligatory – action. See Williams (1981: 28).

[35] See Strawson (1962), Wallace (1996). An alternative, but related, notion of 'communicative blame' as 'basic' was developed by Fricker (2014), in which 'the illocutionary point of any performance of Communicative Blame is to inspire

I agree with Scanlon that 'an account of blame that focused only on these elements [of attitudinal responses] would be too thin.'[36] We have to ask ourselves whether a sort of social-distancing is apropos. Are there 'changes in our readiness to interact with him or her in specific ways', such as 'refus[al] to make agreements with that person or to enter into other specific relations that involve trust and reliance.' One who blames another executes 'a suspension, in varying degrees and in varying ways, of one's readiness to enter into these more specific relations, and suspension also of the friendly attitudes that signal a readiness to do so.[37] Rosen elaborated:

> When you blame X for A in the context of an ongoing relationship like a friendship, you become less interested in spending time with X, less willing to trust him, less inclined to help him, and so on. Changes of this sort may be accompanied by resentment, but this is incidental.[38]

What if Tim is a mere stranger? 'When we say that someone who complies with the norms of basic decency thereby cares enough about others – shows a *sufficient* degree of concern and respect – we simply mean: his manifest level of concern never justifies a revision in the default moral relationship.'[39] Even moral strangers are approached 'with a modicum of good will and openness: some minimal wish that things go well for him, some minimal willingness to extend trust, to cooperate, to take his aims into account in our decision making, and so on.'[40]

Given Tim's attitudes and the circumstances – he took reasonable care to be justified, he awoke in an odd situation – can we say that it is fit for us to withdraw the normal regard due to strangers from people of good will? Tim's belief that he ought not to apologize to us for his (understandably)

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remorse in the wrongdoer, where remorse is understood as a pained moral perception of the wrong one has done.' Ibid. at 167. What I say about the traditional Strawsonian account will, mutatis mutandis, carry over to Fricker's.

[36] Scanlon (2008: 143).

[37] Ibid.

[38] Rosen (2014: 86).

[39] Id. at 88.

[40] Rosen (2014: 87).

erroneous assertion should not strike a reasonable person as cause for social-distancing; even de minimis distancing does not seem to be called for in this case.

Mutatis mutandis for the common-law use of Mere Likelihood, but we can make an even stronger argument that Mere Likelihood is rationally required; we need not rely merely on intuitive appeal.

3.

Especially in private lawsuits – sounding in contract, property, tort, or unjust enrichment[41] – and more generally where it is simply a question of whom some loss shall fall upon, and in which there is no aspect of the litigation that can occasion punishment or which passes judgment on a party's defective character, common-law courts follow Mere Likelihood. But Knowledge-Rule counsels that assertions, such as that someone is liable to someone else, should be founded upon knowledge.[42] Voltaire argued that Mere Likelihood is the right evidentiary standard for the foregoing matters:

> If the subject of explication is an equivocal devise, an ambiguous clause in a contract of marriage, the interpretation of obscure law on inheritance, or on commerce, one is absolutely required to decide as the greater probability guides one. It is just money.
>
> But it is not the same when the subject is a citizen's life or honour. So, the greater probability does not suffice. Why? When two parties contest who owns a field it is clearly necessary, for the public interest and for particular justice, that one of the two parties possess the field. It is not possible to apportion the field to no-one. But when a man is accused of a crime, it is not obviously necessary that he be sent to the executioner on the

[41] A possible view on how these area of private law sum to the possible kinds of inter-personal jural relations, adapted from Epstein (1985: vii) and modified: one can think of property law as governing private right-acquisition over things (including one's person), tort law controlling the means by which privately-held objects are legally protected, contract law as the regulating how rights can be transferred, and the law of unjust enrichment as providing certain kinds of remedies for civil wrongs that are not strictly remediable via contract, property, or tort.

[42] It is implausible that the court simply makes it the case that a defendant is (not) liable, since this would foreclose the possibility of incorrect verdicts. We surely want to say, e.g., in a case where Claimant bribed the judge to direct a verdict in his favour that the court got the verdict wrong, or, e.g., in a case where Defendant gets off by fabricating evidence, we should want to say that the verdict was understandable but incorrect.

> greater probability. It is very possible that he may live without troubling the harmony of the state.[43]

One can be misled here by focusing on Voltaire's remark that in the usual civil matter, 'It is just money.' The important thing is that if we assume symmetry between one party's gains and the other's losses, then an analysis using expected utility shows why the standard of proof in ordinary civil trials is set via a probabilistic threshold of 50%. The key that Voltaire obliquely referred to was that money lost by one party is the other's gain. In this respect, ordinary private law disputes are a zero-sum game.

Claimant C tries to prove that his complaint is true; say that C tries to show the trier-of-fact τ that p. Per the probability calculus: $\Pr(p) + \Pr(\neg p) = 1$. Per the law of excluded middle, either p or $\neg p$; C's complaint is either true or false. There are two ways that τ could err as to the verdict; τ delivers a verdict for C when $\neg p$ or τ gives a verdict for Defendant D when p. The disutility of an error for C need not in all cases be equivalent to the disutility of an error for D. Suppose τ wishes to minimize the expected disutility of a mistaken verdict. τ should follow the rule: Find for C iff $\Pr(p) > (1 / (1 + (\text{Disutility of an incorrect verdict for D} / \text{Disutility of an incorrect verdict for C})))$.[44]

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[43] Voltaire (1829: 80). The New Testament teaches that 'A prophet is not without honour, but in his own country, and among his own kin, and in his own house' (Mark 6:4 (King James Version); see also John 4:44, Matt. 13:57), and although Voltaire advocated on behalf of Mere Likelihood, which (eventually) became the customary civil evidentiary standard in common-law courts, many jurisdictions without common-law systems, including his native France, use the 'conviction intime' (intimate conviction) standard. Fletcher wrote (1968: 1207):

> In reaction to what they felt to be a tyranny of evidentiary rules, the French reformers of 1789 vested complete authority in the jury to formulate its own judgment (intime conviction) of the facts in dispute. The system of formal rules thus yielded to the supremacy of subjective judgment in individual cases.

In France, specifically, the degree of proof 'is the same for civil and criminal cases', namely: 'the judge has to be convinced, without a shadow of doubt, of a person's fault, be it penal or civil.' Clermont & Sherwin (2002: 250); see also id. at 256. To be sure, this is not actually the standard applied, even in criminal matters; see Clermont (2004: 273). But the standard is, in any event, not treated probabilistically, like Mere Likelihood, nor is there a distinction made between civil and criminal proceedings. In both, a standard like common-law courts' 'beyond reasonable doubt' seems to be employed. See Clermont & Sherwin (2002: 247 – 51). But such a standard is not consistent with Knowledge-Rule either, since one can conceivably not know whether p even while harboring no reasonable doubt that p. To be sure, if one knows that p, then that (generally) absolves him of reasonable doubt whether p, but the converse does not hold. Easy proof: if one has no reasonable doubt that p, that does not entail that p, whereas knowledge is factive: if S knows that p, then p.

[44] See Kaplan (1968: 1071 – 2).

In some sorts of cases, the ratio of the disutilities should not, and will not, as a matter of law, be unity. Consider an illustration that Voltaire gave: a criminal trial. The disutility of an incorrect conviction may be much higher than that of an incorrect verdict for the accused. Common-law courts have emphasized that false acquittals are to be tolerated more than false convictions, as evinced by their quoting Blackstone's maxim that 'the law holds that it is better that ten guilty persons escape than that one innocent suffer'.[45] Voltaire's remark that '[i]t is just money' in routine civil cases was plausibly much less an effort to pooh-pooh the utility of money than notation that a wrong result's disutility does not vary with whom it (incorrectly) favours in ordinary civil cases.

Consider next a case in which C's ox was alleged to have been negligently gored, which D denies. That C's ox was gored (simpliciter) is insufficient to support a verdict for C, since the common-law tort of negligence requires that D breached a duty of care owed by D to C in respect of C's ox, such that this breach proximately caused money-damages to be lost by C.[46] There is, therefore, a clear contrast with Voltaire's remark with respect to the alleged criminal that '[i]t is very possible that he may live without troubling the harmony of the state.'

C's ox has been gored. Imagine that we follow Knowledge-Rule. In this case, C would have to establish knowledge of the foregoing elements of the tort of negligence. It would not be enough, for example, for C to establish the likelihood on the evidence that D (via his ox) proximately caused the harm complained of to C. After all, according to Knowledge-Rule, just because *p* is more likely than

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[45] *Coffin v. United States*, 156 U.S. 432, 546 (1894); Laudan (2006: 63) collected several other ratios.

[46] What if C rests his case on merely (or nakedly) statistical evidence? Cases involving so-called naked statistical evidence (see, e.g., Kaye (1980)) do not pose difficulty for Mere Likelihood. The problem for Mere Likelihood is thought to be: Defendant's mere membership in some class makes it (statistically) more likely than not that liability obtains purely in virtue of the (naked) statistic. While common-law courts do *not* permit verdicts on naked statistical evidence (see id.), many nonetheless use the apparent permissibility of such verdicts on Mere Likelihood to argue for a rather more demanding standard of proof based on relatively recent work in epistemology, e.g., verdicts need to satisfy a normality constraint (Smith (2018)), a safety requirement (Pardo (2018)), or be epistemically sensitive (Enoch et al. (2012), Enoch & Spectre (2019)). In my view, the common-law rule against verdicts on naked statistical evidence only brings out a feature of Mere Likelihood that is sometimes missed. As I put it earlier, Mere Likelihood 'the (legally sufficient) statements of fact made in C's pleadings must be shown to be more likely (true) than not.' Others acknowledge this too; see, e.g., Smith (2018: 1194)): As any textbook on evidence law will attest, th[e] standard [Mere Likelihood] is met when a proposition is shown to be more likely true than false – when its probability, given the evidence, exceeds 50%.' Note how both formulations say that the target proposition must be *shown* to be more likely (true) than not. It does not suffice to sustain a verdict for some plaintiff against some defendant for that plaintiff to merely advert to a defendant's membership in some general class. How much work goes into a showing cannot be addressed within the margin, though I believe that there is no real threat to Mere Likelihood once we understand that a plaintiff cannot rest on her laurels and cite nothing but statistical generalities in favour of a verdict directed for her. See also Jackson (2018: 5077).

not fails to epistemically underwrite the assertion that *p*. If one were to assert that *p* when *p* is merely established to be likely, then one would be epistemically liable for violating Knowledge-Rule. Mutatis mutandis for Assertoric Reasonableness, since common-law courts assert that C (or D) is liable based on mere likelihood – rather than high probability.

When called upon to justify Mere Likelihood, common-law courts have emphasized that with Mere Likelihood the risk of error – and subsequent harm – to C and D is (roughly) symmetric.[47] The United States Supreme Court's reasoning in a case deciding the correct evidentiary standard in civil confinement cases regarding the mentally ill is instructive:

> The [evidentiary] standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
>
> Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, [claimant's] burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.[48]

We hear the echo of Voltaire's remark, 'It is just money.' At the opposite end of the spectrum, just as Voltaire insisted, are criminal cases. 'In the administration of criminal justice, our society imposes almost the entire risk of error upon itself.'[49] In between these spectrum-poles:

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[47] It has not gone unnoticed that there is relatively little scholarship on Mere Likelihood compared to the beyond reasonable doubt criterion required by common-law courts in criminal trials. See Leubsdorf (2016: 1569 – 70).

[48] *Addington v. Texas*, 441 U.S. 418, 423 (1979). N.b., to say that a claimant has made out his case (*i*) to be more likely (true) than not; (*ii*) true on the balance of probabilities; and (*iii*) shown by a preponderance of the evidence is to enunciate the same legal test in three different ways. See, e.g., *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47; Leubsdorf (2016). We can just take them as synonymous with Mere Likelihood. To be sure, the sense of probability at issue – objective, subjective, or something else (see, e.g., Cohen (1977)) – remains unresolved in common-law courts, and rather infrequently discussed; see Goldman (2002).

[49] *Addington*, 441 U.S. at 423 – 24.

> The intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal' and 'convincing,' is less commonly used, but nonetheless is no stranger to the civil law. One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money, and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases [e.g., denaturalization, deportation].[50]

Notice that courts look to the specific type of harm that error risks, and that criminal or quasi-criminal discommendation is put into a special category; it is the risk of harm to one's honour or good name that is the essence of what triggers application of a more onerous evidentiary standard than Mere Likelihood. It is not simply being locked up behind bars, searched, or seized that requires a more onerous evidentiary standard to be met, since one can be searched or seized upon probable cause of wrongdoing, but there is still a presumption of innocence in force, such that one's character is not (strictly speaking) impugned.[51]

Thus, Mere Likelihood is not rendered inapplicable to civil litigation merely because there is significant asymmetry in respect of potential consequences. Are the consequences roughly symmetric in an eviction suit brought by a real estate investment trust, Greedyco, with billions of dollars in assets against a family of modest means, the Bunkers, for breaching their lease by bringing a tiny, mute dachsund home? The Bunkers offer to rehome their beloved wiener-dog, but Greedyco will not have it; the trust intends to relet the apartment for much more money, and is wholly unwilling to forgive the Bunker clan their violation.

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[50] Id. at 424; citations and internal quotation-marks omitted.

[51] It is arguable, to be sure, that the formal presumption of innocence does not shield one from being informally calumnied by his peers, and I am not unsympathetic to the idea that this fact should prevent police from abuses like 'perp walks', which are designed to induce public opprobrium in contravention of the presumption of innocence. See, e.g., *Lauro v. Charles*, 219 F.3d 202 (2nd Cir. 2000).

Mere Likelihood applies.[52] The asymmetry that would render Mere Likelihood inapplicable occurs when it of a sort that would tend to bring people like the Bunkers into moral disrepute, which violation of a lease does not. Mere asymmetry in terms of power-relations within a capitalist economy does not suffice. To be sure, there is a debate over the role that distributive justice plays in private law. Standardly, it is of no moment that applying Mere Likelihood could cause significantly more severe consequences for one party; it does not matter that the lawsuit between Greedyco and the Bunkers will not even amount to a rounding error on Greedyco's financial statement. On one side of that debate are pure corrective justice theorists, who posit that private law's structure follows directly from considerations of formal equality. Thus, when C's ox is gored as a result of D's negligence, D's obligation is one of mere repair – to put C back where he would have been absent D's negligence.[53] Thus, even if D is a fabulously rich spendthrift, if C's ox was already not long for the world before the accident, then D has zero obligation to provide C with the means to secure a younger and abler ox. On the other side, it may be arguable that courts ought to consider comparative impact in areas where the legislature has licensed them to do so.[54] But this argument does not feature in common-law courts' ordinary decisions.

An interesting feature of certain cases is that because of Mere Likelihood's symmetric imposition of an evidentiary burden, if a claimant fails to discharge its burden under Mere Likelihood, then the defendant automatically wins; there is no further question.[55] This striking feature of civil lawsuits follows from the probabilistic version of the law of excluded middle, which we used earlier in formalizing Voltaire's argument. Once a claimant's case is not made out to be more likely than not, the negation of the claimant's case is.[56] Notice that using Knowledge-Rule does not confer this

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[52] I bracket the issue of whether the legally correct result is the correct one overall. Various moral responses may be appropriate in cases like this one, e.g., civil disobedience (see, e.g., Zwiebach (1975)), conscientious evasion (see, e.g., Rawls (1999: 324)), etc. For other ways to manifest objections sounding in moral conscience, see Sorabji (2014).

[53] See, e.g., Weinrib (2012a, 2012b).

[54] See, e.g., Gardner (2014).

[55] Technically, the evidence could be exactly in equipoise as to who is legally correct, but it is practically impossible to locate such hypotheses, which do exist in the realm of philosophical theses, e.g., external-world skepticism as well as realism both predict that we would perceive and sense precisely as we do. However, even as philosophical theses like these, one of them is (arguably) rather less likely on the evidence. See Vogel (1990).

[56] This follows as a matter of basic probability. One who affirms the opposite – namely: $\Pr(p) + \Pr(\neg p) \neq 1$ – is clearly susceptible to diachronic Dutch book wagers, in which one is guaranteed not to win, while one who affirms the standard axioms is invulnerable to such exploitation; see Lehman (1955).

property. Under Knowledge-Rule, just because one does not know that some claimant made out his case hardly entails that the defendant's position is correct.

4.

We now have an argument that Knowledge-Rule is not the norm of (permissible) assertion in typical civil actions, since judicial decision via Mere Likelihood is justified in those cases. One driven to zealously defend Knowledge-Rule still has a significant objection-card to play: the claim that common-law courts are not engaged in assertion when they use Mere Likelihood, such that Knowledge-Rule is simply inapplicable.

While Raz's purpose was not to defend Knowledge-Rule, we can appropriate one of his arguments to that effect. He wrote:

> [A]ccepting a proposition is conducting oneself in accord with, and because of, the belief that there is sufficient reason to act on the assumption that the proposition is true: acceptance of the proposition that [*p*] entails belief, but not belief that [*p*]. Rather it entails belief that it is justified to act as if [*p*]. Thus acceptance combines epistemic and practical reasons, though its target is action rather than belief. Acceptance dominates many areas of practical thought. The whole system of law enforcement via courts and tribunals is based on acceptance of presumptions, like the presumption of innocence, and on accepting verdicts based on evidence presented in court, while ignoring all other evidence. Juries and judges are not required to believe that the accused is guilty or innocent. They are required only to accept and pronounce verdicts which are correct according to the evidence before them. Often other people who do not believe that the verdict is correct have compelling reasons to conduct themselves as if it were correct, that is to accept its content.[57]

Raz's line denies that verdicts are assertions. Were he correct, then S's verdict that *p* does not indicate that S believes that *p*, but merely that S accepts (for certain purposes) that *p*. There are several reasons to be skeptical of Raz's position as appropriated for the defense of Knowledge-Rule,

[57] Raz (2009: 38).

but I shall focus on two. First, the relevant verdictive speech-acts are best seen as assertoric; a verdict that *p* contains the speaker's indication that she believes that *p*. Second, a proponent of Knowledge-Rule is basically estopped from adopting Raz's line, since it would for the greatest part render Knowledge-Rule a dead letter.

The threshold objection described above is that verdicts are not assertions but acceptances. My position is that verdicts are not *mere* assertions, since they (can) routinely alter litigants' legal duties, immunities, powers, privileges, and rights. But they are assertoric; the indicate a speaker's belief:

> When we say 'guilty', this is happy in a way if we sincerely think on the evidence that he did it. *But*, of course, the whole point of the procedure in a way is to be correct....Thus when the umpire says 'over', this terminates the over. But...we may have a 'bad' verdict: it may either be *unjustified* (jury) or even *incorrect* (umpire).'[58]

Austin also noted that one could insincerely bring a verdict, and that, in such cases, 'there is an obvious parallel with one element in *lying*, in performing a speech-act of an *assertive* kind.'[59] For example, ' 'I find him not guilty – I acquit', said when I do believe that he was guilty.'[60] A speaker lies, for instance, when he is conscious that $\neg p$ but nevertheless sincerely asserts that *p*. Imagine: the judge in a bench-trial knows from admissible evidence that he ruled inadmissible that an accused is not guilty, but he sincerely registers a guilty verdict to deceive others into belief that he believes that the charges are true. If Raz were right, then not only did this judge not lie, but he could not have possibly lied, since he made no assertion; the judge merely accepted and pronounced a verdict that is correct according to the evidence before him.

The Razian objection goes wrong because it confuses the illocutionary point of a verdictive speech-act with its illocutionary force. In his taxonomy of speech-acts, Searle put typical verdictives down as representatives, whose 'point or purpose...is to commit the speaker (in varying degrees) to something's being the case, to the truth of the expressed proposition', adding, 'All of the members

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[58] Austin (1962: 43).

[59] Id. at 40.

[60] Ibid.

of the representative class are assessable on the dimension of assessment which includes true and false.'[61] This is to be distinguished from illocutionary force. Searle gave 'boast' and 'complain' as illustrative examples. If S boasted that *p*, but in fact ¬*p*, then S erred. If S boasted that *p* when he knew that ¬*p* and concomitantly intended deception, S lied about *p*.[62] Similarly, if T complained that *p* but did so without regard for the truth-value of *p* and primarily with regard for some non-cognitive goal (like closing a deal), then T bullshitted.[63] And if U boasted that she complained about V's work ethic (or lack thereof) to management, then U's boast was false if she never so much as approached management with the thought of complaining about V.

Raz's line was that courts are obligated 'to accept and pronounce verdicts which are correct according to the evidence before them', but this is not even strictly true per Mere Likelihood, which imposes neither a norm of correctness nor even high probability as with Assertoric Reasonableness. It is rational in typical civil cases for a trier-of-fact to believe that liability obtains – or does not – in accord with the greater probability. Certainly, as shown in § 5, that is what an ideal rational agent should believe, and one's assertions are above epistemic reproach if they comport with ideal rationality. The law is not made out to be an alien domain in which discourse that looks assertoric is actually non-assertoric.

Raz's line is also particularly difficult for the proponent of Knowledge-Rule to take on board. For while the Razian gloss on verdictives as non-assertoric saves Knowledge-Rule from having to make an ad hoc exception for verdictives in typical civil cases, it forces the proponent of Knowledge-Rule into a scenario where if one has a certain sort of important goal, then his assertoric-seeming speech-act is non-assertoric. Raz's thought was that '[a]cceptance dominates many areas of practical thought', but the domination he had in mind was not simply that Knowledge-Rule is trumped by a weightier norm – Kelp & Simion considered cases like that[64] – but a domination under catalytic practical pressure where the assertoric is transmuted into the non-assertoric. The trouble with this

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[61] Searle (1976: 10).

[62] See Holton (2019).

[63] See Frankfurt (1988: 117 – 33).

[64] In such cases, one may have all things considered reason to act per a norm weightier than Knowledge-Rule; see § 4.

move is that there is quite a lot of practical discourse. People are variously trying to close a sale, gain tenure, have sex, impress the boss, make money, win elections, and so on. Surely one who is enamored of a knowledge-norm – or any sort of universal norm for assertions – does not desire to narrow the domain of assertions such that only theoretical, non-practical matters are within its scope.

Accordingly, the Razian objection does not spoil the argument given above that knowledge is not the universal norm of permissible assertion.

5.

There is not a perfectly general knowledge-norm of assertion like Knowledge-Rule. Along the way, I've supplied reason to doubt Assertoric Reasonableness too, since Mere Likelihood permits verdicts on the marginally greater probability that sustains them rather than high probability.[65] Nothing I've said cuts against the thesis that there is a limited class of assertions that – as a matter of epistemic or other deontic modality – (prima facie)[66] require knowledge.[67] Indeed, certain sorts of cases in which

[65] Mere Likelihood also cuts against certain other readings of typical civil common-law verdicts, e.g., the sensitivity requirement urged by Enoch et al. (2012); Gardiner's (2019) relevant alternatives rule; Pardo's (2018) safety requirement; and Smith's (2018) normality criterion.

[66] I am sympathetic to the view that deontic modalities should have prima facie – rather than absolute – applicability. Two illustrations in the history of ethics: Ross's (1930, 1939) use of prima facie duties (substituting for absolute deontic injunctions) and Quinn's (1989) reformulation of traditional absolutist double-effect doctrine.

[67] One may speculate that even knowledge is insufficient for certain sorts of assertion, e.g., even if you know that *p* based (merely) on n^{th}-hand hearsay, it might be inappropriate to assert that *p*. See Lackey (2017).

Mere Likelihood is clearly inapplicable,[68] such as casting moral opprobrium or punishing an accused, might well be such that knowledge is needed to assert or cast aspersions.[69]

I conclude on the speculation that the deontic norm (if any) governing a species of assertion is tied to the particular species that an assertion is a member of – such as a verdict in a routine civil case – rather than that the assertion is *assertion*. That would cut against the constitutive theory of speech-acts Williamson used to argue for Knowledge-Rule.[70] And although Williamson offered a constitutive theory of assertoric speech-acts, which is meant to mark it off in terms of a (knowledge-)norm, that program has not been been carried over to other sorts of illocutionary act-types. One suspects – or at least I do – that this owes to the non-existence of any norm that would plausibly mark off all members of whatever general illocutionary act-type. As to assertion, specifically, I argued via the common-law evolutionary process of securing norms for its judgments that Knowledge-Rule cannot be the norm of permissible assertion, since Knowledge-Rule is rationally, reasonably, and routinely flouted in common-law courts.

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[68] Where one speaks of a defendant's bad character, for example, a higher evidentiary standard may be apropos. And certainly in criminal trials, as discussed in § 5. A proponent of a knowledge-norm for blaming (see Kelp (2020)), who thinks that typical verdicts involve blaming, could try to defend the position that verdicts thereby require knowledge, but typical verdicts clearly do not involve blaming. Epstein (1973: 153) noted:

> [T]he standard of the reasonable man, developed in order to insure injured plaintiffs a fair measure of protection against their fellow citizens, could require a given person to make recompense even where no amount of effort could have enabled *him* to act in accordance with the standard of conduct imposed by the law. Certain defenses like insanity were never accepted as part of the law of negligence, even though an insane person is not regarded as morally responsible for his actions.

Moreover, those holding that routine civil verdicts for plaintiffs sounding in, say, negligence (necessarily) involves blaming defendants need to explain why we do not ascribe blame to almost-tortfeasors, who – but for moral luck (see Nagel (1979: 24 – 38)) breaking their way – could have ended up causing grievous injuries to others. See Waldron (1995).

[69] S might assert of a man that he is a pedophile, which is an assertion, but she could ask, e.g., 'Could this fellow right here be any more of a pedophile?', to induce the same content, viz. that the man in question is a pedophile. See, e.g., Kelp (2020: 258 n. 7.)

[70] Schechter (2017: 155 – 6) likewise identified the guilty party.

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