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# DETERMINACY AND DELIBERATION: AN INQUIRY CONCERNING FORENSIC EPISTEMOLOGY

RAY CHAZO, ESQ.\*

"I preach there are all kinds of truth, your truth and somebody else's, but behind all of them, there's only one truth and that is that there's no truth," he called. "No truth behind all truths is what I and this church preach! Where you come from is gone, where you thought you were going to never was there, and where you are is no good unless you can get away from it. Where is there a place for you to be? No place."

—FLANNERY O'CONNOR<sup>1</sup>

## I. INTRODUCTION

This essay is an attempt to elucidate a mystery that is jealously guarded in the statements of jurisprudes and practical enforcers of procedural norms. The process of deliberation, of arriving at a rationally defensible conclusion of fact, is centrally located in a body of doctrine that insists upon uniformity, regularity, and sound method. Yet the deliberation process, if that is what it is, must be conducted in secret. The jury room is sacrosanct; and findings of fact are overturned only if the factfinder is lying or is demonstrably insane.

The strongest and the oldest bulwarks of doctrine are built upon the distinction between "fact" and "law," and they are built primarily to keep the act of deliberation at a level of unfathomable subjectivity. Why? Because no alternative procedure is consistent with our cherished political values. Separate instances of fact never *compel* determinate conclusions in law, in science, or in art. Truth is *usually* stranger than fiction because of the particulars of demeanor and self-interest, the life-experiences of the factfinders, the interaction between experience and perception, and between memory and articulation. The combination of these factors gives fact-finding a psychological complexity beyond the comprehension of normative speech. In contrast, when "law" instead of "fact" is in issue, great jurists spin metaphors to extraordinary lengths, seeking

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1. F. O'CONNOR, *WISE BLOOD* 165 (copyright © 1952, 1962 by Flannery O'Connor). Reprinted with permission of Farrar, Straus & Giroux, Inc., Publishers.

to communicate the ineffable elements of practical wisdom which will exhibit creativity in doctrine and in determination of hypothetical instances upon which doctrine must operate. But these great jurists rarely apply their metaphors to real cases. This bare recital of elementary truths suggests a need for a further exercise of imagination in order to perceive the intellectual costs of keeping the realm of fact at its present nicely calibrated level of indeterminacy.

The operators of the legal system know whimsy when they see it, and they know it when they perpetrate it. But they are relatively powerless to do anything about it, even at a level of subjective freedom where the power to determine facts is transformed into power to do justice by wielding the armaments of discretion. Human values affect and distort perception even in the simplest cases. Furthermore, in the complex problems posed by legally framed contentions of fact, there is believed to be a transcendent value in the "wisdom" and the "experience" brought to the task of factfinding by seasoned and anointed judges, or by neighbors or others appointed to the jury. A consensual bias sheds a desired light upon forensic claims of facts, thereby "enlightening" the process, and consequently entitling reviewers to scan cold records in a "favorable light."

The confidence with which juristic theorists hold such opinions of the epistemology of their craft is itself rather mysterious. The legal system is perhaps a little too naive in its acceptance of the dark side of deliberation. A resurgence of philosophic idealism which accounts for the destruction of the sturdy "enlightenment" version of an objective reality is accompanied, in modern thought, by a sense of liberation. The inevitable bias of subjectivity is celebrated as a virtue, in contrast to previous ages which sought valiantly, in the name of science and in the hope of community, to create an enduring physical and social order that could be the subject of intelligible communication within and between cultures, and over long passages of time. Such subjective "freedom" is the enemy of the objectivity which animated the framers of our constitution, and the formulators of the Newtonian universe contemporaneously described in its legal manifestations by Blackstone.<sup>2</sup>

There is no profit to be gained in idle lamentations over the loss of enlightened innocence, or the corrupting sophistication of modernism. This essay nevertheless seeks to derive a lesson from inspection of the elementary categories of legal thought: those words which are still used unthinkingly, and the formulae of reasoning

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2. See D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1941).

that have an ancestry going back through English usages long preceding the 18th century. The fundamental legal categories still embody the superseded premises of older modes of thought. The categories used in contemporary legal discourse imply connections that seem necessary, but their implications escape analysis. The intelligibility of the modern world depends upon crumbling structures of words and edicts. Perhaps the sturdiest of these ancient doctrines is embodied in the word "theory," the doctrine that impartial observers of a scene, or a process, can compare their perspectives and use their differences to gain a truer understanding of their observations. Subjective vision as the basis of *theory* is also a metaphor for rationality, because vision is not possible in the steady, complete light of mystic understanding. The practical consequences of an acceptance of these terms is best understood by seeing how the language of law is deployed to preserve and enshrine the mystery of subjectivity.

The effort to see contingency in what is defined as "obvious" depends upon a system of contrasts all its own. Clarification could not be attempted if there were not resources available within the realm of practical contemporary law, as well as modern versions of epistemic doctrines which could be used to "posit a model" of a newer and more surprising kind. The trap that must be avoided in modelpositing is the tendency to conceive the model as a visible object. The process of deliberation was once modeled as an algorithm for the conversion of perception into speech; now one needs a model to serve as an emblem for what is meant by "process" itself.

The legal system could attempt the standardization of the values applied in constituting facts inferred from records constructed in the highly artificial but worthy process of trial.<sup>3</sup> This is the doctrine which provides the following remarks with a perspective from which the "obvious" can appear to be puzzling and problematical. This standpoint, adopted for the discussion of deliberative rationality, dictates the method, which is verbal analysis, oriented to representative specimens of contemporary American legal doctrine in the field of civil procedure. The portions of law's seamless web emphasized herein all relate to the central mystery of the fact/law distinction, as well as the crucial intersections between language and thought, where doctrine is manifestly helpless to deal with dissensus.<sup>4</sup> The legal concept of *doubt* and *uncertainty* is the chosen sub-

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3. The approach followed here is one suggested, if not mandated, by contemporary ethical theory. It will be assumed that the process of factfinding is a normative method of seeing-things-as-they-are. Norms are not in the nature of genetic endowments, but are chosen.

4. For a stimulating contemporary example see R.M. UNGER, *LAW IN MODERN SOCIETY* (1976).

ject matter. We ask how the legal order deals with chaos, and we ourselves are therefore immediately plunged into doubt and confusion. The following account of deliberative rationality will serve as a compass, and will be constructed from bits and pieces of contemporary ethical and epistemological doctrine, and by a tiresome insistence that the law's concern is to treat similar cases alike. Like the spoke of a turning wheel, the ensuing linguistic ruminations should describe an area circular in shape and logic, within which the mystery we seek to fathom is played out. This examination of the deliberative process is marked by the pervasive doubt which is the hallmark of modern thought: the doubt that law is still able to recognize likenesses between cases, much less the likeness between cases and true accounts of past transactions or occurrences.<sup>5</sup>

This article may be summarized as an inquiry that unfolds along the following lines: A brief recapitulation is provided of well-settled rules and rationales that account for the special place of factfinding in our adversary process. Particular attention is given to the central importance of the law/fact distinction as the governing concept in legal ideology. This ideology has established strong barriers to feedback or, indeed, to any form of response to the exterior criticism that is often justifiably leveled at legal factfinding.<sup>6</sup>

After exploring the inconveniences and outright dishonesties that flow from the present structure of legal thought (with its secret love of oracles), a new and philosophically more subtle epistemology is described, and its doctrinal implications are explored.<sup>7</sup> An analytic version of knowledge is applied to purely legal concerns by means of a nontechnical, historically oriented proposition: that the legal community participates (with dim awareness) in general changes which have been transforming our cultural situation and our ideology. These changes have been manifested obliquely in the legal subculture without having aroused any systematic attention. This part of the argument invites lawyers to become self-conscious of

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5. The statement of themes in these introductory remarks may not provide the reader with sufficient thread to retrace the architecture of their variations. The structure of the following argument is more diffuse and more organic than the sermon-form of the comment or article that is most familiar to legal scholarship. The departures, however, seem necessary (and illustrative) to consider a doctrine about doctrine. See T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935), analogizing legal scholarship to Puritan sermon forms.

6. George, *King Solomon's Judgment: Expressing Principles of Discretion and Feedback in Legal Rules and Reasoning*, 30 HASTINGS L.J. 1549 (1979).

7. The concise account of "knowing" in Part II is inspired by the teachings of Robert Nozick and the writings of Nelson Goodman; professional analytic philosophers of great stature whose insights have been but dimly perceived, and inevitably distorted in fitting them into this essay. See N. GOODMAN, *WAYS OF WORLDMAKING* (1978); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

what seems most awkward and ill-fitting in the language of law.<sup>8</sup>

The practical importance of this critique is to offer a new conception of the legal factfinding process, one that exploits the logical possibilities of our modern conception of legal language. But such a process appears to be practically inconceivable because of the fragile normative ingredients of a specifically legal notion of pure reason. The proposal of a radically different factfinding procedure serves to assay the strength of the foundations of fundamental legal values and the supporting concepts of practicality and of efficiency. Finally, that which is well-settled is reexamined from a perspective which is far different from our original standpoint. The beliefs which are necessary for an understanding of rules such as the federal rules of civil procedure regarding summary judgment are described.<sup>9</sup> The insights gained from radical criticism of these beliefs are applied to recast the concept of a "presumption." Thus, the critical method demonstrates its pragmatic value. When the wheel of this discourse has come full circle, hopefully the reader's thinking will have undergone a revolution even if nobody has committed one.

## II. FINDING, GUESSING, KNOWING, BELIEVING

### A. *The Origins of Factual Indeterminacy in Litigation: A Survey of the Procedural Status Quo*

Judges at times complain of the standards which must be satisfied before they may interpose their factual judgments in dissent from the initial fact findings. The current standards are justified in terms of consistency, efficiency, repose, and internal bureaucratic morale.<sup>10</sup> The judicial power to interfere with factual determinations after closure of the record must be exercised as if the reviewing judge were a commissioner of the sanity of the factfinder who reached intolerably "speculative" or idiosyncratic, or possibly corrupt, con-

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8. In the course of the semantic discussion, the style of presentation may appear grotesquely unfamiliar to lawyers; some will, however, recognize a diminutive echo of thunderbolts launched by such contemporary thinkers as Hannah Arendt and Michel Foucault. See H. ARENDT, *THE HUMAN CONDITION* (1958); M. FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (1972).

9. FED. R. CIV. P. 56.

10. See *Pendergrass v. New York Life Ins. Co.*, 181 F.2d 136 (8th Cir. 1950).

The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of the litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.

*Id.* at 138. In jury cases the seventh amendment imposes on the federal courts an equal or more stringent requirement of deference to the initial trier of fact. Commentators appear to be unanimous in the view that the present practice is completely justified by the considerations of morale, repose and consistency exemplified in the quoted statement.

clusions of fact.<sup>11</sup> Each instance of such interference is a claim that the conclusion was reached in a way that is inconsistent with universal rules of reason. The rules of procedure thus protect "invalid" but "logical" conclusions of fact within remarkably broad limits.

It is, of course, rare for a losing litigant to succeed in an appeal from a finding of fact on account of its irrationality; but it is very common for appeals to take the form of such claims.<sup>12</sup> An appeal based on the adequacy of the record is frivolity from an actuarial standpoint, and it is often summarily regarded as being frivolous in law as well.<sup>13</sup> It is, however, noteworthy that vocabulary and logic fail to furnish suitable ways for demonstrating frivolity or absurdity, or to describe that line beyond which the factfinders become guilty of intolerable speculation or surmise.<sup>14</sup>

Perhaps the frequency of hopeless fact appeals is explained by their low cost in terms of intellectual compromise as well as their payoff in sheer delay; or it may be that the losing side is obsessed with the appellate opportunity to question seriously the facts upon which legal norms must operate.<sup>15</sup> While the record is in the process

11. "Taken seriously, this conception [of rationality] makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren." *THE LEGAL CONSCIENCE—SELECTED PAPERS OF FELIX S. COHEN* 44 (L. Cohen ed. 1960), cited in A. BICKEL, *THE LEAST DANGEROUS BRANCH* 37 (1962).

12. See *Overton v. Vita-Food Corp.*, 210 P.2d 757 (Cal. 2d Dist. Ct. App. 1949).

With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is any substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen. *Id.* at 759 (emphasis in original). This formulation finds parallels in other state and federal decisions too numerous to be worth collecting.

13. The line between "rhythmic regularity" and such exasperation that the court is willing to impose sanctions is not often articulated, but the dim view taken by appellate courts of such fact appeals may be gleaned from *Overton v. Vita-Food Corp.*, 210 P.2d 757 (Cal. 2d Dist. Ct. App. 1949) and its kindred, as well as the occasional instance of sanctions imposed for frivolity. See *Oscar Gruss & Son v. Lumbermans Mut. Cas. Co.*, 422 F.2d 1278 (2d Cir. 1970).

14. "Unfortunately there is no sure test to distinguish between the legitimate inference, to which the party opposing the motion [for judgment n.o.v.] is entitled, and the unreasonable inference, to which he is not." C. WRIGHT, *LAW OF FEDERAL COURTS* 425 (2d ed. 1970).

15. FED. R. CIV. P. 11 makes the attorney's signature on a pleading a guarantee that it is not interposed for delay, but a frivolous appeal is not proscribed in similarly categorical terms. Nor is the term "frivolous" defined in the ABA CODE OF PROFESSIONAL RESPONSIBILITY, although it states "a lawyer is not justified in asserting a position in litigation that is frivolous." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4. As a disciplinary matter canon 7 also reaches the dilatory appeal only indirectly. An appeal contesting the factfinder's rationality *might* be an instance of violating the omnibus "shalt not" of DR 7-102(A)(1) if the lawyer is found thereby to "delay a trial, or take other action . . . when it is obvious that such action would serve merely to harass . . ." *Id.*

of completion, the advocate's task is altogether different: to paint the factual picture in extreme terms most favorable to the interest of the client, and least favorable to that of the adversary.<sup>16</sup> Only on posttrial motions or appeals can one attempt a reasoned exploration of the middle ground where common sense would presume that the truth is most likely to be found.

These manipulative or psychological reasons do not exhaust the causative descriptions of present practice concerning fact appeals. Yet they seem complete in principle, seem aimed at the right sort of explanation. If our complacency in using present critical tools is ever to be shaken, we must revive some ancient ways of attacking, by reconceiving, factual disagreement as a source of frustration and injustice. It is not cosmically ordained, after all, that an understanding of social phenomena must cease despite doctrinal silence in the face of legalistic absurdity. Only the prudence of jurists makes it seem necessary for courts to be so restricted in the course of factfinding that they may only intimate in passing how conclusions must remain undisturbed even though they are regarded as strange, unendorseable, mysterious; in any case, deviant, or just this side of juristic madness.<sup>17</sup>

When a finding of fact does withstand challenge, however, the *fact* of its survival is as necessary as any other. A line has been drawn in each such case, demarcating a field of autonomy which consists of the functional discretions vested in particular factfinders. The law's empiric possibilities (on particular records) are comprised within the set of all of the facts which a factfinder is permitted to construe free of direct supervisory interference. Is this line continuous, traceable to origins in general principle?<sup>18</sup> It is not felt to be so, even in the weak sense of tracing a discretion guided by observance of general norms in good faith. On the contrary, the limits of legal inference are often removed from the discourse of

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16. *Id.* EC 7-24.

17. "The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'" *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

18. The language in which the freedom of factfinders is couched is extraordinarily broad. For example, even in a criminal prosecution, the Court of Appeals for the Second Circuit is content with the statement, "The jury, in reaching verdicts of guilty on both the substantive and conspiracy counts, were required to choose between competing inferences of fact—this was within their exclusive province." *United States v. Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965). In a civil bench trial the standard is the same, "it is for the trial court to choose from among the competing and conflicting inferences and conclusions that which it deems most reasonable." *Rogers v. United States*, 334 F.2d 931, 935 (6th Cir. 1964).



positive law and described simply as a set of legitimate outcomes within the trial's parameters, lying well below the threshold of a principled normality. This is one consequence of the very high level of abstraction at which the limits of factfinding power are currently defined by the typical American systems of adjective law.<sup>19</sup> Efforts to articulate standards for exercising the new trial power or the set-aside (or clearly erroneous) tests for appellate review of factfinding have failed so far to produce a prudential logic which could be used to deduce or demonstrate the law's version of an "empirical" error.<sup>20</sup>

Indiscriminate toleration of aberration and speculation may be inferred from the freedom of speech which lawyers and judges use in describing trial results when they speak "off the record." Such toleration cannot be satisfactorily justified within the system of official doctrine in the name of epistemic humility or of institutional hierarchy.<sup>21</sup> The speculative nature of factual controversy in the legal process marks a failure of thought and language to provide the discriminations needed to specify an adequate legal form of rationality. This legal rationality should be equal to the purposes of a

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19. The term "abstraction," as used here, refers only to the conclusory form of evaluation and review standards of current rules. This form implies that the bottom line of agreement is achieved through some systematic analysis.

20. The power to review *denial* of a new trial motion (on appeal from a judgment rendered thereafter) in federal practice is very narrow. When the attack is directed to the sufficiency of the evidence, the issue is seen as a question of fact, not of law, and the discretion of the trial court is very broad. *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 852 (5th Cir. 1975). When a new trial has been ordered by the trial judge, the power to review the order at all is extremely problematic. See 6A MOORE'S FEDERAL PRACTICE ¶ 59.08 [5], at 59-154 (2d ed. 1974). But in either case, the principles to be followed by the trial judge, as vestee of a virtually unlimited discretion, have never been made more particular than the following passage from a New York case:

[The trial judge] will not interfere just because he dislikes the verdict; or feels quite strongly [that] he would have done something else; or even because he may think the verdict is unjust.

The point of interference is not fixed on the caprice of judicial individualism; it is rather arrived at by a synthesis of all the experience that the judge has had; in the beginning as a law student, in the later controversies of law practice, in the hearing of cases and the writing of decisions, in the sum of all that he has absorbed in the courtroom and the library.

*Mann v. Hunt*, 126 N.Y.S.2d 823, 824 (App. Div. 1953).

21. The most telling and amusing demonstration that realism demands attention to the non-doctrinal factors affecting decision is J. FRANK, *LAW AND THE MODERN MIND* 127-58 (1930). The generality of expressions used to state the doctrinal standards for interference with the factfinding process are assailed from a different perspective, however, if it be noted that it is both an invidious and an impossible task to point out cases of inconsistency under the standards noted above. Yet the temptation is always there. *Compare Lavender v. Kurn*, 327 U.S. 645, 653 (1946) ("a measure of speculation and conjecture is required . . ." of the factfinder) with *Pennsylvania R.R. v. Chamberlain*, 288 U.S. 333 (1933) (inference based on "mere speculation" disallowed). This article is dedicated to the enunciation of principles of a sound legal epistemology which would not permit the assumption that particular cases can be regarded as "comparable" in such terms.

justice which is founded, as nearly as possible, on the true history of well-scrutinized transactions and occurrences.

Factual indeterminacy is experienced by the observers and participants in legal controversy as a risk and as an excuse. It is widely felt to be an existential misfortune that the gambling nature of the processes of law result in failures of justice in isolated cases. But all cases are isolated. Every case that is processed by the legal system is individual, and the truth established by every case is therefore emphatically provisional. Losers take comfort in the understanding that legal guilt is not guilt; that judgment is cast upon appearances, not realities.

Factual variability is thus regarded as a necessary condition for the very existence of a legal process. If it were possible to think of rationalizing as reason's true conscience, deviations from the truth would not be perceived as a delusion or falsification of an underlying physical reality (that is permanent, regular, "objective" only in a statistical way, according to the creed of vulgar scientism). Conceiving the task of rational inquiry in different terms might lead to a treatment of variability among constructions of the "same" (forensic) facts in a more open and consistent way. It should be possible to recast the dilemma of factual indeterminacy by adopting more tractable categories for understanding familiar legal terms. The attempt to formulate new categories should become attractive because the very shape of what is deemed necessary within the logic of the law has undergone a cumulative and imperceptible change. The sources of the change are manifold, but this discussion focuses upon those introduced into the mainstream of legal thought through a critique of the ideas of impartiality and indifference. The critical exercise of demonstrating new or latent meanings in familiar ideals should generate enough provocations and oblique insights to justify the effort, and to beguile the wanderer with a sense of heightened consciousness.

#### *B. The Verbal Manifestation of Indeterminacy: Findings of Fact*

It is easy to claim that a different body of thought inhabits the familiar robes of legal discourse; demonstrating its anatomy is another matter. The postulation of this thesis and its proof is neither possible nor necessary for present purposes. The course of change in lawyers' conceptions should emerge from a brief review of what law takes for "reason." The reviewer must perforce take a standpoint for analysis that is extrinsic to the particular forms in which adjective law functions. However, the legal idea of "reason" and "reasonable" embraces the rationales found in rule systems as the best examples of the rulings of legal "reason" in contentious circumstances. The

examination of a particularly legal form of rationality thus undermines the boundaries of analytic jurisprudence by insisting upon the inclusion of moral or epistemic norms that are by fiat excluded from the fundamental categories of legal thought by many legal philosophers.

In order to reconsider, through restatement, the body of legal/moral doctrine which distills the common experience of conscientious jurists, it is desirable to admit the least controversial premises of legalism as postulates for later discourse. The most prominent of these is the universal insistence of Anglo-American jurists upon the primacy of the initial factfinder. Factual errors may be corrected, in principle, but not through any process that resembles relitigation. Reversal for faulty factfinding is the limited prerogative of a reviewer; the review is directed to mistakes of logic or perception, not mistakes in judgment.

### C. *Inferences, Findings, Reports, Inventions: Fact Finding Analyzed*

Whether it be in the form of a general or specific verdict, or a judicial decision, the central datum of the completed trial is a specific proposition which is commonly designated as a "finding of fact." Just what is a "finding"? How did such an odd locution remain so long embedded in the standard discourse about legal controversy over facts? If mere isolation of the term does not rob it of its familiarity for the reader, consider its etymological transformation to a more Latinate form: a *finding* may be said to be nothing more nor less than an *invention*. Inventors, however, are free to use whole cloth, while legal factfinders are not.

What are legal factfinders supposed to do? The answer is not clear, nor is it located in standard jury instructions, which are much more concerned with controlling propensities to believe than with describing the domain in which facts are to be "found."<sup>22</sup> That domain, to the uncritical mind, is the subset of the trial record which is worthy of credence. So the task of the factfinder is to survey that record, to organize it (perhaps with some insights afforded by

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22. Jury instructions take the form of direct address, judge to juror. It is therefore significant that despite their length, and often their complexity, such instructions say very little about the propositions of fact that the juror will credit or discredit after attempting to conform his mental processes to his understanding of the words relating to risks of nonpersuasion or standards of "satisfaction" (preponderance, beyond reasonable doubt, clear and convincing, etc.). Assuming that the instructions are intelligible, they still deal only with doubts or assessments of the record previously arrived at in each juror's own way. The mysterious reluctance of judges to permit comments on the evidence and to provide models of rational deliberation is considered more fully in Part IV. of this essay.

argument) and then to recognize a finite entity on its surface, the "true" and legally relevant proposition of fact that has been properly founded upon testimony or other evidence.

This found fact emerges from the contest as a concept with a clear definition of its boundaries (provided by the formulae of the *prima facie* case) but with merely provisional allegiance in the mind of the factfinder who holds it with a more or less firm tenacity, depending upon the force, weight, strength, or other metaphor used to describe its impact or traces as it crosses the cloud chamber of a passive and indifferent alertness. Adequate judicial notice has never been taken of the problematic status of that found fact, which is the result of conflicting oaths, claims, arguments, suppositions relating to a truth forever hidden, forever beyond the surface of the record, and beyond the calculations of probability.<sup>23</sup> Factfinding is the art of *collage*, with the distinction of having lost even the surface coherence of an organic whole, since the propositions catalogued in jury instructions or other manuals of positive law are almost wholly fabricated in relation to the honest reactions of witnesses of the drama of trial.

The artificiality of the synapse linking the trial to the compilation of its truths is not the product of any unconscious or unintended mechanism.<sup>24</sup> The highly formalized and often very detailed struc-

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23. There are sound policy reasons for requiring proof of more than mere "background statistics" as a basis for inferring a fact. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1349 (1971). Assuming, however, that rules adequate to protect the public interest in full investigation and disclosure can be devised, the rejection by Professor Tribe of a mathematical strategy of deliberation (jury instructions teaching Bayes' Theorem) turns upon a sophisticated appreciation of the seventh amendment and other expressions of community values that would prohibit the *mandatory* acceptance of what will be termed herein the "criterial version" of the facts by the trier of facts.

The discussion between Professor Tribe and his critics of the value of Bayes' Theorem of Probability in the process of factfinding is relevant here only in the sense that an instrumental use may be found for the probabilistic rationality of Bayes' Theorem as a way of casting light upon the jury's far-from-evident subjective probability assessments of the truth values of various items of evidence. Professor Tribe seems to have shown persuasively that the secrecy of the factfinder's probability assessments, and even the intuitive and inelegant manner of its use of those assessments, is centrally important to the functioning of the jury as an institution. *Id.* at 1358. The judge could be required to report *his* subjective probability assessments on the evidence and to apply Bayes' Theorem in construction of the criterial account of the record, as part of the law of the new trial power, without offending the principles so ably stated by Professor Tribe. See also Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970).

24. On the contrary, the jury or the judge is instructed beforehand how the field of contention is to be divided and how the points of dispute are to be articulated in the aftermath. Counsel are invited to bring the generalities of purely legal norms home to the factfinders through opening statements and closing arguments, relating the episodes of the trial drama to the checklists distilled from standard manuals, or from scrutiny of the cases and statutes that seem pertinent to the claims asserted prior to trial.

ture of propositions which comprise the prima facie case is an armature for later reasonings and speculations of those who would challenge the *basis* in the record for any particular inference expressed (implicitly or explicitly) in the verdict or the findings.

Having noted these essential features of legal empiricism, we should be struck not so much by the image of Procrustes and his beds, as by the refusal of the story unfolded in trial to conform to the lines of any grid, or to have its dimensions limited by the catalogs found in such works as the American Law Institute Restatements, or practice oriented compilations such as *Proof of Facts*.<sup>25</sup> The duties of adjudication, as understood by the judicial professional and the attentive amateur on the jury who listens carefully to instructions, are formulated in terms too simple to take due regard of the coherence of pieces of a puzzle that fit together at last when provisional estimates, reserved rulings, and senses of probability, are all resolved into a common fabric synthesized from discrete data which are presented as relevant to separately framed issues.

The job of judging is described as analytical, not synthetic, because conclusions are drawn only after resolution of issues of fact. In principle, anyone can frame the correct conclusions; and only considerations of efficiency limit the division of factfinding labor. It would not offend the canons of juridical rationality to proliferate the subdivisions of a factual controversy; nor are principles of rationality at all offended by the practice in some jurisdictions of submitting several interrogatories to the jury for special verdicts. If the experiment were worthwhile, several juries could be assigned to separately resolve each issue framed in an interrogatory, and the combined result should duplicate a single jury's report of findings, either in a general verdict or in response to the same interrogatories. The experiment is not permitted (even in speculation) however, because it would incur great expense of spirit. The same inputs would produce distinctive outputs depending upon the factfinders' idiosyncrasies. Any risk of such an outcome is enough to prohibit the suggested test.

For these reasons, the law's stated version of empirical rationality is worn with the impudence of the Emperor's new clothes. Officials of the law share the nudist's taboo against peeking and the discomfort of vulnerability when winds of doctrine blow chilly. The meticulous legal definitions of "issues" given to the factfinder are not irrelevant. On the contrary, they constitute the essence of legality. But the definitions of issues are incapable of guiding the factfinder

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25. AM. JUR. PROOF OF FACTS ANN. is a multivolumed form book for the practitioner's use in organizing files, depositions, trial briefs, research, and ultimately, thought.

in performing his distinctive task. The definitions circumscribe the law's ideal concerns, but give no useful methods for defining the factfinder's duty to be reasonable, serious, careful, prudent, and, above all else, accurate in reaching a valid outcome.

Duty is, of course, a moral category, and words of definition are notoriously elusive when dealing with moral imperatives once past the "shalt nots" which establish *minimal* standards of behavior.<sup>26</sup> For example, the law of torts involves, in a quasi-definitive way, duty.<sup>27</sup> Tort law attempts to substantiate a consensus about the imperatives of ordinary behavior. The effort to justify the application of the normative terms of tort law as being "legal" (in the sense that they were discernible in advance) is a futile one. The evidence that evolving and mutable norms are woven into the fabric of the law concerning "duty" and "foreseeable harm" is strong, but not stronger than the evidence that similar externalities infect the autonomous thought-system of legal deliberation as it ponders all controversial issues, tort included.

The eclipse of formal legal definition leaves the observer with only a vague sense of boundaries. Definition in its etymological sense appears no longer to be possible. The erasure of "bright lines" in order to clear the boards for the image of a balance between competing interests, or the diagram of a vector resolving clashing forces, is one of the universal diagnostic features of the internal development of legal doctrine in modern times. Honesty demands that theory include among its metaphors the continuity, the delicacy, and the sheer velleity of judgments and estimations of the complex moral gestalts which form the subject matter of law. The result is a situational, even casuistic art of prediction. It is nearly impossible to use prescriptive terms to establish a norm unless that norm is unobservable.<sup>28</sup>

Formalistic attacks on the decline of legalism fairly aim at a source of bewilderment, but seem naive in believing that society might easily regain an obvious, mechanistic view of the social rela-

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26. For an elaboration of this distinction in ethical theories, see Roupas, *The Value of Life*, 7 *PHILOSOPHY AND PUB. AFF.* 154 (1978).

27. In tort, "duty" is a purely positive, extrinsic legal category, but the duty of a juror or other sworn official is part of the legal process itself. The imprecision of even the most frankly positive approaches to the definition of "duty" must be kept in mind when more intuitive and private notions are invoked.

28. The writer adopts the illuminating discussion of the dichotomy between standards and rules provided by Professor Duncan Kennedy in *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976). Compliance with legal standards must be distinguished from observation, which has the connotation of seeing in advance (with sufficient particularity) what constitutes compliance with, or violation of, a stated standard. For the rule of law ideology to remain workable, a degree of simplification is essential which enables a runner to read its writ. See G. GILMORE, *THE DEATH OF CONTRACT* (1974).

tions which are the law's concern. The modern lawyer tends to see the old emblems as if the scales of justice had become so finely calibrated that no reliable reading may be predicted. Or more justly, as if the simple "preponderancies" based on manifest "evidences" have been superseded by hidden variables, apart from the familiar metaphors of volume and visible form which underlie the language used to describe the terms and outcomes of deliberation.

In this important sense then, we are obliged to report that the law has lost its definition and is in the process of losing more of it. In the dizzy universe of policy science, "definition" is no longer a central concern. This fundamental truth runs across the fabric of all legal fields, as may be seen by contrasting any set of first and second Restatements, or by tracing the evolution of the Uniform Commercial Code, or the growth of the federal rules of civil procedure. Definitions which are capable of mechanistic application, and which would satisfy the purest ideology of rule of law theorists like Hayek, uniformly appear to be unsophisticated and unresponsive to the demands of a very complicated social order.<sup>29</sup>

We may thus conclude that the finding of a fact becomes enigmatic through considerations of language and psychology that are extrinsic to any particular doctrine. The fading of definition, which results in a loss of confidence in the meaning of familiar terms, is accompanied by appeals to increasing sophistication in applying those terms in concrete cases. The very words of statutes and decisions no longer seem to be suitable vehicles for achieving consistency in result and method. There is an endemic awkwardness in speaking of "evidence" as the basis of anything that could be "clear and convincing"; of "proof" as some remote kindred to Euclidean demonstration; and of "findings" as anything more than invention. Such expressions have become the artifice remaining after erosion of their denotations in a general revolution of thought. These expressions stand in the narrow gap between the authority of tradition and acceptance by legislative draftsmen for lack of anything better. The terms gain legitimacy from neither draftsmen nor practitioners, and they are rapidly losing what transparency remains to them.

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29. The significance for the individual of the knowledge that certain rules will be universally applied is that, in consequence, the different objects and forms of action acquire for him new properties. He knows of man-made cause-and-effect relations which he can make use of for whatever purposes he wishes . . . Like the laws of nature, the laws of the state provide fixed features in the environment in which he has to move . . .

F. HAYEK, CONSTITUTION OF LIBERTY 153 (1960).

*D. Conviction and Knowledge as Legal Categories: Standards of Proof*

One of the distinguishing features of the ideology of legality has been noted with some skepticism: that is the reluctance of those who govern the deployment of power through law to act in the absence of a set of factual determinations which may be reported by a layman or body of laymen, or which may be mysteriously arrived at through introspective consideration of the trial experience including argument, proof, demeanor, and one's own history. Determination of fact is an act of definition; it is an expression of a legally ordained system of values that demands that the reporter (or the introspector) proceed only if beliefs based on a record are held with a sense of conviction or persuasion. Thus theology interfaces with legality: the factfinder becomes a witness to an inner truth.

That inner truth which produces the sense of conviction is now thoroughly secularized. The factfinder merely resorts recursively, as instructed, to a facet of his own psychology. The moment of arrival at the truth is not perceived as inspiration, nor as the expression of a divine will. A solid ethical justification for the adoption of conviction, persuasion, or firm and impartial belief as sufficient grounds for acting is, however, essential to the law's pretense of justice. Conversely, of course, the absence of sufficient psychological impetus must be ethically justified as an adequate ground for refusing to act.

Though the law's demand for a certain enlightened state of mind in the official actor is much weaker, it resembles the concern of philosophers who would clarify our understanding of knowledge as the basis of science or action. There is a problematic connection between our conscientiously formed understanding of fact, and the reality in which fact is grounded. Far from being a merely philosophical concern, this epistemic quandary epitomizes modern thought. It generates modern confusion at the very practical level of deciding what fodder is fit for the judicial system, and what limits mark the boundary of human wisdom in conditions of social conflict. It is therefore desirable at this point to state succinctly what the term "knowledge," in its strong sense, must posit, if it is to form the keystone of reasoned discourse about disputed facts.<sup>30</sup>

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30. The operational definition of knowledge adopted for this discussion is a distillation from a seminar critique of E. GETTIER, IS JUSTIFIED TRUE BELIEF KNOWLEDGE? ANALYSIS (1963) in Professor Robert Nozick's graduate philosophy seminar at Harvard University, Spring 1976. See also Goodman, *A Causal Theory of Knowing*, 64 J. OF PHILOSOPHY 357-72 (1967); Sheffler, *On Justification and Commitment*, 51 J. OF PHILOSOPHY, 180-90 (1954). The present account is an adaptation of highly technical arguments, and no inaccuracies should be ascribed to the authorities cited.



“Knowledge” is a state of mind with respect to external facts. It may very well be unattainable if it is taken to include certainty, and if the certainty of correspondence between the state of mind and the facts can never be perfectly verified by other minds.<sup>31</sup> The law is not so ambitious as to seek certainty nor even knowledge in the sense in which science constitutes a body of knowledge. Yet law (for all its practicality) is as dependent as science upon the hypothetical (normative) formulation of what must constitute “knowledge.” To illustrate this dependency, the meaning of “knowledge” will now be expanded and restated in a prescriptive way, as if a legislature had commissioned some think-tank to draft an operative definition for the purpose of deriving from it an element of legal discourse herein called *scienter* +.<sup>32</sup>

#### KNOWLEDGE

*P* is any proposition

*S* is any subject (knower)

1. *P* is true
2. *S* believes *P*
3. if *P* were false, then *S* would not believe *P*
4. if *P* were true, then *S* would believe *P*
5. if *S* were to believe  $\neg P$  were true, then  $\neg P$  would be true
6. if *S* were to believe *P*, then *P* would be true

The first two elements of the definition express the commonly held correspondence theory of knowledge, and they may be said to exhaust the subject for the usual purposes of nontechnical discussion, in law and elsewhere. The remaining elements are nevertheless required in order to deal with various objections found in the fields of science, law, and philosophy. The third and fourth elements of the definition specify that *S* must have reliable ways of arriving at some belief concerning *P*. The question is left open as to whether direct perception is reliable, not to mention all other specialized methods of arriving at a belief, such as trials, intuitions, and reasonings. These two postulates, however, amount to a claim that something is inherent in the truth-value of *P* which makes *P* open to the discovery of any *S*.<sup>33</sup>

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31. E. GETTIER, *supra* note 30 at 121-23.

32. *Scienter* is an adverbial form predicated of legally significant acts. This discussion is limited to the highly significant act of making sense of disputed claims of fact. Like the factfinder who is puzzled by the task of having to find mental facts like *scienter*, we must determine what is meant by the report of a factfinder that a fact has been “found” in the special legal sense that it is “known” or believed strongly enough to be adopted as true. *Scienter* + signifies the conditions under which we may claim to know that a factfinder is properly “knowledgeable” of ultimate facts which he has found to be true.

33. In a similar way, the first postulate appeals to an intuitive belief that there could be

The last two elements of the definition may appear both paradoxical and redundant. They seem to reverse a chain of causality running from inherent ("objective") truth values in the proposition to the mind of the knower, and to subordinate factuality to a deeply counterintuitive kind of subjective idealism. In fairness, let it be noted that no naive claim is made such as, "Thinking  $P$  is so can make it so." The form of the last four postulates of knowledge is that of a logical counterfactual; in legal imagination, they are the very familiar kind of statement known as a hypothetical. Their contingent and subjunctive form of expression is necessary in order to maintain a scrupulously agnostic attitude about what  $S$  does in fact believe, and about the objective truth or falsity of  $P$ . A stipulation requiring mutuality of causation is included in the doctrine of knowledge to illustrate the possibility upon which we depend for establishing all notions of factuality. For *if* there were a world in which some fact could be established with certainty in some mind, then the arguments should be equally sound that the truth of the belief, as much as the truth of the facts believed, guarantee that such a circumstance is an authentic example of "knowledge." Indeed, these arguments are but two sides of the same coin.

In the hands of logicians, the counterfactual form of the defining axioms will allow some useful discriminations to be made among contingent events. These elements may be used, for example, to show the logical fallacy of claims to have retrodicted a random event.<sup>34</sup> Finally, the inclusion of the last propositions presents a point for comparison to the legal form of counterfactual: the proposition which is simply taken to be true because it is uncontested, but not extrinsically validated. The law abounds in contingently true propositions (*e.g.*, presumptions, stipulations). Their grounding in reality, rather than in hypotheses, is grist for the legal mills of doctrine, which most pressingly requires attention.

What is distinctively modern in the formulation of knowledge proposed for our adoption? What is its bearing on jurisprudence? Why is there a need for the causality which is implicit in its traffic between mental and physical phenomena?

Two of these questions are merely aspects of a single issue: the

an observer other than  $S$  to verify the conjunction of the mental state and the physical facts.

34.  $S$  cannot claim to know  $P$  under the definitions given, if in truth  $P$  occurred randomly, and  $S$  merely knows  $P$  at this particular time. As to this random event, it is not possible to say that under all known conditions either  $P$  or  $\neg P$  is the case, or what will follow from what is known. Whatever  $S$  says concerning random  $P$  will, therefore, not be related causally to the occurrence or nonoccurrence of  $P$ . It will be a gamble until the random event has or has not occurred, in which case the knowledge of  $S$  no longer concerns a random event but a past fact.

modernity of the foregoing restatement consists in its arrangement of its constituent terms, opening them to endless refinement and redefinition, on the one hand, and in the insistence upon the claim (never doubted until stated) that *evidence* works, on the other. This generalized formulation of knowledge claims merely that the "real" world is somehow accessible to the mortal minds passing through it. The epistemic vocabulary of law, however, with its dependence on *evidence*, retains more than a vestige of the preeminence once accorded to visible perception of appearances as the paradigmatic form of this accessibility.<sup>35</sup> Upon reflection, no modern mind, even a lawyer's, would unhesitatingly subscribe to the notion that the knowable world is altogether visible. But lawyers continue to disregard the consequences which follow from a realization that evidence is neither self-revealing nor self-validating. The law has no suitable apparatus for making sense of the modern, post-Kantian judgment that the mind of the knower constitutes what is known. Everyone depends upon the conventions of language and perception to make objects out of the sensorium of raw experience. Law continually refers to common sense and rejoices in it, but it is usually unable or unwilling to articulate the logical and conventional priorities which constitute common sense.

A definition of knowledge using hypothetical propositions and elements of causality may, however, provide a tool for the formulation of a written constitution of objectivity as a tool of communal understanding.<sup>36</sup> The possibility of such a formulation arises from

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35. If we disregard illusions and all other known impediments to clear perception, we might hope to isolate an adequate conception of the "open and notorious, plain and obvious" item of evidence. The imaginative possibility of beginning from a shared viewpoint, looking upon a common scene, however, is the very threshold where philosophy stumbles into its myriad schools and wonderlands, instead of offering the benefit of its superior refinement and sophistication to the baffled jurist. Neither the practical factfinder nor the purest speculator has so far managed to articulate good reasons for the law's continuing dependence upon what seems, unscientifically, to be the case.

But is sensory experience fixed and neutral? Are theories simply man-made interpretations of given data? The epistemological viewpoint that has most often guided Western philosophy for three centuries dictates an immediate and unequivocal, Yes! In the absence of a developed alternative, I find it impossible to relinquish entirely that viewpoint. Yet it no longer functions effectively, and the attempts to make it do so through the introduction of a neutral language of observations now seem to me hopeless.

T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 126 (2d ed. 1962).

36. A complete analysis of objectivity is beyond the scope of the present paper, but it is hoped that this exercise will lead to a clarification of the meanings of objectivity, and distinguish those meanings from mere diligence, honesty, or moral indifference. These qualities of character which are essential in order to minimize the distortions born of empathy or antipathy are negative, and they set minima. The present essay attempts to go beyond them in suggesting both the possibility and the need for a program enabling factfinders to decide how thorough, penetrating, and shrewd a fact-judgment must be to satisfy the optimal standards of judgment.

the way definition, like legislation, outlaws error, as well as from the way in which definition posits the conditions of truth. The analysis above provides well enough for the ancient verities: that we may be deceived in our perceptions of the visible world, and deceived in our normative understanding of the conventions by which it is organized and made common through language, method, and honest intentions. These sources of error cannot be eliminated by any form of words, and the recognition of this aspect of the human predicament is the fundamental source of the conditional form in which the meaning of "knowledge" was elaborated. The conditional formulation admits the limitations of reasonable inquiry, but it manages to *rule out* a residual fear that haunts reflection with a dream of solipsism. Practical decisionmakers must somehow banish that universally felt risk of isolation which hangs from a suspicion that even if the facts are as we understand them to be, the coincidence between our thoughts and reality could be mere happenstance.<sup>37</sup> The inclusion of a causal element among the conditions of knowledge offers no refutation of such speculations, but it securely places them back in the bottle (in which your brain is floating on *Alpha Centauri*) from which they were released by some evil genius at the dawn of human self-consciousness.<sup>38</sup>

What remains controversial, jolting, and distinctly modern as a doctrine of epistemology, the notion that we *must* have faith in appearances, is very familiar to legal discourse. The element of causality in the definition of knowledge provides a common starting point for the lawyer and the reflective lay person, in an ideal of reciprocity: of a mysterious but causal intercourse between the changing beliefs of those seeking knowledge, and the phenomena at work on them as they pursue the quest.

This ability of the world to generate perceptions, and the capacity of perceptions to constitute a common world through language and deliberation, has, however, lost the status of an axiom for the reflective generalist as well as the legal practitioner.<sup>39</sup> A common opinion

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37. The deliberateness of the choice to ignore the age-old puzzle of solipsism, by ruling out such qualms as it produces, is of central importance to an understanding of the orderly development of rules for forensic inference. The reason for adopting such a highhanded approach is neither a matter of experience nor of taste; but expedience, of stating conditions which will facilitate both the formation and the statement of consensus in the most direct manner.

38. Professor Nozick's star, bottle, and neurons have been borrowed to make the points. R. Nozick, *supra* note 7.

39. Frequently the ultimate issue is resolved as the result of drawing inferences from the evidence received during the trial. Trust in inference is simply the belief that if there is a firm basis for the starting point the derived judgment is acceptable. The difference between speculation and inference lies in the substantiality of the

of educated persons is that ambiguity can never be eliminated from the categories of thought and expression. This truism becomes dis-comforting, however, when one deals with a specifically legal consequence of the modern predicament: the conviction that biases and idiosyncrasies are invisible to their carriers, and that all members of a culture carry a common parochiality which extends to the perceptions and expressions constituting "factuality."

The doctrinal response given by legal ideology to the doubts aroused by the contingencies and finitudes of the perpetual legal inquest is simple, dismissive. Our human limitations are regrettable but not deplorable, because experience teaches lawyers to cherish the notion that those old Cartesian dualities between thought and physical matter are necessary and useful to its social enterprise.<sup>40</sup> Law simply cannot do without a universal subject and a clear and evident object. The values of generality and equality which permeate the foundations of the rule of law ethic demand that degree of philosophical oversimplification, if not more.

Moreover, among the doubts that must occur when lawyers philosophize, it is easily feared that the legal process without its dependence on a seemingly willful superficiality would become involved in a stultifying series of doubts at every level of its operation. For example, there would be doubt in every case whether a result follows from legal malpractice, rather than from an application of law to the best attainable approximation of the facts. Similar doubts may be raised concerning possible corruption of the judge, of the jury, of the witnesses, actually an endless vista of paranoid possibilities, defined only through the fiat of a legitimate political structure as fantasy.<sup>41</sup> For legal thought, objectivity is a characteristic of a hypothetical person who rides the Clapham omnibus, and things are *necessarily* what they appear to be as a matter of record. Far from being a pejorative term, superficiality is the central, essential and most fragile aspect of every phenomenon that may come under legal surveillance.

Contrast this robust, pragmatic empiricism of legal consciousness

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evidence constituting the premise. Inductive reasoning claims the premises constitute some evidence for the conclusions and in law we speak in terms of the probability and likelihood that the premises buttress the conclusions. Few reviewing courts report their endeavors to form conceptions of substantial evidence under Rule 52.

Wisconsin Memorial Park Co. v. Commissioner, 255 F.2d 751, 752 (7th Cir. 1958).

40. For the most definitive and persuasive statement on the ineluctable subjectivity of factfinding, see Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223 (1966).

41. See *Applegate v. Top Assocs.*, 425 F.2d 92 (2d Cir. 1970) (an elaborate conspiracy theory, ruled insufficiently supported by the affidavits filed under FED. R. Civ. P. 56 in opposition to motion for summary judgment).

to the hopelessly remote grail of certainty which knowledge, as *more than* "justified true belief," has placed at the end of true research. What the law calls a "cause of action," or a prima facie case (with its attendant proofs and presumptions), is simply a set of verbal formulae attested to by solemn ceremonies. Because the law requires real action (or its forbearance) as the outcome of all cases under its scrutiny, the legal system must make do with all available data, even the often meager data which survive the screening of the rules of evidence.<sup>42</sup>

The legal profession is, therefore, prompt to seek the public's pardon for the law's acceptance of sketchy statements of the grounds taken to be "logically" sufficient to form a belief in a proposition as the basis for action or inaction. The practical concerns and constant exigencies of legal affairs have come to place the law's empiricism at one pole of a sphere enclosing our common understandings. This pole is best understood by its utter opposition to "knowledge," in which *S*'s conviction of knowing *P* must be so strongly grounded that a change in the mind of *S* concerning the truth of *P* would provide full justification for the adoption of *-P* in place of the original *P* as best expressing common reality. At the legal pole, no such claims are made nor dreamt of; there is only the frail consensus of a divided judicial mind or of the jury that something (which may or may not coincide with the discrete formulations of the prima facie case) "preponderates" one way or another. The achievement of such a consensus may require agonizing arguments and soulsearching; the fascination the law has for literature on the process is a tribute to its moral complexity. Yet the ostensible task is still a superficial one, a matter of organizing surface appearances (evidences) or at most, simple physical qualities (weight, preponderancy). The preservation of the law's authority may require that consensus among a jury be reached in secret, and that the outcome of a judge's ponderings also be known only by the report he is willing to offer of them. Such a report is frequently the result of a judicial direction that the prevailing party prepare findings of fact and conclusions of law according with a simple announcement of the victor's name.<sup>43</sup>

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42. "The mind abhors the vacuum of uncertainty. The trial must end in a verdict, a truth-saying. But there are many controversies where certainty about the truth is really impossible . . . Still the jury must reach, if possible, a 'finding' upon the 'facts.'" McCormick, *What Shall the Trial Judge Tell the Jury about Presumptions?*, 13 WASH. L. REV. 185, 190 (1938).

43. The propriety of delegating judicial rationalization to counsel is canvassed in *In re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970) and is the subject of a lengthy and futile battle between trial and appellate benches in the Fifth Circuit: *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) *cert. denied*, 429 U.S. 861 (1976); *Keystone Plastics, Inc. v. C&P*

### III. CHOOSING WHAT TO BELIEVE IN A UNIVERSE OF LOGICAL POSSIBILITIES

Before undertaking further examination of the doctrinal consequences of this distinctively legal *episteme*, somewhat more detailed attention is necessary to the psychology of the legal knower. This section is concerned, therefore, with our often unstated ideas about recognition, conviction, resemblances, all of the interior pathways which are deemed rational in arriving at opinions, convictions, moral certainties, and ineradicable doubts.

#### A. *The Factfinder as an Investigator: the Legal Conception of the Role*

Roughly and practically, the law requires only a few forms of introspection in the course of arriving at conclusions of fact. It is only suggested (by such things as jury instructions) that the evidence must *seem* to preponderate one way or another, to make a finding eligible for adoption. This doctrine has all kinds of practical consequences, but these do not make it "pragmatic" for all that. No systematic effort is made to monitor the threshold of skepticism a judge or juror brings to his task, nor to assure that the self-referent imprecations of the standards of proof are carried out in deliberation.<sup>44</sup> The universe of legal epistemology is located apparently in the nethermost reaches of Plato's cave, consisting as it does of nothing more than some certified version of the *prima facie* case plus a self-administered criterion of some degree of conviction relating to the truth or falsity of the assertions and demonstrations claimed to satisfy its elements.

Despite the glaring contrast between an analytic definition of the term "knowledge" and the warrants for practical action stated in positive law, there remains an important resemblance between our restatement of the conditions of knowledge, and the account of legal factfinding restated in these pages. The philosophic definition of knowledge is dedicated to the banishment of the solipsist, and the norms governing legal factfinding to the elimination of the philosopher whose fact-skepticism would hang all juries and paralyze all

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Plastics, Inc., 506 F.2d 960 (5th Cir. 1975); Volkswagen, Inc. v. Jahre, 472 F.2d 557 (5th Cir. 1973); Louis Dreyfus & CIE. v. Panama Canal Co., 298 F.2d 733 (5th Cir. 1962).

44. Perhaps the art of *voir dire* (and its correlative institution, the peremptory challenge) can be used to establish a base level of tolerable idiosyncrasy. But there is no system to the practice of *voir dire*, and there are no rules making it available in assessing the suitability of a judge to conduct a bench trial even though the qualities of mind required are individual aspects which cannot be definitely and finally assayed in the process of making judicial appointments. Nor is there any sound reason for thinking that skeptical folks are candid enough or self-aware enough to volunteer information about their style of thought.

action. Both accounts follow a strategy aimed at the formation of conventionally instructed states of mind (beliefs). Each requires belief to be related strongly enough to the evidentiary grounds on which it *must be claimed to have been* formed so that the grounds can be said to have "caused" the belief. It is the stringency of the definition of the "causal" nexus which differentiates the two realms, and creates a point beyond which the law's domain looks like a privileged island of heresy.<sup>45</sup>

In its present outline, perhaps the analogy between two very different solutions to quite distinct problems will appear too farfetched to enter the interior realm of legal heresy (in the sense of a dangerously deviant doctrine). Consider, therefore, some further aspects of the common ground occupied by the two kinds of rationality we have been discussing. The true "knower" and the honest juror or judge must hold some belief intransigently. There must be a sense of conviction, so that the belief "found" (in law) or properly derived from the data (by science), cannot be banished from the mind that holds it without a corresponding alteration in the complete and closed state of affairs from which the belief derives. In both cases the closure of the field of inference is artificial and fallible; nor is it given to human wisdom to discriminate between an experience of false, but justified, conviction of the truth of a particular proposition, and its counterpart, the justified *true* belief.<sup>46</sup> God, or an equally remote "ideal observer," is needed to break the philosophical logjam while the law deals with its more frequent (and often

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45. The absence of good cause for the formation of a legal belief (finding or conviction) is stated in terms of disapproval of those propositions that are matters of "speculation" or "conjecture." See *Smith v. Bell Tel. Co.*, 153 A.2d 477 (Pa. 1959). The court established two criteria of rationality: (1) although the jury may draw inferences based on all the evidence and the jurors' own knowledge and experiences, it is not permitted to reach its verdict on the basis of speculation and conjecture; and (2) "It is the duty of [the] plaintiff to produce substantial evidence . . ." upon which the jury's conclusion may be based. *Id.* at 480. Since the operative terms in such a formulation are not further refined, the process of normalizing outcomes of the factfinding process must become objective in the limited sense that a causal link of the kind justified by "inductive reasoning" must be observable on the face of the record.

46. As E. GETTIER, *supra* note 30, demonstrates, a person may *happen* to believe the truth, on sufficient grounds, but for the wrong reasons. If the American embassy in Nairobi were to cable the State Department news of the death of Idi Amin in neighboring Uganda, having been told by spies and informants of a coup in which he was assassinated, that information might be sufficiently warranted as factual for serious decisions to be taken in reliance thereon. Suppose that the embassy learns a bit later that purported photographs of the dictator's body were really those of a bodyguard, and that Amin takes the air to announce suppression of the plot. The second transmission goes astray (perhaps through communication malfunctions) and before the "erroneous" report can be corrected, Amin perishes of tertiary syphilis. Mr. Vance's belief in the fact of his death is both true and justified, but it would be both false and justified if reliable informants had been mistaken or tricked into believing Amin dead.



probable) fallibility with rituals, solemnities and collateral attacks.

Knowledge and certainty are notions which a philosopher may attempt to attach to the state of consciousness called "honest conviction" through refinements in experimental method, or logic. The jurist, however, is content to leave the derivation of that similar-looking state of mind to intuition or an unexamined antique notion that belief is a matter of choice among competing evidences which become self-validating immediately upon acceptance by a faculty of judgment.<sup>47</sup>

Little more can be said of the operation of evidence upon the minds of the legal factfinders, since there has never been a strongly felt need for the elaboration of a distinctively legal psychology. It may be suspected that the curious survival within legal jargon of older forms of expression carries with it the associated trappings of 18th century faculty psychology, but a speculative approach to this problem may prove more illuminating than an historical one. It is proposed, therefore, to use a typical form of legal disputation to reveal some of the axioms of contemporary legal psychology. By proffering an heretical doctrine for serious consideration of its incongruity and absurdity (when set amidst the array of our settled conceptions of the possibilities and limits of legal inquiry), the coherence of a system of psychological beliefs which comes naturally to lawyers may be plausibly exhibited.

What would it mean, then, to bring the philosophical contingencies of knowledge into the working practice of legal factfinding? Most obviously, it would mean that the possibility that every change in the factfinder's honestly held convictions is a relevant factor in constituting the facts to be assessed according to legal norms would be taken seriously.<sup>48</sup> The juror's pretrial experience might even be evidence, if a few reformations in the idea of what

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47. See note 18 *supra*.

48. See, e.g., *Powers v. Continental Cas. Co.*, 301 F.2d 386 (8th Cir. 1962). If a jury is told by a plaintiff and a corroborating witness that the plaintiff lost his arm when a gun was accidentally discharged on a fishing boat, it can hardly doubt the reality of the missing arm, nor the cause, a shotgun wound. On this state of the evidence, plaintiff might even be entitled to a directed verdict, as Powers argued, on appeal. But add the evidence that Powers had recently invested his scant funds in redundant dismemberment policies and concealed this fact from his insurers, and the case takes on an altogether different aspect.

Note, however, that a deliberate scheme of self-mutilation, even if it is "proven" by defense evidence, will not refute the possible truth of the initial belief (when plaintiff rested). The gun might have accidentally discharged prematurely, and Powers might have contributed an arm to the plot when he intended only to cash in a thumb. He even may have repented completely and really have gone fishing. There may be but one proper defense interpretation of the evidence as a whole in a case like *Powers*, but either interpretation is logically legitimate if the factfinder is truly free to accept any proposition that comports with inductive logic.

constitutes deliberation and in the methods for creating and closing the record are allowed. Differences of opinion regarding the interpretation of the record, between trial judge and jury, or between appellate and trial levels of the legal process may also become relevant "evidence." The fact of difference alone might count differently than it does, and the difference might transform our ideas about consistency, efficiency, and repose.

Minds do change in the course of trials. An adversary trial is an intensely dialectical process, unfolding as a drama or a series of orders to show cause why a certain interpretation of reality or history should *not* be adopted. The trial is concluded with the completion of proofs, none of which are allowed to be reflexive (the addressee is not allowed to think that what he thinks is a datum in the realm of proofs) and each of which is formally warranted by an authoritative interpretation of positive law. If knowledge is contingent, then the interruption of doubt and debate by the termination of proof, and the consequent movement to argument and deliberation, must seem to be an artifice whose epistemic validity is open to serious question. Even more so, perhaps, since the factitiousness of beliefs held only as matters of opinion has been well and derisively understood since the time of Plato.

### *B. Deliberation, Doubt and Competencies: Controlling Caprice*

The central concern of this initial critique has been to find the proper situation within legal thought of a more universal type of empiric doubt. Given the captiousness of human nature, there will inevitably be doubts and disagreements beyond the boundaries of the trial process over the existence of the legally operative facts in dispute. When doubt is concentrated on matters of fact instead of policy and principle, the latter provide nebulous images to guide discussion and debate.<sup>49</sup> One such image is that of an impartial factfinder trying to read the balancing point of a set of scales which ranges between conclusive demonstration and the totally unproven. Another image is that of the appellate court or other supervisor of the readings, trying to calibrate the result, not in terms of its accuracy, but in light of "the record as a whole," which is almost the broadest possible context.<sup>50</sup>

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49. The absence of useful distinctions is best shown by the standards for granting a directed verdict or for granting a new trial in federal practice. See James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961). "[T]he differences are rather because of variations in the new trial test than because of any variation in the directed verdict test." *Id.* 233-34 (footnote omitted).

50. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) (test

It will not do to suggest that the stopping point must be placed where it is in order to avoid a hall of mirrors. The scope of the factfinder is limited intentionally, and the scope of the reviewer is expanded deliberately so that each of these officeholders is perceived as serving a different function and operating at a different level.<sup>51</sup>

More is involved in the explanation and justification of the current orientation of initial factfinders and their reviewers than mere institutional concern for the values of morale, consistency, and repose. The most obvious example is, perhaps, the positive charge to the impartial initial factfinder to make discrete assessments of the proofs offered for, and against, the elements comprising the prima facie case.<sup>52</sup> The trial sequence and its dialectical structure, however, require that those discrete facts, serially ordered as lists of proofs in pretrial orders or opening statements of counsel, can be established only provisionally, rebutted provisionally, and then reported after a process of deliberation. The duty of reviewers who look only at a record and the report of the initial factfinder is supposedly the very distinct one of exploring the logical limits of inference.<sup>53</sup>

Appellate fact reviewers are invited to speculate, while the object of their review is supposed to be the product of a mind sworn to be stubborn and tunnel visioned. On appeal, the defender of a judg-

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for judgment n.o.v.). The overall picture of appellate review resembles a baseball game in which balls and strikes can be reversed by an umpire situated in the bleachers. To retain his job, the second umpire will seldom exercise an independent judgment, but the crucial issue is how he came to be placed there instead of being behind the man behind the plate.

51. [W]e [do] not sit to try cases *de novo*. The scope of review is limited by the clearly erroneous rule. F.R. Civ. P. 52(a). The issue is not whether we would have made the same findings as the District Court but whether, after reviewing the entire evidence, we are left with a firm and definite conviction that a mistake has been made.

Hunt v. Pan Am. Energy, Inc., 540 F.2d 894, 900-01 (8th Cir. 1976) *cert. denied*, 429 U.S. 1062 (1977).

The appropriate, orthodox analogy is to the chief of umpires, who considers seasonal contract review of the man behind the plate, rather than to a checker, who provides a certain redundancy in the system in order to assure quality control.

52. In law, as in baseball, it is expected that the evaluator of the evidence will call it as *he sees it*. It would be a different game if each batter were allowed say seven pitches (exclusive of fouls) and *then* the umpire would announce that the home run hit on the sixth pitch was invalid as the batter had already earned a walk!

53. The verdict of a jury should not be lightly set aside, nor should a new trial be lightly granted—certainly not for the mere reason that the Court may disagree with the verdict. However . . . [i]t also must be remembered that forced or violent inferences may not be drawn and that an inference is a permissible deduction only when it may be reached by logic or reason . . .

Cecil Corley Motor Co. v. General Motors Corp., 380 F. Supp. 819, 827 (M.D. Tenn. 1974) (chosen as representative dictum from a representative trial bench).

ment may rely upon suggestion and supposition concerning such things as the witnesses' demeanor (and the factfinder's superior perspective of it) and the sincerity and coherence of a position taken in a drama with many episodes.<sup>54</sup> The reviewer's burden is said to be limited to the logical task of finding what matters of record *could, if believed*, support some disputed inference. It is implicit in this formulation (and therefore doubtless a comfort) that the *could* of counterfactual appellate discourse harbors an invitation to express considerable skepticism about the outcome that *would have been* reached by an inquirer having a different orientation to the proofs.

The aberrational factfinder must be so unreasonable as to be committed to a "clearly erroneous" conclusion before interference with the primary construction of the record becomes permissible under the doctrine just examined.<sup>55</sup> But suppose it were possible to make the concept of "unreason" relative along a specifically juristic axis of plausibility. After all, the factfinder in a secular judicial process is not allowed to find a miracle, nor permitted to suppose that he is dreaming. Yet there is a possibility that he may say a bubble has been burst, making a presumed fact once more controversial.<sup>56</sup> It is also possible that the factfinder may determine a fact to have been overwhelmingly established by cumulative or direct forms of valid evidence (*e.g.*, the taped replay of Ruby shooting Oswald).<sup>57</sup> As an aspect of subjective consciousness, the stakes contended for in trial are simply labels regarding what makes common sense.

This notion of common sense is a normative idea, predicated in and of a social world. It provides us with a field in which stories can be rank ordered, both as to their elements and as coherent entities standing in a relation of relative plausibility to their immediate audiences.<sup>58</sup> The communal aspect of the common sense required by

54. "The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

55. *FED. R. CIV. P.* 52(a). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Guzman v. Pichirilo*, 369 U.S. 698, 702 (1962).

56. *See* discussion of presumptions at text accompanying notes 101-02 *infra*.

57. *See Greene v. Werven*, 275 F.2d 134 (8th Cir. 1960); *Snead v. New York Central R.R.*, 216 F.2d 169 (4th Cir. 1954).

58. A distinction must be noted between variable interpretations of a set of proofs, and what is sometimes called "circumstantial evidence," meaning indirect proofs. The idea that proofs must be considered in the context of other associated proofs which are not in a direct line of inference may be seen in the law of conspiracy.

All experience shows that positive proof of fraudulent acts . . . is not generally to be expected, and it is for that reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth, and

the forensic factfinding process is an unstated and intentionally ambiguous premise, relating persuasion to a larger consensus. It might be formulated, for example, in a statement that proper sampling of the community would provide a common recapitulation that would serve as the criterion account of the facts inferable from some particular exemplary trial record. For any such randomly selected record, the consensus might range over a series of values from the belief that the record is merely fiction, to the firm conviction that it is a faithful depiction of historical facts.

Legal theory finds the gestation of such a consensus a mystery. The formation of factual beliefs is a matter of intuition, inspiration, or even the exercise of an immeasurable faculty of judgment. The investigation of the origins of a solemn announcement is a matter for a sociologist, anthropologist, or psychoanalyst; anyone but a jurist.

The premise which justifies deference to the closed door of the jury room or the magic word "submitted" is nevertheless a legal notion. Putting the case in terms of a hypothetical, totally representative jury may serve to emphasize the normative element in factual judgments, and to throw into higher relief the differences between the law's evaluative psychology and the disciplines of other human sciences. Moreover, the recourse to consensus as the key element in understanding the quest for fairness is suited to the style of legal rhetoric that is exemplified by the long and fruitless quest by the Supreme Court for a relevant consensus in the definition of obscenity.<sup>59</sup>

When the background of assumed consensus is pulled away from the found facts, genuine heresy can emerge as a temptation no longer repressed by legal consciousness. If publicity, normality, and the other ingredients of positive law are applied to the constitution of its factual basis through the process of deliberation, then immediately the problem of factual disagreement is transformed. Positiv-

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the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof

Wager v. Hall, 83 U.S. (16 Wall.) 584, 601-02 (1872).

59. See *Miller v. California*, 413 U.S. 15 (1973), approving jury determination of obscenity by a jury selected from the southern district of California. "But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district . . ." *Hamling v. United States*, 418 U.S. 87, 106 (1974). A jury may be instructed to apply community standards without definition of the relevant community. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974). But the standard can't be so observable and uniform as to be capable of reduction to words by a legislature. *Smith v. United States*, 431 U.S. 291, 302 (1977).

ism and realism cease to be dominant organizing principles for ordering our perceptions of legal phenomena.<sup>60</sup> Disagreement over factual matters no longer occupies the back-channels of legal communication. Attention may now be directed to an art of criticism based on "possible worlds."<sup>61</sup> The stages of this transformation in understanding are the familiar ones already mentioned while noting universal trends in the evolution of substantive law. Proceduralized, the stages call for rigorous but polyvalent tests of verisimilitude in place of univocal standards with the mechanical features of a light switch (for example, the law of presumptions).<sup>62</sup> Issues that have remained unresponsive to the stresses of forensic debate may yet find words to clothe them, as we cease speaking the marketplace lingo of "competing inferences."

The rejection of a Darwinian model of reason is a safe enough move; it need not throw us upon the other horn of an old dilemma. The alternative to a regime of competition and survival of the fittest among tenable inferences is certainly not a regime which engineers its results by prescribing preferred traits and breeding out anomalous ones (*e.g.*, through arbitrary rules of admissibility) in accordance with a foreordained conception of forensic factuality. Rather, one must seek a set of criteria for good factfinding, which admits that trials are neither experiments nor digs among the wreckage of the recent past. Inquiry must be directed toward the constitution of a more humble sort of truth, one which has esthetic, ethical, political, scientific and, quite prominently, speculative dimensions befitting the most creative of collaborative enterprises. Thus, the problems which take precedence when we look at the specific function of the trial should turn attention toward the methodological puzzles of history, not to the logical confusion that must beset one who would provide an account of the compilation of a single best hypothesis from a collection of singular instances while calling the exercise induction.

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60. Positive law offers no useful prescriptions to remedy doubt or confusion in the forensic perception of fact, and it is this very circumstance that has provided "realists" with opportunity for their exuberant iconoclasm, of which Jerome Frank's *LAW AND THE MODERN MIND* (1930) is the finest example. However, no one has yet implemented a convincing program for a realistic investigation of the behavioral regularities of legal functionaries as they exercise the freedom conferred by fact indeterminacy. The fault-line that marks the schism between realists and their adversaries is deceptive in its obscuration of the nature and status of normative principles in the process of deliberation.

61. See N. GOODMAN; R. NOZICK, *supra* note 7 for exemplification of the complex arguments that are made possible by a strategy of comparing this world with other possible worlds differing from this one in incremental ways.

62. See Part V. *infra*.

#### IV. OBJECTIVITY: MAKING, REACHING, JUMPING, CHOOSING—A PROGRAM FOR POLICING EVALUATIONS OF PARTICULAR FACTS

##### A. *Taboo in Present Doctrines Against Disclosure of Preferences Among Competing Inferences*

Stating norms for the regulation of implausibility requires judgments of creditworthiness which can be explicitly stated only at risk of reversal in the present system of legal doctrine, because the source of such judgments is positively defined by law as prejudice. Strictly speaking, whether adoption of a claim of fact is decreed according to mathematical models of probability,<sup>63</sup> or is based on personally noticed unverified universals (like the connection between sweaty palms and mendacity)<sup>64</sup> the formation of any disposition whatever about the character or weight of the proofs is extra- (and therefore pre-) judicial. The offensiveness of excessive candor is a different and graver matter than the breach of the spatial limits set by the courtroom and its trial. To tell all, or any, of the interior processes of evidence appraisal is embarrassing. Confessional literature is a rarity among the bench and bar, and it is marked by a delicacy elsewhere unseen since the days of the Victorians.<sup>65</sup> The course of choice among competing versions of facts supposedly runs below the surface of thought and speech; the silent doctrine respecting it is "beyond speech, beyond reach."

Nevertheless, there is an observable movement within adjective law, as there is within the major restated or codified substantive systems, from a presumption toward a more generalized rationale of the controversial fact; away from the varieties of "plain error"

63. See discussion of "mathematical interpretations of the testimony," an approach that is "often forceful and is sometimes persuasive . . . .," in *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 442 (8th Cir. 1961).

64. See *Quercia v. United States*, 289 U.S. 466 (1933), reversing criminal conviction for prejudicial error in commenting on the evidence.

And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

*Id.* at 468.

65. Since the trial process is reserved for resolving disputes of fact, it is not surprising that most such disputes involve conflicts between different testimony that is equally well founded. Selecting between contradictory testimonial statements is therefore an exercise in judgment of creditworthiness. It invokes the same kinds of totalistic appraisals of a witness' character as does the assessment of "parent-worthiness" that courts are obliged to make when determining the best interests of a child in custody disputes. The most illuminating literature on the factors that courts deem relevant to these tasks is found in family law cases such as *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966).

and toward a systematic treatment of abuses of an empirically discovered, operative discretion to find fact. In much the same key, there is the already noted awkwardness in keeping evidence on the plane of a term of art, avoiding its connotations of an observable and self-validating world, and a corresponding receptivity to discussion of ensembles and versions.<sup>66</sup> Probative value is regarded not as a natural characteristic of discrete proofs, but as the result of complex considerations of context, and the completion of the trial process.<sup>67</sup> These transformations mark a change in the categories of legal thought at the most profound level, a revaluation of what is regarded as necessary rather than contingent (or positive) and thus alterable, political and instrumental.<sup>68</sup>

A proposition of fact made particulate and discrete by the statement of the prima facie case could be connected with other aspects of that case by correspondencies apart from the traditional rules of inference. The rules of evidence, as prescriptions for the composition of a legally adequate record, do not assure a logically adequate case. They do not derive from, or entail the prima facie case. The rules apply ecumenically, and they find their rationale in a cumulative history of passion, deception, and error. Apart from presumptions, the general rules of evidence have little to say about the various perspectives that common sense may assume toward a record. There is no system for expressing the intuition that a subject's conclusions depend on the starting place that may be randomly adopted for the sifting of evidence. Argument is largely the art of organizing key facts, and it derives its creativity from the range over which imagination may roam in making sense of the record.

The choices offered by the typical record do not establish a completely open market of competing inferences from which one can pick and choose truly at random. There are only a few ways to approach the task of organizing one's view, if one is a judge or juror pledged to conform to the norms of prudent persons dealing with weighty personal matters. But to date, nobody has seen fit to expand a judge's freedom in commenting upon the evidence so that

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66. [W]e no more characteristically proceed by selecting certain statements as true and then applying other criteria to choose among them than by selecting certain statements as relevant and serviceable and then considering which among them are true. Rather we begin by excluding statements initially regarded as either false though perhaps otherwise right, or wrong though perhaps true, and go on from there.

N. GOODMAN, *WAYS OF WORLDMAKING* 121 (1978).

67. See Koffler, *The Assimilation of Law and Literature: An Approach to Metanoia*, III A.L.S.A. FORUM 5 (1978).

68. See Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in *LAW IN AMERICAN HISTORY* 287 (D. Fleming & B. Bailyn eds. 1971).



the limited options of a conforming rationality may be specified.<sup>69</sup> Even if comment is permitted, it must be practically curtailed by the impossibility of canvassing all rationally possible combinations and permutations open to the deliberator. The need is less for a model of all rational alternatives than for a systematic rationale for ranking them according to a legally objective standard, such as that of the rationally prudent juror.<sup>70</sup>

### *B. The Concept of the Criterial Reading or Criterial Findings*

Lawgivers could conceivably require the transcription of trial records into established facts "in stereo." In jury cases, judges could be compelled to compose a central set of findings for contrast to the implicit or explicit findings in the jury's (general or special) verdict.<sup>71</sup> Later use of these central findings could be based upon the rejection of the jury verdict according to some objective standard of mistrial applicable to the face of the record.<sup>72</sup> Or the rulesmakers could instead invite a posttrial reconstitution of the "criterial outcome" on the basis of purely adversarial argument in tandem with the closed deliberations of the judge or jury that produced the verdict or findings upon which the final judgment is grounded. To do this, the lawgivers need only say that parties may no longer speculate, after closing the record, regarding what is not (absolutely) inconsistent with the proofs before the factfinder. Indeed, arguments supporting posttrial motions (for judgment n.o.v. or new trial) tend to address the court as if it already possessed such powers of second sight. The parties in "stereo" litigation would be directed to establish, instead, the *optimal* reading of the record in light of the facts as they most likely are, rather than as shown by the creative imaginings of the most favorable hindsight, enlarged by the availability of another opinion.<sup>73</sup> The second criterial account would be fabricated openly. Since this account would be intended to frame

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69. See 5A MOORE'S FEDERAL PRACTICE ¶ 51.07, at 2532 (2d ed. 1977).

70. The prudent juror is as much a fictional creature as is the prudent man.

71. The absence (when FED. R. CIV. P. 49 is employed) of that ignorance which invites speculation is what makes a jury's response to special interrogatories a mixed blessing. *Turchio v. D/S A/S Den Norske Africa*, 509 F.2d 101 (2d Cir. 1974).

72. The most extreme form a test for mistrial might take is that of the so-called "thirteenth juror," in which the trial judge is invited to opine that twelve other assessors of the evidence must have indulged in speculation and conjecture in order to reach their verdict. As this is equivalent to saying that there was only one direction for the course of deliberation to take, an order to conduct a new trial on this basis comes very close to stating grounds for judgment n.o.v. This argument is not intended to sponsor the "thirteenth juror" test, but to afford a more systematized process for the disapproval of unduly biased or speculative verdicts.

73. See *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960).

the record rather than to supersede it, to show its completions and its *lacunae*, it would be grounded largely upon ingredients of common (or daringly uncommon) experience, including collective experience with the foibles and propensities of judges and juries.

A new kind of bright line is implied by the supposition that a different kind of factual object is available to serve as the atom of legal discourse. It is a line drawn between content and context, in such a way that the rules of evidence and of trial procedure serve only to generate a finite but internally incoherent set of choices according with universal rules of logic as to their several eligibilities for adoption. The new line encloses this set of choices, and then draws a circle concentric with it, enclosing the arguments, prejudices, deliberations, intuitions, and the bargainings of fair debate, which project elements of the record onto a screen of presumptive congruence with an objective reality.

If it were possible to articulate such an all-embracing view of legal factfinding, and to do so in the form of positive rules, almost every case would disclose an area of vagary, a space bounded on one side by the conclusions reached and reported by the initial factfinder, and on the other side by the standard conclusions constructed according to a positively specified method of "objectification," with results designated as the "criterial findings." For the purposes of this discussion, "criterial findings" means no more than a set of ideal findings that the judge feels a properly instructed, reasonably conscientious jury would ordinarily make, or in the case of a bench trial, the findings that would appear to be most solidly supported by the face of a cold record.

The hypothesis that lawgivers could perpetrate a criterial findings rule is a naked one, based on no claims of political expediency, and powerfully opposed by a public interest in minimizing, rather than manufacturing wholesale, the kinds of honest inconsistency that justify doctrines like collateral estoppel. The suggestion that there might be room for such a rule serves, however, to reveal the cost of intentional superficiality in the evaluation of factfinding. This service is accomplished by the proposal's creation of a visible, arguable gap between actual and criterial objectifications of the same evidence. In this space, it is possible for other coherent stories to emerge, and it should be possible for the reviewer or commentator to see more clearly what speculations are entailed by the adoption of a particular verdict or set of findings in the first instance. These may then be contrasted with the explicit revelation (in the criterial version) of the presuppositions which were employed to normalize the propositions of fact which constitute one model of objectivity. The process of conjectural reconstruction whereby a verdict loses its

oracular status and attains the position of *one* (tenable or tenuous) outcome of a series of logically possible inferences would remain necessary. The most favorable reconstruction, however, would no longer be ascribed to the actual factfinder as if it were a fair account of how the result evolved. Instead, the verdict's privileged status would derive from, and be measured by, the extent of our institutional tolerance for variation, for the improbable proposition which is nevertheless true, for sympathies and surprises and suspicions of fabrication—in brief, all those populist celebrations of the folk wisdom of the jury. This tolerance has its limits under the present rule systems in American jurisdictions. Its limits would differ under the criterial finding rule only in being more accurately describable through the provision of a standardized reference point.

The jumps that make up a pattern of inferences become objects for critical evaluation once the factfinding process is opened for scrutiny and the deliberator is asked those guileful questions that some legal realists claim are the true determinants of prudential reasoning, such as: Whose side are you on? When did your sympathies become engaged? How? Which witness most impressed you? Was it the truthfulness of the testimony, or some other element of it that caught your attention? What conjectures did you entertain as a result of those silences of counsel where you had expected inquiry and disclosure? What do you know about these cases in general—their economics, their fairness, their political impact? Who argued most effectively? Did the argument help you find logical pathways around the difficulties you saw in the proofs? Did you ever become confused, and resolve the confusion by placing faith in the honesty of one party, or one advocate, or the court? What opinions of fact did you ascribe to such a figure? Such questions may no longer be addressed by bugging a jury room,<sup>74</sup> and they are not satisfactorily answered by inferences drawn from hallway interviews,<sup>75</sup> nor by the laborious “exegesis” of answers to special interrogatories.<sup>76</sup> Under the suggested rule, they would never need to be asked directly of the jurors. Only by the contrasts afforded by the parallel set of criterial findings should we suddenly see revealed the contours of the artifact produced by the jury or judge. The “stereo” vision provided by opening a second (criterial) channel should enhance the confidence of all observers that they know what they are doing.<sup>77</sup> Everyone would have a better, although

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74. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* vii (1966).

75. See ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29.

76. *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108, 119 (1963).

77. See generally E. GOFFMAN, *FRAME ANALYSIS* (1974).

still divergent, sense of the extent of unguided intuition involved in the primary factfinder's monocular selection of rationally based premises and inferences.

The provisional adoption of a rule dedicated to the fastening of the internal, manufactured reality of forensically found fact to the extrinsic truisms of common sense has one further speculative attraction. The resulting field of doubt might be used to provide a positive test of what is specifically and juristically impossible. Take, for example, the California rule that the new trial power may be exercised only through an order with precise recitals keyed to the record.<sup>78</sup> Here is a strong indication that the need for control is sometimes perceived as more important than the need for clear demarcation of the sphere within which an indeterminate rationality is supposed to operate. Yet the logic of the California rule and of the present proposal for a criterial set of findings both demand, as a suppressed major premise, that the system give positive recognition to error. Error must be adopted and then coopted, by acknowledging that some types of disagreement are unarbitrable. This view of error turns upon a new set of correlative terms instead of the present dichotomy of harmful and harmless errors. The continuum ranges between error and mere disagreement, recognizing that past reality is ambiguous in a fundamental way.<sup>79</sup> The revised version allows some kinds of (mere) disagreement to emerge strongly enough to defeat the contrary opinion of the privileged factfinder.<sup>80</sup> It abandons the shabby espousal by legal epistemology of the notion that might makes right.

This form of modernism in legal thought is inconsistent, however, with one of the moral values claimed to be at the foundation of the rule-of-law ideology. The kind of error that must be tolerated if distinctions are to be drawn among rationalizations of a record is deemed by that ideology to enjoy a privileged status that is fundamental, antecedent to the kinds of misadventure that produce the lore of the harmful/harmless mistake.<sup>81</sup>

The departure from orthodoxy implicit in the "criterial findings" approach to rationality becomes even more alarming when seen in

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78. CAL. CIV. PROC. CODE § 657 (West 1976).

79. There is only one way that events really happen and therefore happened; but the past may be irretrievable and, therefore, if there is an insufficient preservation of its traces, it may appear inscrutable to the present.

80. The present doctrine limits intervention rather strictly to cases of physical impossibility. See, e.g., *Simblest v. Maynard*, 427 F.2d 1 (2d Cir. 1970). The suggested revision would take account of possibilities that are not entertained in a civil forensic context. The canons of legal proof must diverge from the law of canonization.

81. See generally R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970).

its political aspect. The program suggested here would make the process of inference and the dynamics of personal judgment open and controversial. Once the mysteries hidden in the ideal of impartiality and indifference are put in issue, another hall of mirrors is revealed, an endless chain of questioning the subjectivities of the jury, the judge, the appellate judge, and so on. The moral of this hypothetically legislated candor is clear: we must conclude that the sensibility required for making selective judgments in construing the record is subjective, private, and irremediably concealed from others, so that there can be no common sense, nor consensus, on such matters. The factfinder is indeed an ignorant oracle, buffeted upon a sea of doubt by the vatic blasts of the pettifogger.

But the orthodox dualistic account of legal rationality might yet be questioned usefully through a logic based in the possible worlds predicated by counterfactual propositions. There may be a way to circumvent, or at least to ameliorate the radical subjectivity of choice among competing inferences which is at the bottom of our difficulties with the standard account of factfinding.<sup>82</sup> It will be recalled that the causal condition in the earlier revision of the definition of knowledge was included in part to banish solipsistic forms of skepticism. Taking the solipsist as a limiting case, it is frequently possible to map a finite set of possibilities for making a coherent pattern of the trial record, with options fixed by purely logical criteria, starting with the impossibility of simultaneously crediting opposing claims of proof relating to the same statement. It is commonly accepted that virtually every contested matter presents at least two versions of "the facts," whose coherency and completeness are tested in the trial by way of motions to dismiss and for directed verdicts, summary judgments, and kindred examinations of completion and specification.<sup>83</sup> What is proposed here is the exercise of an objective judgment relating these two accounts, and intermediate ones, to a common sense of likelihood: that very sense of the community which the jury allegedly embodies in their roles as "peers" representing a much larger group.

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82. R. UNGER, *KNOWLEDGE AND POLITICS* 76 (1975).

83. The term "completion" is intended to convey a general concept of what is meant by the satisfaction of the burden of producing evidence, and the term "specification" is similarly intended to encompass the test of *FED. R. CIV. P.* 56(e), which requires a demonstration of issues requiring trial.

## V. TRUSTING, REFUTING, PRESUMING: CRITERIAL FINDINGS ORIENTATION APPLIED TO PRESENT RULES

### A. *Deference to the Factfinder Reexamined*

The implications of the proposed "stereo" approach to fact determination for the institutional forms and the procedural rules of litigation must now be examined. The value of a principle which claims to tether a factfinder's freedom of conjecture,<sup>84</sup> and to regulate the speculations of reviewers with the rosy monochrome of the most favorable light, is dubious until we trace the pathways likely to be taken by our institutions in reducing its dictates to determinate forms. This section will therefore explore first the expectations and the controls by which a system of factfinding offices is constituted in our adversary, common law tradition. Then the formalities which determine the subject matter of trial will be examined. In each part, attention is limited to the question of perturbation: how would a new key to the concepts of "fact," "issue," and "knowledge" reshape the rules and the roles of legal actors in conducting civil litigation?

The seventh amendment, and various similar state provisions, are expressions of a fundamental choice (as well, perhaps, as a misplaced confidence) in the matter of realizing the ideal of the "reasonable man." The initial factfinder, whether amateur or professional, is made responsible for his considered conclusions by being unable to share the burden of conscience and intellect that goes with appointment as the *sole* fabricator of the findings. This hallowed institutional arrangement is rootstruck by devices like the suggested criterial findings rule, since the likelihood of radical disagreement or total inconsistency on fundamental issues of fact between the guardians of our liberty and the conformist professional (and also, of course, between any two professional jurists) would be very high.

What response does legal ideology provide in the event of a deadlock, in which the jury reports (implicitly perhaps) that a necessary fact has been established, and the judge concludes that the contrary is supported by overwhelmingly credible expert testimony?<sup>85</sup> Under current standards as exemplified by the federal rules, it may be a close question whether a new trial should be ordered in those cir-

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84. The judge's freedom to conjecture is equally threatened by the normalization of inference choosing, of course. "Given the abundant discretion of a trial judge, it is hardly possible for an appellate court to ferret out what subjective factors, if any, entered into his rulings."

R. TRAYNOR, *supra* note 81, at 65.

85. See, e.g., *Brown v. Ford Motor Co.*, 479 F.2d 521 (5th Cir. 1973).

cumstances.<sup>86</sup> But the principle is clear enough, in federal practice anyhow, that exercise of the new trial power must never be based on "mere disagreement," as if the judge were a "thirteenth juror."<sup>87</sup> The virtue of the criterial finding would be its ability to objectify the relative gullibility of judge, jury, appellate panel, and community; it would make mere disagreement saliently obvious and, hopefully, open to principled discussion. Only in that way would the criterial finding call for continuous, case by case examination of the nature and extent of the trust reposed in the initial factfinder.

The concept of the criterial finding is not offered as a direct path to the resolution of factual disputes. Its purpose is to measure the concrete resolution of a disputed issue reached by the responsible factfinder against an orthodox, mainstream solution. The jury can remain free to thread the maze of legal controversy in a variety of pathways, while the reporter of the criterial version is charged with finding the most direct route.

Disagreements which emerge when two versions of the facts are compared, and when argument is offered about intermediate solutions are not, therefore, properly to be compared or analogized to different calls of the same pitch. What is at stake is a range of real historical possibilities and of objectifiable differences in the judgments to be made about their relative soundness. As jurists, we need not and should not insist upon strict conformity, within that range, to those objective standards by which ordinary mortals express their propensities for, and their aversions to, the risks of misjudgment in conducting themselves through the real world. The judge is not invited to act as a thirteenth juror, but to prognosticate the likely predominant interpretations of this record by thirteen or more unblemished juries.

Our hypothetical proposal contemplates that every assessor of the facts is looking at the same evidence under the same elaborate illumination.<sup>88</sup> So the judge is on the same plane as the jury, but she is charged with an independent mission of revealing a model deliberative process and a model outcome for later comparison with the actual outcome, and a hypothetical deliberative process. Then, if

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86. Compare *id.* with *Wylie v. Ford Motor Co.*, 502 F.2d 1292 (10th Cir. 1974).

87. See FED. R. CIV. P. 59. But see *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941) (approving use of new trial power even if there is "substantial evidence" supporting the jury's finding, sufficient to negate a directed verdict or judgment n.o.v.).

88. The rulings on evidence and the instructions to the jury furnish us with relatively clear images of the way the record was constituted. In principle, every step of its fabrication was authorized either by a specific rule of law permitting such proofs as were tendered, such arguments as were made, such inferences as must have been drawn, or by the waiver of objections through the acquiescence of a licensed adversary.

the hypothesis needed to save the verdict is found to depend upon an ordering of the world that is too strange, it may be rejected as unreasonable quite apart from issues of logic arising from discrete and falsely analytic consideration of the record as it bears upon proof of individual facts. Since coincidences are an observed feature of the real world, and since its appearances are often deceiving (particularly in courtrooms), there will not often be occasions for rejecting a finding or verdict on the ground that it supposes too much, beyond the surface of the record.

When rejection of a verdict is appropriate, however, the requisite test is a comfortable, legal one regarding the general suitability of the version of the world constructed by the factfinder for the habitation of other persons who are ostensibly similarly situated.<sup>89</sup> A rejection on the ground that the verdict is too remote or fanciful, that it constitutes a world too strange or distant, will not be voiced in terms of proof and refutation. It will instead be seen as a case of discretion and its abuse, of permission and its limits. The criterial finding would not become ipso facto the best or the official resolution of the factual dispute, but it could be referred to as a measure of the extent to which the rejected version of the record departs in the direction of the tooth-fairy and the confusions born of passion and prejudice.

### *B. Rules for Framing an Issue or Confining a Controversy*

The recasting of our philosophical conception of the irrational has so far been attempted in a legal vacuum created by the law's disinterest in psychology. The working assumption has been that positive rules of adjective law which establish the terms of a factual controversy requiring trial are unaffected by our ideas concerning the process of deliberation. Procedural formalities of the most neutral, mechanic, and purely legal kind, however, are as vitally transformed by the adoption of a causal theory of knowledge as are the standards of appellate review. The law's pleading and screening mechanisms are among the most prominent examples of the modern transformation of our cultural episteme.

The function of pleadings in federal practice (aside from the statement of jurisdictional facts) has withered away until little is left to inspire the artist except the hope that a superior product may serve a useful purpose later if the doctrine of *res judicata* is invoked. But what has been shorn from the initial phase of litigation, it is

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89. The catchword from FED. R. CIV. P. 23 is adopted here to signify the class aspect of individual litigations. The principle of legality extends not only to application of the same norms to similar cases, but also the normalizing of empirical factors which determine the contents of any case.



often claimed, is only deferred until a moment of more severe truth under federal rule of civil procedure 56, when a summary judgment awaits the litigant whose formal responses have been no more than sandbags piled against the tide of inevitable truth, for the purpose of allowing additional time to remove his valuables beyond the reach of execution. The revolution in modern procedure has been accomplished on the premise, and with the promise, that prior to the awful risk of trial, issues will be examined and retained to be resolved only if there is a true controversy, and only if it concerns a material fact.

The summary judgment rule has had a more controversial past than the reformation of the rules on pleading, but the great procedural scholars of the Second Circuit who gave us our canonical construction of rule 56 were united in their emphasis on a fundamental point. That is, of course, the duty of the judge who applies the rule to limit his inquiry to the purely legal question, whether the parties are divided over material issues of fact.<sup>90</sup> That formulation adds little to the words of the rule, but it carries large implications for our present inquiry. The meaning of *issue* for the purposes of the rulesmakers, is simply a matter of logic. The issue is static, retaining its character under rule 56, or at the pleading stage, or at the appellate level. The complacency of the legal profession, derived from its contentiousness and innocent faith in the dialectical virtue of the adversary crucible, leads its rulesmakers to provide, for example, that some averments may be deemed denied as a matter of mere convenience.

In the case of rule 56, the image of the factual issue requiring trial is not complex: it is nothing more than an averment and an actual or constructive denial of a proposition (or series of propositions) of fact. It will be argued in the discussion of presumptions below that such a simplification of the concept of an *issue* is conscious and intentional, and that the intent is to produce useful confusion. It must, however, be admitted that the historical origin of what is called the "federal rules approach" to the problem of defining controversy was a pure and noble reaction to the elaborate system of common law pleading, with its indifference to the semantic content of the single issue it sought to frame as the crux of trial.

Just as the *issue* remains unsplit by the categories of rule 56, the concept of the *material fact* remains largely indebted for its intelligibility to the otherwise rejected intellectual galaxy of the common law pleader. The adjective *material* in the rule is intended to import

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90. See *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

a revolutionary concentration upon the importance of each disputed fact to the specific substantive legal norms invoked by the parties. This implicit recourse to the law/fact distinction, along with the adjective's dependence upon older and more enduring rules of evidence, provide ample indication that legal ideology uncritically accepts the idea that it is a simple matter to discover and to articulate discrete elements of claim and denial. One needs to adopt only the expedient of examining the postures taken by the parties: the questions they have posed to each other, and the answers they have given each other in the discovery phase, along with the motions they have filed, the verbal challenges and innuendos of pretrial conferences in chambers. All phases of pretrial contention reinforce a confident belief that nothing so defines a controversy as the opposing positions assumed by the spokesmen for the parties.

It is unregrettably true that the point of a query, an averment, or a denial can be inferred only through the briefing and research firmly located on the "law" side of the law/fact distinction. The glory, as well as the efficiency, of the adversary process consists in its capacity to accord hostile litigants the widest imaginable freedom to define their own battlelines through this strangely bourgeois form of dialectic. One consequence of this legally doctrinaire definition of free controversy is that the domain of the factual inquiry reserved for trial is typically described in a pretrial order; or if there is none, then in a process of retrospective inference using the elasticity of federal rule of civil procedure 15 to reconstruct what issues were (on the record) actually tried. At best, the subject matter of the trial is a set of factual propositions which are identified in advance, and individually voted up or down, with the results inserted into a matrix of noticed law and conceded, or previously established, contextual fact. Only what the parties claim to be able to prove (with some supporting exhibition of competent evidence, under rule 56(e)) or to disprove—and only as those claims become manifest in a diffuse series of episodes, spread over a leisurely period of legal feints and procrastinations—in short, only an unfolding and increasingly informal process defines the field of factual controversy, and then, typically, after most of the dust has settled.

The implications of the truth or falsity of the ad hoc elements which comprise the opposing claims, those "material issues of fact" of rule 56, for the establishment of the parties' rights and duties are usually considered to be matters to be sorted out after the facts are in. Still further qualifications are needed, however, to capture the elusive quality of legal "materiality." Because an issue's "materiality" depends upon the hypothetical acceptance of the truth or falsity of discrete propositions of fact which carry the issue,

plus the hypothetical projection of the provisionally true (or false) fact upon some screen (or model) that already displays the uncontested context of the controversial issue and the other contested facts arrayed alongside the established background (whether the latter be provisionally or completely resolved through prior applications of the same process), it follows that all of the complexity embodied in the syntax of the present sentence must be recapitulated in the assessment of the merits of a rule 56 motion.

A remarkable feature of the materiality requirement, when it is formulated at the level of complexity required for the accurate statement of its meaning, is its lack of complication in practice. One might think that the multitude of logically independent variables which make up the usual controversy requiring trial, would make a Herculean labor of the task of determining separately the materiality of each contested fact. Materiality should come and go like the grin of the Cheshire cat, as other facts are proven, qualified, or withdrawn, changing the contours of the context. Legalistic ideology often dwells caressingly upon the difficulty of ordering and analyzing opposing claims so that they fit the manageable grid of particulars essential to the generality of rule recognition and rule application. This insistence is central to the law's mystique. Yet the practitioners on the bench and at the bar are seldom befuddled, or even seriously detained by this kind of problem: they both follow the repeated advice of appellate tribunals to leave the questionable question to the jury. There is almost no such thing as a close question of materiality.

There is an additional doctrinal reason for the highly satisfactory performance of the elusive concept of legal materiality. It is simply that the law has not seen a need to shuck the 18th-century metaphysics which make our idea of what is legally *material* as solid and as substantive as the rock that Dr. Johnson kicked in refuting Bishop Berkeley.<sup>91</sup> The legally material object cannot be touched; the bonds connecting its factual and its legal aspects can be neither severed nor described. Nonetheless, the legal intuition can seize upon a material fact, frame it as an issue, and reserve it for ritual resolution with an unthinking and infallible certainty. The inde-

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91. After we came out of the church, we stood talking for some time together of Bishop Berkeley's ingenious sophistry to prove the non-existence of matter, and that every thing in the universe is merely ideal. I observed, that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it, "I refute it *thus*."

J. BOSWELL, *LIFE OF SAMUEL JOHNSON* (1764), reprinted in 44 GREAT BOOKS OF THE WESTERN WORLD 134 (1952) (emphasis in original).

pendence of these judicial objects is established by their lexical isolation.

Although elementary factual assertions and denials can be reduced readily to the symbolic logic of propositional calculus, confessions and avoidances are a different, more complicated matter. Still more complicated is the issue whether a proposition can be supported by sufficient proofs to overcome some threshold risk of non-persuasion. The technique of lexical isolation is essential if these quintessentially legal issues are to be reached at all. The process is not at all mysterious. One simply asks whether each proposed material issue is in the same position relative to the *prima facie* case as the twopenny nail for the want of which the battle was lost. Since the terms of a legal battle are presumed to have a regular and gamelike structure, it should be a simple matter to decide which facts have a direct or inferential bearing on other (ultimate) facts, and then to compile a complete and orderly list of the proponent's undertakings of proof. Legal arguments for the definition of the *prima facie* case thus operate as a bidding system, and the wonder of it all is only why the legal curriculum has not long since offered courses in contract bridge among its jurisprudential studies.

Before introducing further subtleties in the meaning of legal issues, it is necessary to complete this examination of the diagnostic value of the confusions that lurk in the apparatus of rule 56. It is well known, for example, that some issues requiring trial are in the nature of demurrers to the evidence, challenges to the proponent of a factual proposition to establish its *prima facie* proof on a record properly constructed. Moreover, a party may determine unilaterally what is comprised by an "issue" requiring examination under rule 56 to see if it is worthy of trial, through the formal device of entering a denial upon the subjective supposition that even if the denied proposition is true, it cannot be competently proven. The ethical propriety of such a denial is supported by analogy to the criminal defendant's plight. Being a defendant is an unchosen disadvantage in litigation; consequently one is given a procedural right to "throw oneself upon the law."

Note that when one looks at the right to create a factual issue as an aspect of civil freedom, or as a safety net graciously extended to the patient of the legal process, a disquieting puzzle concerning the status of rule 56 is likely to ensue. How is it that the denial-as-a-dare is deemed to result in an issue of *fact*? Simply because the subject of proof and its adequacy for particular occasions is definitionally regarded as part of the factual domain? Such a rationale partially accounts for the legal system's avoidance of invitations to articulate the normal modalities of inference, but there is a stronger

legal warrant for the treatment of the factitious issue created by a challenge to "prove up" as a matter for jury consideration. The seventh amendment dictates the preservation of the jury right in cases at law. This entails a duty in fairness to maintain as faithfully as we may the associated Johnsonian notion of the "factual" and the idea of the "issue" as a gage, a gauntlet, or as Desdemona's hankie.

Within such limitations imposed by our debt to the continuity of culture, however, it might still prove to be desirable and profitable to devise a system of priorities and association among issues to be considered in ruling upon motions filed under rule 56. Distinctions *could* be drawn between types of fact issue, ranging from the simple paradigm in which Plaintiff asserts *A* and Defendant asserts *-A*, through the case in which Plaintiff asserts *A* and Defendant asserts *B*, which is taken as being in some sense inconsistent with *A*, or the case in which Defendant maintains that Plaintiff cannot support the assertion. The avoidance of such distinctions is a cost paid with unnecessary obscurity in the forms taken by the categories of our discourse.

However awkward they may be made to appear by the sophistries of our chosen mode of analysis, the old furnishings of 18th-century thought are still comfortable enough to accommodate the excessive proliferation of modern doctrine. This critique has so far attempted to probe and penetrate some of the stuffing without inflicting lasting damage to the fabric. Enough has now been said to indicate what kinds of reorientation could be achieved within the recognizable realm of procedural law if our aim were to make it more congruent with modern styles of rationality. The case against a doctrine of criterial findings, which is decisive, is far simpler than the one presented in its favor.

There is no way to legitimize the authority of differing viewpoints in assessing the same data on the same terms. When the concept of the criterial finding is suggested as an esthetic touchstone for judging legal consistency and inferential validity, the conclusive rebuttal is that the constructor of the criterial version of the facts cannot be told anything different than was told to the initial factfinder. Nobody can be put in any superior position vis-a-vis the record than the initial factfinder. A parallel official therefore cannot be expected to produce a result in any way more "respectable" in terms of the ideal of objectivity that legalism desiderates than the one produced by the original factfinder. The recipe for criterial findings is one of pure inconsistency for its own sake, spiced with additional burdens that have been proven unworkable when juries are told to specify

their findings in the form of special verdicts,<sup>92</sup> or when a trial bench is admonished for failing to do its own formulations of the factual conclusions needed to support a result.<sup>93</sup> The criterial findings doctrine is merely a utopian effort to turn subjectivity inside out, to remove the psychological element of deliberation from the chambers or the jury room and expose it to the ridicule which is deserved when ignorance approaches history without method.

If biases, prejudices, and culturally preferred orientations to the reception of testimony and other forms of forensic proof, could be somehow normalized without legislating the transient follies of time and place, we should gain a vast advantage in the struggle to conceive and treat like cases. The conviction which presently prevails that nothing of the sort can be done, even on a side channel, is a confession that trying to do it would amount to the most provocative kind of personal attack, of ad hominism. Regrettably, the incivility surrounding factual disagreement is unavoidable, as the only way to express disagreement within the structure of the current legal process is to invoke the tooth-fairy either directly or with an obliquity that still threatens authority and legitimacy. The alienation resulting from living with an aleatory factfinding process is preferable to this kind of Hobbesian warfare. Yet the legal system must live with its recognition that a side channel of factual disagreement remains loud and active "off the record," and that it serves to exercise a pervasive influence over the subordinate, interstitial rules which attempt to guide factfinders toward legitimate outcomes.

## VI. CARRYING, CONFUTING, TRANSFERRING: BURDENS AND PRESUMPTIONS IN RELATION TO PROOF

This section seeks to apply the lessons learned in the treatment of legal factuality as it looks at the strange clarity and pervasive poetry of the images used by the scholars of evidence when they speak of presumptions and burdens. Despite the hyperboles used to exhibit the subjectivity of judgment, a trial record is not a trackless waste, presented for exploration by the trier of fact. On the contrary, the most barren spots in the record are apt to be posted with officially worded indications of mandatory or permitted routes toward a "rational" conclusion. These signposts are commonly referred to as presumptions.

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92. The general verdict with answers to special interrogatories allowed under FED. R. CIV. P. 49 is not uncommon, but it is unworkable for guiding the factfinding process in the direction of increasing probability. See, e.g., *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108 (1963).

93. See *In re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970).

Presumptions are most commonly justified in terms of instrumental expediency.<sup>94</sup> The functional purpose of the presumption is to allow a judge something to say conventionally about a basic fact, *B*. In other words, a presumption is a legal recognition of the importance of the basic fact, *B*. Logically speaking, the law of presumptions is a set of rules about *B*. What these rules provide for is an attitude or a status in light of *B*, which is to be enjoyed by a counterfactual proposition, *P*.<sup>95</sup>

This discussion may seem needlessly abstract, but it will prove useful in relating presumptions to the foregoing critique of legal empiricism. The dominant account of what presumptions are and how they work is to be schematically reformulated so that the official dogma can be seen in relation to the logical and conceptual problems discussed in the earlier sections of this essay.

It is perhaps best to begin by accepting the decisive demonstration of modern legal thought that the conclusive presumption is nothing but a substitution of the so-called basic fact, *B*, for the presumed one, *P*, as an element of the prima facie case.<sup>96</sup> Conclusive presumptions often do not begin their careers by announcing themselves as such. Most typically, the development of the substantive law by way of conclusive presumptions starts modestly with a true presumption, the rebuttal of which is made more and more difficult, and finally impossible, by evidentiary obstacles placed in the path of the naive pleader who thinks that the stakes of the game are *P*, instead of *B*.

In orthodox theory, a true presumption is always rebuttable. Proof of *B* can never entirely remove *P* from the arena of controversy. More detail is needed, however, in showing the status of the basic and the presumed fact. No violence is done to the rules on presumptions by adding that the true presumption is never analytic, never even metonymic.<sup>97</sup> The basic fact, *B*, is not simply a

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94. The orthodox view on presumptions in American jurisprudence comes from Thayer and his critics, and their differences are less important for the present essay than the habits of thought which made the formulation of any doctrine in this puzzling area possible—and debatable—at all. See J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 339, 346 (1898). See also *Legille v. Dann*, 544 F.2d 1 (D.C. Cir. 1976).

95. The possible truth of *P* does not transform its character. The most that can be said is that *P* is a permitted, or sometimes a required, assumption as to its factuality.

96. The substantive character of conclusive presumptions has been recognized at least since 1932. See *Heiner v. Donnan*, 285 U.S. 312, 328 (1932) (presumptive language used to impose unconditional tax on gifts made "in contemplation of death").

As a form of legal fiction, the conclusive presumption serves ideological and propagandistic purposes in facilitating the disuse of *P*, but it need not be of concern to us.

97. An analytic proof is defined in mathematics and philosophy as one that is tautologous. If *B* and *P* were related to an element of factual proof in an analytic way, they would each be proofs of the same thing, *X*, and the question would be whether one was unnecessarily

diagnostic feature of the presumed fact, *P*, nor a part of its essence, nor even a representation of it directly or symbolically. *B* is said to be only an associate of *P*, entitled to be juxtaposed with it on the following type of rationale:<sup>98</sup>

1) *B* and *P* are encountered so often together in the standard world of real experience that nobody could reasonably reject the conclusion *P*, once satisfied of *B*, all other circumstances aside (e.g., *B*, John Doe was born in 1880; *P*, John Doe is dead).

2) Proof of *B* should excuse its proponent from further proof of *P*, either

- a) completely, or
- b) provisionally

because proofs of *B* are more accessible to the proponent, and proofs relating to *P* (or *-P*) are more accessible to the opponent. (e.g., *B*, the letter was mailed; *P*, the letter was received).

3) Proof of *B* should change the significance of *P* to the trier of fact, because:

a) *P* should no longer be open to controversy in light of *B*, or

b) *P* should be regarded as provisionally established in light of *B*, or

c) *P* should be regarded as sufficiently "proven" by *B*, unless . . . (e.g., *B*, the defendant was standing by the distillery; *P*, he had control of it).<sup>99</sup>

There is an obvious redundancy in the rationales offered under part two and part three of this synopsis. The presumption is seen as an instrumental rule speaking in two directions from a single point of view, telling the disputants how to go about proving *P*, or directing the trier of fact how to evaluate *B*. The first formulation treats the presumption as a maxim of common sense which embodies a conception of a collective, consensual inductive rationality. It could therefore be seen as a standardized brick for inclusion in the

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cumulative in comparison with the other.

Metonymy is the figure of rhetoric in which the part stands for the whole. As the proof of smoke may amount to a basic fact *B*, which supports the inference of fire, it might be said that typically presumptions are metonymic in the sense that they codify essential or causal associations between phenomena, allowing us to diagnose the true state of affairs, in an inductive way. The proof of smoke, however, is not proof that this is an occasion of the usual fire, with smoke, or instead the unusual one, just prior to flashpoint. Indian-fashion, we may refer to "fifty smokes" meaning "fifty campfires," in which case the usage is both analytic (smoke *means* fire) and metonymic (it also *stands for* fire). The presumption requires that a conscious and controversial jump be made from the smoke to the fire.

98. See generally Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245 (1943).

99. See *United States v. Gainey*, 380 U.S. 63 (1965).



“criterial findings,” as previously discussed. This first sort of presumption originates as a predilection, or an argument, or a comment upon particular records found to be unexceptionable.<sup>100</sup> It will soon be suggested that the orthodox doctrine is committed to a fundamental error, under the first rationale, regarding the demise of John Doe. His death cannot be certified, however, until we have further considered the usefulness of presumptions as devices for channeling the subjectivities of deliberation, or accommodating the erroneous propensities of forensic proof.

Scholarly discussions of presumptions and their justifications, which take the form of doctrines about *P* rather than *B*, are of most immediate interest here, because they are directed to the subjectivity of deliberation. In this respect, they share the status of their conceptual relatives, those endlessly debated standards of proof, in asking the deliberator to weigh imponderables (to see whose claim preponderates), or to measure transparency (to see whose claim is clear and convincing), or to guess where doubt is practically justified. The trier of fact presented with a presumption is invited, but not compelled, to jump to *P* from his starting square, *B*. The law provides descriptions of the possible landing points which are said to be rigorous, mutually exclusive, and easily applied, since they are merely psychological requirements limiting the way *P* is to be held in the mind of the factfinder. Elaborating somewhat on the rules authorized by the formalization stated above, we can describe the field of debate in which the law of presumptions has evolved as a rudimentary psychological system, rather than a purely logical one. Thus—

The ALI-Thayer doctrine of presumptions accords the inference from *B* to *P* the following status:<sup>101</sup>

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100. As Professor Morgan observed:

When the basic fact is established in an action, the existence of the presumed fact may be inferred or deduced by the ordinary processes of reasoning. This idea is often expressed in terms of justifiable inference or presumption of fact. It involves no rule, either procedural or substantive, peculiar to the legal process of determining the existence or non-existence of facts.

Morgan, *supra* note 98, at 246. McCormick observed:

Trial judges have to deal with controversies and with offers of proof which recur in rather stereotyped forms. The sufficiency of a particular line of proof to go to the jury as circumstantial evidence of a certain fact and the consequent propriety of explaining to the jury its bearing and relevancy . . . would repeatedly be presented. The recognition of the reasonableness of the inference crystallizes into a judicial habit, and the inference hardens into a “presumption.”

McCormick, *What Shall the Judge Tell the Jury about Presumptions?* 13 WASH. L. REV. 185-86 (1938).

101. The A.L.I.-Thayer Model Code of Evidence viewpoint found its way into the Federal Rules of Evidence only after a struggle.

- 1) *B* is proof of *P*, conclusive in the absence of counter evidence of *-P*.
- 2) Upon proof directed at demonstrating *-P*, the trier of fact is permitted to hold either *P* or *-P*, and *B* becomes an argument for, rather than a proof of, *P*. (Moreover, the argument is not conceived as a move that preserves the jump from *B* to *P*, bridging the unfortunate existence of a datum indicating *-P*; rather, it is aimed at rejecting the evidence of *-P* because that proof is inconsistent with the acceptance of *B*.)<sup>102</sup>

The Model Code of Evidence accepts the same rule when the record is limited to proof of *B*, but when there is an attempt to show *-P*, they add a nuance of great practical importance:

- 3) After admission of an evidence of *-P*, the trier of fact is allowed to conclude that *-P* only in case *-P* is supported by stronger proof than the inference of *P* that is warranted by acceptance of *B*. A burden is placed on the proponent of the negative proposition, *-P*, to overcome the assumed truth of *P* which is justified by *B*'s logical association with *P*.<sup>103</sup>

The apparently identical treatment by both rules of the record in which only *B* is disputed is misleading. Although both rules treat *P* as conclusively established by *B* on a record so limited, the ALI-Thayer rationale is that *P* must be taken as the only rational com-

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As originally proposed by the Supreme Court, the presumptions . . . were given the effect of placing on the opposing party the burden of establishing the nonexistence of the presumed fact, and "[t]he so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, [was] rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to original Rule 301. The House Committee on the Judiciary agreed, but substituted a shift in the burden of going forward in place of a shift of the burden of proof, and conferred evidentiary value on the presumption. H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 7 (1973) . . . . The Senate Committee on the Judiciary felt, however, that "the House amendment is ill-advised. . . . 'Presumptions are not evidence, but ways of dealing with evidence.' . . . This treatment requires juries to perform the task of considering 'as evidence' facts upon which they have no direct evidence and which may confuse them in performance of their duties." S. Rep. No. 93-1277, 93d Cong., 2d Sess. 9-10 (1974) . . . . The Senate Committee accordingly modified Rule 301 to its present form, and the Conference Committee adopted the Senate version. H.R. Rep. No. 93-1597, 93d Cong., 2d Sess. 5-6 (1974) . . . .

*Legille v. Dann*, 544 F.2d 1, 7 n.37 (D.C. Cir. 1976) (brackets in original).

102. The presumption embodies an explicit recognition of the inference or the presumptive fact from the basic fact as being legitimate, but also *optional* with the jury or other trier of fact.

103. See A.L.I., MODEL CODE OF EVIDENCE rule 704(2) (1942). FED. R. EVID. 301 also adopts this approach.

pletion of a conventional, artificial, baseline world (the criterial account again) against which it is possible to envisage reality on the basis of any discrepant accounts that may be offered. The offer of evidence of  $-P$  operates to "burst the bubble" and leaves the model incomplete and entirely open with respect to  $P$ . The uniform rules, however, take the world in which  $P$  is established by  $B$  as a persistent baseline, entitled to consideration by the trier of fact even after evidence of  $-P$  has been introduced. Such evidence does not destroy the bridge of inference linking  $P$  with  $B$ . It simply raises a doubt about the factfinder's standpoint: is the truth of the matter to be ascertained by adopting the model embodied in the presumption, or is the real world stranger than that, a universe in which both  $B$  and  $-P$  are true? The force of the presumption is simply to define the  $B/-P$  world as being less likely than the world in which  $B$  and  $P$  are both true. If  $B$  is entirely creditworthy, the question remains whether  $-P$  may coincide with  $B$ , and the uniform rules partially close this gap by restricting the factfinder's freedom to reject  $P$  while holding  $B$ .

The *Uniform Rules of Evidence*, however, also distinguish between strong and weak entailments of  $P$  by  $B$ .<sup>104</sup> The foregoing analysis applies only in the case of logically strong connections, like those of probable death from a distant date of birth. The weak presumption, in which  $P$  is adopted for a reason rooted in the practicalities of access to proof, and the need for fairness in recognizing the limits of forensic inquiry (the *res ipsa* modality) is resolved on the bursting bubble analogy of the ALI-Thayer model. This dichotomy introduces a source of confusion, as it invites endless argument over the labeling of a particular presumption as "natural" or "artificial," "strong" or "weak." Procedural, instrumental justifications for an inference are mixed with more substantive doctrines about the evidence of  $P$  afforded by a fact  $B$ .

Until it is adopted on the authority of a rule expressed as a presumption,  $P$  has the status of a controversial proposition of fact that looks like, but is very different from, the status of other issues of fact, such as  $B$ . The acceptance of  $B$  depends on testimonial assertions, documentary demonstrations, and other forms of direct proof. John Doe's birth certificate will do. But it is the absence of a death certificate that creates a need for  $P$  as a counterfactual statement which is not recognized as such in the dominant forms of legal discourse. With excessive pragmatism, the presumption is stated on the lines of "John Doe is probably dead." The more complete, and therefore awkward and fussy, statement of  $P$  would be that " $B$  is

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104. See UNIFORM RULE OF EVIDENCE 14.

John Doe's death certificate," or "John Doe, dead or alive, is *legally* defunct so long as our knowledge of him is limited to *B*."

Or still more completely: "If John Doe is 98 years old, that circumstance *would be* legally knowable only by proofs additional to *B*."

The rebuttal of *P* is not a disproof of *B* but the proof of a different and more difficult case. *B* entitles us to *imagine* John Doe's corpse, but the production of John Doe himself rules out the need for imagination in respect of *P*. A presumption successfully rebutted is indeed a burst bubble because the counterfactual plane of *P*'s existence, its provisional truth, is no longer relevant to the factfinder's task. But *B* remains as a fact respectable for whatever it is worth as an indirect proof of *P*. John Doe may be an imposter; *B*, the birth certificate, may be a forgery. Perhaps the most appropriate conclusion is that the real John Doe is a nonagenarian, but that depends mightily upon the nature of the proof of  $\neg P$  which has been offered as rebuttal. If the match is between a birth certificate dated 1880, and the contribution by an employer of FICA taxes in 1978 for a person with John Doe's social security number, the inference of Doe's death might still be defended as a mandatory interpretation of the record.

Rebuttal evidence is logically incapable of truly meeting and defeating the inference that is warranted by a legal presumption, because *B* may coexist with either *P* or  $\neg P$ . But both *P* and  $\neg P$  cannot be true without violating the principle of the excluded middle, so that the choice between them is essential, and the choice of *P*, when it is tolerable over evidence of  $\neg P$ , is entirely dependent upon *B*'s strength as evidence of *P*. The bursting of a bubble does not erase the line running from *B* to *P*; it simply restores *P* to the position of an actual fact in controversy. *P* is no longer a presumption, but now is *p*, a proposition, which can very easily be regarded (at least by the initial factfinder) as sufficiently proven by *B* for the various practical and logical reasons outlined above.

If the draftsmen of the *Uniform Rules of Evidence*, or if Thayer himself, had been more sensitive to the status of *P*, they might have developed a doctrine of presumptions that is articulated solely in terms of the variable significance of *B* as circumstances change. If that approach had been taken, the presumption of law would most likely have been restricted to the case of the unpunctured bubble: *P* could never be anything more than a naked, but necessary, hypothesis. The additional step in the evolution of doctrine in this field, very ably resisted by Thayer and his followers, is a move in an altogether different direction—the direction of the standard or criterial version of the facts. It is a form of micro-directed verdict.

Not exactly directed, perhaps, but at least strongly suggested.

Critics of the *Uniform Rules of Evidence* see its account of *P* as an impertinence as well as a presumption, because the rules can authorize an instruction to the factfinder to take a conclusion, *p*, as entitled to provisional acceptance in the absence of a preponderating counterproof.<sup>105</sup> Under the *Uniform Rules*, the right to accord such status to *p*, as if it remained in the realm of *P*, must derive from a positive rule about the way the world appears to the blindfolded eyes of the law. Assuming that a judgment can frequently be made regarding how the standard world *must* appear in light of *B* and other evidences relating to *-P*, the critic may justly wonder if such a judgment can or should be arrived at in advance of concrete cases.

Despite these reservations about the legitimacy of giving a special recognition to *B* as an *evidence* of *P*, the *Uniform Rules* have taken us a step closer to a law of deliberation. This law is in a primitive state, (if we take flexible discretion to be the terminal point in the evolution of legal doctrine) since the presumption is a mechanistic, all-or-none rule even when it is permissive in form. The permission is carefully phrased to allow only one state of mind with regard to the problematic proposition, *p*. The reluctance of analysts to propose the next step (which would be an enlargement of the sphere of presumptions, in general, and on an ad hoc basis) is most likely grounded in institutional respect for the province of the jury, and a kindred historically justified respect for the propensity of judges to err when allowed too much leeway in commenting upon the evidence.<sup>106</sup>

Much of the opposition to the extension of judicial legislation on the conclusory effects of any *B* could be obviated if it were possible to monitor the impact of presumptive language on the factfinder. If there were a method for ascertaining what was in fact presumed or concluded by the factfinder—other than hypothetical reconstruction in accordance with the most favorable light test—then the framing of presumptions could be more finely tuned to the record as a whole. In one case, the factfinder could be compelled to find *P* on the basis of *B* unless clear and convincing proof were offered of *-P*, while in another case, the proponent of *B* (in lieu of an essential *P*) could be exposed to a nonsuit in the event that *any* evidence of *-P* were introduced. The difference between the cases would come not from the theory of the cause of action, but from the statement of a best interpretation of the significance of *B* in relation to the

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105. See C. McCORMICK, EVIDENCE § 345 at 821-26 (2d ed. 1972).

106. See, e.g., *Quercia v. United States*, 289 U.S. 466 (1933).

record as a whole.<sup>107</sup>

The present structure of the doctrine of presumptions is an obstacle to such fine discriminations. The value judgments which are necessary in order to choose the best interpretation among several that are adequate cannot be imposed upon the existing rules from outside the deliberative process. The doctrine of presumptions insists upon its safeguards against all positive statements of the dictates of prudential rationality. It treats *B* and *P* in isolation and maintains an implacable hostility to the notion that a partial summary judgment or a partially directed verdict might be rationally necessary sometimes to establish a *P* that remains hypothetical, but also seems unavoidable in the context of other proofs (including *B* of course).

These features of the rebuttable presumption in its present form derive from a conception of the issue of fact that is as old as the forms of action. As noted above in section IV.B, an issue of fact is preserved for trial, and throughout the trial it is deemed to retain its original character as a statement and its contradiction. Trial resolves the contradiction instead of exposing claims and denials to a changing scrutiny, an unfolding of the best glimpse possible of the truth, so that the conviction might arrive at any moment that a disputed fact must be regarded as true within its envelope of legal and philosophic doubt.

If our view of proof were otherwise, we would encounter "objective" causes of belief as well as causes of action among the familiar features of the law. The source of these empiric causes would be found in valid, cogent arguments about the inferences available to the factfinder from documentary or testimonial data revealed in trial or pretrial proceedings. The line between argument and proof would become blurred, as would the line between comment and presumption. Even more drastic than these consequences would be the new aspect taken by the prospect of deadlock, that spectre which has managed to generate an astounding volume of subtle verbiage about the burdens allotted to the parties.

The burden of producing evidence (a source of many presumptions and of the doctrine of *res ipsa loquitur*), the burden of going forward, the risk of nonpersuasion, all of these are epicycles in a system of thought which treats the problem of ignorance and speculation (disingenuously) as a matter for introspection and intuitive judgment. Without that self-directed inquiry about the extent of

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107. The adoption of such a stance would render meaningless the standard talk of what the law presumes in general terms; the law would be as flexible in its interpretation of available data as people are.

satisfaction with the adequacy of a proof, we would often be forced to confess our abject ignorance of the optimal construction to be placed on the record. Note how venomous such a confession becomes when it is taken from its secure place as a justification for placing trust in the secret wisdom of a well-instructed mind, and is placed instead at the beginning of an argument about compliance with those instructions. The logic of the present rules of persuasion and proof, with its obsessive concern for ties, doubts, and deadlocks, almost compels the conclusion that in general, there are far fewer defense verdicts than should be expected of institutions which take seriously the level of ignorance which is presupposed by these rules.<sup>108</sup> Could the factors which advantage the widow and orphan remain hidden if the mind of the factfinder had to be made up in public? No; but in principle the transformation of our idea of deliberation could still be accomplished without making the price of honesty a systematic preference for defendants.

The most straightforward solution to the problems of excessive logical rigor and of pro-defense bias is, however, politically bizarre. In order to preserve the value of the "plaintiff's edge," it would be necessary to establish this, and similar irrational elements of orthodox doctrine as ingredients in the otherwise open and debatable process of rationalizing a factual finding. The legal marketplace presently results in many more settled than litigated cases, and the process of adjusting a personal injury case, for example, is one which takes account of much more than merely legal factors. Such other elements as the experience and track record of counsel, the jury value of particular witnesses and of the parties, and the gravity of the injuries are "discounted" in the negotiation process. It is not unreasonable to assume that a legislator or an administrator could quantify the marginal value of these "jury factors." But how might they be blended into the process of constituting a public rationalization of particular factual conclusions? Simply by allowing the factfinder to adopt a pro-plaintiff finding with a farther fetch than is allowed in finding a fact favorable to the defense? Something of this sort is conceivable, as it is one of the most likely ways of accounting for present outcomes which are not only tolerated, but celebrated. The favorable light of appellate hindsight might, after all, be the light that persuaded the jury or the trial judge to adopt an unlikely finding in the first place.

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108. "Nothing is to be gained by a detailed discussion of these cases. The discussion would be profitless and reading it would be both profitless and wearisome." McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 251 (1944) (referring to case law on instructions regarding degree of belief).

Thus, in place of the randomness (or the naughty teleology) of an instructed oracle musing on its intuitions, we should be confronted with rules that shade, slant, distort and explicate the propensity to believe what it is distributively just to believe. Substantive considerations and sociological experience with the jury would combine to produce a set of rules that would wreak havoc with the present conception of evenhanded fairness that is expressed in the assignments of burdens of proof. If this cost is too high, and if the obliteration of the last bright line—between purely substantive and clearly procedural considerations—is unwelcome, we should stop to consider whether the present system of secret sympathies is any more acceptable under the rule of law ideology than this openly partisan alternative.

#### VII. CONCLUSION: LEGAL OBJECTIVITY REQUIRES OPEN DELIBERATION, CREATIVITY AND VACILLATION

Once more, a discussion of the forms and processes of deliberation has led to a single perspective that any reasonable mind ought to take in evaluating the possible construals of a record. The task of the factfinder is finite, and his defensible outcomes (when further circumscribed by the obligation to be conscientiously critical) are even more finite. These logical possibilities, in their finitude, are eminently capable of arrangement according to a rank ordering governed by a legalistically objective scale of their values as approximations. The limit they approach is not one of actual, historical truth, but of the only "truth" the legal process is able to construct—the truth embedded in the conventional world of our scientific and social experience. That world is not ruled by statisticians; it contains a liberal share of mysteries and peripeties, and it presents a face to the court, counsel, and the parties that is often inscrutable.

The recognition, however, of the inscrutability and brutishness of raw evidence is too painfully inconsistent with the majesty claimed by magistrates, and so we are indoctrinated with the mystique of demeanor evidence.<sup>109</sup> By virtue of his wisdom and penetration, it is claimed that the magistrate (or the juror) can see through (behind, below, beyond) visible demeanor to the underlying truth of the case. This fetish of demeanor evidence symbolizes an ineffable hidden truth, implicit in the interior of the record; but it certainly should not be spoken of as true "evidence," as if demeanor were the layman's polygraph.<sup>110</sup> The value *as evidence* of demeanor and po-

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109. See *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952).

110. Polygraphy is derogated in the text as a pseudoscience with full knowledge that reputable scientists consider it an established method for determining that a subject is en-



lygraphy is about the same as that of physiognomy and phrenology. The survival and expansion of pseudosciences in a rational enterprise can be understood only in sociological terms because such auspices are retained for reasons entirely apart from their empiric validity. Similarly, the recurring theme of the criterial finding may retain an office in the course of legal factfinding: the criterial account constitutes the unstated premises which guide the assessor of any findings, in any light, upon any record.

In the foregoing reflections, the concept of the criterial finding is discussed as if it were a procedural novelty. It is not. What has been subsumed under this artificial device is a modeling of those purely internal processes through which we each elaborate our own methodology for the normative exercise of factual evaluation. Appeals asserting factual mistake turn out to be arguments over preferences after all. Intuitions are controlled by other intuitions, awkwardly expressed in a code built upon a "logic" whose chief operant term is "clearly." Perhaps the legal ideal of objectivity is itself a matter of intuitions. We know nothing more about it than our silent willingness to recognize what we are willing to believe, and that willingness is founded upon a representation that appears to be faithful to the possibilities of experience. Re-cognitions, re-presentations: these words, like mirrors, iterate the duality which expresses the subjectivity of the factfinder and the reality he must examine. It seems that judgments can be penetrating only at the expense of remaining silent; that criticism can deal only with doctrines, forms of words floating on the surface of the experience that is the lifeblood of the law.

How paradoxical it is for *lawyers* to insist that judgment is necessarily subjective! Apologists of the received tradition are forced to entertain that view only because of the greater discomfort all must feel in asserting the contrary, that the average person can accurately evaluate the comparative worth of particular conclusions drawn from conflicting and ambiguous claims. Legal factfinding is not a matter of research, not a matter of deducing the actual from the probable, the probable from the average. Nor is the inference of a legally effective fact a matter of induction, since the trial deals with single instances or congeries of instances. What remains after due account is taken of all these negativities is only an isolated position, occupied by the factfinder, in which propositions can appear to be

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gaged in deception. Accepting that there is a litmus test for exhibiting a discrepancy between statement (testimony) and belief, we may still question whether such information should be taken as having a bearing on the issue of credibility.

proven or unproven in the flickering light of a precarious rationality, illuminating the traces of history upon interested memories and colored perceptions.

Although it is neither mathematical nor objective, the rationality of forensic fact-determination is not so nebulous that other minds cannot criticize and sometimes reject an interpretation of the facts made, found or invented by an impartial judge or juror sanely contemplating the same set of proofs, principles, and arguments. The account of knowledge in this essay entitles lawyers to hope that we may yet devise a principled language for the expression of disagreement as something more than the deployment of power. This essay has had to begin and end at a position that is captured in one of the most concise "tests" to be found in any legal treatise: the test for deciding when a finding is "clearly erroneous." As formulated in *United States v. United States Gypsum*,<sup>111</sup> the test is simply whether the second-guesser is firmly convinced "that a mistake has been made." A mistake is made only if the critic can say something pertinent about its nature, size, source, and consequences. The causal elements in our account of knowledge may supply the critic with the conceptual tools needed to begin. On such foundations, critical thought can possibly discover a set of fallacies, neo-Baconian idols of the form, provided that disagreement is not interpreted as an epithet or a claim to superior wisdom.

Law has as bountiful an experience as science or mathematics does, with sophistries of every kind, and with specious shibboleths erected under the influence of its ethical ideals. To describe what constitutes prudent judgment of the facts is therefore simply a matter of discovering (for oneself) the vulnerabilities (and fallacies) that lead to imprudent, but rarely illogical, conclusions. The skill required is not cumulative nor communicable, although close scrutiny of reported cases provides valuable vicarious experience. The cases, rather than the words we use to report them, are the clinic of judgment. Nevertheless, the circles of abstraction which have been spun in this discourse are not entirely futile: they enclose new areas by obliterating familiar lines. These lines separate evidence from inference, subject from object, proof from argument, findings of fact from conclusions of law, value from rule, law from fact. The old lines still show through, of course. What lies above them on the palimpsest inscribed by the evolution of legal culture and feebly transcribed in these pages, is far from clear. The challenge of the present speculations is to cultivate those fields enclosed by the old boundaries in order to germinate new conceptions of rationalization which will

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111. 333 U.S. 364, 395 (1948).

prove to be more conformable to a modern sense of human limitation.

In closing, it must be confessed that the entire essay is only a footnote—a very long footnote—to a single exemplary case. That case, or a better one, can be reconstructed by trying out the ideas encountered above on the records and opinions the reader must deal with in trying to make sense out of trials and their outcomes.