11

LAW AND FACT

11.1 On the Idea of a Fact

Most discussions of legal reasoning and legal argument, including much of this book, tend to focus a great deal on law and not very much on facts. The standard treatments assume that the interesting issues in *Donoghue v. Stevenson*[1] are about whether Mrs. Donohue ought to be able to recover against the ginger beer bottler despite the absence of privity, and mostly ignore the question of whether it really was a decomposed snail that came out of the bottle or just how ill, if at all, the sight of the snail actually made her. We know after *Raffles v. Wichelhaus*[2] that when both of two contracting parties are fundamentally mistaken about the object of the contract, there is no contract at all, but how do we know that there were two ships named *Peerless,* and how do we know that each of the parties really was mistaken? *R. v. Dudley & Stephens*[3] is a staple of criminal law classes, but just how hungry really were the survivors, and just how close to death was the cabin boy before he was killed for the alleged survival of the others? And although the Supreme Court in *Brown v. Board of Education*[4] appeared to base its conclusion on the proposition that racially separate but physically equivalent educational facilities impaired the education of black children, how did the Court obtain that information, and was the information it obtained correct?

All of these questions are *questions of fact:* Was it a decomposed

1. [1932] A.C. 562 (H.L.).

2. 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

3. 14 Q.B.D. 273 (1994). For an engaging and important account, see A. W. B. Simpson, *Cannibalism and the Common Law* (1984).

4. 347 U.S. 483 (1954).

snail? Were there two ships named *Peerless,* or only one, or maybe even three? How close to death were the shipwrecked sailors? Do black children get a worse education in an all-black, legally segregated school whose physical facilities and teacher training are the same as those in the all-white schools? These questions are traditionally contrasted with *questions of law:* Is a manufacturer (or bottler) directly liable to the consumer when there is a decomposed snail in a ginger beer bottle? Is there a contract when the contracting parties have different beliefs about what they are contracting for? Is dire necessity a defense to a charge of murder? Does a separate but nominally equal racially segregated school system violate the Fourteenth Amendment? The typical legal decision involves an initial assessment of what happened—the question of fact—and then moves on to a determination of what the law should *do* in light of what has happened—the question of law.

The distinction between questions of law and questions of fact is not without difficulty. A controversy about how to explain the difference between law and fact has generated a substantial body of commentary,[5] even including the view that the distinction is entirely illusory.[6] Much of the debate centers on the implications of the way in which, conventionally, the jury (or a judge explicitly serving as the trier of fact) is charged with determining the facts, while the judge has the job of interpreting and (perhaps) applying the law. In reality, however, juries make many decisions that partly involve determinations of law, such as whether someone's actions were "reasonable" or whether the defendant's actions "caused" the plaintiff's injury. Conversely, judges commonly make factual determinations when they are reaching legal conclusions, sometimes just by virtue of having to make the factual determination that some rule or precedent is or is not the law, and sometimes because, especially with respect to constitutional issues, making determinations about facts is part of what we want judges to do in order to ensure that constitutional values are preserved.[7]

5. See, e.g., Richard D. Friedman, "Standards of Persuasion and the Distinction between Fact and Law," 86 *Nw. U.L. Rev.* 916 (1992); Henry P. Monaghan, "Constitutional Fact Review," 85 *Colum. L. Rev.* 229 (1985); Stephen A. Weiner, "The Civil Jury and the Law-Fact Distinction," 54 *Cal. L. Rev.* 1867 (1966).

6. Ronald J. Allen & Michael S. Pardo, "The Myth of the Law-Fact Distinction," 97 *Nw. U.L. Rev.* 1769 (2003).

7. See David Faigman, "'Normative Constitutional Fact-Finding': Exploring the Empirical Component of Constitutional Interpretation," 139 *U. Pa. L. Rev.*

Yet although the fact-law distinction in law can become muddied quite quickly, the confusion does not always stem from the lack of a fundamental distinction between fact and law, which becomes far less mysterious if we just think of it as a variation on the venerable distinctions between fact and value, is and ought, and description and prescription.[8] Rather, the confusion comes from the way in which the law has traditionally insisted that facts are for juries and the law is for judges, when in reality many of the things that juries do by way of law application involve making legal determinations, and many of the things that judges do involve making factual ones. If we accept that the distinction between law and fact does not and could not track the distinction between what judges do and what juries do, then we need not reject the basic distinction between what happened and what someone ought to do about it in order to recognize that making factual determinations is a central part of reasoning and argument at all stages of the legal system.

Thus, although legal decisions, even those made by judges and even those made in appellate courts, typically involve both factual and legal elements, discussions of legal reasoning have traditionally focused overwhelmingly on the latter only.[9] They have assumed that thinking about factual questions is for the law of evidence or that making factual determinations is not really a matter of legal reasoning at all. But given that questions of law almost always turn on determinations of fact, and given that determinations of fact are in numerous ways structured by legal rules and by characteristic ways of reasoning, to exclude questions of fact from the topic of legal reasoning seems peculiar. In this chapter, therefore, we shall take up the question of questions of fact and examine the

541 (1991); Monaghan, *supra* note 5; Note, "Corralling Constitutional Fact: De Novo Fact Review in the Federal Courts," 50 *Duke L.J.* 1427 (2001).

8. There are, of course, controversies about and challenges to these venerable distinctions as well, some but not all of which come from perspectives loosely labeled as "postmodern." And it is true that many purported descriptions have a normative element to them, with values being smuggled in under the cover of purported neutral description. Nevertheless, it is sufficiently implausible to insist that there is no difference between "John fired a gun whose bullet entered Mary's heart and caused her death" and "John ought to go to prison for murdering Mary" that allegedly sophisticated challenges to any of the distinctions in the text need not detain us any further here.

9. A noteworthy exception by a prominent Legal Realist is Jerome Frank, *Facts on Trial: Myth and Reality in American Justice* (1949).

reasoning processes that legal decision-makers use to determine in the first instance simply what happened.

11.2 Determining Facts at Trial—The Law of Evidence and Its Critics

In the normal course of things, determining what happened is for the trial court. Did the defendant shoot her husband? Was that the testator's authentic signature at the bottom of a document that appears to be a will? What kind of damage did the overflowing water cause in *Rylands v. Fletcher,*[10] and how much would it cost the plaintiff to repair it? These issues are normally determined at trial and not on appeal, and they are determined by the person or institution we call the "trier of fact." The classic trier of fact in common-law legal systems[11] is the jury, although it turns out that in many criminal cases and most civil ones the determination of what happened is made by the presiding judge.

If we set aside the law for a moment, we can appreciate the fact that there are multiple ways of finding out something about the world. Outside of the legal system, for example, a common method of determining what happened in the past is to go out and investigate, just as police detectives do when a crime has been committed, and just as congressional investigators do when Congress initiates an inquiry into the cause of a disaster such as the explosion of the *Challenger* space shuttle or the nuclear leaks at Three Mile Island. Investigation itself takes many forms, but all share the idea that the investigators go out into the field, ask questions, poke around, interview witnesses, examine physical evidence, and then make the decision themselves.

In other contexts, particularly in science, the way to find out about something is to conduct an experiment. Sometimes the experiment will be conducted in a laboratory, sometimes it will involve some variation on giving some people a drug and others a placebo, and sometimes scientists and others can analyze a natural experiment, the situation in which the world rather than the scientist creates the conditions in which almost ev-

10. 3 L.R.E. & I. App. 330 (H.L. 1868).

11. In general there are no juries in civil-law systems, and judges both determine the facts and apply the law. In some civil-law systems, however, judges will occasionally try cases, especially criminal cases, in conjunction with several laypeople typically known as "assessors."

erything is the same except for some consequence or symptom whose cause we wish to identify. And empirical social scientists often find out about the world by collecting and analyzing data, often in the large computerized arrays of information called data sets. They run regressions using different variables, typically in an attempt to locate the causes and consequences of various social phenomena.

There are, to be sure, other forms of discovering facts of the world, but cataloging all of them here would serve no purpose. The point of mentioning of few of the more widespread fact-finding methods, however, is to highlight the fact that the law's characteristic way of determining what happened is hardly universal and hardly the only way of finding out about things, even the things that the law would need to know for its own purposes. Indeed, the fact-finding methods that we associate with the law in the common-law world—adversarial trials in which whatever information the judge or jury has on which to base its decision is supplied by the parties—are themselves hardly universal. In France, for example, judges play an active role in managing and conducting the more serious criminal investigations,[12] and variations of this approach are seen in many other civil-law countries. In England prior to the fifteenth century, jurors were largely self-informing, expected to rely in part on their personal knowledge of the litigants, in part on their personal knowledge of the situation, and in part on what they could find out by their own investigations.[13] The idea that a jury—or the judge serving as the trier of fact—should be largely ignorant of the specific litigants and the specific facts prior to the trial itself is a relatively modern invention and hardly a universal one. But even apart from the question of the jury's prior knowledge, the view that the best way to make a factual determination is to allocate to the parties all of the burden of coming forth with evidence and then to have a group of nonexperts evaluate that evidence in an adversary mode, rather than, say, an investigative or collaborative one, and rather than relying on people who might have relevant expertise, is hardly self-evident. Nor is the common law's adversary method self-

12. An intriguing and instructive narrative is Bron McKillop, "Anatomy of a French Murder Case," 45 *Am. J. Comp. L.* 527 (1997).

13. See Sanjeev Anand, "The Origins, Early History and Evolution of the English Criminal Trial Jury," 43 *Alberta L. Rev.* 407 (2005); Thomas A. Green, "A Retrospective on the Criminal Trial Jury, 1200–1800," *in Twelve Good Men and True* 358 (J. S. Cockburn & Thomas A. Green eds., 1988).

evidently wrong, and indeed it has its counterparts in other decision-making environments. The Roman Catholic Church, after all, has institutionalized the concept of the devil's advocate as a way of ensuring that the initial impression of a candidate's sainthood is not accepted as final before hearing the best argument against the proposed saint's actually having been one. Thus, the determination of facts in most common-law countries is premised on the belief that adversarial procedures in which the parties have the primary responsibility for coming forth with evidence are valuable ways of determining the truth, even if they are not the only ones. Just as one argument for a system of freedom of speech is based on the assumption that a good way of finding out the truth is through the clash of opposing ideas, the adversarial process relies on similar assumptions.[14] Let the parties bring forward their evidence, let that evidence be subject to the particular form of scrutiny we call cross-examination, and then let the truth, or at least the closest approximation of it we can achieve, emerge. Or so we believe.

This is not the place to evaluate the adversary system as a method of discovering the truth, whether for the Catholic Church, for public deliberation, or for the law. But contrasting the law's methods of fact-finding with others that are or have been used in other contexts or other countries does put the law's method of fact-finding in proper perspective. Moreover, contrasting the adversary system of fact-finding with others reminds us that that jurors or even judges are not only at the mercy of the parties in terms of what evidence they can consider, but are also prone to a host of cognitive failures—bias, inattention, and countless others—that affect most human decision-makers. Indeed, a large body of social science research, mostly by psychologists, concentrates not only on how jurors—and judges, for that matter—might be subject to many of the same cognitive failures that we observe in all decision-makers,[15] but also on the

14. This is not necessarily to say that adversarial epistemology is a particularly reliable way of determining the truth, whether in public debate (see Frederick Schauer, *Free Speech: A Philosophical Enquiry* 15–34 [1982]) or even in the courtroom (see Frank, *supra* note 9, at 80–81; Leon Green, *Judge and Jury* [1930]; David Luban, *Lawyers and Justice* 68–92 [1988]; John H. Langbein, "The German Advantage in Civil Procedure," 52 *U. Chi. L. Rev.* 823 [1985]).

15. A large, growing, and highly valuable body of research focuses on the cognitive failings of juries, of judges as fact-finders, and of judges as interpreters and appliers of law. As to juries, for which the literature is by far the largest, see, e.g., Dennis J. Devine et al., "Deliberation Quality: A Preliminary Examination in

fact that even some of the law's characteristic methods are potentially more flawed than the law has traditionally assumed. Eyewitness testimony, for example, is far less reliable than many people have traditionally thought,[16] and even reliable scientific methods such as DNA identification are subject to the imperfections of the human beings whose job it is to administer the tests and analyze the results.[17]

Legal fact-finding is not only subject to the myriad problems of an adversarial approach to locating the truth, but is also framed by the odd set of rules that are called the law of evidence. Space does not permit providing here even a brief summary of the substance of evidence law, but it is nevertheless important to highlight its peculiar assumptions. In part because of the special needs of the adversary system, in part because of a

Criminal Juries," 4 *J. Empirical Legal Stud.* 273 (2007); R. Hastie, D. A. Schadke, & J. W. Payne, "A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages," 22 *L. & Human Behavior* 287 (1998); R. J. MacCoun & N. L. Kerr, "Asymmetric Influence in Mock Jury Deliberations: Jurors' Bias for Leniency," 54 *J. Personality & Social Psych.* 21 (1988). On judges as fact-finders, see Paul H. Robinson & Barbara A. Spellman, "Sentencing Decisions: Matching the Decisionmaker to the Decision Nature," 105 *Colum. L. Rev.* 1124 (2005); Barbara A. Spellman, "On the Supposed Expertise of Judges in Evaluating Evidence," 155 *U. Penn. L. Rev. PENNumbra* (2006); Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding," 153 *U. Pa. L. Rev.* 1251 (2005). On judges and the law, see Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, "Inside the Judicial Mind," 86 *Cornell L. Rev.* 777 (2001); Frederick Schauer, "Do Cases Make Bad Law?," 73 *U. Chi. L. Rev.* 883 (2006); Dan Simon, "A Third View of the Black Box: Cognitive Coherence in Legal Decision Making," 71 *U. Chi. L. Rev.* 511 (2004); Dan Simon, "Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology," 67 *Brooklyn L. Rev.* 1097 (2002); Dan Simon, "A Psychological Model of Judicial Reasoning," 30 *Rutg. L.J.* 1 (1998).

16. See, e.g., Elizabeth F. Loftus & James Doyle, *Eyewitness Testimony: Civil and Criminal* (3d ed., 1997); Elizabeth F. Loftus & Edith Green, "Warning: Even Memory for Faces May Be Contagious," 4 *L. & Human Behavior* 323 (1980); Gary L. Wells & Elizabeth F. Loftus, "The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects," 79 *J. Applied Psych.* 714 (1994).

17. See, e.g., Brandon L. Garrett, "Judging Innocence," 108 *Colum. L. Rev.* 55, 63, 84 n.109 (2008); Edward J. Imwinkelried, "The Debate in the DNA Cases over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis," 69 *Wash. U.L.Q.* 19 (1991); William C. Thompson & Simon Ford, "DNA Typing: Acceptance and Weight of the New Genetic Identification Tests," 75 *Va. L. Rev.* 45, 66–67 (1989).

substantive concern for the rights of criminal defendants, and in very large part because finding the facts has traditionally been the province of a jury with no specialized training either in law or in factual analysis, a body of law developed whose principal function has been to keep even relevant evidence away from a frequently distrusted jury. For fear that jurors would make too much of some evidence and too little of other, the law of evidence has a host of exclusionary rules that often seem strange. Although we often give some weight to what people hear other people say, for example, the law has traditionally prevented jurors from taking such hearsay evidence into account. And despite the fact that we commonly think that what someone has done in the past might help us determine whether they have done something similar now, much of this evidence of "bad character," "prior bad acts," or even previous convictions for the same type of crime is excluded at the typical trial.

The exclusionary rules of the law of evidence generated no small amount of ire in our old friend Jeremy Bentham, who would pretty much have eliminated all of the rules of evidence in favor of what he called the "natural" (as opposed to "technical") system, which has now come to be known as a system of Free Proof.[18] Under a natural or Free Proof approach, one that Bentham thought not that different from what ordinary people do in their daily lives, evidence is not excluded at the outset by rules that exclude entire categories of evidence, such as hearsay and prior criminal convictions. Rather, virtually all relevant evidence is admitted and then sifted, weighed, and evaluated in light of other evidence in order to give each piece of evidence the weight to which it is entitled. Some evidence will seem unreliable and will be discarded, while other pieces of evidence will be given a bit of weight but discounted. The basic point is that when we are trying to find out what happened, we do not set up a system that will keep potentially relevant evidence from our fact-finding process just because it fits some category of imperfect evidence.

In objecting to a system of factual determination largely structured around a series of what Bentham thought were artificial and categorical exclusions, Bentham was joined then, and even more so since, by many others, including not a few philosophers whose concern is epistemology.[19] And in important respects Bentham and his allies have been carry-

18. Jeremy Bentham, *Rationale of Judicial Evidence* (1827).

19. E.g., Alvin I. Goldman, *Knowledge in a Social World* (1992); Larry Laudan, *Truth, Error, and the Criminal Law: An Essay in Legal Epistemology*

ing the day. Especially with the decline in the importance of the jury—juries have for all practical purposes disappeared throughout the common-law world in civil cases, except in the United States, where the Seventh Amendment and its state constitutional counterparts have rescued the civil jury from oblivion—the formal rules of evidence have been consistently relaxed. Judges sitting without juries often treat the rules of evidence casually and appear to have little hesitancy in announcing that because there is no jury, most of the exclusionary rules of evidence will simply be ignored.[20] Moreover, exclusionary rules such as the hearsay rule and the original documents rule (often called the "best evidence" rule) are increasingly subject to a host of exceptions, and various other exclusionary rules have been officially eliminated or unofficially ignored. We may still be a long way from Bentham's preferred system of Free Proof, but we are also a long way from the highly rule-based and largely exclusionary system that generated Bentham's anger in the first place.[21]

The somewhat peculiar institution of the adversary system, the even more peculiar institution of the jury, and the especially peculiar idea of rigid exclusionary rules of evidence are all of a piece with the larger themes of this book. Law does things differently, for better or for worse, and the difference between how law determines the facts of a case and how other decision-makers find out about the world around them is consistent with law's use of the unusual devices that we have considered earlier, such as stare decisis and a commitment to the sometimes suboptimal control of rules. As with some of the other tools of legal reasoning, law's methods of fact-finding are not totally unique to law. Adversary determinations can be seen in other decision-making environments, as can even exclusionary evidentiary rules. But the fact that law's methods are not unique to law does not mean that law is no different from anything else,

(2006); Susan Haack, "Epistemology Legalized: Or, Truth, Justice, and the American Way," 49 *Am. J. Jurisp.* 43 (2004).

20. See Frederick Schauer, "On the Supposed Jury-Dependence of Evidence Law," 155 *U. Pa. L. Rev.* 165 (2006).

21. This is especially obvious once we realize that Bentham allocated a large part of his considerable capacity for outrage to the rules of competency—the rules that made it impossible for most women, most minors, most convicted felons, and most of the litigants themselves to be witnesses at trial. In large part the rules of competency have been eliminated in the United States, and although there are still things to which witnesses may not testify, there are few blanket exclusions based on a witness's status or personal characteristics.

and thus it should come as no surprise that when it comes to facts as well as to law, it is a mistake to fail to recognize how decision-making within the legal system is, at the very least, a little bit different.

Law's commitment to its own methods of factual determination is reflected even in the structure of the legal system's decision-making about questions of law. Because law is committed to the distinction between the trier of fact and the determiner of law, findings of fact are typically separated from conclusions of law when the same trial judge takes on both tasks. More importantly, findings of fact are typically, except in the most egregious of instances, treated as sacrosanct in the appellate process. It is only slight hyperbole to say that if a jury were to find that the moon was made of green cheese, an appellate court ruling on a legal question about the moon or about green cheese would be expected to take the jury's false conclusion as true. We have seen throughout this book that questions of jurisdiction in the broad sense—what is important is not only what is decided but who has the authority to decide it—are a ubiquitous feature of legal analysis. And jurisdiction in this broad sense has much to do with determining the facts. It is the job of a jury, or the trial judge acting as the trier of fact, to determine the facts. Even if the facts which that trier of fact has found seem wrong to an appellate court, the fact- finder's seemingly erroneous factual conclusions must nevertheless be taken as true. This will seem odd at times, but it may be part of a larger and pervasive characteristic of law itself. What makes law different is that legal decision-making, whether about law or about fact, differs from the simple mandate to judges and other legal decision-makers that they simply "do the right thing." Just as rule-based and precedent-based decision-making often requires legal decision-makers to do something other than the right thing, the strong obligation to accept the fact-finder's factual finding sometimes produces the same kind of suboptimality. To some this may be a bad thing, but to others it is simply part of law's commitment to achieve the greatest good in the aggregate, even if that requires giving up the aspiration to do what particular decision-makers think is the right thing in particular cases.

11.3 Facts and the Appellate Process

At the beginning of this chapter we made reference to *Brown v. Board of Education* and the way in which the Supreme Court in that case relied on psychological studies showing that segregated African-American chil-

dren suffered educationally from their exclusion from the schools attended by whites. This aspect of *Brown* generated much controversy, and for several reasons.[22] First, it was not clear that the conclusions of the studies were necessarily correct. Other psychologists had come to different conclusions, and there was a worry about whether litigation was the best way to resolve disputed questions of scientific fact.

More importantly, the Supreme Court appeared to make its *own* evaluation of the question rather than simply relying on the trial court's resolution of the factual issues. It may be, as we discussed in the previous section, that litigation and the adversary system are not the best ways to resolve some or all factual questions, but that is the way of the law, and it has been for centuries. Not so, however, for appellate courts, and for just as many centuries the assumption has been that determining the facts is for the trial court and evaluating the trial court's handling of the law is for appellate courts. If, barring blatant error or prejudice, the trial court, whether by judge or jury, has found *x,* then *x* must be accepted as true. The lawyer who tries to argue before an appellate court that *x* is not true will quickly find himself on the wrong end of a scolding from the court for trying to use the appellate courts as the forum for relitigating factual determinations that appellate courts are expected to take as final.

This is a nice model, but it may not capture fully the extent to which appellate courts are themselves engaged in determining questions of fact. *Brown v. Board of Education* may have highlighted the issue because of the prominence of the case and because the Supreme Court's footnote reference to the relevant studies made it quite obvious what was going on, but *Brown* turns out not to be all that unusual.

Consider, for example, *New York Times Co. v. Sullivan,*[23] the 1964 case in which the Supreme Court constitutionalized and revolutionalized the law of defamation throughout the United States by holding that public officials (and, later, public figures)[24] could succeed in a libel case only if they could prove with convincing clarity not only that what had been said about them was false, but also that it had been said with knowledge

22. For descriptions of the controversy, see John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials* 84–99, 106 (1985); Mody Sanjay, Note, "Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy," 54 *Stan. L. Rev.* 703 (2002).

23. 376 U.S. 254 (1964).

24. 388 U.S. 130 (1967).

of its falsity. In other words, plaintiffs had to prove not only intentional publication, but also intentional falsity. This was a dramatic change in the common law, and the Court justified the change by concluding that criticism of public officials would be "uninhibited, robust, and wide open" only if publishers were relieved from liability for even their negligent untruths. This empirical conclusion may well be true, but it is not at all clear how the Supreme Court knew that it was true. Some might think the proposition self-evident, but once we realize that uninhibited, robust, and wide-open press criticism of public officials exists in countries with far more restrictive defamation doctrines (Australia, for example) than exist in the United States, it becomes less clear that the factual proposition that provided the linchpin for the Court's conclusion was as self-evident as the Supreme Court thought it was. Nevertheless, this factual proposition about press behavior was an essential element of the Court's conclusion. Whether the Court was right (probably) or wrong (possibly) in its assessment is not the important issue here. The important issue is the question of the extent to which a potentially contestable factual proposition—and not one that had been part of the trial proceedings at all—turned out to be central to the Court's legal conclusion. Perhaps because the Court in *Sullivan* did not cite to nonlegal sources, as it did in *Brown,* the factual link in the Court's argumentative chain was less obvious, but no less than in *Brown,* the Court in *Sullivan* rested its conclusion on a contestable factual proposition as to which there had been no finding of fact below.

Much the same was true, and with a level of controversy closer to *Brown* than *Sullivan,* with respect to the Supreme Court's conclusion in *Mapp v. Ohio*[25] that illegally obtained evidence could not be used at a subsequent criminal trial regardless of its reliability. If an illegal search, for example, actually did lead to the discovery of drugs plainly belonging to the defendant, after *Mapp* those drugs would be excluded as evidence from the trial. The Court based its conclusion on the belief that an exclusionary rule would deter the police from engaging in unconstitutional behavior, but once again this is an empirical conclusion with which reasonable people can and did disagree.[26] Maybe the police do not much

25. 367 U.S. 643 (1961).

26. See Yale Kamisar, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition'?," 16 *Creighton L. Rev.* 565 (1983).

worry about what goes on at trials and are concerned mainly with apprehending perpetrators, or maybe unconstitutional police behavior would be deterred more by threats of internal sanctions against police officers personally. But whatever the fact of the matter, the important point is that once again the Court's route to a new legal rule was one that took it through the making of a factual determination as to which most of the evidence appeared to come from the Justices' own beliefs, experiences, hunches, intuitions, and armchair sociology.

Finally, consider the plurality opinion in *Bush v. Gore*.[27] In concluding that the Supreme Court of Florida had erred in rejecting George W. Bush's equal protection challenge to the Florida vote-counting procedure, the Supreme Court found it important that the casting of invalid ballots was not in fact a historically infrequent occurrence and that many invalid presidential ballots had been cast in most previous elections. Whether this should or should not have been important to the Court is not pertinent to our discussion of factual determination, but what is germane here is the fact that on this factual proposition there was again virtually no finding below, and the Court reached its conclusion, as discussed at somewhat greater length in Chapter 4, on the basis of several newspaper articles, presumably located by the Justices (or, more likely, their law clerks) through a Nexis search.

Brown, Sullivan, Mapp, and *Bush v. Gore* are all constitutional cases in the Supreme Court, but it would be a mistake to think of the phenomenon as restricted to constitutional law. When Holmes insisted that the "life of the law has not been logic; it has been experience,"[28] he made it clear that appellate judges, in both following and creating "the path of the law," would have to rely on empirical and factual determinations, a phenomenon extensively theorized almost a century later by Melvin Eisenberg in showing how reliance on what he called "social propositions" is an essential element in common-law reasoning.[29] *Henningsen,* for example, was premised on a view about the nature of consumer transactions that came largely from the Court's own impressions, and when the New York Court of Appeals in *Adams v. New Jersey Steamboat Co.*[30] concluded that a stateroom on a steamboat was more like an inn

27. 531 U.S. 98 (2000).
28. O. W. Holmes, Jr., *The Common Law* 1 (1881).
29. Melvin A. Eisenberg, *The Nature of the Common Law* (1988).
30. 45 N.E. 369 (N.Y. 1896). The case has become a staple of discussions

than like a sleeping compartment on a train, it relied heavily on what *it* believed about contested factual propositions regarding the normal uses and expectations with respect to steamboats, inns, and trains.

But if social propositions—which are conclusions of fact, albeit about general social conditions and not about the particular facts of the particular case—play such a large role in appellate decision-making, then how is an appellate court to find out about the facts necessary to reach such conclusions? This has been a recurring issue, and it is one that Justice Breyer of the Supreme Court, more than anyone, has brought to the forefront of legal debate, especially in the context of questions about science.[31] Justice Breyer himself is hardly reticent about going far beyond the record to make factual determinations he believes necessary to resolve the cases before him, and his dissenting opinion in *Lopez v. United States*[32] is replete with scores of references to economic, sociological, and political materials directed at the question of whether the possession of weapons in the public schools has an effect on interstate commerce. Similarly, Justice Breyer's (again dissenting) opinion in the high school affirmative-action case of *Parents Involved in Community Schools v. Seattle School District No.1*[33] drew heavily not only on his own research about the factual background of *that* case[34] but also on far-reaching em-

about the use and misuse of analogy in legal reasoning. See Richard Posner, *How Judges Think* 169–70 (2008); Lloyd Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005); Scott Brewer, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy," 109 *Harv. L. Rev.* 923 (1996). And see Chapter 5, *supra*.

31. See Stephen Breyer, "Introduction," *in Reference Manual on Scientific Evidence* (2d ed., 2000); Stephen Breyer, "The Interdependence of Science and Law," an address at the American Association for the Advancement of Science Annual Meeting and Science Innovation Exposition, Feb. 16, 1998, available at www.aaas.org/meetings/scope/breyer.htm *and in* 280 *Science* 537 (1998).

32. 514 U.S. 549 (1995).

33. 127 S. Ct. 2738 (2007).

34. This practice is both unusual and controversial. There is a traditional distinction between legislative facts and adjudicative facts, the former being the facts necessary to make or support a legal rule and the latter being the facts of a particular controversy or rule application. This is a distinction that is of some import with respect to questions of due process and the right to a hearing, because it is accepted that individuals have due-process rights to notice and hearing with respect to adjudicative facts that will produce adverse consequences to them, but not to legislative facts that will produce adverse consequences to them only in respect to which they are members of a class adversely affected by the legislative rule. See Bi-

pirical inquiry about the history, sociology, psychology, and politics of student assignment in American public schools. For Justice Breyer, managing appellate factual and scientific inquiry has been for some time a pressing question, but it may be that we are not especially close to an answer.

If what Holmes called experience and what Eisenberg calls social propositions are a pervasive and indeed necessary component of common-law *legal* decision-making, then where are appellate judges (or trial judges making legal and not factual determinations) to get the information necessary to reach their factual and empirical conclusions? Justice Breyer's opinions, the social science data in *Brown v. Board of Education,* and the newspaper reports in Justice Kennedy's opinion in *Bush v. Gore* have the virtue of displaying the sources on which the Justices were relying, but *Sullivan, Mapp, Henningsen,* and *Adams* are for just that reason more important. Even when a judge does not cite to nonlegal academic journals or newspapers or anything else, she is still, although less obviously, relying on sources of information that are importantly factual, that may very well be contested, and that wind up being part of the law in a somewhat under-the-table manner, even apart from the way in which such propositions may produce adverse consequences for one of the parties without that party having much or any opportunity to challenge those propositions by the normal adversarial processes, including but not limited to cross-examination.[35]

Metallic Investment Co. v. State Board of Equalization of Colorado, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908). Related to but somewhat distinct from the notice and hearing question is the question of whether an appellate court should investigate adjudicative facts not found below or even reevaluate findings about adjudicative facts made by the trier of fact. The answer to these questions has traditionally been a clear no, and the extent to which judges may or should do research about the facts of *this* case, outside of the formal adversary processes of trial with the rules of evidence, is more controversial and far less accepted than the idea that judges can and must do their own research with respect to legislative facts.

35. It is worth noting here that traditional English practice, now softening somewhat, prohibits judges from doing their own research outside of the presence of counsel, even as to the law. Cases and statutes not cited and argued by the parties or discussed in open court might as well not even exist. This practice may seem unusual to Americans, but it is part of a tradition of *orality* that stresses that nothing should happen in litigation that is not transparent and available for argument by all parties. See Delmar Karlen, *Appellate Courts in the United States and En-*

To the extent that contested factual propositions are increasingly "flagged" by citation to nonlegal materials,[36] the issue is becoming more patent, but the deeper question is not about the materials that judges consult or cite in order to make legal, as opposed to adjudicative factual, determinations. Even with no explicit consultation and no citation, judges making law, and often just applying law, must rely on empirical conclusions that lurk scarcely beneath the surface. When the existence of such conclusions is not announced by means of, for example, citation to newspapers or nonlegal books or periodicals, there is a risk that we may ignore the extent to which such conclusions are open to contest, which may well be a function of what the judges think of as common knowledge but which others may wish to challenge. Citation to materials outside of the traditional legal canon may be for some a source of alarm, but it may as well be a way in which the empirical propositions that are necessarily a part of all judicial lawmaking and much judicial law application can be subject to argument and challenge, rather than simply being clothed in the disguise of common knowledge or what judges believe, not always correctly, and not necessarily unrelated to their own backgrounds, to be the common wisdom of humanity.

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gland (1964); Suzanne Ehrenberg, "Embracing the Writing-Centered Legal Process," 89 *Iowa L. Rev.* 1159 (2004); Robert J. Martineau, "The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom," 72 *Iowa L. Rev.* 1 (1986); Richard A. Posner, "Judicial Autonomy in a Political Environment," 38 *Ariz. St. L. Rev.* 1, 10 (2006). The tradition can produce extraordinarily lengthy appellate arguments (which often take days, rather than the typical thirty minutes per side in American appellate courts), because the expectation is that everything on which judges rely is open to argument by both sides, and it produces a tendency to rely on only a narrow range of widely accepted legal sources. But it does forestall most objections that judges are making decisions based on information not known to or argued by both parties.

36. See the discussion in section 4.4, *supra*. See also Frederick Schauer & Virginia J. Wise, "Non-Legal Information and the Delegalization of Law," 29 *J. Legal Stud.* 495 (2000).