University of Pennsylvania Law Review
May, 1975

Article

PRESENTATION OF EVIDENCE AND FACTFINDING PRECISION

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For at least a century a debate has been raging about the relative advantages of the adversary and nonadversary presentations of evidence as tools in the quest for the truth. Most of the time this debate proceeded in a mild sfumato of conceptual ambiguity: Differences in the styles of developing evidence were often conflated with differences in arrangements concerning the collection of evidence, admissibility rules, and similar related issues. Beyond that, until quite recently, the arguments advanced were speculative, and information was exclusively in the form of impressions and intuitive insights. In our age, so enamoured of scientific methodology and so desirous of replacing "soft" by "hard" data, the question almost naturally arises: can at least some themes involved in the debate be translated into a form susceptible of empirical analysis? If the answer is in the affirmative, perhaps products of disinterested science can replace our prejudice, parochialism, and irrational attachments to existing arrangements, no matter how "efficient" these existing arrangements may be. In the present Article I propose to express my reflections on this subject, reflections that were stimulated by a piece of research presented in a series of recent, thought-provoking empirical studies.

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I. THEORETICAL PROPAEDEUTIC

A. Preliminary Remarks on the Object of Proof

The problem whether the adversary or the nonadversary mode of presenting evidence is better equipped to lead to the truth cannot be analyzed in vacuo. "Truth about what?" is the question that must be answered at the very outset. It must be determined with sufficient precision what is the referent to which the characterization "truth" or "falsity" applies.

Following in the path of the studies mentioned a moment ago, I shall be concerned solely with issues involved in arriving at a judgment concerning the guilt or innocence of the criminal defendant. But this restriction is far from sufficiently precise. To begin with, consider that the issues disposed of in a judgment do not all have the same epistemological status: The meaning of the symbol "truth" changes considerably as we attach it to its different component parts.

As background for my quick reconnaissance over familiar terrain, imagine a manslaughter charge arising out of reckless driving. The decisionmaker must determine the truth of a certain number of propositions regarding "external facts," such as the speed of the automobile, the condition of the road, the traffic

signals, the driver's identity, and so on. The mental operations required to ascertain such "external facts" belong primarily to the sphere of sensory experience. The inquiry here appears to be relatively objective, and the "truth" about such facts does not seem to be too elusive.

But many "internal facts" will also have to be established in the imagined case. They regard aspects of the defendant's knowledge and volition, to the extent to which these are important for the application of the relevant legal standard. The ascertainment of such facts is already a far less objective undertaking than the ascertainment of facts derived by the senses: processes of inductive inference from external facts are the most frequently traveled cognitive road. Even so, we do not hesitate to accord roughly the same cognitive status to findings regarding these internal facts as we do to findings of external facts. The characterizations "true" and "false" retain their respective meanings.

The situation changes, however, when the facts ascertained must be assessed in the light of the legal standard. Whether a driver has deviated from certain standards of care--and if so to what degree--are problems calling for a different type of mental operation than that used in dealing with external facts. It is, of course, a matter of free semantic choice whether to characterize the outcome of legal evaluation as "true" or "false," or to use some other pair of symbols. But if one decides to stick with the former, he must recognize that these symbols acquire a different meaning in the new context. In essence they convey the idea that the result of the activity is either correct (coherent) or incorrect (incoherent) within a given framework of legal reference.

Additional issues, whose characterization is exceedingly complex, arise under the Anglo-American system of adjudication, especially in connection with the adjudicator's powers of nullification. But what I have said so far suffices to indicate that the question about the truth or falsity of a judgment as such, without further specification, is too ambiguous to be meaningful.

Notwithstanding marginal uncertainties and philosophical arguments on some aspects of this problem, it is generally agreed that the presentation of evidence is directed toward establishing the veracity of factual propositions, rather than the correctness of legal reasoning. In what follows I shall therefore, be restricted solely to the factual segment of the judgment, as the only proper object of proof-taking. Within this factual segment, the problems of findings regarding external facts will bulk largest. They seem a very convenient object of empirical study, in that the processes of their determination are relatively objective.

Where empirical research is contemplated, is this restriction to the factual segment of the adjudicatory activity a workable proposition? Can this segment be extirpated from the whole in any fashion other than through logical analysis? This thought occurs quite naturally to lawyers in the Anglo-American legal culture, where the largely inscrutable jury verdict is so central. But even in continental systems, where decisionmakers are, as a rule, required to provide separate reasons for factual findings and legal determinations, skepticism can easily arise. The mandate to write separate reasons can easily be viewed as implying rationalizations: what is in reality intertwined is presented post-festum in two neatly separated categories. It is indeed the most sophisticated modern view on the continent that, in arriving at a judgment, the mind of the decisionmaker constantly travels from facts to law and back to facts again, in a simulacrum of regenerative feedback.

The constant interaction between fact and law thus cannot be denied. It poses serious problems for the empirical study of the factual segment of adjudication in isolation. If the actual criminal litigation were the object of study, these problems would be insuperable. But there is another strategy of research. The presentation of evidence can be observed at simulated trials, under controlled laboratory conditions, and under this method the activity may be limited to factual issues only, even to the determination of external facts. And it is this methodology of laboratory experimentation that I shall analyze in the next part.

It cannot be denied that the separation of the factual from the totality necessarily infects the results of the study with an element of artificiality and distortion. The latter element is more pronounced in the Anglo-American system, where the place of the factual in the whole of the adjudication is less certain than on the continent. But this is hardly news to the scientist who deals with parts of totality all the time. It only means to him that the results must be interpreted with reserve and caution.

But here I am getting ahead of my story; later I shall have more to say about the significance of possible empirical data in this field. In this part, dealing with conceptual preliminaries, I must first turn to the opposition between adversary and nonadversary proof-taking.

B. Two Contrasting Modes of Developing Evidence

Let me then try to present in some detail what is involved in the opposition of the two proof-taking styles. Because the standard against which the two procedural arrangements are to be studied is to be their relative suitability to lead to the truth, I will focus my discussion on those facets that are most relevant to truth determination. Although my method here necessarily implies a degree of imprecision in depicting a much more complex phenomenon, for the sake of brevity I shall limit my discussion to the development of evidence through the examination of witnesses.

1. The Nonadversary Mode

Under this variant, there are no separate witnesses for the prosecution and the defense. All witnesses are evidentiary sources of the bench, and it is the judge, not the parties, who has the primary duty to obtain information from them. The parties are not supposed to try to affect, let alone to prepare, the witnesses' testimony at trial. "Coaching" witnesses comes dangerously close to various criminal offenses of interfering with the administration of justice.

At trial, the witness is first asked by the judge to present a narrative account of what he knows about the facts of the case. His story will be interrupted by questions from the bench only to help the witness express himself, to clarify a point, or to steer the witness back from the labyrinth of utter irrelevancy. Only when this very informal communication comes to an end does the judge proceed to the interrogation. But even this interrogation process may sometimes strike an Anglo-American observer as more of an informal conversation than a rigorous succession of questions and short answers. Some of the questions go to the credibility of the witness and serve, to a moderate extent, as a functional equivalent of cross-examination. When the interrogation from the bench has been completed, the two parties are permitted to address questions to the witness, in an attempt to bring out omitted aspects favorable to them, or to add emphasis to certain points on which testimony has already been obtained. In brief, the bulk of information is obtained through judicial interrogation, and only a few informational crumbs are left to the

parties.

But how can the judge effectively interrogate? It stands to reason that there can be no meaningful interrogation unless the examiner has at least some conception of the case and at least some knowledge about the role of the witness in it. Thus, under the nonadversary mode of developing evidence, the judge is typically given a file (dossier) containing summaries of what potential witnesses know about the case sub judice.

It is easy to see what lies at the core of the described manner of presenting evidence. The decisionmaker is active; he uses the informational sources himself. Information does not reach him in the form of two one-sided accounts; he strives to reconstruct the "whole story" directly.
After the proof-taking phase of the trial is over, the predominantly unilateral style of proceeding comes to an end. Then summations of facts and legal argumentation must be presented. Each side makes his own one-sided assessment of the evidence heard and advances his legal arguments. Exchange is permitted, but the defense must have the last word. Before the bench retires, the defendant is given the chance to make a final statement, which usually contains a potpourri of what can be classified as testimonial statements and exhortations to render certain decisions.

2. The Adversary Mode

Under this arrangement, each party calls his own witnesses and tries to obtain from them information favorable to his case. In order to do this effectively, the party must often prepare the witness for the court appearance; what is later to be testimony is often told in the lawyer's office first. After one party has elicited information from his witness, his adversary takes over the interrogation process. Now the reliability of the other party's witness will be questioned, or an attempt will be made to obtain from him reliable information in favor of the cross-examiner's thesis. And it is through such rival use of evidentiary sources that the factfinding stage of the trial unfolds.

It is true that this adversary presentation may be moderated by the intervention of the factfinder, if he happens to be a judge. He can ask questions that "cry out to be asked," or he may obtain immediate clarification of points from the perspective of his cognitive needs. But this judicial intrusion into an adversary development is necessarily limited. Too extensive an intervention may lead to reversal of the judgment. Apart from this consideration, it is exceedingly hard for a judge to ask meaningful questions, innocent as he must be of any prior knowledge of the case.

The essence of this second arrangement is obvious: The decisionmaker is passive, and the informational sources are tapped by two procedural rivals. The information about the facts of the case reaches the adjudicator in the form of two alternating one-sided accounts.

C. The Perspective of Experimental Witness Psychology

As I am interested in the problem of which of the two described arrangements leads to more accurate factual findings, the insights offered by experimental psychology become valuable. And it is just one of many melancholy facts unraveled by this relatively young discipline that all interrogation techniques exert some distorting influences. It is true that we operate tolerably well with rough approximations of what

scientists would demand of factfinding precision, and that the psychological pitfalls of the interrogation process can easily be exaggerated. Even so, in their most diluted form, psychological caveats contain sobering messages of humility vis-à-vis our sometimes revered and often overrated techniques of using witnesses. Paraphrasing Dr. Johnson's observation about the lady preacher, one would say that the remarkable thing is not how perfect one or the other arrangement is, but rather that it operates at reasonably tolerable levels.

Let me first allude to a number of problems with the nonadversary mode of developing testimonial evidence. It will be recalled that the judge must have some prior knowledge of the case in order to become an effective interrogator at trial. But his necessary prior knowledge is, at the same time, a considerable shortcoming from the epistemological point of view. Being somewhat familiar with the case, the judge inevitably forms certain tentative hypotheses about the reality he is called upon to reconstruct. More or less imperceptibly, these preconceptions influence the kinds of questions he addresses to witnesses. More importantly, there is an ever-present danger that the judge will be more receptive to information conforming to his hypotheses than to that which clashes with them. Although the resulting dangers to accurate decisionmaking are somewhat decreased by the fact that judges are usually aware of this distorting psychological mechanism, the shortcomings of this arrangement cannot be entirely eliminated.

Consider now the adversary manner of developing evidence. It is designed in such a way that the art of suspended judgment can be practiced for a much longer period of time by the adjudicators. They are not driven by the duty to lead an inquiry into forming early tentative theories about the facts of the case. This is, of course, an advantage of the adversary mode. There may be yet another one, although it is much less certain in terms of experimental witness psychology. It is possible that an interrogator "hostile" to the witness may be in a better position to bring out potential conscious or unconscious distortion mechanisms inherent in his testimony (e.g., inaccurate perception, faulty memory images, mystifications, etc.).

But all this is only part of the story: there are important cognitive costs of the adversary arrangements. As this darker view of the cathedral is seldom illuminated, let us explore various epistemological pitfalls that lie in the tactical wake of letting two adversaries control the development of evidence at trial. I do not propose here to start the reader on an extended tour of experimental psychology relevant to problems of the rival use of evidentiary sources. It is enough for my limited purposes to call attention to a few of the most salient shortcomings of this arrangement, assuming, at all times, that the parties are not engaging in unethical practices.

It may be in the narrow interest of only one party, or in the common interest of both, that some items of information which the witness possesses do not reach the adjudicator--even though their relevancy in the quest for the truth is beyond dispute. Evidence unsupportive of one's case has no function in the adversary litigation process, nor do matters which the parties decide to leave out of the disputation. And, as the witness is limited to answering relatively narrow and precise qeustions, much information may effectively be kept away from the decisionmaker who presumably is responsible for finding the truth within the limits of the charge. Accordingly, the factual basis for the decision may be incomplete.

But there are much more important costs of the development of evidence through rival use of informational sources. The damage to testimony inflicted by the preparation of witnesses is very serious. Parties can hardly be expected to interview the potential witnesses in relatively detached ways that minimize the damage of interrogation to memory images. During the sessions devoted to "coaching," the

future witness is likely to try to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions. Another important cost accompanies the cross-examination technique, which, with its challenge to the credibility of witnesses, is a two-edged sword. As Judge Frankel has noted, it is "to a considerable degree ... like other potent weapons, equally lethal for heroes and villains." Even with the best of intentions on the cross-examiner's part, reliable testimony may easily be made to look debatable, and clear information may become obfuscated.

Finally, observe the procedural position of the passive decisionmaker. It is old hat in experimental psychology that people display different cognitive needs; they try to reach knowledge and understanding along different paths. It therefore stands to reason that decisionmakers may sometimes require a different method of presentation than that of the clash of two one-sided versions, and that, at a psychologically crucial point, they would sometimes like to ask a specific question of a witness, which in their passivity they cannot do.

Even this brief digression into experimental psychology clearly shows that it is treacherous to make definitive pronouncements about which of the two manners of presenting evidence is a more effective tool in the search for the truth. Speculation about these problems is made even more intractable because the narrow epistemological problem involved can hardly ever be totally separated from a cluster of attitudes and values comprising the larger legal culture. It is thus easy to make impressive speculative arguments on either side of the divide separating the two great modern systems of criminal justice, apotheosizing one or the other proof-taking style. Can this debate be made more objective? More particularly, can empirical tests tell us which evidentiary arrangement, if either, leads to a better approximation of the evanescent reality that we seek to reconstruct in the criminal process? The answer to this question takes me from theoretical preliminaries to the core of my preoccupations.

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III. A GLANCE AT A LARGER EPISTEMOLOGICAL PROBLEM

A much debated problem has now hopefully been presented in a form susceptible of empirical testing. Quite unrealistically, let me assume that experimentation has proven conclusively that one manner of presenting evidence leads to more precise factual findings than the other. What would be the significance of such an empirical datum for the question of which evidentiary arrangement is preferable?

As the criminal process is not an untrammeled exercise in cognition, it does not take much imagination to realize that from the standpoint of other important values, an epistemologically inferior technique may on the whole be preferable. Preoccupation with the rationality of one component can be irrational when judged from the point of view of the entire scheme. But the perspective of such other values does not concern me here, limited as I am to the sphere of the quest for truth in the criminal process. Observing, then, the presentation of evidence in this narrow, artificial light, would the datum mentioned above not put an end to the debate about the relative merits of the two manners of presenting evidence? To answer this question I must, before closing, return once again to the object of proof-taking which I touched on in

a preliminary fashion at the beginning.

An argument can be made that as we move from the continental to the Anglo-American procedural system, a subtle change takes place. It used to be much more pronounced than it is in our century, but its contours are far from indistinct. Anglo-American decisionmakers are traditionally strongly attached to individualized justice and strive to arrive at the just result in the light of concrete circumstances of the case: Justice to them can hardly be separated from details. The continental decisionmakers are relatively more concerned about uniformity and predictability: they are much more ready than the common-law adjudicator to neglect the details of the case in order to organize the world of fluid social reality into a system.

This unequal value orientation leaves an unmistakable imprint on decisional standards in the two legal cultures. Those of the Anglo-American judge are traditionally in the form of precedents. It is typical of precedents that the decisional standard contained in them can hardly be translated into an abstract rule. What is important in factual details of such professional anecdotes can be approached from different perspectives, and hardly can be stated with precision. Meanwhile, standards of the continental judge are preferably in the form of precise rules, contained in authoritative texts. The consequence of this difference in standards for factual determination, and therewith for the object of proof-taking, is not difficult to see. The Anglo- American criteria of relevancy make the factual basis of a decision closer to social reality, where fact and value are intertwined. The foundation of the continental decision is drained of much of the concreteness of real life situations. It is frozen, as it were, into a relatively artificial world of technical relevancy, untainted by social conflict. Now, the more one is removed from the fullness of life, the more limited but also the more precise is our knowledge: there is one fixed perspective. On the other hand, the closer one remains to the complexity of real life processes, the more encompassing but also less certain is one's understanding: as in cubism, our sensations come from multiple viewpoints and there is more than one side to every story. The truth appears elusive, often a matter of feeling and intuition.

If I am right, and there is indeed a subtle discrepancy in the "realities" constituting the object of proof in the two systems, then it is only natural that methods of inquiry into such different realities need not be exactly the same. The continental system would tend to embrace a paradigm closer to that of scientific investigation. The Anglo-American system, where truth is so much a matter of perspective, would tend to espouse a variation of the dialectic method for the divination of the elusive truth.

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In light of this discussion, what is the significance of empirical data telling us that one mode of presenting evidence leads to more precise factual findings than another? It is obvious that this small empirical pied-à-terre does not take us very far, even within the limited horizons of procedural epistemology. This is not, however, to imply that efforts at gaining empirical information on evidentiary arrangements are of no consequence at all. Even when empirical information is available, the debate mentioned at the beginning of this article will, of course, go on. But it will be conducted on a partially more objective basis, with the help of at least some verifiable criteria. Claims like the Wigmorean one that "cross-examination is the greatest legal engine ever invented for the discovery of truth" could then be analyzed with more understanding and accepted less on faith. And, if one believes that a dose of skepticism about one's own system is healthy, this in itself is no small gain.