DO LIES MATTER? UNDERENFORCEMENT IN OFFENSES OF PERJURY AND OBSTRUCTION OF JUSTICE

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ABSTRACT

"You are cautioned to tell the truth, the whole truth, and nothing but the truth, under penalty of perjury"*[1] *– or are you?

This article will attempt to contend with the difficulty posed by the failure of law enforcement authorities to enforce rules relating to false testimony (i.e., perjury) and obstruction of justice. Out of 2,572 overturned convictions in the United States, some 60% were found to have been the result of perjury—making it the leading cause of false convictions. The current dissonance between the severity and scope of the crime, and the remarkably weak enforcement of criminal statutes aimed at preventing it, remains unexplained to date and demands in-depth research. So lax is the enforcement of the crimes comprising obstruction of

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1. This is the sentence every witness hears from the Israeli court before giving testimony, and which every affiant must certify as a condition for their signed affidavit taking effect. *See Oath*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/oath#google_vignette (last visited Jan. 27, 2024) (indicating that "prior to hearing testimony, the [Israeli] Court must warn the witness that he must state the truth, and the witness must swear to testify the truth").

justice that there appears to be a significant incentive for witnesses to perjure themselves since the penalties associated with such action are all but non-existent. The purpose of this article, thus, is twofold: **Firstly**, to analyze and map the existing criminal statutes constituting obstruction of justice, evidence tampering, perjury, and so forth. **Secondly**, the article will establish the reasons behind law enforcement's failure to exhaustively prosecute these statutes. Thereafter, the article will illustrate how this lax enforcement, which undermines deterrence, is more problematic in the Digital Age given the impact of digital evidence on the legal field. Accordingly, the article will explore the existing incentives for both parties in the proceeding to use lies and misrepresentations to manipulate the trial and the serious risk of judicial errors that result from such actions, which, as stated above, remain unaddressed. The article will also distinguish between incentives in practice and incentives in effect, demonstrating how each of these exacerbates this phenomenon. In its conclusion, the article will offer our proposal for dealing with the issue of obstruction of justice and perjury, based on the underlying rationales of discovering truth and protecting innocents.

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INTRODUCTION

To date, at the start of the third decade of the 21st century, we find ourselves exposed to one of the greatest breaches in legal history. This dissonance, remarkably enough, exists in roughly the same manner and effect across many different legal systems. It rests on two underlying facts, which have been established by both case law and legal literature.

The first fact: The phenomenon of perjury is widespread and constitutes a central underlying cause of judicial error (recognized as such in hindsight) in the United States.[2] For

2. *% Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS, https://

example, the American legal system has been described on occasion as a "perjury-plagued system."[3] This mantle—of a legal system that suffers under ubiquitous perjury—is borne by many varied legal systems,[4] and even applies to international criminal law.[5]

The second fact: Across most, if not all, legal systems, indictments filed for crimes relating to obstruction of justice, in general, and perjury, in particular, are virtually nonexistent.[6] While the inadequate filing of indictments is of particular concern

www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Jan. 27, 2024).

3. *See* Barry Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J. 917 (1975).

4. Though, to be clear, there are many legal systems that this article, owing to brevity of scope, will not examine in depth. *See, e.g.*, Mekonnen Nigusie & Abreha Mesele, *Perjury in Ethiopia: Legal and Practical Challenges in East Gojjam Zone*, 3 HAWASSA UNIV. J.L. 89, 90–91, 125 (2019) (finding that the "practice of perjury [was] rampantly growing in judicial and quasi-judicial proceedings in East Gojjam Zone" and that "perjury [was] a deep-rooted problem in the study area").

5. The requirements for conviction for perjury under international law are comprised of several layers, as set out in Article 70(1)(a) of the Rome Statute: first, there is a requirement that testimony be given; second, the testimony must be discovered to be false; third, the false testimony must be knowingly and deliberately given; and fourth, it must be shown that the witness knew they were under penalty of perjury. *See* Ekaterina A. Kopylova, *The Offence of Giving False Testimony Under Solemn Declaration in the Rome Statute*, MOSCOW STATE INST. INT'L RELS. 1, 21 (May 15, 2016), https://dx.doi.org/10.2139/ssrn.2780084; Alexander Zahar, *The Problem of False Testimony at the International Criminal Tribunal for Rwanda*, 25 INT'L CRIM. TRIBUNAL RWANDA 1, 1 (2010) (finding that despite the detailed statute governing this issue, even the International Criminal Court is plagued by underenforcement); Michael Bohlander, *International Criminal Tribunals and Their Power to Punish Contempt and False Testimony*, 12 CRIM. L. F. 91, 97, 111, 115 (2001).

6. As our analysis will show below, indictments that are filed to account for obstruction on its own or as the main crime are practically non-existent. *See, e.g.*, Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 UNIV. TOL. L. REV. 397, 399 (indicating that existing perjury statutes are unable "to account for the human tendencies that go along with trying to rectify a lie once it is told" and often do not serve their intended purpose).

in Israel,[7] many other legal jurisdictions suffer from the same underperformance, including the United States.[8]

The combination of these two basic facts leaves us in an astonishing situation: despite this being a severe crime, and a crime that occurs on such a wide scale as to amount to a "national epidemic,"[9] we see only a pittance of indictments filed in the various courts on its account. The choice of the authorities to ignore crimes of obstruction of justice—being both serious crimes under the dry law and crimes that are ubiquitous—requires in-depth research to establish the causes for this conduct.

Accordingly, this article will seek to establish the reasons behind the gap between the severity of the crime of perjury—a crime with game-changing ramifications for the results of the legal trial—and the willingness of prosecutors to fully and exhaustively enforce the law against perjurers. The objective of this article will be to understand the underlying rationale behind the decision to try (or not to try) a person for their testimony that did not reflect the truth. The article will attempt to establish the motivation to give false testimony and to tamper with evidence (given the ostensibly severe prohibitions associated with these actions in the dry law), and to propose a practical model to contend with this phenomenon, which, as noted above, is

7. Upon searching the legal database "Nevo," which contains the lion's share of criminal and civil rulings in Israel, only a single verdict involving an indictment for perjury based on Section 237 of the Israeli Penal Code exists. *See* § 237, Penal Law, 5737–1977 (Isr.), https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/43289694.pdf; Ella Levy-Weinreib, *Why Are Witnesses Who Provide False Testimony Not Being Put on Trial?*, GLOBES (Nov. 4, 2014), https://www.globes.co.il/news/article.aspx?did=1000931432 (indicating that the lack of enforcement is so blatant that it has even received media attention); ARIEL SALTO, WHEN YOU SAY YOU SAID: NO! COMPLAINANT'S TESTIMONY IN DATE RAPE CASES: AN IRREFUTABLE STATEMENT, (Aug. 24, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020646.

8. David W. Eagle, *Civil Remedies for Perjury: A Proposal for a Tort Action*, 19 ARIZ. L. REV. 349, 349, 351 (1977) (finding that, in 1975, only 225 indictments out of 41,108 (0.54%) were filed for perjury and out of about 20,000 federal prisoners, only two (0.01%) had been incarcerated for perjury).

9. The issue of perjury has been written about at length for decades. *See* H.L. McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727, 727–29 (1940); Alfred David Whitman, *A Proposed Solution to the Problem of Perjury in Our Courts*, 59 DICKINSON L. REV. 127 (1955); Wendell F. Cowan, Jr., *Criminal Law: Perjury in Kansas*, 13 WASHBURN L. J. 479 (1974).

currently under-enforced to an extent that impacts the accuracy of court verdicts.[10] This article will aim to raise the level of accuracy of court verdicts by causing these to be based on more truthful testimony and reliable evidence. The more accurate court verdicts are produced, the stronger the level of deterrence attained.[11] And the more efficiently and accurately the court system works, the less incentive there is to commit crimes.[12]

The order of this study shall be as follows. The **first chapter** will introduce a practical review of the existing laws relating to obstruction of justice: perjury, lying under oath, presenting false documents, and, in effect, any other statute aimed at preventing the court from being deceived. In this chapter, we will also establish the willingness and, in some cases, unwillingness of the prosecutors and the courts to convict for the crimes comprising obstruction of justice, bearing in mind their severity. We will compare the performance of the Israeli legal system to that of the American system in this regard. The **second chapter** will seek to illustrate how the existing situation, and the difficulties it raises, are exacerbated in the Digital Age. The significance of the connection between the above-described ambivalence and the Digital Age cannot be overstated, as we bear witness to an inexplicable apathy on the part of law enforcement toward digital evidence and its potential for forgery. This chapter will demonstrate the surprising parallels between the failures of the Israeli legal system and those of the American system. The **third**

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10. To reiterate on account of its import, this under-enforcement is mainly (though not solely) the result of the abstention from filing indictments for the crimes of obstruction of justice and/or perjury as the sole or main crime tried. *See generally* Whitman, *supra* note 9, at 127–28, 145 (noting that prosecutions for crimes like perjury are rare and difficult to establish within the law).

11. *See* Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. CAL. L. REV. 499, 516, 538 (2014) (indicating that "Congress abolished the parole office and made sentences 'basically determinate,' which placed far more pressure on the accuracy of the sentencing" with guidelines seeking to provide uniformity and fairness and that sentencing "traditionally is animated by concerns of (1) just or proportional punishment . . . and (2) recidivism concerns").

12. *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 348 (1994); Matteo Rizzolli & Luca Stanca, *Judicial Errors and Crime Deterrence: Theory and Experimental Evidence*, 55 J.L. ECON. 311, 311 (2012) (concluding that false convictions do much greater damage to deterrence and public confidence in the system than false acquittals).

chapter will build on the groundwork laid by the first two chapters, illustrating how these failures effectively create a situation in which there are multiple incentives to obstruct justice, and expanding on the reasoning behind these incentives. The **fourth chapter** will present our proposed solutions, as indicated by this article. This solution will be based, among other things, on the economic model of Evidence Law. We will follow this with our **conclusions**.

II. LIES, PERJURY AND OBSTRUCTION OF JUSTICE – PRACTICAL REVIEW

The main thrust of this article concerns the issue of obstruction of justice and the criminal statutes derived from it. The article will approach this issue from the perspective of Israeli law while illustrating the common denominator between it and the comparative legal systems (i.e. the American and English systems): underenforcement.[13] Astonishingly, though obstruction of justice is both illegal and potentially decisive in triggering a false verdict—undermining the legal system and harming litigants alike—it remains to be appropriately addressed. Though the illegitimacy of these acts and their inherent threat to the trial system are undisputed—particularly, their potential to mislead the court[14]—they have been given only tangential treatment in terms of enforcement, and serious sentences handed down in such cases are non-existent.

The comparative study conducted in respect of this issue (which will be fully presented below) yielded some very surprising findings: Nearly all legal systems, *similar to the Israeli system*, suffer from the same "double jeopardy": a multitude of overlapping legal statutes relating to obstruction of justice, many

13. *See* Gavriel Strussman, *Lies in Court*, 31 NEW DIRECTIONS 167 (2014); Hami Ben Nun et al., *Repairing the Court: Burdensome Behaviors and the Dignity of the Court*, 20 TRIAL 11 (2015). Moreover, per our review, Section 237 of the Israeli Penal Code (which we will expound on below) was cited only 118 times in the entire history of Israeli caselaw.

14. For more on attempts to mislead the court and the various proposals to contend with these, *see* Tarlow, *supra* note 3, at 920 (noting that courts "must commence war against perjury" when searching for the truth).

describing the same factual scenario and underlying intent;[15] and this same collection of statutes being known to be rarely enforced.[16]

Both the review of existing literature and the review of relevant caselaw conducted in the framework of our study revealed, each in its own respect, that the courts and academia have refrained from engaging in an earnest discussion of this issue, both regarding the practical challenges it poses and the under-enforcement that plagues it. Effectively, the Israeli case law and comparative case law show that even in cases where the court faces blatantly false testimony (or obvious obstruction of justice), such offenses are treated far more casually than the severity associated with their maximum statutory sentences—or, for that matter, the underlying principle of the trial system, i.e. optimal discovery of the truth—would suggest.[17] This gap between the scale and severity of the crime and its dismissal by the authorities forms the basis for this study.

This is the place to note that this gap between the severity of the crime and its enforcement does not only hurt the one litigant whose trial may be adversely impacted by the perjurer's false testimony. The damage extends far beyond. The same false testimony impairs the court's chance of discovering the truth[18]—the underlying rationale of the legal process—and harms the concept of justice and undermines public confidence in the court and in society's institutions.[19]

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15. This "double jeopardy" has been written about extensively. *See* Andrea C. Halverson & Eric D. Olson, *False Statements and False Claims*, 46 AM. CRIM. L. REV. 555, 568 (2009) (indicating that sometimes the same prosecution can doubly occur under a congressional act and a federal statute).

16. *See e.g.*, Levy-Weinreib, *supra* note 7.

17. *See* Doron Menashe & Eyal Gruner, *Should Judges Convict Based on Their Speculations of Guilt?*, 26 BUFFALO PUB. INT. L.J. 129, 136 (2019) (highlighting the issues that arise in the criminal trial in connection with the optimal reconstruction of the truth and the innocence hypothesis).

18. *See* Doron Menashe, *Can the Pursuit of Truth Reconcile With the Principle of Minimizing False Convictions?*, 21 CARDOZO J. CONFLICT RESOL. 381, 383, 404 (2020) (noting that while "the pursuit of truth is an essential component of [judicial] justice . . . the current [perjury] discourse emphasizes that the pursuit of truth is not the sole principle at play").

19. It should be noted that, in essence, any act whereby evidence is submitted in violation of the law can have the same effect. For example, where an unlawfully obtained

A. Obstruction of Justice – Comparative Review

Obstruction of justice is a wide category that seeks to encompass as broad an array of behaviors as possible. The common denominator among the behaviors is their intent: attempting to mislead the authorities, in general, and the court, in particular, in order to trigger an inaccurate verdict, one which exonerates the perpetrator.

Aside from the above summary—which was conducted in brief, and not intended to be exhaustive—we saw fit to refer to the Anglo-American legal tradition to examine sanctions imposed for perjury under these systems. We chose this route for several reasons: for one, these are Common Law systems, which occasionally develop in a casuistic manner, very similar to the Israeli system. Also, the American legal system is known for its severity. Thus, for an appropriate system to compare to the Israeli legal system, we chose to examine that of a country with a record of harsh punishment, whose system is otherwise similar to the Israeli system.[20] The similarities between these systems, contrasted by their differing models of punishment, could help us to understand the causative element in our case.

B. The Israeli System

The relevant legal reference in the Israeli legal system is found under Chapter I of the Israeli Penal Code,[21] titled "Attacks on Government and Judicial Processes."[22] Article A of Chapter I,

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confession—one that was not given freely and willingly—is admitted. *See e.g.*, Doron Menashe & Guy Alon, *Criminal Law—Does A Confession Matter? A Defendant's Confession as Irrelevant to Prove His Guilt*, 42 W. NEW ENGLAND L. REV. 191, 198–99, 201, 213 (2020) (highlighting that courts "tend to admit confessions" that are unlawfully obtained and that a "substantive incentive" exists to give a false confession, which can undermine confidence in the legal system).

20. *See* Tali Cheruti-Sover, *The Prison System in Israel is One of the Strictest in the World – But This Does Not Help Against Crime*, MARKER (July 14, 2016), https://www.themarker.com/career/1.3006335 (showing that the U.S. incarcerated at least 700 individuals for every 100,000 people while Israel imprisoned 256 people per 100,000).

21. Penal Law, 5737–1977 (Isr.), https://www.icj.org/wp-content/uploads/2013/05/Israel-Penal-Law-5737-1977-eng.pdf.

22. It should be noted that this chapter originated in the Criminal Law Ordinance, 1936 – a decree issued under the British Mandate that ruled Israel from 1917-1947. *See*

the section relevant to us, deals with *"Obstruction of Justice."* Under Article A we can see the basic prohibition of perjury, which is punishable by seven years' incarceration.[23] Also found in Article A are various other prohibitions that feed into this one, such as the prohibition against *tampering with* or *destroying evidence*, the punishment for each of which is five years' incarceration; prohibition of *providing a false oath*, punishable by three years; the prohibition of *providing false information* and *providing false testimony through perjury*, which are punishable by five years and nine years, respectively; and finally, above all the rest is perched the most general prohibition of all the chapter's residual clause, which is titled *"Obstruction of Justice."*[24] The elements of this residual clause are very general: *"Commission of an act intended to prevent or undermine the legal process, or to cause a miscarriage of justice, whether by preventing the summoning of a witness, hiding evidence, or otherwise."*[25] Thus, the action required is simply the "commission of an act," meaning any action at all can fall under the umbrella of obstruction of justice, provided that, as stated, the action was committed with the intention of preventing or undermining the legal process or causing a miscarriage of justice. The broad requirements of this clause, and the fact that it does not actually demand a resulting consequence, but only the act itself, have led to relatively widespread use of the clause at the expense of the other prohibitions covered under Article A. Thus, effectively, and in contrast to what is expected of them, prosecutors elect to make use of a broader clause with a lower maximum sentence, instead of more specific clauses with more serious sentences.[26]

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generally Matthew Hughes, *From Law and Order to Pacification: Britain's Suppression of the Arab Revolt in Palestine*, 1936–39." 39 J. PALESTINE STUD., no. 2, 2010, at 6–22.

23. Under the Israeli Penal Code, perjury means "Knowingly providing false testimony in a legal proceeding regarding a material point of deliberation in that proceeding." § 237, Penal Law, 5737–1977 (Isr.), https://www.icj.org/wp-content/uploads/2013/05/Israel-Penal-Law-5737-1977-eng.pdf (emphasis added).

24. *Id.* at §§ 239–240, 242–244.

25. *Id.* at § 244.

26. *See generally* BRUCE FREDERICK & DON STEMEN, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – TECHNICAL REPORT i, ii, 1 (2012) (indicating that "[w]hile discretion plays an important role in other parts of the criminal

And yet, this is not all. In practice, not only do the law enforcement authorities in Israel refrain from use of all the prohibitions covered under Chapter I, Article A of the Israeli Penal Code, choosing instead to use the residual clause of obstruction of justice, but the state prosecutor directive of 2016 on the subject reveals that the prosecution often prefers **not to file any indictment at all.**[27] For example, Section 4 of the state prosecutor directive reads: "Opposite the obligation to tell the truth are other public interests and objectives *which may weaken the justification to open an investigation and try the case.*"[28]

This directive is revealing as to the considerations guiding the discretion of prosecutors in connection with crimes of obstruction of justice. Section 11 of the directive, for the sake of illustration, instructs state prosecutors that: "*To the extent that a statement actual caused or had the potential to cause serious damage to the suspect, defendant or another individual, or public interests, <u>there is a stronger inclination to order that an investigation be opened</u>.*"[29] Likewise, Section 12 states that: "*To the extent that the statement is made in respect of a criminal trial, and to the extent that it concerns a more serious crime, <u>there is a stronger inclination to order that an investigation be opened</u>.*"[30]

This Directive also deviates somewhat from the Israeli approach whereby false testimony does not yield a monetary remedy, determining in Section 18 that: "*In the appropriate circumstances, consider use of Section 81 of the Penal Code, which allows the court in the original case to charge the complainant with the defense costs of the defendant <u>if the complainant filed a complaint that was baseless or specious.</u>*"[31]

This Directive would seem to indicate that the Israeli system's trajectory is bringing it closer to the American system in

justice system," prosecutors often enjoy broader discretion than most when making decisions in criminal cases).

27. *Policy for Opening Investigation and Trying Suspects on Suspicion of Providing a False or Conflicting Statement or Testimony during Investigation or Trial, or Refusing to Testify*, 2.5 Attorney General Guidelines (March 21, 2016), www.justice.gov.il/Units/StateAttorney/Guidelines/002.5.pdf.

28. *Id.* at § 4.

29. *Id.* at § 11.

30. *Id.* at § 11–12.

31. *Id.* at § 18.

recognizing the severity of the crime of obstruction of justice and recognizing the possibility of providing monetary compensation to the victims of such crimes. And yet, at the same time, the Israeli system remains astonishingly indifferent to this phenomenon. In practice, apart from a few solitary sentences handed down in recent years with perjury as the main crime, we can see no change in the Israeli system's treatment of crimes of obstruction of justice, in terms of viewing it as worthy of being brought to criminal trial.

The reason for this, in our case, can be found in the enhanced *mens rea* requirement for these crimes. This enhanced requirement, which is not even mentioned in the Israeli Penal Code, is given tangible expression in Section 10 of the State Prosecutor Directive, whereby the prosecutor instructs that: *"Should the suspicion arise that a person, in the course of an investigation or trial, provided a false statement, or a statement that conflicted with an earlier statement, regarding a material detail, with the intention of misleading...."*[32] This represents a notable departure from the elements of the crime set out in the Israeli Penal Code. Henceforth, the crime no longer required false testimony *alone*, but additionally, a *specific intent to mislead.* This naturally limits the applicability of the prohibition in a manner inconsistent with the principles of the crime, with the prosecutor's directive effectively encouraging prosecutors to *overlook this crime*, while at the same time, creating a serious challenge for those same prosecutors to prove the element of specific intent.[33] This is in addition to the already existing challenges, which had already brought about the circumstance of barely any indictments being filed for crimes under the chapter of "Obstruction of Justice."[34]

In recent times, the Israeli media has extensively covered an episode that has come to be known as the "Sex for Judgeship"

32. *Id.* at § 10; *see also* Cheruti-Sover, *supra* note 20.

33. It should be noted that overlooking this crime is consistent with the American law, as we will expand on in Chapter 2.2.

34. There are a handful of exceptions to this, mostly concerning indictments filed for perjury in cases of attempted insurance fraud. To reiterate, only a small number of such cases exist. *See, e.g.,* CrimC (DC BS) 61042 State of Israel v. Yohanan, Nevo Legal Database (2015) (Isr.); CrimC (DC BS) 16811 State of Israel v. Best, Nevo Legal Database (2022) (Isr.).

scandal, wherein Judge Karif was indicted for providing a bribe in the form of a sex act in return for a judgeship appointment.[35] In the course of her police interrogation, upon receiving possession of her cellular phone, she deleted five correspondences between herself and key characters, including a correspondence with the Finance Minister, who was serving as a member of the Judicial Appointments Committee at the time.[36] For erasing these correspondences, the judge was accused of evidence tampering.[37] Even in the circumstances of a high-profile case of a sitting judge defendant, the authorities ultimately elected not to file an indictment, satisfied instead with the judge's promise to resign from her judgeship.[38] This incident, the "Sex for Appointment" scandal, clearly illustrates the unwillingness of the prosecution to file indictments on counts of obstruction of justice, even in cases where the public interest would outwardly seem to demand this,[39] and even in such cases where said indictment

35. *See* Yonah Jeremy Bob, *Female Judge in Sex-for-Judgeship Scandal Named as Eti Karif*, JERUSALEM POST (Mar. 14, 2019), www.jpost.com/israel-news/female-judge-in-sex-for-judgeship-scandal-names-as-eti-karif-583323.

36. Tomer Levy, *Subject to Hearing: Effie Nave will be Charged with Bribery, Fraud and Breach of Trust – Walla! News*, LIMITED TIMES (Dec. 3, 2019), https://newsrnd.com/news/2019-12-03—subject-to-hearing—effie-nave-will-be-charged-with-bribery—fraud-and-breach-of-trust—-walla!—news.Sy3FmTmTB.html.

37. § 238, Penal Law, 5737–1977 (Isr.).

38. *See* Tamar Almog, *Sex Case for Appointment: The Case Against the Former Head of the Bar Association Efi Neve is Closed*, KAN NEWS (Mar. 21. 2021), https://www.kan.org.il/content/kan-news/local/280348/.

39. As an aside, we should mention that the prosecutor's decision not to indict the judge provoked harsh criticism from the Movement for Quality Government in Israel, which noted that: "In light of the new findings that were published last night, there is a serious need to investigate this matter exhaustively and to infer whatever lessons are necessary, even by use of a special governmental committee, if need be – and even at the prices of exposing systemic failures – for this incident has fatally damaged the public's confidence in the legal system, in the integrity of the various functionaries, and in the capacity of the system to oversee itself and repair its defects – all the more so when we are discussing the most senior figures in the legal system." *See* www.israelhayom.co.il/article/730591. It is, of course, possible that additional considerations marked the prosecutor's unwillingness to bring this case to trial – particularly, evidentiary challenges with the foundation of the case. And yet, notwithstanding such difficulties, we believe it would have been appropriate to refuse the judge's offer to resign, or, alternatively, to refrain from accepting such an offer while filing an indictment. See e.g., Sharon Spicher, *Sex and Appointment Case 4: Prof. Doren Menashe Opinion why the Crime of Destroying Evidence does not Apply to Etti Kharif who*

could have a positive impact on the development of the law and its alignment with the contemporary setting.[40]

Having thus skimmed the surface of Israeli law, we are left with the conclusion that, in spite of the ostensibly strict prohibition that exists under Israeli law, the limited enforcement of the provisions of the Israeli Penal Code (in light of the directives of the chief prosecutor) have rendered the crime of obstruction of justice a dead letter;[41] or, at the very least, a category of crimes suffering from a severe dissonance between the dry law and its implementation in practice. As noted above, this situation is reflective of the circumstances in other legal systems as well,[42] including the English system, upon which the Israeli system is based.[43]

Deleted WhatsApp Messages from the Phone to Protect her Intimate Privacy, EDNA CARNIVAL (Feb. 1, 2022), https://perma.cc/C3RD-PQDF.

40. As an aside, it's worth mentioning that the decision of the prosecution not to indict on this count actually worked against the suspect in this case, given the inadequacy of the evidence against her and the intrinsic legal challenges that plagued the prosecutor's narrative in the first place – challenges that, we believe, would have ultimately led to her full exoneration. In other words, the prosecutor's failure to indict in this case actually harmed the suspect by robbing her of the chance to clear her name. Moreover, and no less severe, it withheld from the courts the opportunity to develop the law with respect to crimes of obstruction of justice. *See* Spicher, *supra* note 39; Almog, *supra* note 38.

41. It should be noted that between 1950–2018, there were some nine cases in which they saw fit to hold a substantive discussion on the matter of perjury and its standing. The most recent of these was the sentencing of MK Tsahi Hanegbi in 2010, which, after a 694-page verdict, decided to impose on MK Hanegbi a fine of ILS 10,000. Likewise, a request filed in 2020 under the Freedom of Information Law revealed that no indictments were filed for perjury during this year at all. *See generally* CrimC (DC Jer.) 4063/06 State of Israel v. Hanegbi, Nevo Legal Database (2010) (Isr.).

42. Or, as it has been better described, "[p]erjury as an offence has often been relegated to the confines of paper books." *See* Okpa Ujong Bassey, et al., *Rethinking the Basis and Relevance of the Law of Perjury: A Pathway to its Resuscitation*, SCHOLARS INT'L J. L., CRIME & JUST. 68, 68 (2020).

43. As noted above, the Israeli Penal Code originated in the Criminal Code Ordinance of 1936, a decree of the British mandatory regime that served as Israel's penal code in practice until 1977. To understand the close connection between the Israeli and English penal codes, we present the wording of Section 4 of the Criminal Code Ordinance, which states: "This law shall be interpreted in accordance with the definitions of the legal terms commonly accepted in the laws of England, and any expressions set forth herein shall be interpreted, to the extent that the text allows and unless expressly set forth otherwise, to make use of the definitions associated with them in the English law." § 4 Criminal Code Ordinance of 1936. One could argue, similarly, that the English law in reference is the Perjury Act 1911, the terms of which are so woven into the Israeli law that

C. The American System

The relevant normative framework of the American legal system, similar to that of the Israeli system, is decentralized and scattered over several sections. This is because the American legal system, like the Israeli system, is based on the English system.[44] From reading these sections in composite, it is evident that the American system is, at least ostensibly, stricter than the Israeli system. The main criminal statutes relevant to our discussion are found in Title 18 of the US Code (*the American Penal Code*), referring most to, in some formulation or other, the prohibition of perjury.

Before reaching any conclusions as to the state of the American legal system, this article shall establish the elements of the prohibitions of perjury and obstruction of justice thereunder. The most pertinent statute to our discussion is Section 1621 of the American Penal Code, which concerns the crime of perjury. This section defines "perjury" similar to Israeli law. The American Penal Code further determines in Section 1746 that there are additional prohibitions which, though not meeting the strict definition of perjury, are nonetheless considered as such.[45] The American Penal Code goes on to discuss the prohibition against "False Statements," under Section 1001, whereby one who **willfully** makes a false declaration in any matter under the jurisdiction of the court, and **knowingly** makes a false claim on the basis of such false testimony, shall be found in violation of the law, and subject, accordingly, to five years' incarceration, or, in

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they tend to overlap, as evidenced by Article 1 of the English Perjury Act: "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding willfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labor for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine." PERJURY ACT 1911, §1(1) (Eng.).

44. *See generally* WILLIAM MIKELL CLARK JR., HANDBOOK OF CRIMINAL LAW, (3rd ed. 1984) (noting that the US law is based on and has evolved from the British Common Law); Eliezer Rivlin, *Israel as a Mixed Jurisdiction*, 57 MCGILL L. J. 781, 781 (2012).

45. 28 U.S.C. § 1746; 18 U.S.C. §1621.

aggravated circumstances, eight years.[46] A similar punishment is given for making a false declaration to any government agency.[47]

Aside from these two criminal statutes, there is a third statute in Israeli law in which the same residual clause exists, as aforementioned: Obstruction of Justice. The relevant section, U.S.C. 18 Section 1505, states that: "*Anyone who corruptly [...] obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law,*" commits the felony of Obstruction of Justice.

As we can see, the American residual clause is largely similar to the Israeli one, requiring only a behavioral element, without regard for the result. All that is required is the commission of an act that negatively impacts—or attempts to impact—a pending proceeding, whatever that act may be. Indeed, compared to Israeli law, American law would appear stricter, as it provides a broader definition of perjury. The American legal literature on the subject further illustrates how this is a serious felony that is not adequately addressed.[48] The American court has at times described the matter of perjury as a "medley of crimes."[49]

And yet, much like the situation under Israeli law, indictments filed for these crimes are lacking. From a close examination of the requirements of the law, it could be argued that the reason behind the flagging enforcement stems from the **enhanced threshold of proof** required to establish perjury, whereby the prosecution must prove each of the following:[50]

- (1) that the declarant took an oath to testify truthfully;

46. 18 U.S.C. § 1001.

47. 18 U.S.C. § 287 ("Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.").

48. Weston C. Loegering, *White-Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 165, 263–73 (1980) (noting the elements and defenses to a perjury offense in the United States, and because of prosecutorial discretion and the many elements of the offense, this makes a perjury charge difficult to obtain).

49. *See United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999).

50. Loegering, *supra* note 48, at 263–267.

- (2) that he **willfully and knowingly** made a false statement contrary to that oath;
- (3) that the declarant believed the statement to be untrue;
- (4) that the statement related to a material fact.

This section shows that the main difficulty found in American law rests in the enhanced threshold of proof associated with this statute, especially with regard to the requirement that the act be committed "**knowingly.**"[51] The Supreme Court has ruled that a conviction for the crime of perjury cannot be based on testimony that only met some of the requirements, or evasive testimony intended to mislead the interrogator.[52] Under these circumstances, it is easy for "perjury by omission"[53] to occur, which, accordingly, has led to the situation in which "perjury is a charge often threatened but rarely used."[54] It should be noted that, in at least one instance, high-profile cases have concluded without convictions in light of this enhanced requirement.[55] This built-in leniency is largely consistent with the State Prosecutor Directive, which also essentially allows perjury by omission under Israeli law. Even by the turn of the century, serious concerns had already been raised about perjury and the consequences of underenforcement of this crime, among other things, as a result of this enhanced threshold of proof requirement[56]—a requirement

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51. *See e.g.*, *United States v. Dowdy*, 479 F.2d 213, 230 (4th Cir. 1973) (noting the importance of proving the element of willful untruthfulness for perjury); *United States v. Markiewicz*, 978 F.2d 786, 811 (2d Cir. 1992).

52. *Bronston v. United States*, 409 U.S. 352, 360–62 (1973).

53. This has been the basis for substantial critical review in this regard. *See e.g.*, Ira P. Robbins, *Perjury by Omission*, 97 WASH. U. L. REV. 267, 295 (2019).

54. *Id.*

55. *See generally* Mark R. Slusar, *The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment*, 49 CASE W. RSRV. L. REV. 869, 880, 883 (1999) (showing that the Senate has repeatedly determined that perjury is an impeachable offense).

56. *See* Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1566, 1576 (2000) (describing the standards of the enhanced threshold requirement for perjury).

that has seemingly led to a state of ambivalence on behalf of the various courts confronted with this crime.[57]

D. *Interim Summary: Resemblance that Illustrates Indifference*

Having reviewed the law comparatively, it could be argued that both legal systems have similar approaches to crimes involving obstruction of justice. Both have appropriate acts of legislation in place establishing that obstruction of justice—and, in particular, perjury—are criminal felonies meriting punishment of several years' incarceration, at least. And yet, in spite of this, both legal systems express a real hesitancy to employ the sanctions set out by law, and instead prefer to refrain from enforcing these statutes on a wide scale: both for the same exact reason, i.e., the concern that this will deter witnesses from testifying in court.

Here we should note that this combined attribute—establishment of serious sanctions for the crime on the one hand, while refraining from enforcement out of concern for deterring witnesses on the other hand—is witnessed in other legal systems, which also seek to avoid trying witnesses for perjury[58] despite recognizing the need to deal harshly with instances of perjury in order to generate deterrence.[59]

This same dissonance, between the severity of the crime and the willingness to prosecute it, is itself enough to justify research with the aim of finding and proposing a solution. However, that is not the full picture. At this point, this article will proceed to examine the ramifications of the Digital Age on the subject of perjury, and, specifically, its catastrophic potential for causing

57. Notably, the article's entire proposal was to combine the crimes of "Perjury" and "False Testimony," seeing as these are conceptually identical in terms of their factual elements. *See id.* at 1578–79.

58. Notably, these are not just the legal systems included in our study; in effect, the legal systems of India and the UAE suffer from the same underenforcement in their respective jurisdictions. How these systems deal with these statutes in practice was best described by Akshata, who referred to them as "**seldom invoked**." *See* STA Law Firm, *United Arab Emirates: Criminal Implications of Perjury: An Examination of the UAE Penal Code,* MONDAQ (May 20, 2020) https://www.mondaq.com/crime/937530/criminal-implications-of-perjury-an-examination-of-the-uae-penal-code.

59. *See id.* (noting that "those who engage in perjury have to be appropriately dealt with.").

judicial errors in court verdicts if the current trajectory persists. We will duly expound on the impact of the Digital Age on the subject of perjury and obstruction of justice below, in Chapter 2.

III. THE DIGITAL AGE AND ITS IMPLICATIONS

Until now, this article has focused on the gap between the scale and severity of crimes of perjury in light of the lack of priority assigned to it by law enforcement agencies. This was accomplished by comparing the Israeli legal system to other Common Law systems, which are largely based on English law.

Now we must consider another factor that influences the stated enforcement gap, which, as we will illustrate, significantly amplifies the scope of crimes of obstruction of justice and their destructive impact. This factor consists of the age that we are living in: the Digital Age.[60] The onset of this era has changed the legal world by magnifying the risk of being exposed to and relying upon forged evidence that cannot be identified.[61] In this chapter, we will attempt to illustrate how, and on what scale, digital evidence can exacerbate the flaws in the current situation[62] as set out in the first chapter of this article.

A. *The Digital Evidence – a Fly in the Ointment*

On the surface, one could easily assume that the addition of digital evidence would assist the court in reaching accurate verdicts by widening the pool of evidence on which the court bases its reconstruction of the facts, thus allowing for a more accurate and exhaustive reconstruction.[63] In practice, however, this has

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60. *See* Guy Alon et al., *Judicial Errors: Fake Imaging and the Modern Law of Evidence*, 21 UIC REV. INTELL. PROP. L. 82, 82, 101–02 (2022) [hereinafter Alon, *Fake Imaging*]; *see also* Sophia Dastagir Vogt, *The Digital Underworld: Combatting Crime on the Dark Web in the Modern Era*, 15 SANTA CLARA J. INT'L L. 104, 106 (2017).

61. Alon, *Fake Imaging*, *supra* note 60, at 82.

62. To be clear, while we discuss the exacerbation of the current situation, this is not by any means intended to derogate from the severity of the situation as-is, which already overburdens the court. *See* Yehudit Koren, *Diagnosing the Perjurer*, *in* 19 PUBLIC HEARING – THE BAR ASSOCIATION PUBLICATION 27 (2007); *see also* EITAN ELAD, THE PSYCHOLOGY OF LIES (2007).

63. In their doctoral thesis, Crimmins surveyed the wide scope of literature discussing digital evidence. *See* Danielle M. Crimmins, Lawyers' Knowledge of, Attitudes

not proven to be the case. While the pool of evidence has indeed expanded, the actual knowledge that the court is able to infer from said pool of evidence has not expanded accordingly,[64] as was found by a special committee appointed to investigate the matter in the US.[65] To put it concisely,[66] the circumstances mentioned above have created a situation in which it is much easier to tamper with and forge evidence than it was previously. Consequently, the expansion of the pool of evidence—while in theory, a positive development—has instead diluted the evidence that the court must rely on, rendering all of it less reliable and, in many cases, causing judicial errors.

Before discussing the quality of digital evidence, we must first address the unfathomable **quantity** of digital evidence available today.[67] The term "digital evidence" essentially encompasses all evidence originally produced by digital means including: digital files found on a smartphone; files found on the internet (such as

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Towards, and Experience with Digital Evidence (Dec. 10, 2021) (Ph.D. dissertation, Purdue University) (ProQuest; on file with the university) [hereinafter "Crimmins, Digital Evidence"].

64. *Id.* at 19.

65. *See* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. COMTY., NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 14-15 (2009); *see also* Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 860 (2016) (commenting on the Committee's study referenced earlier).

66. Unfortunately, it is outside the scope of this article to examine the NAS report in detail, which has had widespread impact on the perception of scientific evidence thereafter. *See* Karen Kafadar, *Statistics and the Impact of the 2009 NAS Report,* 69 DUKE L. J. ONLINE, Sept. 2019, at 6, 6, 9 (describing the impact of the NAS report on the forensic science field, its creation of defensiveness among practitioners, and positive consequences).

67. This increase was already noted 15 years ago, in the wake of the Digital Revolution and its ramifications for our day-to-day lives, even as smartphones and laptops were only just beginning to take hold in society. *See* Michael Losavio, et al., *Implications of Attorney Experiences with Digital Forensics and Electronic Evidence in the United States 2008 Third International Workshop on Systematic Approaches to Digital Forensic Engineering*, IEEE, 79, 79–80, 83 (2008); *see also* Michael Martin Losavio, et al., *The Juridical Spheres for Digital Forensics and Electronic Evidence in the Insecure Electronic World,* WILEY INTERDISC. REVS. FORENSIC SCI., 1, 6 (2019).

can be found on one's Facebook profile);[68] a value cited on Wikipedia;[69] or the results of a Google search.[70]

What interests us in this new kind of evidence, which comes in many forms, and the intrinsic challenges it presents—apart from its versatility—is the fact that it is produced in simply astronomical quantities on a daily basis. These massive amounts of digital evidence are a byproduct of the extent of our use of technology, which creates technological "footprints" in our wake that may compromise usable evidence in the event of legal proceedings or can even serve as the basis for a criminal indictment.[71]

In theory, the expansion of the pool of potential evidence ought to be a welcome development, offering additional resources for the court to avail itself of when performing its most fundamental task: reconstructing the truth.[72] And yet, in practice, this has not borne out, as these same technological developments have raised new and serious difficulties that cast a pall over the legal process in its entirety: the ability to tamper with digital evidence in a

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68. For an example of a social media profile being used as evidence in court proceedings, *see* Lynne Graves, et al., *LinkedLegal: Investigating Social Media as Evidence in Courtrooms*, 38 COMPUT. L. & SEC. REV., 2, 4–6 (2020); *see also* Ioannis Iglezakis, *Messenger Messages and Facebook Photographs as Means of Evidence-Heraklion Jury Trial Court (Mixed) 21/2019*, 3 EUR. DATA PROT. L. REV. 404, 405–06 (2019).

69. The Israeli court has even found itself using digital evidence, in the form of a Wikipedia search of the topic, to decide its verdict. *See* Case (MC TA) 171279-07 Biochord Ltd. v. Shoken Network Ltd., Nevo Legal Database (Dec. 27, 2007) [hereinafter "Ha'aretz Newspaper"]. In contrast, an American court ruled that information from the crowd-sourced encyclopedia was inadmissible, since any person could edit it and influence its contents. *See Flores v. State*, No. 14-06-00813-CR, 2008 WL 4683960 (Tex, Ct. App. 2008) (mem. op. not designated for publication), 4 n.3, wherein the court determined that Wikipedia could not be treated as a reliable source of information, since the public is able to edit its contents anonymously and without any real oversight. While this situation has changed to some extent, the court ruling on the subject has yet to be overturned.

70. *See* Paul W. Grimm, et. al., *Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1, 23–25 (2017).

71. *See* Riccardo Vecellio Segate, *Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution*, 21 INT'L CRIM. L. REV., no. 2 (2021), at 242–79.

72. *See* Menashe, *supra* note 18, at 381, 411.

manner that is virtually undetectable.[73] Already 20 years ago, concerns began to rise regarding the ease with which evidence produced by computer systems could potentially be forged.[74]

Many studies have been undertaken on this subject out of a desire to learn more about the nature of this new evidence. These studies have raised the urgent need for authentication standards and education regarding the minimum standards for accepting digital evidence[75]—knowledge found to be lacking in many cases.[76]

The combination of the sheer amount of digital evidence being produced and the ease with which it is forged has resulted in a serious risk of judicial error stemming from the misuse of digital evidence—or, rather, the proper use of compromised digital evidence that the litigants failed to detect.

Having established the double challenge posed by the ease of forging digital evidence and the difficulty in detecting such forgeries, we now turn our attention to the characteristics of the courts tasked with examining said digital evidence—which, we believe, themselves serve as an added challenge to overcome in the existing circumstances.

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73. We have already discussed in previous articles the gap between the ease of tampering with digital evidence compared with ordinary evidence. *See* Alon, *Fake Imaging*, *supra* note 60, at 95–96.

74. *See, e.g.*, NIMROD KOZLOVSKY, THE COMPUTER AND THE LEGAL PROCEEDING 35–36 (Bar Association Pubs., 2000).

75. *See* Gregory H. Carlton & Reginald Worthley, *Identifying a Computer Forensics Expert: A Study to Measure the Characteristics of Forensic Computer Examiners*, 5 J. DIGIT. FORENSICS, SEC. & L. 5, 17 (2010); Sheona A. Hoolachan & William B. Glisson, *Organizational Handling of Digital Evidence*, ANN. ADFSL CONF. ON DIGIT. FORENSICS, SEC., & L. 33, 43 (2010); *see* Mohamed Elyas, et al., *Towards a Systemic Framework for Digital Forensic Readiness*, 54 J. COMP. INFO. SYS., 97, 97–105 (2014); Jan Collie, *A Strategic Model for Forensic Readiness*, 5 ATHENS J. SCIS., 167, 178 (2018) (describing the need for additional measures and education regarding data security due to human error).

76. *See* Michael Losavio, et. al., *Prevalence, Use, and Evidentiary Issues of Digital Evidence of Cellular Telephone Consumer and Small-scale Digital Devices*, 1 J. DIGIT. FORENSIC PRAC., 291, 295 (2006) (describing how the average witness is not likely to have much knowledge about how cell phone evidence can be unreliable); REZA MONTASARI, ET AL., *The Standardized Digital Forensic Investigation Process Model (SDFIPM)*, *in* BLOCKCHAIN AND CLINICAL TRIAL: SECURING PATIENT DATA, 169, 193, 205 (Springer, 2019).

B. Digital Evidence Against a Non-Digital Law

Above, we discussed the main difficulties posed by digital evidence. These difficulties equally affect all legal systems that might seek to conduct fact-finding on the basis of digital evidence. We have also illustrated how such evidence is available in a wide variety of formats, each of which requires its own unique academic investigation. We discussed the difficulties inherent in attempting to detect tampering with digital evidence—a difficulty amplified by the immeasurable ease with which such tampering is performed on digital evidence compared to ordinary evidence.

Now, in this chapter, we will illustrate how implementing Evidence Law as it is currently implemented only serves to exacerbate the difficulties presented by digital evidence. First, we will establish the fundamentals of Evidence Law in the Digital Age; a normative framework that has been largely neglected for years, which encumbers the court's efforts to properly utilize the evidence submitted to it. We will then proceed to establish the dearth of knowledge and expertise that prevails among the courts in all matters relating to digital evidence, which, as we will also demonstrate, results in their chronic overconfidence in such evidence. We will examine this point from the perspectives of both the Israeli and the American legal systems.

1. The Israeli Law of (Digital) Evidence

Evidence Law is a procedural field of law that exists to assist the court in deciding what evidence to admit and what probative value to assign to that evidence, given its particular circumstances. In doing so, among other things, Evidence Law must establish rules for evaluating evidence in two principal categories: *relevance* and *admissibility*.[77] The Israeli Evidence Law is from 1971, and the date of its entry into effect reveals that it largely (and rightly) avoided dealing with matters concerning technology. The law's most significant amendment, which dealt with the connection between technology and evidence, was

77. §1 Evidence Ordinance [New Version], 1971 (Isr.) ("Any person may be summoned to provide testimony that is *admissible* and *relevant* to the matter, unless stated otherwise in this Ordinance.") [hereinafter "Israeli Evidence Law"].

executed in 1995 when The Computers Law was put into effect.[78] In the process of creating this law, the Israeli legislators also amended the Israeli Evidence Law.[79] The sole addition to the Law relating to the Digital Age was its recognition of the term "output" to match the definition in the Israeli Computers Law,[80] which constituted the de facto recognition of "*data, symbols, concepts or instructions produced, in any manner, by a computer*."[81] This was done with no reference or regard whatsoever for what was otherwise generally considered to be a founding principle of Evidence Law in the Common Law systems: the "Best Evidence Rule."[82]

To date, the feeble advances made in Israeli Evidence Law have remained unchanged, and one could argue that it is hopelessly outdated, lacking the tools to address the unique characteristics of digital evidence.[83] Given these circumstances,

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78. The Computers Law, 1995 (Isr.) ["hereinafter Israeli Computers Law"].

79. Israeli Evidence Law, *supra* note 77, as amended 1995.

80. Israeli Computers Law, *supra* note 78, § 1 at 2.

81. Israeli Evidence Law, *supra* note 77, §§ 35, 39A; *see also* Ofer Argov, *Admissibility of Computer Outputs as Evidence*, 20 JUST. 131, 131 (1991) (discussing the impact of the amendment on Israeli law and how "the difficulty with admitting computer outputs largely revolves around two issues: the rule that disqualifies hearsay, and the Best Evidence Rule").

82. "The rule known in our system as the 'Best Evidence Rule' states that only the original document may be submitted to prove the contents of said document (unless the law sets out an exception, of course). The prevailing position in the Anglo-American legal tradition is not to make any broader generalization from this with respect to evidence that may be submitted to establish facts at trial." DORON MENASHE, THE LOGIC OF ADMISSIBILITY OF EVIDENCE 36 (2008). For the implementation of this rule in the Common Law states, *see* Dale A. Nance, *The Best Evidence Rule*, 73 IOWA L. REV. 227, 232 (1988); *see also* Shyamkrishna Balganesh & Peter S. Menell, *Proving Copying*, 64 WM. & MARY L. REV. 299, 379 (2022) ("It has long been a fundamental precept of Evidence Law that a factfinder must be presented with the "best evidence" available on an issue when making a determination."). For the implementation of this rule in the British Isles, *see* Denis Seán Kennedy, An Examination of Evidence Admissibility Rulings in Trials on Indictment in Ireland 26–27 (Jan. 1, 2021) (Ph.D. dissertation, University of Limerick) (on file with University of Limerick).

83. 60In this respect, as far as Israeli law is concerned, we have illustrated that: "The characteristics of digital evidence are different from those of other forms of legal evidence. The difference is found in the manner in which the evidence is obtained (digitally); its recording; its analysis; and its presentation to the court." ALON, *Fake Imaging*, *supra* note 60, at 99; *see also* EHUD ROFEH, BETWEEN LAW AND TECHNOLOGY—DIGITAL EVIDENCE IN PRACTICE (2014).

the Supreme Court developed the law through judicial activism in all matters relating to submissions of evidence that did not satisfy the Best Evidence Rule. This development began with *Schneer v. State of Israel*,[84] where the Supreme Court determined the following:[85]

> [...] [S]ome legal scholars have opined that all that remains of the Best Evidence Rule is the stipulation that the original copy of a private document (as opposed to a public document) must be submitted to the court in order to prove its content, unless the absence of said original copy can be explained[...][T]his trend of easing the requirement to present original documents is necessary in our modern reality. In the accelerated Technology Age that we are being sucked into, stubbornly clinging to a rule requiring that specifically originals be produced—as opposed to photocopies or outputs of electronic evidence—would place an undue stumbling block in the path of the litigant.

The Supreme Court ruling in *Schneer* left little more than vapor of the Best Evidence Rule,[86] and this trend continued to develop: first in *Unger v. Ofer*,[87] and later with *John Doe v. State of Israel*,[88] which concerned a defendant convicted of multiple sex crimes. The thrust of the appeal in *John Doe* revolved around the admissibility of recordings of the defendant's conversations made by the complainant. The complainant originally recorded the conversations on his mobile phone before copying them onto a

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84. CrimA 869/81 Schneer v. State of Israel, Nevo Legal Database (Nov. 4, 1984).

85. *Id.* at ¶¶ 19–20 (emphasis added).

86. As of the drafting of this paper, the *Schneer* case has been cited 850 times by court rulings in Israel, making it one of the most frequently cited rulings in Israeli case-law. *See generally id.*

87. Justice Heshin reached the following determination, which remains standing today: "The exemptions and loopholes that have accrued to [the Best Evidence Rule] have withered the import of this rule, and today this rule scarcely peeps at us from between the lines of its exemptions. Indeed, it is not unfounded to reason that today, this rule is satisfied with requiring the litigant to present a suitable reason for not presenting the original document". *See* CivA 6205/98 Unger v. Ofer, Nevo Legal Database (2001) (Isr.) [hereinafter "Unger case"].

88. CrimA 4481/14 John Doe v. State of Israel, Nevo Legal Database (2016) (Isr.).

portable recording device that he delivered to the police. Later, at the request of the police, the recordings were burned onto a disk, which was then submitted as evidence in court. In theory, these recordings could be described as evidence that definitely does not meet the Best Evidence criteria. That being said, the court laid out a new precedent that has remained in force to this day with respect to the admissibility of digital evidence:

> On the backdrop of the trend of easing the rules of admissibility and focusing instead on the question of reliability and probative weight of evidence [...], and in light of technological developments that have allowed for the production of copies that are identical to the original, the standing of the Best Evidence Rule has been further undermined. *Continuing this trend, case-law has ruled that the contents of a document can be proven through a copy—i.e., secondary evidence—as long as the litigant in question provides a satisfactory reason for the absence of the original document.*

Soon after *John Doe*, the Legislature made an attempt to amend the Israeli Evidence Law and thus align it with the Supreme Court precedents.[89] In a draft bill, a solution was proposed to the issue raised by *John Doe*, whereby: "If a document is admissible as evidence, its contents may be proven by presenting the original document or a copy thereof."[90] Here, "copy" was defined broadly to include:

> The product of a process of duplication of the document, including by converting a document from a format that is not digital to a digital format; the conversion of digital materials that can be viewed through one form of computer software to a format that can be viewed by a

89. Draft Bill to Amend the Evidence Ordinance (Original and Copy Evidence) 2017. A similar draft bill was also filed in 2006, before the John Doe case. This bill was similarly rejected. Memorandum of Law, Draft Bill to Amend the Evidence Ordinance (Originals and Copies as Evidence), 5778–2017.

90. *Id.* at § 41.

> different computer software; or an "output," as defined in the Computers Law.[91]

This draft bill provided a rare glimpse of the Legislature addressing the concern of evidence tampering, with Section 42 of the bill referring to the "reliability of the copy."[92] In the explanatory brief, the sponsors of the bill discussed the issue of metadata, noting that: "The supreme importance of a document's metadata has become clear, as these can shed light on the document's contents, versions, revisions and more, providing additional information regarding the document and, in effect, additional content."[93]

In this regard, the draft bill went even further, proposing that the reliability of the document be assessed

> ... in light of its metadata, if any. These metadata have the power to shed light on and to provide information in respect of the same considerations. E.g., the metadata can teach us about the size of the file, thus providing information regarding the scope of information that was copied (para. (A)(1)); or about the type of software that was used to execute the copy, thus teaching us about the conversion process (para. (A)(2)). As an aside, it should be noted that *the metadata can also inform us as to the reliability of the original document, and not just that of the copy. E.g., these can show us the identity of the person who created the file, the date it was created, the last date on which it was saved, and more. Naturally, this information could also be of great importance when the document submitted to the court is the original document.*

The importance of this proposal cannot be overstated. This was the first serious proposal to use metadata to determine the reliability of a digital file, as well as the first proposal to use software to try to detect revisions. The problem is that not only was this draft bill never adopted, subsequent caselaw also

91. *Id.*
92. *Id.* at § 42.
93. *Id.*

showed a certain departure from the approach of using metadata to check the authenticity of digital evidence.[94]

Indeed, from a review of Israeli caselaw, one could argue that there is no reference at all—let alone guiding precedent—related to the issue of evidence tampering, nor to the issue of judicial errors that could result from said evidence tampering. Caselaw has only opened the floodgates to more kinds of evidence that might not be the "best evidence," while, at the same time, ignoring the serious issues and challenges such an action invites, not least in the Digital Age.

This state of affairs, whereby the court is allowed to admit more evidence but not equipped with the tools to properly vet it, constitutes the greatest difficulty posed to the court that seeks to contend with digital evidence. The solitary mechanism left to the court in determining the probative weight of such evidence is not any external, objective metric of truth, but rather the judge's own ability to identify "telltale signs," as the Israeli Evidence Law would have it. In other words, the judge is left to contend with this phenomenon with nothing more than their own intuition to rely on.[95]

2. The American Law of (Digital) Evidence

Like the Israeli system, the American legal system relies on the requirement of relevance for evidence to be admissible[96]—but

94. CrimA 6662/19 The State of Israel v. Ben Oz, Nevo Legal Database (2019) (Isr.) ("If officer Reuven wrote a memo that he followed the defendant as he headed to Afula, it's difficult fathom that, already at this stage [...] the defense should be entitled to demand an output from the officer's cellphone, the cellphone's position, the officer's work assignment that week, and an affidavit from his wife, all in order to prove that the officer wasn't even in Afula at the relevant time. Officer Shimon wrote in his memo that he found three shell casings at the crime scene? How do we know officer Shimon was even at the crime scene? *Under this approach, every scrap of evidence, every memo, provides grounds to demand the metadata that could substantiate the reliability of that evidence. There could be no end to the matter, because, of course, then the metadata itself could be challenged, and we end up with a "chicken or egg" scenario. Ultimately, we will come full circle to the philosophical principle of "I think, therefore I am."* (emphasis added).

95. ISR. EVID. ORDINANCE § 53.

96. *See generally* FED. R. EVID. 401–03 (enumerating conditions for (1) whether evidence is relevant; (2) when relevant evidence is admissible; and (3) when relevant evidence is inadmissible); *see also* FED. R. EVID. 104 (illustrating the function of the court as a preliminary "gatekeeper").

this is not the only similarity between the two. The American legal system is flexible with respect to its rules of admissibility and seeks to gather as much evidence as possible into a given case's pool of evidence. This approach works off the default assumption that the court is capable of accurately evaluating this evidence.[97] For example, it was determined in *United States v. Hassan* that:[98]

> [The] district court's role is to serve as **gatekeeper** in assessing whether the proponent has offered a **satisfactory foundation** from which the jury could **reasonably find** that the evidence is authentic.

In this case, the court had to deliberate on the authentication of Facebook webpages by implementing Rule 104(a) of the Federal Rules of Evidence.[99] When determining admissibility under Rule 104, and "[i]n performing its Rule 104 gate-keeping function, *the trial court itself need not be persuaded that the proffered evidence is authentic*."[100]

It has been said about Rule 104—as well as the test of relevance under Rule 104(a)—that these conditions are, arguably, almost always met, if interpreted liberally. Moreover, under American law—unlike Israeli law—there is actually a second test that must be met, found in Rule 104(b) of the American Evidence Law, which this section outlines as the "conditional relevance" test, which requires introducing evidence to prove that a fact exists if the relevance of other evidence relies on that fact.

After satisfying Rule 104, which functions as a gatekeeper in determining if evidence is relevant—and thus, admissible—we

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97. Under Israeli law, this is referred to as the "telltale signs" by which the court can assess testimony entered into the case file. *See* Hemi Ben Nun, *Cognitive Biases and Judicial Rulings: Intuition and Structured Thinking in the Work of the Judge*, 5 GATES OF JUST. 177 (2010).

98. *See United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (emphasis added) (quoting *United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009) (revealing how authentication procedures are appraised by the court at present)).

99. *See* FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

100. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012) (emphasis added).

arrive at Rule 901 of the Federal Rules of Evidence. This rule concerns "authentication," or establishing the probative weight of the evidence in question. Under Rule 901, the party submitting the evidence must "... *produce evidence sufficient to support a finding that the item is what the proponent claims it is*."[101]

The aforesaid difficulties have led to, among other things, much academic literature aimed at proposing how the court ought to go about such business,[102] with some even venturing a guess at how this is to be done in the Digital Age—described as a "new world."[103] Others have described Evidence Law during the Digital Age as forging a "new path,"[104] as opposed to the "old path," which sought to avail itself of more basic forms of evidence, such as testimony and documents.

3. The Shared Difficulty of Both Legal Systems: Intrinsic Inequality Originating from the Parties to the Proceeding

Having highlighted the lack of relevant knowledge among the various courts, we now turn to another difficulty posed by digital evidence: the inevitable **overconfidence** of the parties to the proceeding—whether the law enforcement agencies or the courts themselves—in digital evidence despite their general ignorance of the subject.[105]

This lack of knowledge on the part of the parties to the proceeding has been acknowledged by legal academia as a *fait*

101. FED. R. EVID. 901(a).

102. *See, e.g.*, Jonathan J. Koehler, *How Trial Judges Should Think About Forensic Science Evidence*, 102 JUDICATURE 28, 34–36 (2018); Keith A. Findley, *The Absence or Misuse of Statistics in Forensic Science as a Contributor to Wrongful Convictions: From Pattern Matching to Medical Opinions About Child Abuse*, 125 DICK. L. REV. 615, 647–49 (2021).

103. *See* Jean R. Sternlight, *Justice in a Brave New World?*, 52 CONN. L. REV. 213, 255 (2020).

104. Zhuhao Wang, *The Fate of Evidence Law: Two Paths of Development*, 24 INT'L J. EVID. & PROOF 329, 340 (2020).

105. *See generally* Nachshon Shohat, The Moral and Legal Duty to Protect Innocents from False Conviction: A Critical Analysis of the Legal System's Normative and Procedural Derived Obligations (2015) (Ph.D. dissertation, Univ. of Haifa) (Isr.).

accompli for some time. For example, Judge Straschnov stated with respect to this overconfidence in digital evidence:[106]

> The courts tend to rely more and more on expert opinions in the various fields of professional expertise and bas[e] their findings and decisions on these. In some cases, the court will even prefer expert witness testimony in scientific matters [to] actual witnesses [...] and even to eyewitness testimony of the event.

To illustrate the inherent challenges posed by the overestimation of digital evidence, we will establish the intrinsic risks associated with its use. These were best described by Prof. Menashe:[107]

> The massive impact that scientific evidence leaves on the layman, *and the general esteem enjoyed by scientists and experts, contribute to the risk of misleading or wrongful use of scientific authority.*

This is the place to note that reliance on evidence considered to be "innovative" at the time, and the damage that this can cause, was witnessed in the American Freedom Project. According to their findings, 185 out of 250 post-conviction exonerations involved cases where the court had based its false convictions on, among other things, forensic evidence. The forensic evidence in question was discovered to be mistaken in 60% of cases.[108]

The Freedom Project, and the general overreliance on digital evidence, is evidence of a flawed system whereby during times of technological development, from the DNA revolution to the digitization revolution, the court finds itself exposed to the risk of overestimating such "innovative" evidence, without regard to its quality and substance.[109] The findings of the Freedom Project

106. Amnon Straschnov, *Scientific Evidence and Expert Testimony in Court*, 25 MED. & L. J. 177 (2001).

107. MENASHE, *supra* note 82, at 180–81.

108. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9–14 (2009) (finding that out of 137 cases, 82 involved invalid forensic science testimony).

109. Some of this evidence has been described as "junk science." *See* Peter W. Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723, 724–26, 729–31, 737–39, 741–42,

show exactly how this risk can manifest when fact-finding is based on evidence purporting to be reliable, but in practice is flawed or misleading. This difficulty, alongside the underlying suspicion that scientific evidence merits in its own right, has led legal literature to propose banning convictions based solely on scientific evidence altogether,[110] given the high rates of judicial errors associated therewith.

With the conclusion of these first two chapters, we are left with two conclusions, which are relevant to both the Israeli and American legal systems. The first is that there exists a certain ambivalence and reticence when it comes to enforcing criminal statutes relating to obstruction of justice. Second, the courts are not sufficiently versed in digital evidence and its analysis, leading them to overestimate such evidence. The synergy of these two factors increases the incentive to tamper with digital evidence. In the coming chapter, we will discuss these incentives to obstruct justice as they apply to digital evidence.

IV. THE INCENTIVES TO OBSTRUCT JUSTICE AND ITS DIFFICULTIES

In the previous two chapters, we drew parallels between the Israeli legal system and the American legal system: the *relatively* ambivalent treatment of crimes of perjury and obstruction of justice, and the *relative* lack of awareness of the potential tampering of digital evidence, owing to the general ignorance of technological matters among parties to the proceeding.

We will now discuss how the ramifications of the combination of these two issues, as we illustrate below, give rise to an incentive to obstruct justice in general, but specifically through tampering with digital evidence. In this chapter, we will establish the motivations to bear false testimony under the current normative framework; this phenomenon on both the criminal and civil

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744 (1992) (describing the emergence of junk science and the consequences that accompany this evidence in the courtroom).

110. *See generally* Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS 43, 90–94 (2007) (discussing the pitfalls of relying too heavily on scientific evidence and expressing the dangers of convicting someone based on a single piece of evidence).

planes; and the difficulties in curtailing this phenomenon, especially in the Digital Age, given the contributing factors to this situation that we will discuss. The many and well-grounded justifications for this situation, alongside the inexplicable scope of this phenomenon—against which no action is currently taken—will lay the groundwork for the fourth chapter of this study, which will propose an alternative model for blunting the wide-spanning scope of this issue.

A. *The Causes for Perjury and Obstruction of Justice*

The reasons for perjury (specifically) and obstruction of justice (generally) in law are essentially all relevant to both civil and criminal trials. As this article has previously indicated through case law and legal literature, a witness may choose to perjure themselves due to: being dismissed from their position or threatened in connection with their testimony; a desire to assist a stakeholder in the outcome of the trial (either the defendant or another litigant); fear of revealing the factual truth to the authorities; and, of course, an attempt to deceive the parties into believing a false narrative based on their false testimony.

These incentives have been reinforced by decades of cumulative practice,[111] in light of various courts' apparent sympathy for such conduct. For example, "many judges show strong sympathy for an advocate whose client wants to commit perjury,"[112] while in other cases, such acts—in which attorneys are forced to stand by as their clients deliver false testimony—are described as "futile."[113]

Another indirect incentive to commit perjury stems from the enforcement policy itself, which is similar across many legal systems (as shown above). Courts are **largely apologetic** toward crimes of perjury[114] and other attempts to mislead the court or

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111. *See generally* Monroe H. Freeman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 136–42 (2008) (recounting the history of client perjury and the conflicting obligations lawyers must deal with when their client perjure themselves).

112. Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1051 (1997).

113. *Id.* at 1060.

114. *See e.g.*, Case 6302/01 Deri v. The Attorney General 56(6) PD 725 (2002) (Isr.) ("... under these circumstances, the Attorney General decided, even assuming the

conceal evidence pertinent to the discovery of truth.[115] Moreover, in the rare case that such crimes are brought to trial (with perjury being the sole or main charge),[116] they are treated with relative lenience, notwithstanding such actions being defined, in accordance with their statutory punishments, as felonies.[117] This leniency serves as an incentive to lie to the court, or to otherwise obstruct proceedings. Indeed, the of lack enforcement can even give the impression that there is no moral issue with such behavior given that the associated statutes are unenforced.[118]

Apart from the probative significance of this approach, and the danger of judicial errors posed by a court seeking to reckon with a population that has no reason not to lie,[119] this is also a very problematic situation in terms of behavioral economics.[120] When perjury is not perceived as being an act of particular consequence, as understood from the behavior of the authorities towards it, this will result in the population tending to lie more and more. Both Professor Menashe and Professor Arieli have discussed the connection between "moral reminders" and the tendency of people to lie in proximity to receiving such

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Shmulovitz had lied, not to hold him to criminal trial, for reasons relating to the pursuit of the public's interests.").

115. *See e.g.*, Bob, *supra* note 35.

116. *Id.*

117. Section 237(a) of the Penal Law prescribes 7 years' incarceration. Clearly, the Penal Law does not consider such acts to be inconsequential. In practice, there is no precedent in Israeli law for a person actually being given jail time solely for committing perjury, let alone seven years', as set out in the law. *See* § 237(a) Penal Law, 5737-1977 (Isr.) ("If a person knowingly gives false testimony in a judicial proceeding on any matter material to a question dealt with in that proceeding, that constitutes perjury and is liable to seven years imprisonment; if he did so in return for a benefit – then he is liable to nine years imprisonment.").

118. This is essentially the same policy taken toward the prohibition against homosexual relations—a law which had not been enforced for many years, and which, upon reaching the threshold of the court, was ultimately deemed long overdue to be repealed. This was, naturally, a result of increasing public awareness and legitimacy around homosexuality. *See* Lawrence v. Texas, 539 U.S. 558, 569–70 (2003).

119. *See generally* MENASHE, *supra* note 82 at 180–81 (providing more information on the probative ramifications).

120. Thus, Ariely reasons, the more we are convinced that a lie is morally justified, the chances that we will lie increase–among other things, owing to the "ego motivation." *See* DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE – ESPECIALLY OURSELVES 13 (2013) [hereinafter "The Honest Truth"].

reminders.[121] Both researchers hold that warning the witness prior to their testimony can help reduce the scope of this phenomenon. While Arieli believes that this serves as a moral reminder affecting the witness,[122] Professor Menashe reasons that the warning serves to direct the witness to speak carefully and precisely by way of evidentiary deterrence.[123] The very possibility that the judicial ruling could ultimately find the witness' testimony to be of questionable reliability, is sufficient motivation to increase the accuracy of the testimony.[124]

And yet, as we will illustrate below, the phenomenon of false testimony, and more generally, the widespread tendency to attempt to mislead the court, does not only occur in criminal trials and is not concerned with only one area of civil law. The scope of this phenomenon, as we will demonstrate, is evidence of both the inadequacy of current enforcement policies and the need for urgent changes to be made. In the following subsections, we will survey the scale of these occurrences in both criminal and civil cases, as well as the difficulty contending with them, in light of the many ostensible justifications for leaving this situation as-is.

B. The Scope of the Obstruction of Justice Phenomenon

1. Criminal Proceedings

This phenomenon of obstruction of justice (generally), and perjury (specifically), can present in several ways in the criminal justice proceeding; it may come about because of law enforcement officials providing false testimony[125] or as a result of a defendant presenting a false narrative intended to exonerate them. It may even come from complainants who, through an unfortunate turn of events or other, are brought for the point of providing false

121. *See* MENASHE, *supra* note 82; *see* The Honest Truth, *supra* note 120.

122. The Honest Truth, *supra* note 120.

123. *See* Doran Menashe, The Probative Value of Suppression of the Defendant's Testimony, 53 PROSECUTOR 41, 49–51 (2014) (offering more information on the disclaimer as an evidentiary deterrent).

124. *See* MENASHE, *supra* note 82, at 82.

125. *See* Case (MC Hi) 44591-11-10 Police Internal Affairs v. Alhads, Nevo Legal Database (2011) (Isr.) (documenting the indictment filed by the internal affairs division against a police officer for falsely testifying about a crime he supposedly witnessed).

testimony.[126] A general survey of these cases suggests that obstruction of justice is used to benefit the obstructor or perjurer, either directly, such as by saving them from conviction for a crime, or indirectly, such as by causing them to benefit from the downfall of another.

On the other hand, there are also cases in which the false testimony harms the perjurer themselves. The classic example of the worst kind of perjury, with the greatest potential to wreak havoc on the legal proceeding, is the **false confession.**[127] This is perjury of the sort most likely to directly result in the worst sort of judicial error: a false conviction.[128] In criminal trials, confessions are of paramount importance, serving as the prosecutor's main and most efficient weapon against the defendant.[129] Specifically, owing to the concern of false confessions leading to false convictions, most Western legal systems do not allow convictions based solely on the defendant's confession but require some additional evidence tying the defendant to the criminal act.[130] Conversely, the significance attributed to confessions under the Israeli legal system is termed the "queen of evidence."[131] In the United States, legal literature

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126. *See e.g.*, Helena Smith, *UK Woman Found Guilty of False Gang-Rape Claim Lodges Appeal in Cyprus*, THE GUARDIAN (Sept. 16, 2021), https://www.theguardian.com/world/2021/sep/16/uk-woman-found-guilty-of-false-gang-claim-lodges-appeal-in-cyprus (retelling the case of the young British woman who stayed in Cyprus and filed a complaint concerning her gang-rape by a group of Israelis, wherein the Cypriot court ultimately determined that this testimony had been false).

127. *See* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS IN PSYCH. SCI. 249, 249 (2008); *see also* Allan Fong, *Interrogations and False Confessions: How the Innocent are Made Guilty*, 30 S. CAL. REV. L. & SOC. JUST. 363, 365, 375–82 (2021); Doran Menashe & Eyal Gruner, *How to Minimize the Risk of False Confessions*, 4 KEY L. 19, 20–21 (2014); Hagit Lernau, *False Confessions, False Convictions*, 11 LEGAL J. 351 (2014).

128. *See* Brandon L. Garrett, *Actual Innocence and Wrongful Convictions*, in 3 REFORMING CRIMINAL JUSTICE at 193, 207 (Erik Luna ed., 2017).

129. *See* HUGO SAFFIENCE, WHAT LEADS PEOPLE TO GIVE FALSE CONFESSIONS? PSYCHOLOGICAL AND COGNITIVE PROCESSES THAT DRIVE FALSE CONFESSIONS (2012).

130. *See* BOAZ SANGERO, CONVICTING THE INNOCENT IN ISRAEL AND IN OTHER COUNTRIES–CAUSES AND SOLUTIONS 129 (2014) (Isr.).

131. *See* Boaz Sangero, *Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2800 (2007) ("In my opinion, not only is the confession not the "queen of evidence," but rather, it is the "empress of wrongful convictions.").

suggests that up to a fifth of all convictions are based on false confessions extracted from interrogated defendants.[132] This finding is relevant to cases in which some objective external evidence indicates the innocence of the defendant, such as newer types of forensic evidence (e.g. DNA testing), revealing false confessions resulting in false convictions may, in fact, comprise well over a fifth of all cases.

Accordingly, in American law, the fear of false confessions (i.e. perjury that amounts to a confession) is actually rooted in legislation, with the Federal Rules of Criminal Procedure allowing the court to require testimony under oath from defendants interested in confessing, to verify that they did, in fact, commit the acts attributed to them.[133] This section even states that the defendant should be cautioned that they are under penalty of perjury.[134]

Thus, it would seem that American law contends with this issue by stating unequivocally that perjury is illegal in any circumstance while warning the defendant intent on confessing that, should their confession prove to be false, they will be made to stand trial for perjury. Unfortunately, this is not quite the case: unlike under Israeli law, American law will sometimes allow defendants to enter into plea bargains wherein they continue to maintain their innocence. In other words, *the defendant gives false testimony that is anchored in a plea bargain, claiming they did not commit the criminal act, but still pleading guilty as a part of the plea bargain.*[135] In spite of such plea bargains, the explicit legislative reference contained in the American law is still indicative that there are reasonable grounds to be concerned about false confessions. While we are used to facing false denials, the existence of false confessions has also been established.[136] In one case, the defendant explicitly stated that he preferred to lie

132. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88–89 (2008) ("In thirty-one cases (16%), a false confession was introduced at trial").

133. *See* FED. R. CRIM. P. 11(b).

134. FED. R. CRIM. P. 11(b)(1)(A).

135. *See* AMI KUBO, INCONSISTENT DEFENDANTS IN COURT CONFESS TO GUILT WHILE CLAIMING INNOCENCE, 104–10 (Nevo Publishing, 2010).

136. With emphasis on the important discussion featured in Ben Uliel, *see* Menashe & Alon, *supra* note 1919.

because, were he to tell the truth, they would have continued to interrogate him—in other words, it was "worth it" to lie.[137] Let us recall that, apart from the matter of false conviction, there is also the serious concern that false confessions allow the true criminal to walk free.

In Israel, the status of the confession is beyond reproach, and its credibility is rarely questioned. The words of Justice Arbel are relevant here:

> Indeed, the glamor of the confession as the "queen of evidence" has dimmed somewhat, as a spotlight has been shined on the possibility of false convictions associated therewith. Even so, I believe, the confession retains a place of honor in the hierarchy of evidence in criminal law, and it remains an important and accepted tool in those cases where the court is persuaded that the confession is truthful.[138]

These words illustrate the polarity of Israeli law: realizing, on the one hand, that the confession cannot serve as the coveted "queen of evidence,"[139] while at the same time continuing to rely on it to assist law enforcement agencies in fighting crime. Justice Dorner's proposal was to treat a confession with suspicion, examining the circumstances under which it was given i.e., who is the defendant, what is their background, what led them to confess, and so forth.[140]

And if we are discussing the connection between perjury and false convictions (and obstruction of justice, for that matter), we should clarify that false confessions are not the only form of

137. *Id.* at ¶ 246.

138. CrimA 6679/04 Steckler v. State of Israel, Nevo Legal Database (May 11, 2006).

139. *See* Dalia Dorner, *Queen of Evidence v. Tark Nujidat*, 49 PROSECUTOR 7 (2007).

140. In Zadorov (which is most relevant to this discussion), Justice Amit ruled that: "The confession, once seen as the "queen of evidence," has steadily declined in stature; and yet we must be wary of allowing ourselves to swing to the opposite extreme of the pendulum by treating the confession as a wench. As far as I am concerned, the confession need not be adorned as queen, to whom all other evidence is subordinated; but I also don't see cause to throw out the baby with the bathwater by treating every confession given as presumed to belong to one category or other of false confessions." *See* CrimA 7939/10 Zadorov v. State of Israel, Nevo Legal Database (Dec. 23, 2015) (Isr.) [hereinafter Zadorov Case].

perjury that leads to false convictions. Another such form of perjury is comprised of false testimony given by law enforcement officials. Studies have shown that law enforcement agents are also known to give false testimony from time to time.[141] Ignoring the inherent motivation for them to give false testimony (ostensibly, the desire to counter crime "at any cost"), this is clearly an unacceptable trend that must be reversed, given the obvious danger of this leading to false convictions.[142]

The purpose of the above discussion was to establish the broad scale of obstruction of justice and perjury in the criminal justice system. The above review (which does not purport to be exhaustive) illustrates how ubiquitous this issue is, and—no less importantly—that these acts of tampering and obstruction do real damage to the legal system's purpose of reconstructing the truth, by raising the specter of both false acquittals (owing to obstruction and the concealment of critical information from the court) and false convictions (owing to false confessions and perjury of various sorts). Now, we will explore the scale of this practice in the field of civil law.[143]

2. Civil Proceedings

Above, we discussed the scale of perjury obstruction of justice in criminal proceedings. Effectively, most of the relevant literature concerns the ramifications this has from a criminal perspective, given the serious consequences that can result from evidence tampering in such proceedings—i.e., false acquittals or, worse, false convictions.

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141. *See* Christopher Slobogin, *Testilying: Police Perjury and What to do About It*, 67 U. COLO. L. REV. 1037 (1996); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997); Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 2 (1993).

142. The ubiquity of lies by police officers has even given rise to academic proposals to address them. *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 42 (2010).

143. Aldert Vrij, Christian A. Meissner & Saul M. Kassin, *Problems in Expert Deception Detection and the Risk of False Confessions: No Proof to the Contrary in Levine et al. (2014)*, 21 Psych., Crime & L. 901 (2015).

But beyond this, the phenomena of perjury, obstruction of justice, and general ambivalence toward the consequences of lying in court are just as present in civil proceedings. This occurs, first and foremost, in the context of personal status law— especially family law (in both Israel and the US). In the American context, family court is rife with perjury, specifically in cases of domestic violence (which lay on the borderline between civil and criminal law).[144] This is also true in the Israeli court when it comes to child custody disputes.[145] In light of this, Yoav Maza held that false complaints should trigger an automatic remedy for the defendant when they are discovered to be false.[146] Of course, perjury also spills over into other fields, but it is nonetheless on the level of a national epidemic in Israeli family law.[147]

Ambivalence toward false statements in court is not a feature unique to family law; it often occurs in the context of commercial litigation as well. Surprisingly, this careless ambivalence about acts intended to mislead the court and undermine the value of discovering the truth has been met with only a half-hearted response from the court. In the Agrometal cases, for instance, we encountered a litigant engaged in serial evidence tampering, alongside perjury intended to corroborate the forged evidence. [148] In many of these instances, the court didn't even refer the trial protocol to the law enforcement agencies. Investigations were not opened, and indictments were not filed in even one instance,

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144. *See* Njeri M. Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 149 (2009).

145. *See* YOAV MAZEH, FALSE ALLEGATION OF CHILD ABUSE AND ITS EFFECT ON THE DETERMINATION OF CUSTODY AND PARENTAL RESPONSIBILITY (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2861903.

146. *See* YOAV MAZEH, ALLEGATIONS, THE HARM TO THE SUSPECT AND THE RIGHT FOR REMEDY (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2884237.

147. *Id.*

148. There is no incentive not to tamper with evidence under most circumstances, and there is not even a negative incentive against repeat offenses (take, for example, the Agrometal cases, wherein the same litigant tampered with evidence both times). *See e.g.*, Case (MC Ashdod) 59869-01-14 Electric Wadi v. Ben Simon Nevo Legal Database (June 9, 2016) ("*It has further been proven that the defendant wastes no opportunity to forge documents for a trial....*"); *see also* CivC (DC BS) 18922-01-14 Electric Wadi Ltd. v Agrometal Projects Ltd., Nevo Legal Database (Nov. 29, 2017) ("*Wadi has proven that the "contract" purporting to show a different division was a forgery....*").

despite there being tangible reasons to suspect clear violations of the Israeli Penal Code statutes on perjury and evidence tampering. And, once again, in the field of civil law, the situation in the United States is arguably equivalent.[149]

And yet, civil law must be viewed through a different prism than criminal law—a prism that sees cost versus benefit, and efficiency. In our case, one could argue that there is no real damage in the forged evidence, aside from its disqualification. *Should we wish to illustrate the current situation with respect to evidence tampering in civil proceedings, we may avail ourselves of the following example:*[150]

Suppose we have a civil dispute stemming from a breach of contract by A. B, the injured party who is suing A, does not have a copy of the agreement between the parties. During the stage of discovery, B demands that A disclose the agreement to the court. A has two options: the first option is to disclose the agreement to B as-is. Upon doing so, they will definitely be found liable for breach of contract and be compelled to pay ILS 100,000. The second option is to forge the contract by creating a contract indistinguishable from the original, but with slight alterations to the (allegedly) breached clause. Supposing A pursues this second option, one of two things will happen: there is a 50% chance that the claim will be dismissed for lack of grounds, in which case A will benefit from their obstruction; and a 50% chance that B will pursue a protracted legal struggle to establish that the document provided was forged. Supposing, solely for argument's sake, that B is successful in proving their injury, A will be charged both the ILS 100,000 originally demanded, as well as ILS 50,000 in additional court fees as a result of the evidence tampering. Granted, these are exaggerated court fees by any measure—generally the number would be lower. But we digress.

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149. *See* Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 716 (1998) (quoting a prosecutor who stated: "[I]f perjury were water, the people in civil court would be drowning.").

150. Notably, this example assumes ambivalence to the risk of the party in breach. However, as we will show below in this regard, a rational person will choose the risk associated with evidence tampering. In any event, in the described case of ambivalence to the risk, the option of tampering will be preferred.

Now, let's calculate the cost-benefit to A. Under the first option, which is the more efficient option from a societal standpoint (in that it reduces litigation expenses and ensures the optimal reconstruction of the truth), A will lose ILS 100,000 with 100% certainty. On the other hand, if A forges the contract, there is a 50% chance they will need to pay ILS 150,000—so their cost forecast stands at ILS 75,000. To the extent that A is capable of rationally calculating their benefit, they will prefer to tamper with the evidence.[151] Without a doubt, rational actors will always view the substantive rules through the evidentiary lens from their own perspective, and in doing so, will skew the incentives that the substantive law creates.[152]

At this stage, in the absence of comprehensive and exhaustive sanctions, and without any reasonably demonstrable will to enforce against these crimes—it seems all but foregone that this situation will remain as-is, in all its ruinous ramifications with respect to the flawed fact-finding that will inevitably result. Effectively, from an economic standpoint, the best thing for the defendant to do is to tamper with the evidence to escape liability. This is the most sensible approach under the circumstances, as it stands the chance of allaying the risk of prosecution, while it entails no real risk of its own.

Now, having seen the ubiquity and destructive potential of the phenomena of perjury and obstruction of justice among the criminal and civil systems alike, we will examine the counterarguments in favor of keeping the situation as is. These arguments will help us to refine our own proposal, which will seek to counter these challenges, on the one hand, without harming the interests that the current situation upholds, on the other hand.

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151. This is essentially an overview of what happens in practice, not just a theoretical exercise. *See generally* Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 519–20 (2010) (explaining how evidentiary concerns dominate actors' behavior). For further reading on the "Learned Hand" approach: *see* Thomas W. Merrill, *Learned Hand on Statutory Interpretation*, 87 FORDHAM L. REV. 1, 3 (2018) (explaining Judge Hand's ideas about how judges should interpret statutes by the text as a whole rather than by the dictionary school of interpretation).

152. Talia Fisher, *Truth, Reason, Justice, and Evidence Law*, 108 CORNELL L. REV. ONLINE 92, 107 (2023).

C. *The Danger of Excessive Deterrence of Witnesses*

This article has explored many of the contributing factors to the current state of affairs, with all its challenges—including the phenomenon we established above, whereby perjury and obstruction of justice abound with seemingly little interference from the law enforcement authorities. A review of the academic literature gives rise to one main factor contributing to this circumstance: the concern that punishment will lead to excessive deterrence, or "chilling effect," against witnesses, ultimately resulting in them deciding not to testify rather than risk punishment for perjury.

In this sub-chapter, we will discuss the matter of excessive deterrence and the concerns surrounding it. We should note even now that, in the main chapter of our study—the fourth chapter, where our proposal will be stated—we will seek to avoid harming this interest, given the understanding that the concern underpinning it regards a real threat to the basic aspirations of Evidence Law: reconstruction of the truth, to the best of our abilities under the circumstances.

We can divide this fear of excessive deterrence into two elements: the first concerns the difficulty in establishing the *mens rea* of perjury, or, specifically, the difficulty in identifying and distinguishing between an outright lie and an honest mistake. Litigants and witnesses appearing before the court are reliant on their sensory inputs and memory, which are fallible. In many cases, testimony has been found to contain inaccuracies or even outright mistakes, simply because human memory is vulnerable to corruption (for example, in the case of false memories).[153] Contrary to our position of wanting to convict witnesses for perjury and obstruction of justice, the concern here holds that many may simply refuse to testify out of fear of accidentally

153. For more on the topic of false memories *see* Rebecca K. Helm, *Evaluating Witness Testimony: Juror Knowledge, False Memory, and the Utility of Evidence-based Directions*, 25 INTL. J. EVIDENCE & PROOF 264, 277 (2021); Jennifer S. Bard, *"Ah Yes, I Remember It Well:" Why the Inherent Unreliability of Human Memory Makes Brain Imaging Technology a Poor Measure of Truth-Telling in the Courtroom*, 94 OR. L. REV. 295, 298 (2016); Jesse H. Grabman et al., *Predicting High Confidence Errors in Eyewitness Memory: The Role of Face Recognition Ability, Decision-time, and Justifications*, J. APPLIED RSCH. MEMORY & COGNITION 1, 4 (2019).

perjuring themselves. This concern, combined with the difficulty in discerning lies from honest mistakes, constitutes the first element of this argument, which prefers a situation of under-enforcement and tolerance for perjury and obstruction of justice, in consideration for a population that is less afraid to testify.

To this first element, we can add the *second element*, which is the desire to promote cooperation among populations that otherwise tend not to cooperate or, alternatively, populations meriting extra protection given their vulnerability. Examples of this would be complainants in crimes that suffer from underreporting (such as sex crimes); witnesses to such crimes (whose testimony, generally speaking, is already difficult enough to obtain); and various damaged parties who are unlikely to bring their issues to court simply on account of their fear of challenging large and powerful parties (such as personal injury victims, victims of rights violations in labor law, and so forth). The desire to protect such populations, to prevent any chilling effect from taking hold of them, and to promote positive results to the extent that they do succeed in approaching the law enforcement authorities and the courts, are all arguments in favor of the status quo, whereby we take a tolerant approach to cases of false testimony.

In addition to these two elements of opposition, there are also two **practical** difficulties to consider. The first of these is how infrequently obstruction of justice or perjury are actually the only crime being tried. In most cases, obstruction of justice is a secondary crime intended to cover up a primary crime. Thus, in a case where we have five criminal counts—among them counts of murder, robbery, rape etc., and obstruction of justice, the latter crime will be "swallowed" by the former, becoming essentially an accessory crime to the others—generally more serious crimes requiring a much greater degree of investigation and deliberation.[154] In a situation wherein the court's dealings with the provisions of these particular statutes and, consequently, the

154. For example, one of the most thoroughly-covered cases in the history of the State of Israel is the Zadorov murder trial. Out of the verdict's 141 pages, the court granted the issue of obstruction of justice only a modest two paragraphs (around half a page, or, in other words, 0.35% of the verdict). *See* CrimC (DC Nz) 502/07 State of Israel v. Zadorov, Nevo Legal Database (Sept.14, 2010) [hereinafter Zadorov Case].

development of the caselaw in this regard are so infinitesimal, it becomes clear why these statutes have been so neglected and denied their due attention. The lack of trial time dedicated to these statutes is a practical factor contributing to the current situation.

The second practical difficulty stems from the cost of the criminal trial. The costs associated with the criminal trial have created a situation in which crime is viewed from an economic standpoint, whereby crimes deemed to be lesser, by judicial interpretation, are not seen as meriting the investment of resources it would require to file an indictment in their regard.[155] This rationale is strengthened when any party perjuring themselves or tampering with evidence is already subject to an additional sanction—**the disqualification of their testimony and/or evidence**. This can amount to quite a serious sanction under the circumstances; consequently, there is a tendency to refrain from filing an additional indictment, with all the costs this would entail. The assumption here is that the damage incurred by the witness or litigant whose false testimony is disqualified is sufficient punishment, and further punishment would be superfluous. The result is that cases of these crimes are dealt with haphazardly, with the eventual punishment (should the court choose to impose one) being lenient.[156] For these reasons, we find that there is little incentive to pursue cases of perjury, while, simultaneously, there is a significant incentive to lie on the witness stand, undermining the legal process and society as a whole.[157] **Hence, the a need for a comprehensive solution to change the status quo.**

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155. It should be stressed, however, that the reason this crime is dealt with leniently is not the penalty set out for it (which includes many years of prison, under both the Israeli and American systems). The reason for this leniency is because the court treats it leniently, often settling even for alternatives to prison, and only actually imposing prison sentences on the very rarest of occasions.

156. *See, e.g.*, CrimA (DC TA) 70942-08 State of Israel v. Tzur, Nevo Legal Database (Jan. 11, 2010); CrimC (DC Hi) 433/01 State of Israel v. Akhoy Nevo Legal Database (June 17, 2008).

157. LCivA 572/74 Roytman v. United Mizrahi Bank Ltd., Nevo Legal Database, 61–63 (1975) (discussing the problematic nature of perjury) [hereinafter Roytman].

V. THE NEED FOR ADEQUATE DETERRENCE–AND OUR PROPOSED SOLUTIONS

This article established the many different factors that have contributed to the situation today, with its many difficulties and considerations. We discussed the legal situation, the seemingly inexplicable ambivalence of law enforcement, and the exasperation of these issues as a result of the Digital Age and the Digital Revolution. We considered both the Israeli and American legal systems, which have yielded near-identical conclusions. Finally, we discussed the existing incentives for tampering with evidence, and the arguments in favor of maintaining the status quo, in accordance with the founding principles of Evidence Law.

Now, in this chapter, we will propose a number of solutions aimed at improving the existing law, in light of both the current situation of under-enforcement, and in keeping with the principles of Evidence Law—principles common to both legal systems under discussion. These proposed solutions are cumulative and may be applied concurrently, each seeking to make use of a different obligation set out in the law, as detailed below.

A. *Creating an Independent Negative Incentive Based on the Economic Approach to Evidence Law*

Our first proposal will be to change the current equation when it comes to incentives, which, as we demonstrated above, weighs in favor of tampering with digital evidence in both criminal and civil proceedings. We will change this equation by applying the principles of the economic approach to Evidence Law—specifically, the "Primary Activity Incentives" approach, which we will expand on below.

The economic model of Evidence Law seeks, at its outset, to ensure the efficiency of the judicial system, generally, and the efficiency of the fact-finding process, specifically, by seeking to minimize the cumulative societal costs incurred from both judicial errors and the expenditures required to prevent such errors.[158] In

158. For the pioneering article on this topic: *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1478 (1999) (highlighting both a

his book, Professor Stein presents the three primary functions of Evidence Law according to this approach: reducing judicial errors; minimizing the costs of preventing errors; and distributing the risk of judicial errors evenly among the litigants. *This pragmatic approach accounts for the costs of measures employed to prevent judicial errors and also recognizes the inherent impossibility of ensuring a 100% accurate reconstruction of the truth. Consequently, it seems a part of the mission of Evidence Law to distribute these risks and uncertainty as evenly as possible among the litigants.*[159]

The relevant subcategory having evolved from the economic approach to Evidence Law, in our case, is the Primary Activity Incentives approach, which seeks to emphasize the role of evidence procedures as being mainly a means of *shaping the future*, with less emphasis on their role in reconstructing the past. Unlike the traditional approach to Evidence Law, which strives for an accurate reconstruction of the truth, the Primary Activity Incentives approach is forward-looking and focuses on the role of judicial proceedings and evidence procedures in shaping future behavior.[160]

Under this approach, the ex-post reconstruction of the truth is a worthy cause, but not the objective of Evidence Law. Rather, the approach holds that the **truth is a means** to achieving other societal objectives of the trial and the legal system as a whole. The first among these is the desire to guide societal behavior ex-ante, outside of the halls of court.[161] This approach stipulates that, if private actors are not made to internalize the societal costs associated with their illegal activities, they are bound to ignore the wider ramifications of their behavior on the greater good. Deterrence can only be achieved by imposing the legal sanction on the party that transgressed in practice, and vice versa. *The creation of such incentives is only possible when the potential*

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search model and a cost-minimization model of evidence, the basic structural rules of evidence-gathering, and an economic appraisal of the salient provisions of the Federal Rules of Evidence).

159. ALEX STEIN, FOUNDATION OF EVIDENCE LAW, 142–43 (2006).

160. *See* Fisher, *supra* note 152, at 107.

161. *See* Chris Williams Sanchirico, Evidence Tampering, 53 DUKE L. J., 1215, 1292–93 (2004) (noting that increased anti-tampering enforcement deters inframarginal tampering).

transgression is aware in advance, at the time that they stand to commit the transgression, that it is likely to result in their conviction and punishment. An example of the implementation of these principles can be seen in the use of negative evidentiary inferences during the stage of evidence hearings as a result of a litigant refusing to present certain evidence. In his works, Kedmi backs this negative inference:

> Refusing to bring relevant evidence, in the broader understanding of this concept [...] effectively creates an intuitive factual presumption, whereby such refusal is akin to an admission that the evidence in question, were it to be presented, would have harmed the position of the party refusing to present it. Thus, in essence, probative value is assigned to evidence that was *not* brought [...].[162]

This is an example of the creation of a **preemptive** incentive for litigants to present to the court *all* evidence in their possession since failing to do so would be akin to admitting to the claims issued against them.

There is a certain difficulty in drawing a direct comparison to our situation since it is hard to imagine under what circumstance we could draw a negative inference against a litigant or defendant for their past conduct. It is doubtful if establishing a negative inference against a litigant proven to have previously lied or tampered with evidence would even be consistent with the founding principles of Evidence Law. Moreover, this could lead to a sort of "bribery" effect that might well do more evidentiary damage than whatever advantage is achieved by such an inference.[163] Furthermore, in many cases, the forgery is intended to protect the defendant from being caught for a crime they committed. Under such circumstances, this would create a strong disincentive since the perjurer's true concern is being caught for a primary crime. To create a permanent negative inference out of the defendant's desire not to be caught, in what constitutes a

162. YAKOV KEDMI, ON EVIDENCE, vol. III (2003), pp. 1650.

163. *See* Doron Menashe, *Further Thoughts on Ehud Olmert's Conviction in the Holyland Affair*, 12 LEGAL J. 107, 126-127 (2016).

corollary to the *nemo tenetur* principle, would be seriously problematic in view of the founding principles of Evidence Law.

And yet, notwithstanding the foregoing, we do believe that there is a path forward to creating a significant negative incentive against evidence tampering and perjury, in just such a manner as would create *ex-ante* deterrence without undermining the fundamental rationales of Evidence Law—including the principle of abstaining from self-incrimination.

Our proposal is to impose an **additional** minimum sentence beyond that already set out for evidence tampering in criminal proceedings. This minimum sentence (**which does not currently exist**) would create a direct negative incentive against acts of obstruction.[164] This statute would come into play at a stage following the commission of the crime—or, more specifically, following the opening of the investigation into the suspect or defendant. For example, if the accused wore gloves on their hands so as to avoid leaving fingerprints at the crime scene, this—while perhaps encumbering the investigation of the truth—would not constitute obstruction of justice. To impose a punishment for wearing the gloves, in this case, would be to harm the basic right of refraining from self-incrimination. The minimum sentence would thus be triggered only after the defendant is identified, and the evidence used as a basis for their indictment has been assembled. Were our proposal to be accepted, each action undertaken by the defendant with the purpose of sabotaging the evidence against them and/or obstructing the court in its efforts to reconstruct the truth—such as committing perjury,

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164. It should be noted that the Israeli legislature has previously shown a willingness to impose minimum sentences for crimes against the state occurring on a wide scale. E.g., Section 273 of the Israeli Penal Code states, with respect to assaulting a police officer: "One who assaults a police officer in the line of duty or abets another in assaulting an officer in the line of duty, shall serve up to three years in prison, *but no less than one month*." On more than one occasion, similar draft bills have been proposed to address crimes that had become routine in their scale. *See, e.g.*, Penal Code Draft Bill (Amendment–Mandatory Sentence for Grand Theft Auto), DB 1733, which sought to impose a minimum prison sentence for car thieves previous convicted of the same offense; see as well Penal Code Draft Bill (Amendment–Mandatory Sentence for Arson of Public Property),which sought to impose a minimum sentence of three years and nine months for criminals convicted of arson, and a minimum sentence of five years in aggravating circumstances. *See also* DALIA DORNER, REPORT OF THE PUBLIC COMMITTEE FOR EXAMINING STATE POLICY FOR SENTENCING AND HANDLING CRIMINALS (2015).

intimidating witnesses, and so forth–would incur an additional penalty apart from the principal. As we have demonstrated above, it is necessary to treat obstruction of justice as a separate charge given the fact that, in many cases, it is perceived as being a minor infraction compared to the principal crime with respect to which the act of obstruction was committed.[165] The minimum sentence would prevent the court from attempting to ignore the crime of obstruction (i.e., our primary objective),[166] and, consequently, provide an immediate, direct negative incentive against committing acts of obstruction after the outset of the investigation. The minimum sentence prevents the defendant from reasoning that obstruction is so insignificant compared to the principal crimes they stand indicted for, that it could fly under the radar (relatively speaking).

B. Establishing Civil Remedies

In the previous sub-chapter, we discussed the need to create a direct negative incentive to commit acts of obstruction in criminal proceedings while safeguarding the right to abstain from self-incrimination as an indispensable principle of criminal law. Such an incentive is needed in civil cases as well, with the civil proceeding, in particular, being infamously rife with perjury.[167]

Naturally, such a proposal raises its own issues, given the Israeli Supreme Court precedent, per the Roytman ruling, that breach of a statutory duty under the Penal Code—such as perjury—cannot serve as a tortious cause of action.[168] Under the current legal regime, one cannot sue for damages for false testimony, whether negligent or malicious, if such testimony resulted in an erroneous ruling that caused bodily, monetary, or prestigious harm to the plaintiff. The Israeli court recently upheld

165. *See* Zadorov Case, *supra* note 140.

166. *See* Nick Werle, *Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L. J., 1, 40 (2018) (arguing that imposing a minimum sentence will ensure full, comprehensive and exhaustive enforcement, leaving the authorities with no choice but to impose the penalty set out in law).

167. *See* Underwood, *supra* note 149, at 715 (remarking how common perjury is in civil cases).

168. Roytman, *supra* note 157, at 175.

the Roytman precedent in Boleg,[169] holding that a witness in court is not exposed to civil-tort liability for perjury, based on the argument that:

> Were the law to allow a person to be sued on the grounds that their testimony in court was untruthful, one would then be able to sue the witness from the second trial in a third trial, and so on and so forth, *and there would be no end to it.*

One of the reasons for refraining from using civil remedies for perjury is the judicial confidence, from time untold, that criminal sanctions **alone** are always sufficient deterrence.[170] This reasoning is not inconsistent with the immunity granted to litigants in court against claims of slander and libel relating to statements made in court. I.e., just as one is immune from being sued for libel on account of their statements during testimony in court, so, too, they are immune from tortious complaints under the same circumstances. This is aligned with the American approach as well and enjoys a general consensus among the Anglo-American legal systems.[171]

Consequently, the Israeli caselaw has opined that the obligation to give truthful testimony is a clear public duty owed by every witness toward the state and the court— and not toward litigants. Thus, the correct interpretation of the prohibition of perjury yields that it is not intended to benefit or protect litigants, and, accordingly, a breach of such duty cannot serve as a cause of action for breach of a statutory duty.[172]

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169. CivA 884/18 Boleg v. Aharon, Nevo Legal Database (July 24, 2018) [hereinafter "Boleg Case"].

170. Eagle, *supra* note 8, at 350.

171. *See id.* at 367; John R. Alford, Jr., *Lying on the Stand Won't Cost You a Dime: Should Courts Recognize a Civil Action in Tort for Perjury*, 44 WASH. & LEE L. REV. 1257, 1257, 1268 (1987); John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in Civil Proceeding is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 775 (2006).

172. *See* Case (MC TA) 10393-01-17 Avraham Netiv v. Alimi Hassan, Nevo Legal Database (Nov. 20, 2018) (explaining that there needs to be a statutory duty of which purpose is for the benefit of the injured party) [hereinafter Netiv Case]. We should nonetheless note that there are legal systems that do allow such claims to be filed, unlike the Israeli and American systems. In a nutshell, the *Scottish* legal system, for instance,

Beyond the aforementioned difficulties, there is another issue with formalizing a civil remedy to contend with this phenomenon, which relates to the negative label such a claim would taint the defendant with if accepted. Such a statement of claim would necessarily attribute the act of criminal perjury to the defendant. These are serious accusations that carry with them the weight of moral turpitude, as well as a general societal stigma. It is no simple matter to create a civil remedy that would establish facts relating to serious crimes but with an evidentiary threshold of only the civil law preponderance of the evidence.

The aforesaid difficulty has led to the recognition of a third category of proof, a sort of "mezzanine level" between the "preponderance of evidence" standard and the "beyond a reasonable doubt" standard. This standard of proof is employed in cases involving a charge of fraud in civil proceedings, where such an accusation, were it to be accepted, would negatively brand the targeted litigant.[173] As was noted in one ruling:

> The threshold of proof for an accusation of fraud, on the other hand, is higher. In the civil plane, it is customary in certain cases to make use of a sort of third category of proof, which rests somewhere in between the accepted civil proof standard and the criminal proof standard. This is an "enhanced threshold of proof," at times being termed the "mezzanine level." When the defendant raises a claim of defense that would attribute to the plaintiff a criminal act, this constitutes a serious accusation against their opponent – one which threatens to stigmatize them with some sense of moral turpitude. The nominal probative

holds that only a person actually convicted of perjury in criminal trial is exposed to torts. In the *French* system, there is a technical impediment to such filings: a person convicted in criminal trial is prevented from claiming and arguing against a witness in a subsequent civil trial that they (i.e., the plaintiff) are innocent because the defendant committed perjury, since this would contradict the ruling in the criminal trial. In *Britain*, swearing a false oath is only a crime when committed against the state, and not when directed between litigants; thus, it cannot serve as a tortious cause of action (i.e., bringing this system in line with the Israeli system). For an exhaustive overview, *see* Roytman, *supra* note 157.

173. Case (DC Hi) 5264-02-09 Gentos v Gentos Shoe Co. Ltd. Nevo Legal Database (Mar. 1, 2012).

> value (in the sense of quantity or weight) of the evidence required to meet the evidentiary threshold may vary in accordance with the severity of the charge one seeks to establish. A more serious charge demands more serious proof. In our case, we are dealing with a defense claim that attributes to the plaintiff – and even to the other defendants–a *criminal act, and thus, a more serious charge than the usual variety. Therefore, the defendant must bring a greater quantity of evidence, of greater weight, compared to what would be needed to defend a charge that was not criminal in nature.*

We argue that, while obstruction of justice may be deemed a crime against the state, and not necessarily against any particular person, it is still fitting—in cases where a person is directly harmed by such acts—to compensate the victim directly.[174]

That being said, before stating our proposal, let us lay out the relevant **facts.** Perjury and obstruction of justice are perceived as crimes against the state, and not necessarily against a particular person; therefore, they cannot serve as cause of action for civil claims. *Additionally*, civil proceedings entail immunity for statements made in court, and to remove this immunity would lead to a slippery slope that the court has no interest in testing (see: the *Boleg* case). Accusations of perjury or obstruction of justice are effectively criminal accusations, and so would, in any event, require a higher standard of proof than a standard civil

174. Directly compensating the victim of a crime is not an unusual approach in Israeli law, and occurs in many other instances, notwithstanding the prevailing wisdom that any compensation granted to the victim of a crime in criminal proceedings is not a replacement for compensation due to them in tort proceedings. *See e.g.*, CrimA 5683/16 State of Israel v. Tvak, Nevo Legal Database (Sept. 13, 2017). Such legislation can be found in the Israeli Torts Ordinance to some extent. *See* § 60, Torts Ordinance, 5729-1968, as amended (Isr.), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/il/il078en.pdf. ("*If a pernicious case is opened or continued – in effect, maliciously, and without a reasonable or discernable cause – against someone, whether criminal, in bankruptcy or in dissolution, and such a proceeding tarnishes their credit, their reputation, or threatens their freedom, before ending with their exoneration, if the proceeding was likely to conclude as such [...]*"). Arguably, the Tort Ordinance confers a cause of action against a false witness; but this right is only afforded to a person against whom a criminal or bankruptcy proceeding is initiated, and then goes on to add more conditions effectively precluding the possibility of filing a civil claim for perjury.

claim would. Finally, the crimes of perjury and obstruction of justice are rarely enforced, as the fear of deterring witnesses from testifying has led the authorities to refrain from imposing sanctions for these crimes as the sole/main crime being tried.

Given the aforesaid limitations, our proposal is to create the option to file civil claims for obstruction of justice *only when the civil claim is filed pursuant to a criminal conviction*, as set out in Section 42A(a) of the Israeli Evidence Law.[175] The procedure in Section 42A(a) is fairly simple: it allows the victim of a crime that has been tried (in our case—the victim of a crime of perjury and/or obstruction of justice) to file a civil/tort claim for monetary compensation for the criminal act that was committed. The pursuant civil claim is heard before the same court that presided over the criminal trial and is thus already familiar with the facts. The plaintiff need only prove the damages caused to them and the responsibility of the guilty party for said damages. The court determines the sum of compensation accordingly. In a civil claim, unlike a criminal trial, the sum of compensation is not limited by the criminal statute but is determined based on the damages suffered.

There are several reasons to use the mechanism of a civil claim pursuant to a criminal conviction. One such reason is that it creates a significant barrier to filing civil lawsuits since the (very) high requirements for filing an indictment effectively prevent the vast majority of perjury cases from resulting in civil complaints. **Another reason**, and pursuant to the foregoing, is that once this is instituted, any party injured by false testimony or obstruction of justice will apply pressure on law enforcement to indict for these crimes. Once there is the potential for monetary gain through the filing of a civil claim pursuant to the criminal conviction, it is reasonable to assume that the victims will act and make use of whatever means are at their disposal to bring about

175. *See* Israeli Evidence Law, *supra* note 77, § 42A(a) ("The findings and conclusions of a final verdict in a criminal trial, wherein the defendant was convicted, are admissible in civil court as prima facie evidence of their content, if the convicted person, their substitute or any other party whose liability results from their culpability–including any person liable to them by debt ruling–is a litigant in the civil trial.").

action, which are not being taken advantage of at present.[176] From this point onward, it would be difficult to imagine a case being closed for "lack of public interest" when there is a real, tangible, and substantive public interest in seeing indictments and convictions for obstruction of justice. Then, there is the matter of efficiency. Granting the option of filing a civil claim only after an indictment is filed will ensure that civil claims for obstruction of justice will cost the court relatively few resources since the relevant factual disputes will have already been settled. This negates any concern of the court being overwhelmed by a flood of civil suits for perjury. Finally, the matter of the threshold of proof. We illustrated above how civil claims that raise accusations involving moral turpitude, or which indicate conduct that is criminal in essence, merit a higher threshold of proof than the preponderance of evidence threshold. By providing the option to file a civil claim for perjury only by using the mechanism of a civil claim pursuant to a criminal conviction, we effectively ensure that all civil claims filed for crimes of obstruction of justice will involve only factual assertions that have already been proven beyond a reasonable doubt. This recognizes that such claims exist in the space between criminal and civil proceedings, which requires a higher threshold of proof than the preponderance of evidence standard, and perhaps even a higher threshold than the mezzanine level proposed by caselaw with respect to accusations of fraud in civil proceedings.

Were our proposal to be adopted, we would ensure increased enforcement by law enforcement agencies against crimes of obstruction of justice (as the sole and/or main charge indicted) as a result of the new incentive for victims of these crimes to act to pursue their interests. At the same time, we create a significant barrier preventing a flood of civil claims for obstruction of justice by employing the mechanism of the civil claim pursuant to a criminal conviction. The few civil complaints filed in this manner will be handled efficiently since their factual disputes will have previously been settled in the criminal trial. And, finally, we will ensure real protection for the litigants, since the standard for

176. E.g., by filing an appeal or even a petition to the court in connection with law enforcement's decision not to open an investigation and/or not to file an indictment for obstruction of justice.

demanding compensation for obstruction of justice is effectively proof of the act of obstruction beyond a reasonable doubt.

Thus, by employing the civil remedy (which, arguably, would only be granted sparingly, in suitable cases), we will increase criminal enforcement, increase deterrence, and, accordingly, increase the likeliness (at least, in theory) of reaching more accurate, just and correct verdicts in court.

C. Imposition of Ethical Obligations

The third proposed solution relates to the ethics rules incumbent on attorneys as a condition of their membership in the Israeli Bar Association. This proposal is complimentary to the main two proposals posited above, which relate to the civil and criminal fields of law, all of which are premised on the Israeli law's recognition of the obligation borne by lawyers not to mislead the court.

This is spelled out clearly in Section 34 of the Ethics Rules,[177] whereby: *"An attorney may not, orally or in writing, raise a factual or legal claim that they **know to be incorrect.**"* In this sense, the Ethics Rules recognize the capacity of the attorney to serve as a modulating factor to balance false testimony—so much so, that it even sees fit to impose **independent liability** for claims that are made, orally or in writing, which are known to the attorney to be false.

In this regard, caselaw has even determined that Rule 34's prohibition against misleading the court also includes misleading by default—i.e., refraining from presenting information in a way that can create a false impression of the situation.[178] This obligation has merited no small amount of academic discourse, and it stems from the faith the court places in the standing of attorneys and its reliance on the integrity and faithfulness of those presenting cases before it. It perceives these attorneys as

177. § 34 Bar Association Rules (Professional Ethics), 5746-19861, 1, 15 (Isr.).

178. *See* Case 9951/16 Green v. Tel Aviv District Bar Association, Nevo Legal Database (Jan. 31, 2017); Bar Association AppealCase 5/87 Shmuel v. Southern District Bar Association Committee, 41(4) CP 516; Bar Association Appeal Kremzin v. Tel Aviv District Bar Association Committee. With respect to misleading the court by inference, *see* Disciplinary Hearing 37/08 District Committee of the Tel Aviv District Bar Association v. Adv. John Doe.

court officers of a sort, whose role is to assist the court in adjudicating disputes and discovering the truth.[179]

In the adversarial system, which reigns in Israel and in the US, the ability of the court to function under the monumental load that it carries depends on its ability to rely on the factual representations made before it by attorneys and to act on the assumption that these arguments are thoroughly investigated and found to be truthful.[180] And yet, we find that this prohibition against making knowingly false statements is, similarly, treated disdainfully at best. The courts often find themselves deliberating just such statements—knowingly false statements made before them by attorneys—but, apart from expressing their scorn at such conduct on the part of a court officer, we see little additional action. Take, for example, the district court of Beer Sheba:[181]

> I am extremely concerned by the fact that, even after the appellant attorney became aware that the documents he presented in the hearing of October 3, 2018, were not related to the accident, he then presented a motion for review on October 9, 2018, purporting to attach "a copy of the correct documents." *In the appeal hearing, the appellant attorney was forced to admit that these new documents were also not related to the accident. I hardly need state that attorneys are confidants of the court, and cannot present the court with information that does not reflect reality, undermining, in the process, the court's ability to carry out justice* (compare to: Rule 34(A) of the

179. Limor Zar Guttman, *The Attorney's Obligation Not to Mislead the Court*, 24 LEGAL AFFS. 411, 415 (2001).

180. Case (DC Jer.) 54692-05-15 Kabha v. Haifa District Bar Association Nevo Legal Database (July 16, 2015) ("I should hope that this verdict, after it is published, will implant in the hearts and minds of lawyers the depth of their obligation to submit to the court only documents that are fully and impeccably truthful. They must understand that the court relies on them. It would be a tragedy if, beyond the case currently deliberated before us, we see similar cases increase in volume, and the court thus loses its ability to rely on documents submitted to it by attorneys. If this is what it has come to, what is next?). This case concerned a disciplinary hearing against an attorney who was accused of filing motions in court that he knew to contain false information.

181. Case (DC BS) 56496-06-19 Namer v. State of Israel Nevo Legal Database, 10 (July 6, 2019) [hereinafter Namer Case].

Bar Association Rules (Professional Ethics), 1986). This alone could serve as grounds to dismiss the appeal.

The Namer case perfectly illustrates the status quo: the court expresses its concern that perjury will "[undermine] the court's ability to carry out justice," while, in spite of this, taking no action, imposing no sanctions, and failing to pass the matter on to the relevant authorities – whether the disciplinary committees of the Bar Association, or other law enforcement agencies (considering that this is, after all, perjury we are discussing, or obstruction of justice at the very least).

The foregoing is largely consistent with the Israeli Ethics Rules. All the Ethics Rules can create, in their current formulation, is a disciplinary infraction.[182] Another way to moderate the impact of obstruction of justice and perjury would be to make use of the existing ethical violations that already apply to lawyers, while also establishing a new statute that would hold attorneys liable for making false representations out of negligence. Allowing lawyers to be held accountable in the case of negligence would have the effect of lowering the existing evidentiary threshold under Rule 34, which requires active knowledge on the part of the lawyer with respect to the factual or legal inaccuracy of their claims. Such a rule creates an incentive (in effect) for lawyers to be willfully ignorant and to ignore material details and pertinent facts. Penalizing negligence will, in contrast, encourage precise and professional conduct, ensuring an additional pair of eyes to scrutinize the quality of claims and documents submitted to the court—i.e., those of the attorney, who now bears the burden of showing they acted professionally in investigating the facts—on the level expected of them—before submitting them to the court. We believe that making use of the potential evidence tamperer's own attorney as an additional layer

182. *See* Netiv Case, *supra* note 172 ("*The prohibition against misleading [the court], as it appears in Section 34(a) of the Bar Association Rules, is intended to benefit the court [...] a conceptual determination seeing every advocate representing a party at trial as having violated a statutory obligation meant to protect their opponent, should they be found to have "knowingly made a false factual or legal claim," would do more harm than good. It would simply flood the court with frivolous claims, and, in the abundance of caution it would cause lawyers to demonstrate, it would also undermine their fiduciary duties toward their clients.*")(emphasis added).

of protection against false factual and legal claims from misleading the court will assist in reducing the scale of this phenomenon.[183]

VI. CONCLUSION

There is an unexplained gap between the ruinous consequences of acts of obstruction of justice and the willingness to prosecute such acts as the main or sole charge in an indictment. The main reason for this gap is the fear of a "chilling effect" on potential witnesses, which would have the effect of reducing the amount of evidence available, rather than necessarily ensuring its quality. Under the current status quo, there is an incentive (in effect) to obstruct proceedings in order to influence the outcome of the trial, not least in light of the ease with which this can be done using modern technological developments of the Digital Age. Alongside the expansion of the basket of evidence available to the court as a result of the Digital Revolution, we have seen an expansion of opportunities to mislead the court—opportunities that are, unfortunately, difficult to detect, in light of antiquated laws that are not suited to contending with these threats. The solution of simply ignoring obstruction of justice in order to avoid deterring witnesses is only a partial solution, which really amounts to ignoring the problem. This simply opens us to the possibility of any and all proceedings being determined by partial or forged evidence. In the conclusion of our article, we proposed three courses of action that could improve the current situation: the first, seeking to tackle this challenge using the economic approach to Evidence Law; the second, seeking to create a quasi-civil remedy that would allow the perpetrators of obstruction to be sued in court; and the third, seeking to use the ethical obligations incumbent on lawyers to create a chilling effect against obstruction. We believe that legislative action in the vein of our offered proposals in Chapter 4 of this article, which aspire

183. As an aside, we are aware that our proposal is not lacking its own difficulties, not least of which the matter of imposing punishment of a criminal nature for a crime of negligence. Even so, this proposal seeks to open us to the possible uses of the professional ethics rules. Our proposal, as noted above, deals with creating negative incentives at the stage of the criminal act (by increasing enforcement), and, thereafter, creating a new civil remedy, which has yet to stand the test of academic scrutiny.

to offer a proper deterrence against acts of obstruction of justice, will amply express the will of the legislator to tackle this serious dilemma frontally. Perhaps, in this way, we will succeed in resolving the issue.