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TWO CONCEPTIONS OF RELEVANCE

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Courts use complex modes of relevance judgments in regulating the introduction of information and construction of factual narratives. Likewise, common law works both through and around relevance presuppositions in determining doctrine. This study examines different functions of relevance—conceived as different conceptions, at times competing, at times interdependent. The distinctions between these conceptions are arranged on three levels: (1) a normative/"causal" level, arguing for the status of relevance as a requirement for a "meaning-based" conception of entailment and drawing on discussions from relevance logic and modal logic; (2) a pragmatic/metapragmatic level that explores the ways in which law's "factfinding" and other epistemological functions are subjected to normative, practical purposes (under the heading "practical primacy"); and (3) the relevance/metarelevance distinction between the kinds of information admitted to the court's discursive space and the very notion of reliance on information in regulating decision making. All these levels are accommodated primarily by the law of evidence (although not exclusively); in an important sense, they define it. The study claims that although pragmatic and semantic relevance (corresponding to the "fit thesis") are at the center of most studies, it is relevance's metapragmatic function in constituting legal discourse that merits special attention, viz, the constitutive role of relevance in determining what may count as knowledge rather than merely its regulative or derivative function regarding relations between information and presupposed doctrine.

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INTRODUCTION

How do courts conceptualize relevance? How do they actually put it to use, as practical, discursive, and normative devices, both in shaping process and constructing argumentation? What are the *functions* of relevance in legal discourse?

The argumentative point this study attempts to make is that conceptions of relevance occupy larger roles and function in richer ways than commonly acknowledged by standard legal discourse. This goal prescribes a somewhat eclectic methodology, building on elements of linguistic theory and narrative analysis as well as decision-making theory. In essence, however, this is a work of particular jurisprudence, focusing on the law of evidence: not a general investigation of the concept of law (although building on theoretical claims) as much as a detailed study of a few of its intricacies. It is less the *concept* of relevance that this study examines, and more a related family of practical-reasoning apparati that, responding to a unifying logic of relevance, serve both to constitute legal modes of argumentation and to perform manipulations within them. The study concentrates primarily (but not solely) on the law of evidence because that is the main regulative framework for law's treatment of information.

Even seemingly clear-cut cases are occupied with relevance concerns. In *Hui Chi-Ming v. R*[1] the disputed issue was appellant's right to present as evidence the verdict of a prior trial, in which co-offenders were convicted of manslaughter rather than murder. The court's refusal was upheld by the Privy Council, on the grounds that

> Verdict reached by a different jury (whether on the same or different evidence) in the earlier trial was irrelevant and amounted to no more than evidence of the opinion of that jury. . . evidence which is irrelevant or insufficiently relevant to an issue is inadmissible (*ibid.*, p. 902).

But what does that mean? Surely, by "irrelevant" the court does not mean that the information in question will necessarily prove *inconsequential*, play no actual part in the jurors' decision. On the contrary, it seems that the court thought that it very well might, however *should* not; if such information is to have no probative value it is because the court

[1][1991] 3 All E R 897.

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has an interest in regulating jurors' construction of factual narratives (or "factfinding," as if facts were a thing to be "found") in spite of what they, as factfinders, may do if given access to such information. Information of prior trials is inadmissible on grounds quite different than, e.g., information regarding the weather on the day of the trial. The jury is spared the latter because (let us assume) it has, in American terms, no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable" (Federal Rule of Evidence 401).[2] However, as far as the actual cognitive processes engaged in by factfinders, there is a sense in which this is not the case of information regarding the former trial. Cognitively, such information may very well "tend" to make a fact more acceptable or tip an interpretative scale. It may so befall "according to the common course of events," to paraphrase Stephen's *Digest of the Law of Evidence* on this matter. It may prove "of consequence" in the factfinder's language game, even if it shouldn't so prove in the law's.[3] Law's game involves subjecting factfinding to practical purposes (henceforth "practical primacy")—it attempts to regulate the extent to which "common" reason effects factual reconstruction. By regulating information through criteria of relevance the law understands information's probative "tendency" as something quite different than a "natural" or "common" inference. Two interdependent levels are at play here: the particular information's ability to actually influence a decision-making process, as assessed on "purely cognitive" or "formal" grounds;[4] and a normative level of reasons, whether to allow the cognitive process to run its common course or not.[5]

[2]Compare with the telling language of Stephen's *Digest of the Law of Evidence*: "Facts . . . so related to each other that according to the common course of events one . . . proves or renders probable . . . the other."

[3]Compare with *Hollingham v. Head* [1858] 27 LJCP 241, where a litigant attempting to establish the terms of a contract was barred from producing similar contracts entered into with other customers. The matter seemed to concern admissibility only inasmuch as relevance is a category of it.

[4]Indeed I do not believe that any nonnormative mode of cognition exists at all. "Purely cognitive" here is used fictionally, designating a formal kind of decision-making system, not any complete, actual factfinding process.

[5]An immediate objection would be to point to the all-too-well established British distinction between relevance and admissibility. The following discussion isn't an all-out critique of this distinction, yet it does claim that normative considerations (rather than exclusively epistemologic or logical ones) are at the basis of relevance, too (Keane 1994, pp. 17–18, 371–373; Cross 1995, pp. 65–67).

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The first level, I think, responds well to Sperber & Wilson's (1986) maxim of producing maximum cognitive effect at the smallest processing cost, discussed below. The second, however, does not respond a-priori to economicity. It sees cognitive processes as subject to practical purposes in a broad Aristotelian sense. It is the level of law's teleology as opposed to its mechanics (that play center stage in the first level).

So far this exposition is, I think, fairly orthodox. Where this study tries to go a step further is in examining the relations and interdependencies between the two levels. It tries to arrange the different conceptions of relevance it identifies in a coherent superstructure.[6]

A study of relevance's functions downplays both rhetoric and symbolical meaning inasmuch as these obscure function. It is one thing to pursue and examine judicial language relating to obvious occurrences of relevance criteria (such as rules 401–403 of the Federal Rules of Evidence) or explore cognitive processes obviously associated with relevance judgments. It is another thing to work, as this study attempts to do, from a theoretical claim pertaining to the nature of law, critically analyzing the functions of relevance. Some modes of argumentation may then appear not to deal with relevance at all, apparent judicial language notwithstanding. On the other hand, devices of manipulating reliance on information may prove to be all about relevance (at least in one of the senses hereby offered), although no corresponding language to that effect is in use. A case in point is the presupposition—critiqued below—that relevance should, by and large, be conceptualized as a *relation* between static, presupposed elements, that it is essentially a criterion of compatibility or *fit*. If the fit thesis is correct, then queries of the type "is information byte I relevant to hypothesis H" logically require that I and H be strictly defined before the question of relevance can be approached. According to the fit notion, we must first know exactly what H is about if we are to determine whether I is in any sense "relevant" to it—if it fits the decision-making process aimed at responding to H. (For example, in order to know whether a certain communicative act should count as a contractual acceptance, we must have presupposed notions of what the

[6]Dworkin (1986) famously distinguishes between a concept and its conceptions, or what the concept actually requires. It is a useful distinction, I think, although I disagree that it rests primarily on a matter of abstraction. A concept may accommodate separate, at times negating, conceptions, each claiming to capture its true meaning in given contexts.

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requirements of contractual acceptance are.) The "substantive" legal question is strictly independent of the conditions of knowledge, hence from any notion of evidence. However, as this study attempts to show, relevance doesn't work exclusively this way: in trying to construct "contractual acceptance" relevance functions in a richer way (denoted here as "metapragmatic"), insisting that both epistemological and normative concerns shape the substantive framework. In constructing acceptance, is the question of verifiable communication relevant? Should it be? The latter is the preferable way of going about the inquiry, as relevance is—or at least so this study claims—a predominantly *normative* concept, in ways that preempt its epistemological functions.

METARELEVANCE: THE DISUSES OF INFORMATION

The insight that certain kinds of information are of no use to a specific decision-making project, and that indeed information may be of no use to it at all, is far from radical and actually quite well established both in traditional and in modern jurisprudence. Information is of no use when it does not make a difference—due to reasons either normative or "causal," of irrelevance (the distinction is elaborated below). Such a paradigmatic theme is Aquinas' analysis of the necessity of arbitrariness in certain formative decision-making processes. To recall, the argument goes forth: human law is generally inferred from natural law. There are, however, certain aspects of human activity that require coordination or determination in ways that natural law cannot dictate, because it is indifferent to the choice of specifications: it is morally necessary that driving be coordinated (to protect from harm and death); however, there is no content or information about the world factual or normative—which in classical natural law are one and the same—that can determine, e.g., the standard driving side of the road. Another example: one may justify a litigant's right to appeal on moral grounds, and likewise a litigant's right to enforce a ruling; yet one will be hard pressed to infer from natural law the specific determination of appeal periods. A distinction must be kept in mind: while boundaries of the continuum of legitimate alternatives are indeed derived from natural law (this is sometimes known as "reasonableness"), the final determination is not. Because the content of the determination carries no moral value (but the performance of *a* determination does), information cannot be relevant for tilting the process of determination this way or another. That—from the point of view

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of the concept of relevance—is the definition of arbitrariness, of meta-irrelevance: the scope of decision-making processes (or fragments thereof) where information is not relied upon.

Raz's theory of authority, while tacitly building on the Thomist distinction, works from a different approach (Raz 1986). Raz discusses two types of situations where recourse to authority rationally preempts otherwise relevant reasons for action. One is when the authoritative agent is presumed to be better equipped than the original decision-making "principal" to identify the correct reasons that apply in the given practical context. (Raz later referred to this as "expertise": It would be rational to heed my plumber's advice on the matter of a leaking faucet.) The other is the authority's position in respect to coordination, where the authoritative agent, although possessing no particular expertise, is better situated to arrange for coordination and determination. According to the first model the authoritative agent acts as a mediator between the decision-maker "principal" and the reasons to be considered. According to the second the actual abidance justifies recourse to authority. Both models entail that some information, at least, becomes irrelevant for the decision maker (i.e., she is exempt from considering it) although it is relevant for the mediating agent; indeed, the assumption that the mediating agent will perform correct relevance judgments justifies the authoritative relationship (at least according to the expertise thesis). The principal decision maker needs not consider what has already been mediated (except for review purposes). In accordance with Sperber & Wilson (1986) we may conclude that metarelevance is significant because decision-making processors require information only when they do something with it. "Metarelevance" here is not identical with the term as employed by Crump (1997) or Friedman (1997), nor with "meta-evidence" (Mueller 1992). Here, metarelevance deals with the general question of reliance on information for decision making. The question it asks is: "When is reliance on information/further information called for at all?", as distinct from the question of relevance, "what information is called for?" The authors indicated here refer to information that, although of "insubstantial probative value with respect to the material proposition. . . bears closely on another proposition that is not a proper subject of proof and that raises a significant danger of prejudice" (Crump 1997, p. 67). According to the conception of causal relevance offered here, however, such information is strictly relevant. It possesses the force to influence the decision-making process according to

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our understanding of what factors cognitively possess such force (including prejudice). It is the fact that such information is normatively irrelevant that may sanction inadmissibility, but otherwise there is no "meta" level involved here.

We now turn to a more detailed analysis of "causal" (epistemic or "logical") and "normative" conceptions of relevance, and will later return to an examination of exclusionary devices based on the interplay of these conceptions.

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LOCATING PRACTICAL RELEVANCE

Thinking of relevance as a reasons-based and theory-dependent device of practical reasoning may seem putting things on their head. First, relevance is commonly treated as a criterion for invoking other practical devices. Second, it is considered a measure for the attractiveness of theory. In what sense then can relevance itself be in need of justification?

Two initial distinctions may help clarify the point (they are applied and critiqued later.) The first is a matter of demarcation: this paper deals in what it terms "practical relevance" as opposed to what, following the philosopher H. Paul Grice, has come to be known as "conversational relevance" (Grice 1975). Broadly speaking, the former responds to concerns of decision-making theory, the latter to those of communication intersubjective linguistic interaction. Grice's goal was to articulate, through a universal "ethnography" of conversational dynamics, a set of "supermaxims of conversation" that obey a standard "logic of conversation." One of those is the somewhat blunt "supermaxim of relation": "be relevant"; additional maxims are effectively governed by notions of relevance, such as the "supermaxim of quantity": "make your contribution as informative as is required (for the current purpose of the exchange)." However, although "questions [arise] about what different kinds and foci of relevance there may be" (Grice 1975, pp. 45–46), the concept of relevance is treated by Grice, overall, as an inherently vague logical primitive (Dascal 1979).

Unlike conversational relevance, *practical* relevance focuses on decision-making processes and systems. That is a very wide scope: in an important sense, conversational relevance is a subset of practical relevance because "what to say?" is a query typically resolved in a decision-making context. Likewise the queries "what to know? What to bring into account?" are approached in decision-making contexts. In the

trial context, relevance is first and foremost about what counts—what is allowed to count—as knowledge.

Recourse to information bytes as the postulated units that relevance applies to is an implied invocation of Sperber and Wilson's influential work (1986). That work, however, is of limited application in the current study. The main reason is that even more than Grice, Sperber and Wilson spell out and rely on a default normative assumption—economic, even "evolutionary-biological" in nature—namely, that relevance is necessary because

> Human cognitive processes . . . are geared to achieving the greatest possible cognitive effect for the smallest possible processing effort . . . to communicate is to imply that the information communicated is relevant (Sperber and Wilson 1986, p. vii).

It will perhaps be more correct to regard communication as involving *claims* of relevance, rather than implications.[7] Validity claims as to what constitutes a relevant contribution and what doesn't is a matter for debate; barring some minimum requirements, there need not be a consensus or a presupposed communicative layer in this respect (Yovel 2003; Conley and O'Barr 1990). Courtroom dynamics feature, inter alia, a struggle over relevance claims. Conditions of relevance are as much products of linguistic interaction and other practices as they are agents that help shape them. One can certainly come up with interests that do not yield to economicity, nor do they depend on it to count as successful, and certainly not, in J.L. Austin's terms, performatively felicitous (Austin 1962).

It is a fact of logical discourse that relevance has not—perhaps not yet—found a canonical position in its seemingly natural habitat, modal logic. (Indeed relevance assisted in alienating another "logical" concept, entailment, from the calculus of possibility/impossibility.) Recent studies

[7]Relevance claims, in turn, are necessarily implied through communication. The making of a conversational contribution is (metapragmatically) performative in claiming its own reference. Given a Silversteinian turn, Dascal (1979) comes in handy here, because pragmatic relevance claims are independent from whether a claim for semantic relevance may be implied or not. The style known as nonsense thrives on dynamics of irrelevant contributions (semantically) that may pose relevance claims (pragmatically); the latter cannot help being metapragmatically relevant in that they frame and construct pragmatic relevance.

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suggest a reason for that. As Diaz (1981) convincingly presents it, relevance thrives on the inability of standard modal conditionals to supply a satisfactory definition of "entailment."[8] This is not the place to elaborate on Lewis' (1973) modal treatment of entailment (under which impossible propositions "entail"—that is, are semantically compatible—with anything, and necessary propositions are "entailed" by anything)[9] except to express, as critiques do, the need for an additional requirement for "entailment": that a condition of valid entailment be a "meaning connection" between antecedent and consequent. In other words, the additional "relevance requirement" is that for A to entail B the former must be "relevant" in respect to the latter. One way of looking at relevance, therefore, is as an (or perhaps *the*) intersection between modality and meaning. Meaning is cultural and logically contingent, which at least partially explains logic's traditional difficulty in dealing with relevance; but the *requirement* of a "meaning connection," whatever theory of meaning is subsequently employed, should not present such a grave problem, as the following discussion attempts to explore.

PRACTICAL "CAUSATION": BETWEEN ENTAILMENT AND MEANING

Two problems of locating and defining relevance emerge from a reading of David Crump's succinct formula:

[8]That is, of our cultural expectations of what the form of entailment must provide. "Entailment" itself may be seen as well-defined in analytic terms, e.g., by the semantics of material implication. According to that approach, $\rightarrow$ is a representation of, and only of, the truth table TFTT. It is only when we think of it as representing something other than semantic compatibility that we resent the fact that "a false proposition entails anything." See Diaz (1981).

[9]For Lewis, "p entails q" is true iff it is impossible for p to be true and q false:

$$(p \Rightarrow q) \equiv \sim P(p \cdot \sim q)$$

where $\Rightarrow$ stands for "strict implication"—another misnomer—and P for the primitive modal predicate, "possible." This formulation avoids the mislabeled "paradox of implication," where "a false proposition implies anything" (third and fourth lines in the standard truth table TFTT represented by $p \rightarrow q$) and "a true proposition is implied by anything" (first and third line). As $\rightarrow$ is, semantically, about compatibility of combinations (e.g., the compatibility of a false antecedent and true consequent), there is not a paradox at all, but a *pragmatic* difficulty indeed. (For a brief discussion and taxonomy of paradoxes see Mendelsson [1987].)

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> Evidence is relevant, under the modern definition exemplified by Federal Rule of Evidence 401, if it has "any tendency" to increase or decrease the probability of a proposition of consequence to the action (Crump 1997, p. 2; Friedman 1997, p. 56).[10]

The first problem is, what does "tendency" to effect probability mean? Isn't probability itself a quantitative "tendency" of the actuality of an occurrence—or a tendency of a narrative to be factually true?[11] The second is, doesn't the relation "of consequence" effectively presuppose relevance? How can A be judged to be "of consequence" in relation to B if not, as a matter of a necessary condition, by virtue of being relevant, of entailing by virtue of a "meaning connection"?

Modern logical approaches to relevance are typically propelled by such concerns. Since the 1960s these have emerged from various directions, mostly along two lines: modal inquiries and what came to be loosely termed "relevant logic" (RL) since a symposium bearing that designation took place in 1974 (Norman & Sylvan 1989). The latter project relies mainly on work by Anderson and Belnap (Anderson 1960; Anderson & Belnap 1975), who work to identify challenges, dilemmas, and modes of approaching relevance. Interestingly, Both Lewis' work in modal logic and Anderson & Belnap's in RL stem at least partially from uneasiness with classical logic's handling of implication relations. In a nutshell, two such problems were identified: one (the semantic inade-

[10]The legal-realist suspicion of analytic reasoning and readiness to ground relevance judgments in experience and in "background knowledge" undermines Lord Simon's reliance on "logic": "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof," *DDP v. Kilbourne* [1973] AC 729, 756.

[11]Or untrue: the standard probabilistic approach is concisely summarized by Professor Friedman in his treatment of Fed. R. Evid. 401 (slightly rephrased here). Let E stand for an information byte, H for a narrative hypothesis, and O for all other information bytes (Friedman adds "which the factfinder may validly consider with respect to H" clearly presupposing relevance). E is "minimally relevant" to H iff the probability of H, given E and O, is different from the probability of H, given O alone (as well as different from $P(H<abvall> \sim E,O)$, in the same direction). For instance: the fact that a defendant can drive is (minimally) relevant to the hypothesis that he ran the victim over intentionally, because according to notions of human behavior held by the factfinder (be those theoretical or not), it augments the probability of the hypothesis' veracity (in terms of truth by correspondence).

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quacy) finds fault with the question of the validity of material implication as divorced from any requirement that consequent B considered in any sense as *dependent* on its antecedent A. In other words, the problem is that relevance is not essential to logically valid argumentation. Although the term "implication fallacy" is sometimes invoked in this context it better be avoided; Anderson & Belnap's critique is about the desirability and fruitfulness of classical implication in explaining and regulating both discourse and decision-making procedures, not about its internal coherence or completeness. The problem they identify is the lack, in deductive systems, of a serious requirement that a conclusion depend on its assumptions, that a proof be *from* a hypothesis as opposed to being *allowed* by it. For instance, in classical logic the following is an obviously valid argument form: (1) if A, then if B, then A (or $A \rightarrow (B \rightarrow A)$).[12] The relevance problem here is that the consequent/conclusion is not dependent, is not derived *from* the antecedents/assumptions A and B, respectively; there is no use for hypothesis B. Another example is that of validity on the force of contradiction, (2) if A, then if $\sim A$, then B (or $A \rightarrow (\sim A \rightarrow B)$). In (2) the conclusion B is not derived *from* its assumptions; the formula is valid on what are basically semantic considerations.[13] Moreover, it is the very *hyp* procedure of natural deduction that is at fault here: if hypotheses can be added at will, in what sense is the conclusion entailed by them? Likewise, consider Genzen's rule of introduction of the implication connective in "natural" deduction I→, which allows introduction of the material implication connective between elements that just happen to occur in a hypothetical sequence. B's irrelevance is thus demonstrated in line $j + k + 1$:

(1)			(1.1)	
i.	A			i. A
j.	|B	hyp		j. A reit i
$j + k$.	|A	reit i		
$j + k + 1$.	$B \rightarrow A$	$I \rightarrow j,\ j + k$		
l.	A	reit i		

[12]Likewise, consider $A \rightarrow (B \rightarrow B)$.

[13]Semantically, a material implication whose antecedent is a contradiction is a tautology, because the second line of its standard truth table TFTT, i.e., the only possibility for an implication sentence to be false, can never occur.

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It was on the concept of *use* that Anderson's initial attempt to form a relevance requirement for deductibility rested. In simplified form, it allowed that B be relevantly deducible from a set of statements $\{A_1, \ldots, A_n\}$ if and only if there is a deduction from $\{A_1, \ldots, A_n\}$ in which each of the A_i are actually *used* (Anderson 1960). However, at least on the surface that criterion doesn't seem to work: the $A_i = B$ in (1) is, after a fashion, used—and its introduction definitely incurs a cost.[14] What Anderson seems to suggest is a sine qua non condition: that in order to be relevant in P, each A_i must have actual significance in respect to P's outcome. This criterion means something quite different from actual use: it must mean something akin to *force*, the quality of potentially carrying an influence.[15] Note that B *has* an influence on (1): its introduction influences the number of stages and strategy of proving in (1). Perhaps then B is relevant in (1) if and only if it actually influences its conclusion. Can that be the meaning of a conclusion being derived *from* an assumption, of an assumption *entailing* a conclusion?[16] Indeed as (1.1) shows, B has no such significance in (1) because $A \rightarrow A$ whether B or $\sim B$; $(B \vee \sim B) \rightarrow A$ is a tautology.[17] The sine qua non interpretation of relevance is, however, too strong a requirement. It mixes relevance with

[14]This approach differs from Anderson and Belnap's modification of the deductibility theorem, which distinguishes (1) $A_1A_2..A_n \rightarrow B$ from (2) $A_1 \rightarrow A_2 \rightarrow \cdots A_n \rightarrow B$ on the basis of the requirement that in (2) each A_i be relevant to B, but not in (1) (Anderson & Belnap 1975, p. 21). Diaz (1981) convincingly criticizes the distinction that is consequently not followed here. This way or another, "used in" seems ambiguous enough to allow for the interpretation offered here, leading to the concept of causal relevance.

[15]I use "force" here mainly in deference to J. L. Austin's terminology in discussion of illocutionary, locutionary, and perlocutionary forces (Austin 1962). Legal authors may be more comfortable with the terminology of "power," the capacity to change normative arrays (both dynamic and static). See Radin (1938); Hohfeld (1964 [1919]).

[16]K. F. Hauber offered to define a "closed system" as any *n* statements of the form $p \rightarrow q$ that satisfied the requirement that the antecedents exhaust all possible cases and the consequents exclude each other. The advantages of such a system for decision making are clear: for every true assertion $p \rightarrow q$ it is also true that $\sim p \rightarrow \sim q$. All necessary conditions are also sufficient ones and vice-versa. Hauber's system marginalizes "implication paradoxes" but is not conducive toward forming a relevance requirement for entailment, as Anderson and Belnap sought.

[17]Note that in this and other parts this study neglects to examine intuitionistic treatments of relevance.

eventual weight, indeed defines relevance in terms of weight; it does not allow for overruling or outweighing a relevant factor. The solution must be dynamic rather than static: in order to be considered relevant, B must be held to have a particular force in respect to (1), which is the ability (but not the necessity) to make a difference in it in terms of outcome rather than process alone.

This then is what I offer to term "causal relevance." Establishing it does not require that the information in question actually tilt some metaphorical scales of decision making, only that it be identified by a theory of what is capable of influencing that particular process. That is why relevance is theory-dependent, and cannot be seen as a neutral, formal criterion for the attractiveness of theory. Why relevance can and must be conceptualized normatively also becomes apparent when we think of such cases as *Hui Chi-Ming* and *Hollingham v. Head*: if a decision-making process is subject to a practical goal, relevance functions as a device for introducing and barring information that frustrate that goal, not because they cannot influence P's outcome (as B in (1)), but because they can—and shouldn't.

The requirement of force substitutes for a requirement in terms of sufficient and necessary conditions. It would not do to determine relevance in terms of actual influence on a procedure P's outcome because, although it may be that element B possesses causal force in relation to P, other considerations may negate or neutralize that force. It may be that information be considered relevant (in the causal sense) in relation to P, yet eventually not allowed to influence its outcome on grounds (or *reasons*) that are external to the relation between B's causal force and P. A paradigmatic case, typical to the law of evidence, is when B, although maintaining causal relevance in relation to P, lacks *normative* relevance. However, before looking into normative relevance, and having characterized causal relevance in terms of force begs some discussion of the quantitative notion of "minimal relevances." "Minimal relevance" troubles Crump (1997) in its introduction of a quantitative aspect of relevance. His notion is that almost any proposition may prove "minimally relevant" to any other, if some mediating generalization is involved: it may "tend" to prove it very slightly, but be relevant nonetheless. In essence, Crump echoes Hempel's (1965) paradox of the ravens: a generalization such as "all ravens are black" is strengthened from an observation of white doves, because the proposition "all ravens are black" is logically equivalent to

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"anything that isn't black isn't a raven," which that observation strengthens. For a quantitative approach applicable to problems such as "minimal relevance" as a quantum of "tendency" to confirm a hypothesis see Yovel (1998, 2000a). Allen (1994, n72) argues that lawyers effectively internalize relevance criteria through a demand of effectiveness anyway, thus undermining "minimal relevance" concerns. The distinction between causal and normative relevance must now be further explored.

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EXCLUSIONARY REASONS AND NORMATIVE RELEVANCE

Why conceptualize causal relevance in terms of force and not in more established logical terms? One can offer a hypothetical requirement or a "relevance condition" according to which an element A_i is relevant in relation to a procedure P if and only if its absence would entail a different outcome. (In other words, if the sole difference between P and P′ is that $A_i \in P$ while $A_i \notin P'$ then A_i is relevant in relation to P only if $P \rightarrow B$ then $P' \rightarrow B'$ and $B \neq B'$.) However, any student halfway through an evidence class will identify the basic fallacy embedded in this definition: it confuses relevance with effect, or eventual *weight*. This claim means that whether any specific information is considered a part of discourse is a different matter than its proper function within the discourse. A witness' testimony may be treated as relevant (and admissible) but eventually carry no effect and no weight because of numerous possible reasons. Counterevidence may nullify its otherwise prospective influence, the decision maker (judge or jury in this case) may be impressed adversely as to the witness' reliability, etc. In accordance with Anderson's *use* requirement, the significant thing is to acknowledge B's causal force in terms of actual use, not eventual outcome. According to standard evidence doctrine not only is relevance strictly different from weight but the *reasons* that eventually determine A_i's weight in P are different in kind from those that determine its relevance. A decision-making framework (such as a law of evidence) is defined, inter alia, by the reasons that govern its relevance and metarelevance parameters. A law of evidence is primarily about such questions as "what is knowledge, for the trial's purposes?"—i.e., it is guided by goal-oriented (practical) reasons.

Some significant reasons, according to Raz, are second-order reasons, of which prescriptive rules are a subspecies (Raz 1975a, 1975b, 1979). An exclusionary reason excludes other reasons from the decision-

making process P. In the context of relevance it identifies reasons that cannot determine whether P's outcome be B or B′, not because they may eventually lose out to other reasons on grounds of relative weight but because of an effective second-order reason not to weigh those reasons at all.[18] According to Raz, rules typically function this way because the recognition of an applicable rule generally excludes considering the pros and cons involving the justifications that generated it (Schauer 1991; Yovel 1996). Hence rules, too, are mediators between a decision maker and reasons. Let us then review the structure: exclusionary reasons sort out reasons that cannot, in principle, influence P. These reasons have, in the terms defined above, no causal force in P. However, the array of reasons that the exclusionary device must examine is that of relevant reasons that potentially may influence P—i.e., those reasons that possess causal force in relation to it. (Strictly speaking, information that in principle cannot influence the outcome of a given decision-making process at all is not a reason for action to begin with.) Excluded reasons must be relevant in order to be excluded, yet by being excluded they appear to become not merely *overruled* but *irrelevant*.[19]

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[18]Thus a "local a-priority zone" must be identifiable by any exclusionary reason in relation to P; any reason that cannot identify such a zone is a first-order one (see Yovel 1996, 2000a).

[19]Irrelevant information (in the causal sense) is undesirable economically because it produces unhelpful tautologies. Let p and q stand for the mutually exclusive, possible outcomes of D—a "closed system" (i.e., in which the antecedents exhaust all possible cases and the consequents exclude each other. In such a system all necessary conditions are also sufficient ones and vice-versa). r stands for a proposition that represents an irrelevant reason relative to D. Whether r is true or false (reasons are facts and hence predicative propositions that represent them are either true or false) it can have no influence on D's outcome, hence $r \rightarrow (pvq)$. As $q \equiv \sim p$, pvq is semantically a tautology and so is $r \rightarrow (pvq)$.

Relevant contingent reasons cannot stand for r in this formula because their relevance is not indicative of their relative weight. The latter can be considered only in relation to other reasons. A relevant reason is one that, solitary, would bring about a certain decision (e.g., $r \rightarrow p$). This is easier to maintain in Hauber's closed systems, yet holds for relatively open systems as well. Let us define the relation Pxy as "x promotes outcome y" and Wxy as "x weighs more than y." Let A and B stand for the possible outcomes of the closed system D. The contingency of r's final influence in D is semantically represented by $A \equiv (\exists r)((PrA \bullet \sim (\exists q)(PqB \bullet Wqr))$. Outcome A will prevail by r if and only if there is no other reason q that promotes outcome B and that is weightier than r.

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The way to work this out is again by distinguishing the two conceptions of relevance, this time according to their respective positions concerning the function of relevance. Irrelevance and exclusion seem to function in similar manners, although perhaps applied in different stages of decision-making processes. The operation performed by exclusionary devices is to signal out reasons that have no practical causation in a given decision making procedure. At a preliminary stage reasons are admitted that possess practical force, i.e., information bytes that are reasons for action properly understood. These relevant reasons are then subject to normatively-based criteria of exclusion. For instance, consider the following information bytes in the context of a criminal trial:

1. The courtroom is rectangular.
2. The defendant promised the jury money in return for a favorable verdict.
3. The defendant admitted to the alleged crime.

3.1. The admission was obtained under torture.

Information item 1 is an irrelevant fact because according to any social-constructionist theory of rationality there is (presumably) no conceivable way it can affect the jury's decision—it possesses no practical force according to our understanding of what kinds of facts may influence a jury's verdict: in topical terms, there is no "meaning connection" between the proposition "the courtroom is rectangular" and anything equivalent to "the defendant is guilty/not guilty."[20] Whether these building-block speech units share a "meaning connection" cannot be inferred from the proposition alone, because it presupposes a distinct context of utterance on which we count to do much of the work of delineating causal relevance. "Meaning connection" is thus necessarily a pragmatic concept,

[20]Determining lack of meaning connections, however, must be carefully made. For van Dijk the proposition "Because Suzy was ill, the Russians did not land on the moon" (van Dijk 1989, p. 27) seems obviously guilty of irrelevance, yet this judgment is highly dependent on a presupposition, namely, the kinds of facts that we think may influence the Russians' landing on the moon. The relevance judgment here presupposes a contextual scenario according to which relating Suzy's illness to the Russian moon landing is not merely wrong but verges on the nonsensical, yet this is hardly necessarily the case. We do not know who Suzy is and can easily come up with a context rationalizing the "meaning connection" so that the proposition's antecedent will appear highly relevant to its consequent (causally speaking), e.g., if Suzy were a cosmonaut, etc.

and relevance judgments of this kind cannot be made on the basis of a semantic understanding of an utterance alone.

There is of course a normative dimension to this. We think that jurors should not consider information bytes such as 1 because that would be a violation of a specific institutional rationality, namely, that of due process. Knowledge per se is not the court's exclusive or even main interest: that is justice, and the court conceives of knowledge as subordinate to and conditional in relation to that primary interest. Justice—in relation to information and knowledge—is a *practical narrative reconstruction*, a narrative in the service of a practical interest. Causal relevance is found out to be theory-dependent (it depends on our theory of knowledge) and normative, because practical reasons are those that both call for knowledge (or information) in the first place and classify and shape it subsequently: "theory of Knowledge" is thus a practical, not purely epistemological framework. This is the essence of the metapragmatic principle of "practical primacy," elaborated below.

Information bytes 2 and 3 apparently possess practical force and are thus causally relevant. If left nonexcluded, 2 may very well prove not only relevant but even weighty. Yet lawyers often speak of reasons such as 2 as "irrelevant"; they also say that 3.1 renders 3 irrelevant. This "irrelevance" cannot be lack of causal force as in the case of 1. Information byte 3—that does possess causal force—is excluded because of 3.1 on grounds that at least partially are not about knowledge. Information 3.1 does not necessarily counter 3's causal relevance, although it does affect it: an admission extracted by torture may be judged unreliable—a matter of weight and not of admissibility, or relevance. Yet, putting aside 3.1's possible implications for 3's reliability, we identify a reason to exclude it from the decision-making process that has nothing to do with knowledge. It has to do with justice—and courtroom knowledge, as expressed in the principle of practical primacy, is subject to justice. Little wonder then, that in law normative considerations restrict knowledge and ways of forming it. Information item 3 becomes not just unreliable or of little weight but irrelevant. Its causal force is neutralized by considerations that are sometimes regarded as "external" because they do not stem from the court's interest in reality reconstruction. That description, however, is misleading: the court is interested in reality reconstruction for practical (= normative) reasons that play on the same level as the normative

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reasons that exclude 3 on the basis of 3.1. Contrary to the initial sharp distinction between causal and normative relevance, anyway one looks at it, relevance is inherently normative.

TWO CONCEPTIONS OF RELEVANCE?

In the courtroom such questions of relevance as "what is knowledge" underlie many apparent concerns. In an important sense relevance may be conceived of either causally or normatively. According to the former, relevance is a criterion of selection of information in respect to a specific practical context (or a specific decision-making process or a procedure, forthwith generally termed "procedure"). Thus causal relevance is about distinguishing between factors, conceived mainly in terms of information, that if introduced can influence a decision-making procedure from those that cannot. Whether some information X can influence the outcome of a decision-making procedure P is its "causal force," or its relevance, narrowly construed. We may thus note "rel X(P)" as signifying that X indeed maintains causal force within P, and contextual requirements may be added. (Whether causal force is a binary property or one that may be conceptualized on a continuum regards the corollary question of "minimal relevance" concerns [Crump 1997]).

Normative relevance, on the other hand, is about the norms that govern influence on practical procedures. It may well seem that normative relevance presupposes practical causation when it selects information on normative grounds. Not less important, however, is normative relevance's function in the critique of causal force. It is more obvious how normative relevance acts within the set R_1 predefined by practical causation: $R_1 = \forall \times (\text{rel} \times (P))$. R_1 then is the set of all things causally relevant to (P). This, however, must not lead to an automatic conclusion that any set R_2—produced by operators defined by normative relevance—is necessarily a subset of R_1. The reason for that, in a nutshell, is that practical causation is itself theory-dependent and that theory plays, in respect to dictating the behavior relevance of functions—a normative role. Normative relevance may be used to alter the theoretical considerations that define practical causation vis-á-vis practical contexts, but that only if it is defined itself independently of causal relevance; in other words, R_2—the set of normatively relevant factors—must not be logically subject to R_1 and it is not the case that *only* when fulfilling R_1 requirements, an information byte becomes a candidate for R_2 membership.

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Both semantic and pragmatic relevance (jointly "topical" relevance) seem to be defining characteristics (or categories) of causal relevance, while metapragmatic relevance is the primary domain of normative relevance; but so (again) is pragmatic relevance, and we begin to see how the distinction between causal relevance and normative relevance begins to break on the metapragmatic level that regulates the pragmatic categories. Causal relevance depends on notions of topical relevance because that is the domain of criteria for what may be considered a reason, i.e., what may influence a decision-making process. These notions, in turn, must be justified in terms of justifying reasons (presumably of a second order): what may count as a reason (in causal terms) according to any given theory of rationality.[21] Theory of rationality is invoked here to present three standard positions on the question of validity of justifying reasons, of which the first two may be very cursorily typified as follows. The internalist position, according to which a decision maker is rational if and only if she can justify a decision-making move on grounds of reasons that she coherently holds, and the externalist position, according to which a decision maker is rational if and only of she can justify a decision-making move on the grounds of reasons that a "universal observer" will consider as valid according to an external conception of rationality to which the decision maker is judged to be committed.[22] It is essential to the externalist position that the decision maker has no role in constituting rationality; she is only subject to it. The third position is—quite expectedly—a social-constructionist (or metapragmatic) one, according to which a decision maker is

[21]The now-obsolete Uniform Rule of Evidence 1(2) speaks of "a tendency in reason" to prove a matter. According to Crump, the omission is welcome due to an "undue emphasis on the logical process at the expense of experience" in the old rule (Crump 1997, p. 7). However, there is a strong sense in which causal relevance is demarcated "in reason." "Reason," like "rationality," need not—of course— be limited to formal logical processes. Reason *is*, inter alia, a product of experience—that is to say, of history and of culture. The law does have an interest in monitoring, and must take into account, the "reason" that directs relevance judgments—hence the current emphasis on the dependency of relevance judgments on a theory of rationality (for a version of what may be called elements of "popular reason" — nontheoretical, everyday causal links between events, see Mueller & Kirkpatrick 1995, pp. 102–103).

[22]The semantics of "decision making" instead of the standard "factfinding" reflects the insight that narrative reconstruction involves choices and decisions, in the course of which "facts" are manipulated in more complex ways than merely being "found."

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rational if and only if she can justify a decision-making move on grounds that she is expected to be committed to it in view of discourse socialization and culture, which are products of practice and not only conditions for it. This position isn't internal in a strong sense because it is not solipsistic and is not satisfied with the requirement that decisions be made on grounds of reasons, only; neither is it strongly external because although it commits decision makers to normative systems it insists that subjects take part, through and by action, in constituting those systems. According to this position, rationality is not a language game in the static sense of action committed to presupposed rules. It invokes a Wittgensteinian-metapragmatic model, in that the moves and actions of the practitioners influence "rules" (either stabilizing existing forms of action or altering them): the practice constitutes itself, rather than abiding by presupposed rules. Rationality has no formative stage of development that is distinct from its "use," because it is use through practice which forms.

Causal relevance, then, is itself subject to norms. Lord Simon's dictum in *DDP v. Kilbourne*, according to which information must be "logically probative or disprobative," must be understood on epistemological, rather than formal grounds. Information is causally relevant because a justifying reason can be identified according to which it will matter to the decision-making process and will not be sorted out by general irrelevance operators. (The question of what counts as a justifying reason, however, is answered normatively by metapragmatic considerations, discussed below.) Figure 1 tentatively summarizes the discussion so far.

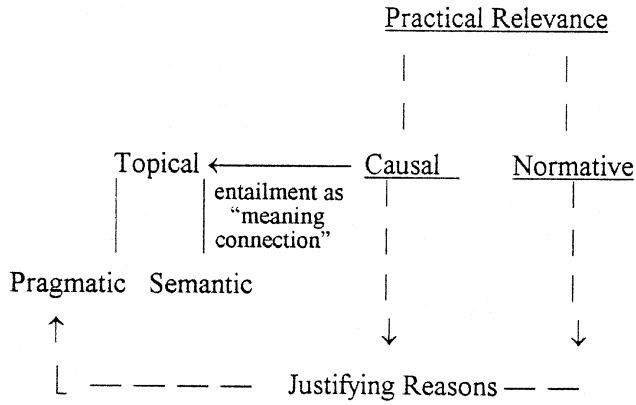

Figure 1.

NORMATIVE RELEVANCE AS THE CONSEQUENCE OF THE PRINCIPLE OF PRACTICAL PRIMACY

Law uses highly structured modes of introduction to govern and monitor the kinds of relevant information that enter the courts' discursive universe through the construction of various narrative forms. The introduction of both factual claims and normative ones[23] is regulated by narrative conventions (e.g., those that govern the styles of such genres as primary and cross-examination, opening and closing arguments, etc.), by rules of evidence, procedure and professional ethics, as well as by various generic and stylistic conventions, all of which use at some point or another the language of relevance. The rich relations between the constructed narratives and other modes of factual narration is an important issue that cannot be dealt with here in full; the structure presented here as a fundamental principle of legal discourse is *practical priority*. According to this, truth by correspondence—the semantic relation between legally constructed narratives and nonlegal narratives (historical, journalistic, folk, and other "reality capturing" reconstructive narrative modes)—is subject to, filtered by, and molded by practical (=normative) considerations. The legal system dictates how narratives can be constructed in the courtroom based on its particular functions and objectives. "Truth" may be one of them, but not by default, because the justice system is about truth only when this is mandated by the cause of justice. This can be shown from different angles. The obvious one is the law of evidence that effectively calls for the construction of counterfactual narratives in the name of interests other than truth, such as the rule of law, the suppression of police brutality, family cohesion, etc. Rules of evidence famously serve two kinds of interest: (1) cognitive reliability of information ("a tortured person's statement is dubious"), and (2) normative desirability of

[23]Normative claims are considered factual ones in interestingly different ways by different people, depending on one's jurisprudence. They are factual social conventions (of different statuses) in all "easy cases" according to legal positivism, and they are factual but nonconventional according to natural law. In a sense, Dworkin's allegedly nonpositivist approach reconciles between the schools in this respect: adjudication is normative in being interpretative, yet the norms it is guided by are the actual political values of a community. Yet how does one find out about these values?—it seems by way of interpretation of institutional history, societal tradition, and practice. Interestingly, the introduction of foreign law as evidence is standardly considered in courts as a matter of fact (as opposed to a matter "of law").

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information, in view of rules that privilege social institutions such as medical privacy or family cohesion (e.g., not allowing for coercion of a spouse's testimony against her/his spouse in a criminal case that does not involve domestic violence or abuse).[24] The fact that in the law of evidence admissibility is not just about the reliability of some evidence, but about barring some kinds of evidence although and exactly because they may be found reliable, is an admittance of the primacy of practical considerations—again, in the broad Aristotelian sense that includes "ethical"—over truth, at least in these cases.[25] In civil trials courts are liable to accept counterfactual stipulation as well as normative ones, e.g., concerning statutory interpretation. (This is not the case in criminal trials where the court has an independent duty to protect the defendant's rights and should not be the case where third parties are involved, such as in antitrust cases.) Another perspective, surely to be approached with care, is a semiotic one. Interestingly, the duties of judges and officers of the court are standardly invoked in terms of justice, while those of witnesses—outsiders who are not expected to internalize nor master practical primacy—are in terms of truth-telling.

In a hermeneutical manner we must constantly ask "why are we reconstructing reality in the courtroom? What is to be achieved by this?"

[24]For federal privileges see the dynamic introduction mechanism of Fed. Rule Evid. 501, according to which testimonial privileges shall be "grounded by the principles of the common law as that may be interpreted. . . in the light of reason and experience." For spousal privileges see *Hawkins v. US*, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958); *Trammel v. U.S.*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980); (also Uniform Rule of Evidence 504). For physician–patient privileges see *US ex rel. Edney v. Smith*, 425 F.Supp. 1038 (E.D.N.Y. 1976).

[25]In *Wong Kam-Ming v. The Queen* [1980] AC 247 the court emphatically argues that "Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or statements obtained by improper methods. This is not because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody . . . should not be subjected to ill treatment or improper pressure" (p. 261; see also *R v. Sang* [1980] AC 402, 436, 454). Lord Salmond works through the concept of procedural rights when he argues that "a confession by an accused that has been obtained by threats or promises is inadmissible as evidence against him, because to admit it would be unfair" (at 445; it is not wholly clear whether the unfairness relates to prejudicing a party's position in relation to the trial's outcome or to an independent, noninstrumental procedural right). Courts in Queensland and Scotland have spelled this out earlier, *R v. Beere* [1965] Qd R 370; *Chalmers v. HM Advocate*, 1954 JC 66.

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Although some folk views—that indeed present a powerful paradigm—regard the trial process as an opportunity "to find out what really happened," that is not the internal view of the law or its practitioners. The legal system does not regard itself as a substitute for other narrative institutions and forms—journalism, narrative history, literature, etc. It employs factual reconstruction to the extent that this is required by its main function as a practical framework for decision making. Of course, this "internalist" ideology is not the exclusive or otherwise salient one. Courts fulfill much richer functions in modern societies than just dealing with disputes, and sometimes factual reconstruction is the main focus of public interest.

THE FIT THESIS

The fit thesis builds on the insight that relevance is a "meaning connection" between either practical elements (in practical relevance) or speech acts (in conversational relevance). "Fit" here means compatibility of information with a given practical context or, in more restricted terms, with a decision-making process.[26] But what is, properly speaking, compatibility? On an introductory level it is fairly standard, I think, to speak of compatibility in semantic and in pragmatic terms (grouped as "topical relevance"). Accordingly, some authors (Dascal 1979) offer, in the context of conversational relevance, to differentiate semantic relations among logical, linguistic, or cognitive entities (concerning reference, "aboutness," entailment, and "meaning relations"), from pragmatic relations in terms of the suitability of speech acts to perform certain functions.[27] How does this reflect on the kind of compatibility required here? As ours is an examination of practical relevance, it must be practical compatibility between information and practical function. The qualifier "practical" is the focus here. It means that the compatibility in question is not, for instance, a truth function—indeed can doubtfully be semantically constrained at all. Short of spelling out a fit principle, van Dijk nevertheless acknowledges that

[26]As an aside, it seems that the fit thesis is thus suitable for understanding only the realm of relevance properly termed—pragmatic relevance—the assumption being that reliance on information is metarelevantly given.

[27]Better conceived, I think, in metapragmatic terms. The current study works further from Dascal's distinctions to discuss the governance of pragmatic relations by language's metapragmatic structure and functions, according to Silverstein (1993).

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> ...both syntactic and semantic structures of sentences should be characterized relative to the structure of other sentences of discourse on the one hand, and relative to the structure of the speech context, on the other (van Dijk 1989).

The problem with this approach is that it deals with structure alone; in this sense it is not an advancement over Grice. As a criterion, fit must be pragmatic in the following sense. Information "fits" if and only if it has practical significance in relation to the decision-making process, conceived in the quasi-causal terms of *entailment*. As noted above, this does not require that in retrospect the information in question will have had identifiable influence in terms of outcome, because overruling or overweighing reasons may outweigh it in course of the decision-making process. It does mean, however, that the information carried practical force, i.e., a potential of being effective.

The fit thesis answers for one function of relevance, and therefore corresponds to one of its conceptions, namely to "causal" relevance. It does not, however, respond to the second interest that relevance serves—normative relevance—which, according to the metapragmatic approach advanced here, is ultimately the more significant conception. The reason for this seems quite obvious: "fit" is not a constitutive relation. It identifies and pronounces compatibility between presupposed elements. It is exactly the metapragmatic function of shaping practical causation through epistemic and normative goals that the fit thesis cannot, by itself alone, accommodate. Showing this requires a further explanation of the metapragmatic notion of relevance, as follows the more detailed study to the "two conceptions" of relevance in the next section.

METAPRAGMATIC RELEVANCE AND THE CASE OF SPEECH ACT THEORY

How does relevance function in relation to speech acts? Presumably, in J. L. Austin's terms, relevance is a "felicity condition": a presupposed condition for successful linguistic performance (e.g., promising).[28]

[28]To recall, satisfying a set of "felicity conditions" is for Austin a requirement for a successful speech act. In the case of assertions, truth functions serve as felicity conditions, which prompted the school of "indirect speech act" theory to base all linguistic performance on assertions (see Yovel 1997).

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The main point emphasized here—that Grice's maxim of relevance seems to share—is that relevance antecedes speech, that for performative speech to be carried out it must abide by a preconceived criterion of relevance. Austin's approach is therefore pragmatic but nonmetapragmatic. In Austin's world the question of how, if at all, language creates "procedures" for action—as opposed to acting within "procedural" conventions—is not approached. The metapragmatic approach would be to deny the presupposed status of felicity conditions, thus undermining the concept as a whole. Instead, venues for action are conceived in perpetual interaction with action itself. That is what, in this context, "practice" means and why it serves better than "discourse." What may count as "promising"? What may count as contractual offering? The history of the common law manifests a metapragmatic structure: the answer to the latter question is constantly reshaped through interaction with shifting, actual practices of contract formation, as well as their recognition and entrenchment in institutional settings.[29]

How then to conceive of relevance in this respect? The causal/normative distinction serves here as well, because the pragmatic position to which most standard discussions are committed is better suited to the

[29]This approach is likewise critical of Searle's theory of institutions, where institutions are conceived of as systems of constitutive rules (Searle 1969, p. 51). This particular critique follows Raz's argument contra to the regulative-constitutive distinction, being, in a nutshell, that all rules have a constitutive aspect in as much as any rule creates the possibility of a new form of practice, namely, action by adhering, breaching, or merely referring to it *qua* rule. Regarding the rule as a reason for action, even if the behavior it mandates exists antecedently, is possible only once there is a rule, whether constitutive or regulative (Raz 1975a, p. 108–113.) This point is somewhat akin to H. L. A. Hart's "internal aspect of rules," relating to rules as normative standards and reasons for action, as opposed to behavior in accordance with them (and thus an "external" aspect). I see fault with Hart's distinction on a few levels, one of which is that the "external" aspect seems wholly descriptive, thus rather an empirical fact concerning behavior and not an aspect of the rule. [Hart 1961, pp. 55–56]. Searle, by the way, acknowledges the Razian point but plays it down as trivial. As for constitutive rules, Frederick Schauer (following Raz) makes the point that although sets of constitutive rules establish institutions, they are regulative within those institutions (Schauer 1991). The rules defining the situation of a checkmate are constitutive in that they define a new kind of activity, yet once this has been done they regulate what is now an antecedently existing action. The distinction itself is still useful, even if not as a demarcation criteria for distinguishing different *kinds* of rules.

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causal conception, rather than to the interaction of the causal with the normative, which is a metapragmatic structure.

The pragmatic argument may run as follows. A pragmatic model suits causal relevance because it seems adequate that we form conditions for knowledge, and conditions for reliance on information, before we manipulate knowledge and information. When determining whether an information byte B is causally relevant in relation to a given decision-making process P we must have some idea of what may have causal significance within P, at least to distinguish B from the class of all possible information bytes. By introducing some bytes and not others we affirm this presupposed commitment. It is not a pragmatically normal course of things when a decision-making process in the course of a trial shapes our epistemology. When Grice demands that a contribution to a conversation be relevant he thinks that a criterion for relevance can and must be formed independently, not interactively in respect to the speech situation. The metapragmatic fact that relevance is a projection of discourse as much as a progenitor certainly requires a metapragmatic reformulation of both Grice's position and Austin's.

How does this argument fare in respect to normative relevance and the principle of practical primacy, that at least locally subjects epistemology to practical goals? Normative relevance is not necessarily in itself a metapragmatic concept. The normative considerations that govern introduction of information into P may well be presupposed with respect to P. However, the actual metapragmatic character of relevance is derived

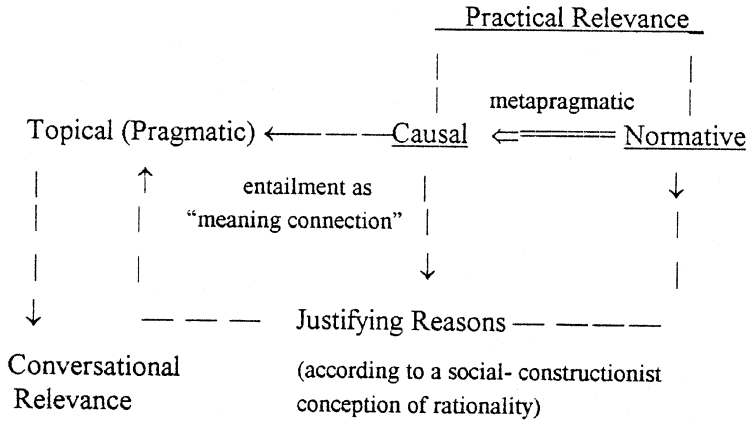

Figure 2.

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from the relation between normative relevance and causal relevance. Considerations that stem from the normative context (e.g., a criminal trial) end up dictating a compound criterion of relevance. Epistemology does end up affected by substantive considerations that do not serve the goals of knowledge, that are rationalized on the ground that knowledge itself serves a practical goal, e.g., justice. Thus, at least in law, relevance is not a logical primitive and is not presupposed by discourse, but lives with it in continuous interaction.[30]

Figure 2 correspondingly enriches the initial structure presented in Figure 1.

IN WHAT SENSE IS RELEVANCE A RELATION? THE CASE OF CONTRACT FORMATION DOCTRINE

Academic treatments of relevance standardly refer to it as a *relation*: A may be said to be relevant only in respect to a given B. According to this account (a ''topical'' approach) legal relevance judgments are always about a relation. For instance, when we launch a decision-making process guided by the query ''what may count as a contractual offer?'' the semantic approach is to deal with the putative question of identifying all meaning factors A_1, A_2, $A_3, \ldots$, A_n that may prove causally relevant in conducting the inquiry. (This approach is seconded by the classic distinction between substantive and procedural law.) However, the topical approach to relevance proves inadequate in explaining any state

[30]This position should not be mistaken for Schauer's ''presumptive positivism,'' even if on certain points they reflect similar claims. Schauer offers to replace the exclusionary interpretation of rules with a presumptive one. The implications are wider than can be dealt with here. For one, admissibility is reduced to reliability and weight. Schauer's aversion to exclusionary reasons is on basis of this device's ''inherent sub-optimality,'' due to the limits of internalizing contexts. In presumptive logic reasons are not divided into orders and thus are never excluded, but rather incur onuses in defeating presumptions; thus the status of such presuppositions as relevance changes, because potentially they are ever in a position to be defeated. One of the problems of a presumptive approach to reasons is the requirement to *actually* consider each reason against given presumptions. However, it is an established function of the law of evidence not to allow introduction nor consideration of certain information bytes on normative grounds. Actual consideration of such information bytes defies this essential function of exclusion and effectively gives up on the conception of normative relevance.

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of affairs that is not static; it cannot account for change. The history of contract law doctrine provides an ample case study. The argument, in a nutshell, is that the distinction between definition (responding to such concerns as "what amounts to a contractual offer?") and conditions and characteristics of knowledge (dealing with such concerns as "how do we know that A?") co-inhabit in the same practical space and influence each other. Practical primacy, again, is at the heart of the matter. Law needs to putatively define such conceptual frameworks as "contractual offer" in the service of protecting and promoting certain interests. It therefore needs to know things—facts about conduct, intentions, etc.—that are "relevant" to these interests.

Classical contract law doctrine strove to protect the autonomy of the self as manifested through the will (or, in intentionalistic terms, "intent"). Information that is helpful in discovering the actual historical intent of a party was therefore relevant in determining contractual relations. Such have proven harder and harder to come by (Atiyah 1978; Gordley 1991; Gilmore 1992). Fictions and the drawing of conclusions about inaccessible cognitive states on the basis of apparent conduct (a party's intent is not readily accessible to a factfinder) were substituted for actual data. Relevance became shaky: what was that B, in relation to which As had to be relevant? Shaky knowledge failed to protect its stipulated interests. Relevant As could not be conveniently identified. Little by little B changed, from an intentionalistic (or "subjective") doctrine of contract formation, to an almost exclusive interest in reliance (the "objective" doctrine) (Atiyah 1978). Doubtlessly this radical shift was due to many reasons. An underlying one may be—and this is on the level of speculation—a "crisis of relevance." Although intentionality was no longer protected by contract law because protecting reliance became acknowledged as more just and protecting expectancy as more efficient, the protection of intentionality additionally involved insoluble problems of knowledge and of relevance. Practical primacy thus needed to reshape the questions asked and the criteria of relevance applied. The divide between definition (def_1 = "a contractual offer is...") and relevance ("what relevant information is accessible to accommodate def_1?") contributed to a change of definition. Relevance is not strictly a relation between possible As and a presupposed B, because the question of what As are accessible in turn shapes B. There is no reason to believe that in contract law doctrine we have seen the last radical turn shaped by what essentially is a metapragmatic principle (Yovel 2000b).

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CONCLUSION

The aim of this article is to set parameters for a richer examination of relevance than usually acknowledged by legal discourse. Relevance is ascribed a "deep grammar" status in relation to a complex system of introduction and manipulation of information and information compatibility, most notably on the metapragmatic level (where it works—on the normative level—to define and shape discourse, as spelled out by the principle of practical primacy). This is sometimes obscured due to the fact that different conceptions of relevance co-inhabit the same practical space. An attempt was made to demarcate, locate, and form hierarchies or mutual dependencies of these conceptions—causal versus normative, topical versus metapragmatic. These relations are yet to be further studied. In this, as in other respects, the current study's main effort is at outlining a research program rather than substantiating definite conclusions.

If practical primacy is indeed law's "supermaxim" then it seems a mistake to allocate to a certain body of doctrine—such as the law of evidence—the exclusive treatment of relevance. Relevance makes no distinction between so-called procedural and substantive law because both appear to presuppose it: substantive law on the level of definition ("what should count as a contractual offer?") and evidence law on the level of a knowledge claim ("according to what can we claim that X, counting as a contractual offer, as defined by substantive law, is the case?"). Law is shaped by practice and by its own history. A true research into the intricacies of relevance must always respond to this realist insight. Relevance is not a static relation between presupposed elements, but a discursive deep grammar that participates in shaping those elements—both epistemologically, as a matter of knowledge, and normatively, as a matter of practical primacy.

One last note: When discussing the concept of relevance, different approaches, serving different intellectual and practical interests, should be distinguished. One such distinction is between the "logical" (or, in this restricted, early Wittgensteinean sense, "philosophical") and the "anthropological" projects; while the latter is concerned with cultural structures of such relations as entailment and relevance, the logical project claims to offer an analysis of these concepts in relatively acontextual terms (Wittgenstein 1922, § 4.112). The answer to any question of the type "is A 'relevant' to (or 'entails') B under circumstances C?" may typically depend on cultural context but, it may be claimed, not so the very concepts

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of "relevance" or "entailment." Our understanding of the world or positions concerning the nature of reality are not relevant and do not entail the characteristics of relevance's deep grammar status, although they do entail what elements of discourse are judged relevant.

This study does not argue directly for any social-constructionist version of rationality. Instead, it assumes an intersubjective practical framework, clearly influenced by Habermas' theory of communicative acts. There is, however, a catch: the conceptions of relevance themselves are not socially constructed (neither the logical status of causation nor that of normativity, per se, is a matter of cultural contingencies, as opposed to the actual frameworks and accounts of causation or normativity), which immediately places this study in the less relativistic branch of social constructionism.

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APPENDIX: EXCLUSION AND RELEVANCE "SORTERS"

Consider the following microProlog-style program of a simplified structure quite common to logical programming:

```
likes(sarah,most,x)?
likes(sarah,toreasonpractically,4)
likes(sarah,chocolate, 2)
likes(sarah,daydreaming, 10)
likes(mary, sarah, 12)
brother(abe,sarah)
biggerthan(12, 16)
likes(sarah,mary,alot)
arebeautiful(flowers,mary).
```

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This program segment is designed to answer the question "what does Sarah like the most?" "Most" is defined as an operator that recognizes sets containing ordered pairs of word and indexical value (e.g., "chocolate,2") then produces the word that is paired with the highest value.[31] This alone would not answer the question properly, because the answer produced would then be "sarah" which is wrong in terms of the data base (it is Mary who likes Sarah "12" in the fifth line). An exclusionary device is needed, because what others like is irrelevant and should not be allowed into the decision-making process. Thus the candidate for the answer must possess a data structure of the form "likes (sarah, ,x)". Not all words suffixed with a number (,x) are to be considered, only those preceded by "sarah". The exclusion of all other data structures not conforming with this requirement is due to the attempt to design the process' actual function to a designated practical goal, to classify knowledge from what, for these purposes, is not.

[31] x in the question line represents a function f(x)→x such that at each line examined x is substituted for the figure that accompanies the word.

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