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Mirjan R. Damaska
Yale Law School

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Truth in Adjudication

by

MIRJAN DAMAŠKA*

Introduction

As the century limps to a close, the gap seems to be widening between the views on truth prevailing in a variety of theoretical disciplines and the understanding of truth in the social practice of adjudication. One of the working assumptions of the practice of adjudication is that truth is in principle discoverable, and that accuracy in fact-finding constitutes a precondition for a just decision. But influential currents of contemporary thought are skeptical of truth as a philosophical principle, and they doubt that the acquisition of objective knowledge is possible. Due to the unsettling force of this skepticism, legal scholars are beginning to wonder whether aspiration to objective knowledge is a realistic goal of factual inquiries in adjudication.

Related to the doubt cast upon the ability to obtain objective truth is the growing uncertainty about the weight to be attributed to fact-finding accuracy. It is traditionally recognized, of course, that accuracy is not the sole measure of the value of adjudicative fact-finding: social needs and values are recognized that constrain the pursuit of the truth. But the more the feasibility of attaining objective knowledge is questioned, the more truth-values are discounted in trade-offs with competing considerations.

In Part I of this Article, I first consider whether skepticism permeating other disciplines indicates that the time has come to revise the assumptions on which factual inquiries in adjudication are predicated. After concluding that these assumptions should be retained, despite some uncertainty about what qualifies as objective knowledge, Part II turns to the question of the proper weight to be attributed to fact-finding precision in legal proceedings. Approaching the subject from the standpoint of procedural goals, I hope to clear away some of the fog that has kept people talking past one another on this important and delicate issue. While the cultivation of truth-values remains important for all adjudication, the demand for fact-finding

* Sterling Professor of Law, Yale University.

accuracy is far from constant across legal proceedings. Unstable like cloud shapes, it greatly changes according to context.

I. Is Truth Discovery a Realistic Objective?

A. Theories that Challenge Truth Discovery in Adjudication

To establish whether aspiring to objective knowledge is realistic, I must briefly survey the theories that question this aspiration.¹

(1) *Post-Modern View of Reality*

Little needs to be said about theories, typical of our times, that carry relativism to the extremes of skepticism. Most prominent among these theories are those versions of “post-modern” or “post-structuralist” thought that posit a disjunction of language from external references and recognize no reality other than what one chooses to make of it.² It seems obvious that adjudication cannot draw on this radical thought for inspiration. When we engage in social practices such as adjudication, we presuppose a world beside our statements. And as factfinders, we embrace a vision of the world in which there is reality beyond language. It is these common-sensical attitudes that make attempts to establish empirical events meaningful: if there are no constraints on discourse aiming at something beyond itself, the practice of fact-finding becomes pointless. In short, while “post-modern” thought may be usefully unsettling for some intellectual pursuits, it is of little use in evidence law. Profound skepticism cannot account for existing fact-finding arrangements, and it does not provide workable ideas for their transformation.

(2) *The Social Construction of Reality*

A more serious challenge to conventional views comes from intellectual currents that acknowledge reality beyond language games but insist that much of it—or all of it—is socially constructed. From this “constructionist” perspective, assertions of objective knowledge can appear problematic. But before considering the matter, a false

1. For a comprehensive survey leading to similar conclusions, see WILLIAM TWINING, *Some Skepticism about Some Skepticism*, in *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 92, 152 (1990).

2. For an example of this view, see Hayden White, *The Burden of History*, in *TROPICS OF DISCOURSE* 45 (1978).

cause for alarm ought first to be removed. According to conventional understanding, fact-finding involves establishing a congruence between our statements about the world and the world itself. In other words, the conventional understanding accords with some version of the correspondence theory of truth.³ But can this theory be reconciled with the view that reality is created by social actors? The question is important because most facts we seek to establish in adjudication are "social" facts rather than phenomena intrinsic to nature.

Admittedly, the embrace of social constructivism is fatal to the "mirror" version of correspondence theory, a version holding that true thought or language reflects what is out there in reality.⁴ For to establish whether something corresponds to our views, we must first conceptualize it, with the result that human constructs inevitably appear on the reality side of the correspondence equation. Now if all versions of correspondence theory shared this primitive "mirroring" notion, evidence scholars would have a good reason to despair about the epistemological foundations of their discipline. But not all versions are so naive. To establish the truth, sophisticated versions of the correspondence theory maintain, is to ascertain a "match" between a cognizer's statement and phenomena that can be either intrinsic to nature or socially constructed. For example, days of the week are social artifacts unknown to nature, but this does not render meaningless the inquiry whether testimony that an event occurred on a particular day matches with reality.

It is also not clear how correspondence could be replaced by coherence as the criterion of truth for factual inquiries in adjudication. Coherence theories hold that a statement is true if it flows from a body of consistent propositions.⁵ But for any adjudicative event, there may be several coherent sets of statements, or several consis-

3. This theory is predicated on the idea that truth consists of a relationship between words and the world. See THE OXFORD COMPANION TO PHILOSOPHY 166-67 (Ted Honderich ed., 1995). For well-argued defenses of the correspondence theory, see ALVIN I. GOLDMAN, EPISTEMOLOGY AND COGNITION 151, 156 (1986); JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 200, 203 (1995); Arthur Kaufmann, *Läßt sich die Hauptverhandlung in Strafsachen als rationaler Diskurs auffassen?*, in DOGMATIK UND PRAXIS DES STRAFVERFAHRENS 15, 19 (Heike Jung & Heinz Müller-Dietz eds., 1989).

4. The "mirror" theory assumes that the world is structured or "sliced" in such a way that it can be reflected ("mirrored") by our cognitive apparatus. The theory was embraced by Lenin and became the "official" view in the former Soviet Union and its satellite countries. See TIBOR KIRÁLY, CRIMINAL PROCEDURE, TRUTH AND PROBABILITY 94 (Kornel Balazs trans., 1979).

5. On "coherence" theories of truth, see, e.g., A.C. GRAYLING, AN INTRODUCTION TO PHILOSOPHICAL LOGIC, Chapter 5 (1982).

tent theories. That a set of statements cohere in adjudicative practice is not a sufficient reason to believe that these statements are true. Adjudicators are expected to accept a story as true when it is amply supported by items of evidence relating to the facts of the case. And what these small foot soldiers of verity are expected to achieve is to establish that a match exists between factual propositions woven into the fabric of a story and the way the world really is.

(3) *The "Objectivity" of Knowledge in Adjudication*

While social constructionism is thus not irreconcilable with the correspondence theory of truth, it complicates conventional claims to objectivity. Some of these complexities, however, are not serious. To be sure, adjudicators cannot acquire objective knowledge in the strong sense of knowing how things are independently of human beliefs. But they are not in the business of seeking this metaphysical knowledge anyway: they seek to establish events and phenomena in the socially created world. What constitutes this world—think of the days of the week—is objectively ascertainable: ontologically subjective matter can be epistemically objective.⁶

The real problem remains, however, of defining objective knowledge in the less demanding sense sought by factfinders in adjudication. It is true that this knowledge, because it depends on the social milieu, can in most situations be equated with knowledge that fits the grounds for belief in the polity that has set up the court system.⁷ Occasionally, however, this understanding appears too weak: factfinders lay claim to knowledge in a sense that is more transcending of the social context. I shall return to this point in the next section. Suffice it to say, for the moment, that it is difficult to arrive at a definition of objectivity that is applicable to all situations and all facts subject to proof in court.

Nor is this the only difficulty. So long as there is agreement on grounds for belief within a community and people's viewpoints on reality converge, socially dependent knowledge is not hard to identify. Where these two conditions do not obtain, however, uncertainty

6. Cf. SEARLE, *supra* note 3, at 9-11.

7. In discussing legal decisionmaking generally, two legal philosophers have recently proposed a similar conception of objectivity. They call it "minimal" and define it as "what seems right to the majority of a given community." Observe that relevant to them are "majority" rather than dominant views. See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, in *LAW AND INTERPRETATION* 203, 253 (Andrei Marmor ed., 1995).

can arise about the identity of the social actors whose perspective on reality counts. Fortunately, the resulting problem, while endemic in some intellectual practices, seldom looms large in the administration of justice. With regard to many facts that are the object of proof, people's points of view coincide, or overlap, across ethnic, class, gender and other divisions in society. Without massive cross-cultural convergence in the construction of reality there would be no way to explain various forms of contemporary international life. Also, perception of common humanity could not evolve. Nor should it be forgotten that cognitive methods supply a decisive criterion of objectivity in some circumstances when social standpoints diverge. Thus, for example, while the denizens of suburbia and ghetto inhabitants may have different perceptions about police, this does not mean that there are no accepted criteria for them jointly to determine the specifics of police behavior in a particular case.

Another vehicle for selecting a controlling viewpoint is substantive legal norms. They are capable of excluding many perspectives on reality as "immaterial"—no matter how pertinent or fascinating they may be in intellectual pursuits concerned with the fullness of life. Where these intellectual pursuits thrive on plural, often ambiguous meanings, law usually insists on a single, fixed perspective. If it defines rape as non-consensual sex *tout court*, so that the defendant's mistake as to consent is no defense, his understanding of the character of intercourse with which he is charged is simply beside the point. Whether the victim dressed provocatively—another perspectivist matter—can also be made immaterial by law. Such restrictions on available viewpoints are unknown to many intellectual domains, including historical research, where a few hard facts can give rise to a swirl of interpretations. Artificial or not, these restrictions based on substantive legal norms can focus factual inquiries on narrow aspects of reality in regard to which the potential for controversy is greatly reduced.

Despite the simplifying potential of the law's formal regime, divergent viewpoints can still cause problems for the administration of justice. This is especially likely in a deeply split society, where normative standards are uncertain. Fuzzy legal standards in this environment provide no effective barrier to a multiplicity of viewpoints that bear on factual inquiries: legal indeterminacy contributes to the elusiveness of truth. Faced with cacophony in the citadel of justice, an authoritarian government can impose the power-holders' perspective as pertinent. But a liberal polity, with fluid power structures and

wide group participation in the administration of justice, has no such option. As a result, it can be difficult in this polity to establish what counts as objective knowledge in some cases.

(4) *Truth and Justification of Knowledge*

Our century has witnessed not only the growing uncertainty about the concept of objective truth, but also the realization of the fallibility of our fact-finding methods, particularly when human behavior is the object of investigation. Increasing sophistication of some disciplines has also revealed the fragility of many distinctions of mainstream evidence scholarship—such as those between perception and inference, or investigation and the construction of events.⁸ This has prompted some scholars with lateral vision—both in this country and abroad—to embrace “communicative,” “dialectical,” or “consensus” theories of truth as a foundation for fact-finding arrangements in legal proceedings.⁹ Common to all these theories is the shift of emphasis from truth to the process of justification of claims to knowledge. Truth is regarded as no more than the ideal end of a properly structured inquiry. These theories seem to posit that if there is no clear access to truth, we should at least arrive at fact-finding decisions in proper ways. As a consequence of this shift of emphasis, the line has become thin between a belief that is properly justified and a belief that is true.

We can thus encounter the opinion that truth in adjudication is most likely to emerge from properly structured discussion among people with different viewpoints. The more you let them argue, freely ask questions, and justify their positions, the more you can be confident in the accuracy of outcomes—not only in deliberating about values and rules, but also in determining the truth of factual claims.¹⁰ But while the reasons for this optimism may be strong when participants deliberate about values and rules,¹¹ they are quite uncertain when participants determine the truth of factual claims using this

8. For an overview of these developments capable of disturbing thoughtful students of evidence, see John D. Jackson, *Theories of Truth Finding in Criminal Procedure: A Evolutionary Approach*, 10 CARDOZO L. REV. 475, 514-20 (1988).

9. For an example of the “dialectic” approach, see *id.* at 522-24.

10. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 243 (1993).

11. Observe, parenthetically, that public choice theory does not share this optimism even in regard to normative issues. See, e.g., *THE IDEA OF DEMOCRACY* 157 (David Copp et al. eds., 1993).

method. In the latter context, the exaltation of the power of discourse to generate the truth from multiple perspectives seems justified only to the extent that the discourse can persuade some participants that their perspective leads to erroneous factual claims and should be abandoned. Failing this apostasy, the agreed-upon decision is more likely to reflect compromises aimed at breaking deadlocks rather than truth in any meaningful sense. If compromises generate the truth, the accurate outcome of a dispute between people espousing the geocentric view of the world and those espousing the heliocentric view would be that both earth and sun revolve around an axis equidistant from each.

The next step for those who recognize this problem is to follow modern philosophers who conflate truth with the successful justification of knowledge claims. Under this theory, truth tends to be equated with whatever is agreed upon following inquiry free of distorting constraints, or with whatever has been successfully defended against all comers.¹² But while this theory may have some purchase in regard to the law-making component of adjudication, it fails to account for its fact-finding aspect.

The fundamental reason for this failure is that the practice of fact-finding rests on what philosophers call the realist view of truth. According to this theory, what is "really" true need not square with what has been decided to be true; factual findings need not match reality, even though inquiries leading to them were optimally designed.¹³ This position, underlying the practice of fact-finding, rebels against weakening the *locus standi* from which a person, burdened by incriminating evidence, can assert his innocence, despite a consensus as to his guilt. Small wonder that many procedural and evidentiary institutions, including most legal remedies, depend for their coherence on the separation of truth from justification.

Anti-realist theories are also not helpful as a blueprint for procedural reform.¹⁴ Take the example of a criminal justice system con-

12. A stimulating example of views blurring truth and justification are passages written on the epistemics of criminal procedure by an imaginative British scholar. See J.D. Jackson, *Two Methods of Proof in Criminal Procedure*, 51 MOD. L. REV. 549, 567 (1988). See also *infra* note 15.

13. Observe that the correspondence theory of truth requires a realistic stance. For a helpful discussion of truth and realism, see GOLDMAN, *supra* note 3, at 142-61, and SEARLE, *supra* note 3, at 149-89.

14. Admittedly, some useful reforms can be supported by anti-realist theories, but all of them can also be backed by arguments that do not require fundamental philosophical shifts. Cf. Kaufmann, *supra* note 3, at 15-19 (discussing that the dialectic approach man-

templating the use of “dialectical” truth theories as inspiration for an alternative fact-finding regime. The first stumbling block to the realization of this project would be the pervasive procedural environment. While “dialectical” theories require an environment free from psychological pressures, a criminal justice system—even one thoroughly permeated by the rehabilitative ideal—cannot assure this favorable milieu. Another obstacle would be the strategic behavior of procedural participants. While dialectical truth theories assume that people communicate things the way they see them, some procedural participants are not prepared to do so. What incentives could be given to the guilty criminal defendant to induce him to truthful exchange? Still another difficulty arises from the demand of dialectical theory for early and full disclosure of pertinent information to all concerned. If this demand were observed in real life, it would greatly facilitate the fabrication of testimony and the destruction of evidence.¹⁵

A final problem with anti-realist positions in adjudication is that by blurring the lines between truth and successful justification, they obfuscate the distinction between procedural doctrines that were created to promote fact-finding accuracy and those rooted in considerations of fairness. As I will soon try to show, this confusion is harmful in several procedural contexts.

B. The Administration of Justice Requires Aspiring to the Discovery of Truth

The above overview should be bracing to those whose belief has

dates that in a criminal case, the defendant be given every opportunity to expose contradictions and muddles in the prosecution's case, and that the prosecution must justify its methods of investigation). But this can also follow from arguments based on conventional epistemic positions.

15. The application of “consensus” theories of truth is especially hard to contemplate. How far should the consent idea be carried in criminal procedure? Should it encompass the criminal defendant? Should witnesses be permitted to confer with one another to establish whether they can reach an agreement on what they witnessed? It deserves to be noted that the philosopher who developed an influential model of communication related to consensus theories voiced skepticism about its applicability to legal proceedings which are, in the last analysis, an exercise of authority. See Jürgen Habermas, *Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann*, in JÜRGEN HABERMAS & NIKLAS LUHMANN, *THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE—WAS LEISTET DIE SYSTEMFORSCHUNG?* 142, 201 (1971). See also Hans-Ludwig Schreiber, *Verfahrensrecht und Verfahrenwirklichkeit*, in 88 *ZEITSCHRIFT FÜR DIE GESTAMTE STRAFRECHTSWISSENSCHAFT* 117, 141 (1971).

been shaken in the epistemological foundations of the fact-finding enterprise. Although the truth we seek in legal proceedings is dependent on social context—contingent rather than absolute—this does not imply that our aspiration to objective knowledge is misconceived, or quixotic. In fact, full knowledge can more easily be justified in regard to some phenomena of our own creation than in regard to objects intrinsic to nature. While we can accurately determine the result of a soccer match, the speed of a vehicle, or similar little truths of a type with which litigation is routinely concerned, the fabric of the physical world eludes our understanding. Here we can only attempt, as in differential calculus, to get nearer to the truth.¹⁶ Of course, we have no guarantee that in litigation we can accurately determine even truthlets than can be fully known. But this failure is no argument against our effort to gain accurate knowledge. What would be the alternative? That truth transcends evidence is, after all, an implication of epistemic realism which, as we have seen, makes our discourse about fact-finding intelligible.

Nor should we be unduly disturbed whenever aspects of our analytical structure look objectionable from the perspective of other disciplines. Although justified in some cases, this concern is often misplaced. Because other intellectual genres are driven by different purposes even as they cope with the same aspects of reality, their criteria and conceptual instruments may be ill-suited to adjudicative fact-finding. On some issues where another discipline or practice cultivates conceptual refinement, law rightly prefers seat-of-the-pants concepts. And where law is sometimes impelled to draw distinctions, other disciplines may find no significant discontinuities to justify the drawing of lines. Thus, for example, although psychological research revealed that perception is not free from inferential construction, lawyers rightly stick to their distinction between information based on observation and information based on inference.¹⁷ Those who believe in the same degree of conceptual refinement across disciplines are the “*indisciplinati*” of medieval philosophy, capable of mixing

16. As Giovanni Battista Vico has argued, because we can fully know only what we ourselves have created, only the Demiurge of the physical world has thorough knowledge of it. For a lucid comment of Vico's dictum “*si conosce veramente solo ciò che si fa*,” (one really knows only what one does), see ANTONIO ALIOTTA, *DISEGNO STORICO DELLA PEDAGOGIA* 220 (Rome 1964).

17. And blurred though the frontier between them may be, lawyers feel rightly impelled in a variety of situations to separate factfinding from legal evaluation.

genres and creating misbegotten subtleties.¹⁸

But let me return to objectivity in regard to knowledge sought in adjudicative fact-finding. As the preceding survey suggests, the question stirs uneasiness: it is indeed difficult to settle on a single definition of what this knowledge entails. A historical example should help to illuminate the problem. Until a few centuries ago, criminal courts in most Western countries were in some cases called upon to determine whether an individual entered into a contract with the devil.¹⁹ This transaction constituted the *actus reus* in the definition of the crime of witchcraft.²⁰ Practitioners' manuals were replete with instructions about external signs, such as inability to weep, from which the existence of the contract could be inferred.²¹ The belief in the inferential value of these external signs was part and parcel of the way in which social actors of the period constructed their world.

Now, if we equate truth and objective knowledge with whatever appears right in a given society, we are driven to the conclusion that contracts with the devil existed in Western society until a few centuries ago but no more. Most people resist this conclusion, however. They believe that contemporary scientists know more about the world than was known a few centuries ago. Even if familiar with Thomas Kuhn's paradigmatic shifts,²² most remain confident that fu-

18. See ETIENNE GILSON, ETUDES SUR LE ROLE DE LA PENSÉE MÉDIÉVALE DANS LA FORMATION DU SYSTÈME CARTÉSIEN 235 (1930).

19. The seventeenth century was the era of great prosecutions for witchcraft understood as resulting from a contract with the devil. This scholastic understanding of witchcraft can be found already in Thomas Aquinas. See THOMAS ACQUINAS, SUMMA THEOLOGICA, I, QUESTIO 110, ART. 4. For prosecutions in continental Europe, see JULIO CARO BAROJA, THE WORLD OF THE WITCHES (O.N.V. Glendinning trans., 1964). For prosecutions in England, see C. L'ESTRANGE EWEN, WITCH HUNTING AND WITCH TRIALS (1929).

A good illustration of the mood of the times on the eve of the seventeenth century is the little book by a French judge, HENRY BOGUET, DISCOURS DE SORCIERS (I. Pillehote ed., 1603). In the book's dedication, the author offers his estimate of the number of witches in France (at least 30,000) and boasts about his experience in sentencing considerable numbers of them to death.

20. On the continent of Europe, the most widely used text on the technical aspects of this crime, including its *actus reus*, was that of the seventeenth century German judge Benedict Carpzov. See BENEDICT CAPRZOV, PRACTICA NOVA IMPERIALIS SAXONICA RERUM CRIMINALIM, Pars I, questio 48 (B. Wust. ed., 1677).

21. Special precautions were recommended to detect "false tears." See HEINRICH KRAMER & JAMES SPRENGER, MALLEUS MALEFICARUM 227-30 (Montague Summers trans., 1971).

22. Thomas Kuhn has challenged the conventional view of the progress of science as a succession of theories that grow ever closer to the truth by better representing what nature really is. According to him, the development of science proceeds in terms of a se-

ture scientific advances will not contradict the contemporary view that signs once attributed to dealings with the underworld have nothing to do with "objective" reality. Thus, despite widespread acceptance of the view that knowledge depends on social environment, people are inclined to treat *crimen magiae* and its *indicia* as a social illusion.

But the very thought of "social illusion" indicates that a conception of objective (though socially contingent) knowledge is at large—a conception stronger than one identifying this knowledge with what is right under dominant societal views, and yet weaker than knowledge independent of human beliefs and practices. Some philosophers propose that objectivity in this stronger sense should be defined as what people would believe (or would be justified in believing) if they were in epistemically optimal conditions.²³ But this leaves us with the puzzle of determining what is epistemically optimal, and discerning how this ideal is refracted in or shaped by the social environment.

A major reason that it is difficult to converge on a single conception of objectivity is the multifarious character of the object of proof in legal proceedings. What lawyers include in their *thema probandi* as "facts" or "events" is actually a jumbled mixture of matters of unequal ontological status²⁴ with an unequal degree of accessibility to our cognitive apparatus. No wonder, then, that it is hard to locate a single scale on which to arrange this mixture of matters into an intelligible chart.

Look at some component parts of the pastiche. In the first place, adjudicative fact-finding is not merely a matter of reconstructing historical events. While most facts we seek to establish indeed lie in the past, some exist at the time of inquiry.²⁵ Still other facts, especially those sought in modern mass litigation, consist of predictions of future occurrences. Second, fact-finding is concerned not only with the

quence of largely incommensurable "paradigms" (e.g. Ptolomeic, Kopernican) that replace one another through scientific "revolutions." Whether one paradigm or another is better cannot be decided in terms of its proximity to truth but only pragmatically, in terms of how it permits us to cope with practical problems. See Thomas S. Kuhn, *The Structure of Scientific Revolutions*, in 2 INTERNATIONAL ENCYCLOPEDIA OF UNITED SCIENCE 198-206 (University of Chicago Press ed., 1970).

23. See, e.g., HILARY PUTNAM, MEANING AND THE MORAL SCIENCES 125 (1978). Similar is the "modest" conception of objectivity developed by Coleman. See Coleman & Leiter, *supra* note 7, at 263.

24. Some matters exist as natural phenomena, while others are produced by social agreements of varying complexity.

25. For example, we might seek to establish the fact of a disfiguring scar for the purpose of assessing damages.

empirical question *whether* something happened, but also with the reasons-seeking question of *why* something happened.²⁶ Along yet another dimension, some facts seem easily severable from value judgments, or the application of legal norms: for example, was a certain chemical present in the deceased's blood? Other facts, however, consist of complex social evaluations: for example, was a situation dangerous, or is a picture sexually explicit? Even legal relations can become the object of proof—a matter which, if established, must be related to a legal standard.²⁷ It is scarcely surprising that in regard to knowledge of such diverse matters, the objectivity of fact-finding can be variously understood. Establishing that somebody died is much less dependent on changing social views than establishing that he was engaged in provocative or life-threatening behavior at the time of his death. A stronger conception of objectivity can thus be applied in the former than in the latter case.

Observe that the varying grain of knowability leaves its marks on fact-finding practice. It surfaces in different operational levels of certainty required for the determination of facts. Other things remaining equal, for example, the causality of omissions calls for less demanding proof than the causality of most positive acts.²⁸ The unequal epistemic access to facts is also reflected in the assessment of the gravity of factual errors: a failure to ascertain an alibi, for example, is likely to be considered as a more serious mistake than a faulty attribution of motive to an individual, or of a complex social significance to his conduct. So long as all these intertwined complexities of the object of proof are not adequately mapped, the precise character of factual knowledge in adjudication will remain difficult to pinpoint. And when an adequate taxonomy of facts emerges, it will become easier—and less tricky—to apply insights of other disciplines to this problem.²⁹

Make no mistake: as the migration of ideas across disciplines intensifies, advances in fields such as information processing, cognitive science, or experimental psychology will no doubt require consider-

26. The distinction resembles that between fact and interpretation in historical research.

27. Whether somebody was married, for example, can be a precondition to the application of a bigamy statute, and foreign law can be made the object of proof.

28. Of course, much of this variety is not recognized by formal legal doctrine.

29. From a philosopher's perspective, John Searle has recently worked out an interesting taxonomy of facts. See SEARLE, *supra* note 3, at 121. While the taxonomy cannot directly be applied to legal needs, it can serve as a source of inspiration to students of evidence.

able updating of current evidentiary doctrine. But it does not appear that the coming *aggiornamento* will mandate the rejection of realism and the correspondence theory of truth on which factual inquiry in adjudication is now predicated. Those who want us to abandon these common-sensical foundations of present practice owe us a better account than they have provided so far of how justice can be administered on an alternative basis.³⁰

II. The Importance of Truth-Values

If truth finding is thus a realistic aspiration, what priority should be given to it? In judicial rhetoric and popular discourse, one sometimes encounters solemn pronouncements that truth is the basic purpose of all adjudication.³¹ Quite obviously, however, truth-conducive values cannot be an overriding consideration in legal proceedings: it is generally recognized that several social needs and values exercise a constraining effect on attempts to achieve fact-finding precision. Various lists have been compiled of these countervailing considerations: privacy and human dignity, the demand for stability in decisionmaking, and cost figure prominently among them. There is no agreement, however, on what precisely should be included in the list, and how these "collateral" values should be balanced against the desire for accuracy in fact-finding.³²

If greater clarity is to be achieved on these questions, discussion should proceed against the background of the objectives of adjudication. But it is not very helpful to start from an overarching goal, cut-

30. I have elsewhere tried to show how adjudicative practice can be resistant to fashionable, or even dominant, truth theories. See Mirjan Damaška, *Rational and Irrational Proof Revisited*, 5 CARDOZO J. INT'L & COMP. L. 25, 34-36 (1997). The relationship between epistemological currents of a period and its adjudicative practice is more complex than first inspection suggests.

31. See, e.g., *Williams v. Florida*, 399 U.S. 78, 82 (1970). More often than not, this exaltation of the truth stems from a linguistic usage in which truth is equated with an ideal procedural outcome and relates to the proper resolution of both factual and legal issues. When the zone in which truth values operate is properly confined to factual inquiries, truth discovery is conventionally treated as a necessary precondition of decisional rectitude—a just decision. William Twining includes this view in the "rationalist" model of adjudication. See WILLIAM TWINING, *The Rationalist Tradition of Evidence Scholarship*, in *RETHINKING EVIDENCE: EXPLORATORY ESSAYS*, *supra* note 1, at 32, 73.

32. Some commentators consider factual findings in other spheres (e.g. in the media) as rivals of forensic truth. They then proceed to examine the interaction of judicial and extra-judicial factfinding, rather than values and needs that compete with factfinding accuracy in adjudication. These inquiries are interesting, but should not be confused with those to which this symposium is devoted.

ting across the whole adjudicative spectrum. This is because very little can be bracketed out as common to the objectives of all types of legal proceedings. Even their instrumental function is not a constant: not all legal proceedings serve as a vehicle for the application of substantive law to the same degree, or in the same way. Only where a matter is governed by specific and unambiguous rules can adjudication be imagined as application of predetermined norms. In all other cases, adjudication acquires a law-making dimension that can grow in intensity and begin to compete with the law-applying function.³³

For all these reasons, if the lowest common denominator of procedural objectives is used as a background for examining tradeoffs between truth and its rivals, discussion cannot move beyond generalities. There is also the danger of mistaking the objectives of a narrow class of proceedings for the objectives of adjudication in general. Like a blind man trying to capture the reality of the whole elephant from fragmentary impressions, a commentator is tempted to theorize from the ends of proceedings with which he is best acquainted.

Regrettably, a more fruitful, contextual approach to the tradeoffs between truth and other values is bedeviled by the paucity of studies on the changing objectives to which various kinds of proceedings are devoted. The conventional distinction between civil, criminal and administrative procedure is of little use in this regard: a centrifugal process is under way in all three of these branches of adjudication, and newly emerging forms of justice, while attributing different weight to fact-finding accuracy, show little respect for traditional classificatory boundaries.³⁴ Faced with so much uncharted territory, I can on this occasion only illustrate how the weight of fact-finding accuracy follows changes in procedural objectives. Three procedural contexts will serve as examples: the litigation with a heavy law-making component, the garden variety civil lawsuit, and the trial stage of the criminal process.

33. A further weakening of procedure's instrumental role occurs if the value of substantive legal provisions is doubted. More emphasis is then placed on procedural justice. Consider also that procedural rights can acquire intrinsic value—in greater or lesser measure, so that their violation cannot be justified instrumentally—that is, by invoking the factual accuracy of outcomes.

34. On these centrifugal tendencies within civil procedure, *see, e.g.*, Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). As far as the criminal process is concerned, it suffices to allude to the different role of factfinding precision in cases decided by a guilty plea and those that go to trial.

A. Factfinding Accuracy in Adjudication with a Strong Law-Making Component

Some legal proceedings in our times are prompted by the desire to shape societal values—to make or change the law. Included in this category are not only civil lawsuits in the public interest,³⁵ but also all proceedings in which the constitutionality of applicable law is challenged. The jurisgenerative part of the total procedural function can in all these contexts reduce the relative weight attributed to fact-finding accuracy.

This reduction in the importance of fact-finding accuracy can be quite pronounced in some circumstances. If the impulse to shape a desirable norm is so powerful that a particular constellation of facts—a historical event—turns into a mere pretext for adjudicative lawmaking, the accuracy regarding this event can assume a very minor role. Whether an individual instructed a couple to use contraceptives, for example, is not nearly as important as the chance to determine the constitutionality of a criminal statute banning this activity.³⁶ The accuracy of this “adjudicative” fact pales here in comparison to that of “legislative facts”—that is, facts bearing on the desirability of lawmaking, or legislative change. Many of these latter facts are in the form of predictions of likely consequences of regulatory alternatives, thus the reconstruction of past events greatly recedes in importance.

Adjudication with a strong lawmaking component can also influence views on whether a tension exists between the pursuit of truth and considerations of fairness. Consider that when courts engage in lawmaking, the litigants’ participation in procedural action gains in importance: the parties become interest representatives for those who will be bound by the norm created by the court’s decision. The judgment’s legitimation depends heavily on this participation.³⁷ But participation now also appears as the most conspicuous ingredient of procedural fairness. And when fairness is so conceived, it no longer appears as a constraint on decisional rectitude, but as a precondition

35. For a seminal account, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

36. I am alluding, of course, to *Griswold v. Connecticut*, 381 U.S. 479 (1965).

37. For a recent thoughtful argument along these lines, see Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 346 (1997).

for it. The greater the “voice” of the parties in proceedings, the more the resulting decision seems correct.³⁸

B. Factfinding Accuracy in Traditional Civil Lawsuits

Moving on to a context where the end of conflict-resolution sets the tone, consider small contract, tort or property lawsuits that impose no visible costs on third parties. It is true, of course, that even these lawsuits retain a larger function—especially in systems like ours where law grows out of judicial precedent. Nevertheless, the goal of resolving a private controversy takes center stage and affects the weight accorded to truth values. In the first place, litigants are sovereign in determining what is in issue between them through admissions, stipulations and settlements. Because issues of public policy are seldom visibly implicated, courts normally give judgment on the basis of unilaterally admitted, or agreed facts, rarely subjecting their accuracy to independent scrutiny. The event that underlies the cause of action is therefore not examined from all factual aspects that are material in terms of substantive law.

But even within the party-determined factual parameters of the lawsuit, the concern with truth is muted. Symptomatically, the court’s decision need not be based on the belief that the facts as alleged by the litigants are true. Even if factfinders are skeptical about the reality of the hypotheses of both parties, they will normally give judgment for the side favored by the preponderance of evidence. Neutral arbitration is more central than the search for truth.³⁹

All this goes to show that when the paramount goal of a legal proceeding is private dispute-resolution, accurate fact-finding is valued only to the degree allowed by this goal. Accordingly, adjudicators must tame their inclination to establish the truth depending on the proceeding. In so doing they follow the ancient insight that a dispute-resolver’s untrammelled search for the truth can backfire—unearthing matter capable of intensifying rather than absorbing the underlying controversy. Situations can even arise in which truth can

38. An example of this reasoning can be found in Paul G. Chevigny, *Fairness and Participation*, 64 N.Y.U. L. REV. 1211, 1223 (1989) (reviewing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988)). Note in passing that “dialectical” and “consensus” truth theories discussed in the previous section can best be applied to the lawmaking component of proceedings.

39. This is especially obvious in many forms of alternative dispute resolution, where decisionmakers do not have to worry about the precedential value of their decision.

engender hatred. *Veritas odium parit*.⁴⁰

C. Factfinding Accuracy in the Criminal Process

The role of fact-finding accuracy is most often discussed in the context of the criminal process. Its driving objective is, of course, the desire to identify the perpetrator of a crime and to impose a criminal sanction on him if appropriate. Without this goal—which implies that the search for the truth be high on the totem pole—the process comes to a stand-still. Yet, as is generally recognized, the criminal process also serves a variety of needs and values that are independent from and potentially in conflict with the drive toward fact-finding accuracy. The most striking among these collateral objectives in the American criminal process is the protection of the individual from abuse of power by public officials. The high measure of distrust of them justifies many obstacles to the easy collection of evidence. Prominent among collateral objectives are also humanistic and efficiency concerns. In short, the criminal process is characterized by an unruly mix of objectives—a mix that varies from stage to stage, but assumes its most perplexing form at the guilt-determining phase of the trial.⁴¹

Before remarking on the interaction of elements in this mix, some special features of factual inquiry at trial deserve to be noted. The first feature to be observed is the asymmetrical attitude toward the truth-content of verdicts. While convictions are expected to accurately determine the factual predicates of criminal liability, acquittals are not meant to do the same for the factual predicates of innocence. If we wanted to increase the truth-value of acquittals, we would have to adopt a third type of verdict—a type capable of expressing a range of belief-states between the conviction that the accused is guilty and the finding that he is innocent.⁴² Acquittals could then be reserved for cases in which factfinders are convinced of the accused's innocence. This asymmetry is not solely the consequence of the cluster of social values behind the presumption of innocence.⁴³ The truth-

40. TERRENCE, ANDRIA act 1, sc. 1.

41. This variety is reflected in dramatic differences between the court's concern with factfinding precision in accepting a guilty plea and in the course of trial.

42. Such a third type of verdict was known in ancient Rome (*non liquet*), and in the criminal process of the continental *ancien régime*. For references, see MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 170 (1986). The Scottish "not proven" verdict is a modern example of this third way.

43. The presumption is relevant here because—unless rebutted—it compels the

content of not guilty verdicts can also be negatively affected by jury nullification: jurors can acquit even if they are fully persuaded that all factual preconditions of guilt have been accurately established.⁴⁴

Another feature to be noted about the search for truth at trial is that this activity appears complicated and arduous for reasons other than the pull of non-epistemic procedural objectives. For one thing, only contested cases are brought to trial. As these cases tend to be complex and close, the attainment of accurate results in them seems more problematic than in a modal case ingested into the justice system. For another thing, the method of introducing evidence in two clashing cases, each presented in the most favorable light, further contributes to the perception of fact-finding difficulties. The role of rhetorical argumentation increases, skillful cross-examination reduces the credibility of almost any testimony, and the identification of uncontroversial propositions is made harder.⁴⁵ All in all, when trial cases are used as the baseline, the results of the search for truth appear somewhat uncertain. And when truth encounters rival procedural objectives, this perception can weaken the force of arguments insisting on the attainment of fact-finding accuracy.

An aspect of this encounter deserves to be singled out for consideration because it is so often neglected. If truth values are to be properly balanced against their competitors, doctrines and institutions that promote fact-finding accuracy and those that serve other goals should be clearly distinguished. Failing this prerequisite, double-counting and other distortions can mar the balancing process. Regrettably, the distinction is not always easy: some institutions and doctrines appear capable of promoting both truth-enhancing and other values. Rejecting coercive interrogation methods, for example, can be supported by humanitarian rationales, but it can also be justified by the need to protect the court from unreliable information

finding of the presumed fact, *i.e.*, innocence. The resolve not to burden a possibly innocent individual with lingering suspicion about his guilt is especially pronounced in common law systems, where the prosecution is not allowed to seek reversal of a judgment of acquittal on appeal.

44. This points, by the way, to the submerged pardoning function of criminal trials, whose relation to their ability to unearth the truth remains insufficiently explored. It is probably fair to say that where lay adjudicators can decide on intuitions of what is just under the circumstances, the question of what happened ("*wie es eigentlich gewesen*") can get out of focus and decline in importance. Why should a jury agonize over conflicting evidence that the defendant pulled the trigger, for example, if the jurors feel that it would be unjust to convict him even if he did?

45. This surfaces most clearly in respect to expert testimony. For perceptive remarks, see Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1180-184.

these methods can produce. Even doctrines that clearly lead to the loss of reliable evidence can sometimes be said to advance accurate fact-finding. The attorney-client privilege can be justified—even in the context of criminal procedure—not only on privacy grounds but also on the ground that it promotes truth values. Without the privilege, it is often argued, defendants might hold back information crucial for the attainment of accurate outcomes. The long-range gain in truth-conducive values is thus used to justify an immediate loss of evidence in a particular case.⁴⁶

The identification of truly “polyvalent” doctrines and institutions is complicated by the widespread belief that law enforcement officials are more amenable to fact-finding than to humanistic rationales for the rules of procedure and evidence. It is thus believed—though seldom openly stated—that these officials are more effectively dissuaded from employing an undesirable method of interrogation by claiming that it could lead to evidence of uncertain reliability than by claiming that it diminishes personal autonomy. Due to this belief, some rules and practices of basically humanistic inspiration are buttressed by dubious truth-conducive arguments. While this strategy may have some advantages, it skews the proper tradeoff between truth values and their competitors. It also obscures the tension that exists in the criminal process between the aspiration to fact-finding accuracy and social needs that constrain it. Skewing this tradeoff and obscuring this tension is innocuous only so long as the driving force of criminal procedure—the desire to identify and punish the perpetrator—is not excessively blocked by collateral concerns. When the *id* of the process is repressed too much by its *super ego*, “neurotic” symptoms can appear in the administration of criminal justice.⁴⁷

46. This is reminiscent of the economists’ oscillation between support of the free flow of information and support of incentives needed for the production of information. Torn between the two contrary impulses, they are prepared to justify restrictions on the availability of information in some circumstances. See generally Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988).

The problem of cost can also be confusing. While cost considerations can require sacrifice of optimal truth-finding methods in a specific case, they may represent optimal allocation of resources across cases and thus advance overall factfinding accuracy.

47. Trial avoidance is only the most obvious of these symptoms. The victim’s desire for satisfaction, made largely irrelevant by the demise of private prosecutions, can also surface in a destructive form, endangering the polity’s commitment to the protection of the defendant from abuse.

Conclusion

The just completed survey suggests that the discussion of factual accuracy in adjudication can be greatly improved if the diverse objectives of legal proceedings are attended to more closely than in the prevailing convention. Even if these objectives and their impact on truth values are not exactly the way I depicted them—and much of what I have said is admittedly controversial—I hope to have demonstrated how the importance of factual accuracy in adjudication is sensitive to procedural environment and thus unstable. There is a lesson in this for evidence scholars interested in maximizing fact-finding values under constraints. There are few evidentiary issues they can properly examine without intimate knowledge of the institutional milieu and legal problems that arise in specific procedural contexts. If evidence scholars are to become more influential in legal discourse, their splendid isolation in general evidentiary problems must come to an end.