RATIONAL AND IRRATIONAL PROOF REVISITED

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It is interesting to examine fact-finding practices in culturally distant societies. These practices often seem thoroughly permeated by unreason, or else seriously defective in terms of the demands of rational inquiry. But if we look at them more carefully, placing them in their native cultural milieu, it usually emerges that they are not nearly as unreasonable as superficial inspection suggests. Our readiness to see them as tainted by unreason and radically different from our own, springs in large part from the failure to appreciate the degree to which the rationality of proof is culturally determined.[1] But as soon as the broad cultural perspective is introduced we also begin to wonder whether our own evidentiary arrangements are as free from admixtures of unreason as their theoretical sublimation suggests. The study of exotic forms of proof provides us with yet another benefit: it opens up vistas from which subtle differences among contemporary Western proof systems come into view that are otherwise barely noticeable. By studying culturally distant fact-finding practices and locating ourselves among different cultures, we come to understand somewhat better our own fact-finding arrangements.

1. *Confounding Fact and Law*

Our rationalist Western tradition requires that the distinction be maintained between fact and law. Evidentiary activity is directed toward establishing the truth of factual propositions, while

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[1] A debate rages among anthropologists on what to make of cultural practices that seem to us odd and illogical. Some consider these practices thoroughly discontinuous with modern rationality — different cultures, different rationalities. *See, e.g.*, MARSHALL SAHLINS, HISTORICAL METAPHORS AND MYTHICAL REALITIES (1981). Others argue that the capacity to confront particular tasks with simple practicality and ordinary common sense constitutes a pan-human characteristic — a cultural universal. *See, e.g.*, GANANATH OBEYESEKERE, THE WORK OF CULTURE: SYMBOLIC TRANSFORMATION IN PSYCHOANALYSIS AND ANTHROPOLOGY (1990). I do not presume to know enough to take a position in this larger controversy. But in my narrow field, the administration of justice, the discontinuities among legal cultures seem not to be so sharp as to warrant the conclusion that people are totally imprisoned by their way of being in the world, unreflectively acting out their cultural code.

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the legal dimension of adjudication concerns itself with the correctness or validity of legal standards to be applied to the facts determined. If fact-finding and "law-finding" are conflated, the object of proof becomes elusive, and the rationality of the fact-finding entreprise seems to be negatively affected.

These are relatively novel concerns, however. For long periods of European legal history, the objective of lawsuits was to "right" loosely defined wrongs. This objective resulted in a mode of adjudication that failed to differentiate between fact-finding and "law-finding." In German lands, for example, the distinction between factual and legal questions evolved only in the sixteenth century, *pari passu* with the "lawyerization" of the administration of justice, and the introduction of regular instruments of appellate review on the Roman-canon model.[2] Up until that time, the most widespread mode of proof — the oath — did not relate to the truth of specific facts, but rather to the global "justice" of claims and defenses. To characterize such amorphous lawsuits as involving the determination of material facts with the view to applying legal norms, or as relating an established norm to a found fact, is to project our analytical apparatus into an environment where it was as yet unknown. Nor did these pre-modern European adjudicators such as Molière's Monsieur Jourdain, fail to realize what they were doing; their judgments actually flowed from "gestaltist" assessments of what is proper or fitting in a concrete social situation.[3]

Was this mode of adjudication tainted by unreason?

The question cannot properly be answered *in abstracto*, without considering the enveloping socio-cultural context — tightly integrated social structures, the concept of law as a sense of propriety, the absence of a bureaucratic machinery of justice, and the like. When all these factors are duly considered, the fusion of factual and legal issues appears to have been a sensible and efficient arrangement. As Joseph Strayer has pointed out in discussing an early type of such amorphous proceedings, intruders were promptly punished, violence discouraged, disputes resolved, and

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2 *See* FRANZ WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 185-88 (1967). For the long-standing fusion of fact and law in English administration of justice, see, e.g., PAUL VINOGRADOFF, VILLAINAGE IN ENGLAND 337 (Oxford, Clarendon Press 1892).

3 Outside of Western legal culture, the failure to discriminate fact and law is still found in many places. *See* CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 189, 205 (1983).

"anyone could understand what was going on."[4] Even the avatars of rational decisionmaking, our social choice theorists, would subscribe to this assessment: they envisage conditions in which the search for diffuse justice can "maximize utilities."

Reflecting on the fusion of fact and law in ancient European adjudication invites another look at our dispersion of the two. Starting from the factual side of this divide, observe the great diversity in the character and the grain of knowability of facts we establish in adjudication. Admittedly, we often establish "brute" facts that belong to the external world. The search for such facts (e.g. the chemical properties of a product) is easily severable from value judgments and does not entail application of legal criteria. But the separation of the empirical from the evaluative and the juridical becomes more difficult when subjective "states of the mind" must be ascertained, such as intent, absence of consent, and the like. Whatever difficulties we confront in this regard are compounded when fact-finding necessitates complex, inter-subjective evaluations,[5] or when the course of future events must be predicted as increasingly happens in contemporary litigation. Establishing the "factual preconditions" for the application of legal norms shades in these situations easily into the search for the norm. Nor should it be forgotten that legal norms themselves can sometimes become an object of proof, as is the case with foreign law.[6] But the line between fact and law can also be uncertain from the legal side of the distinction, especially when open-ended norms, such as those on negligence or pornography, come into play.[7] The line is most tenuous in technocratic decisionmaking in which consequentialist calculations become critical aspects of legal analysis; as these calcu-

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4 JOSEPH R. STRAYER, *The Writ of Novel Disseisin in Normandy at the End of the Thirteenth Century, in* MEDIEVAL STATECRAFT AND THE PERSPECTIVES OF HISTORY 3, 7 (1971).

5 For example, if a person was confronted with a dangerous situation, did a situation arise warranting the deployment of defensive measures?

6 We should thus not be overly surprised that following Aristotle, Cicero included statutes (*leges*), precedents (res judicatae), and opinions of learned jurists among forensic means of proof. *See* CICERO, 1 DE ORATORE 281, 283 (E.W. Sutton trans., Harvard Univ. Press 1967). In the court practice of the *ancien régime*, moreover, it was standard practice for litigants to prove all legal norms other than those of Roman law.

7 Consider, for example, that the sexually explicit character of an object is not found but rather "constructed" with an eye to the applicable standard of what constitutes pornography. No wonder that lawyers reading the opinion of a court with power to pass on factual as well as legal questions often find it hard to establish whether the court has announced a rule of law or resolved an issue of fact.

lations proceed, fact-finding becomes truly inseparable from the search for the law. All things considered, then, our separation of fact and law, far from implicating the correlation of two different realms of being, is more of a rationalist aspiration than a decision-making reality.

It is tempting to suggest that the Anglo-American variant of Western adjudicative systems comes closer to its "diffuse" ancestor than the continental variant. The long-standing love affair of continental judiciary with textually fixed, abstract rules is well known. The civil service judiciary puts a high premium on cross-case consistency, even if it comes at some cost to finely tuned, individualized justice. As a result, the factual foundation of the continental decision — the matter that triggers the application of the legal norm — tends to be quite distant from the "thickness" of real life, closely edited, so to speak, to fit the artificial world of legal relevancy. And, as a result, adjudication can be approximated with some plausibility to an enterprise of joining an empirical situation to a jural principle.

In the Anglo-American judicial apparatus, on the other hand, the paradigmatic decisional standard is the precedent — a factually rich professional anecdote from which abstract rules cannot easily be distilled. Individualized justice is more highly valued than on the Continent, and this orientation further complicates a sharp dividing line between the quest for the law and the search for the facts. Most importantly, the role of the jury is not strictly limited to the "what happened" aspect of litigation. In criminal cases, for example, jury acquittals can be based on the impulse to pardon, or on vague intuitions of what is just under the circumstances, despite judicial admonitions to the contrary. In short, the foundation of common law verdicts remains closer to social reality where fact and value mesh.[8] The rationalist model of adjudication does not "fit" decisionmaking patterns as well as in the more differentiated and bureaucratized machinery of justice on the Continent.

It could be argued on other grounds that European procedure was threatened with "irrationality" well into the eighteenth century. The object of proof, even ultimate facts, could include fantasist matter. In witchcraft prosecutions, for example, fact-find-

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[8] There are other grounds, herein unexamined, for doubting whether the line between law and fact is drawn the same way in Anglo-American and continental legal traditions. *See, e.g.,* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 647, (5th ed. 1988).

ers were required to establish the existence of the contract with the devil as a necessary element of the *crimen magiae*. Lawyers crafted elaborate doctrines upon outward signs from which this contract could be inferred.[9] This rightly impresses us as "irrational." A basic prerequisite of rational fact-finding is that imaginary facts should not be permitted to sneak into the object of proof. But can we really be sure that "facts" we seek to establish are always free from social illusions? Today's truths, tomorrow's superstitions. Psycho-analytical findings we routinely employ in many types of litigation, for example, might someday soon be accorded a "fantasist" status.[10]

2. *Appeals to divinity and to divine punishment*

As already intimated, medieval lawsuits were mainly decided by oath-swearing. Those who took the oath were not witnesses in our sense — that is, individuals swearing to the truth of factual propositions. Rather, they swore to their belief in the rectitude of the cause advanced by the party who relied on them. These "oath-helpers" (*conjuratores* or *testes de credulitate*) strike us as rationally defective means of proof. But this characterization attaches with even greater force to trials by ordeal that rested on the belief that deity could be induced to intervene in adjudication and resolve the question of right and wrong.[11] Because of the employment of such exotic "truth revealing" devices, the prevailing convention dismisses medieval administration of justice as irrational. Like denizens of the Tristes Tropiques, medieval people seem to have been thoroughly afflicted by primitive mentality. Sharp, perhaps

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[9] On these signs, including traces of sexual intercourse with the devil, see HEINRICH INSTITORIS & JAMES SPRENGER, MALLEUS MALEFICARUM, pt. III, Question XV at 473-80 (Montague Summers trans., Arrow Books 1971) (1928). Note, parenthetically, that the English translation of this fifteenth century prosecutorial handbook, published in New York in 1971, follows the mistaken habit of referring to the first co-author as Heinrich Kramer.

[10] Leave to one side that the meaning of social "illusion" is complicated by the recognition that the life-world is socially constructed. *See infra* note 26.

[11] It was believed, for example, that supernatural forces will assist an innocent litigant to walk over red-hot ploughshares without sustaining injury (*examen vomerum ignitorum*). While most ordeals were "unilateral," some involved both parties. Contrary to widespread belief, however, judicial duel was not always regarded as a magical test inviting the intervention of deity. *See, e.g.*, ST. THOMAS AQUINAS, 3 SUMMA THEOLOGICA, seconda secondae, ques. 95, art. 8, at 1600-02 (Fathers of the English Dominion Province trans., Christian Classics 1981)(1911). *See* HEINRICH BRUNNER, 2 DEUTSCHE RECHTSGESCHICHTE (1892)(the best source on Eurpean ordeals).

incommensurable contrasts seem to exist between them and us; they were incapable of reacting to adjudicative problems with simple practicality and ordinary common sense.

A somewhat different picture emerges, however, if we place these devices in the context of early medieval life and consider them as an integral part of the existing socio-judicial system. Most disputes or misdeeds were then not subjected to a specialized justice machinery at all. Instead, as part of their everyday business, kin-groups and local communities engaged in what we might call "alternative dispute-resolution." In the course of this communal action, much as in some present day tribal cultures, the need for information was satisfied by communications from people who knew something about the event that precipitated the community to act. In other words, "natural" truth-revealing methods were employed, and so was the common sense as it existed in that historical period. The grist for the judicial mill was only the residue of cases whose importance transcended or whose resolution evaded the local community. And in regard to this residue, oath-helpers and magical tests should not be hastily dismissed as incapable of producing outcomes we would consider as accurate today.

First, consider the oath-helpers. It is unlikely that they were ready to accept divine punishment by falsely swearing to the justice of a litigant's cause. After all, the belief in supernatural forces was part of social reality in medieval communities. Persons willing to take an oath to assist a litigant must have known him well, or possessed sufficient information to persuade themselves of the rightness of litigated issues. It is even possible that they conducted personal inquiries prior to deciding whether to make themselves available as *conjuratores*.[12] If we nevertheless persist in regarding oath-helpers as an irrational mode of proof, we should also doubt the rational character of English royal justice well into the sixteenth century. Remember that original jury trials were not instructional; no evidence was taken in their course. The self-informing Angevin jury would appear before the royal judge only

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[12] Nor should it be ruled out that at least some *conjuratores* were individuals capable of perceiving "what is right" in a situation, rather than individuals informed about empirical particulars of the case. If so, their role was close to that of witnesses in Muslim adjudication. For interesting remarks on "normative witnessing" in traditional Islamic administration of justice, see, e.g., GEERTZ, *supra* note 3, at 190-91. I do not consider here a species of "oath-helpers" who can easily be likened to our character witnesses; such procedural participants do not strike us as strange truth-revealing devices.

to answer his question of which side should win. The rationality of the system hinges on whether jurors knew something about the event *sub judice* because of their informal inquiries, or because they witnessed the event in question.

Even in evaluating the character of trials by ordeal we must tread more carefully, sensitive to the enveloping cultural milieu. For starters, it should be recognized that magical tests were administered only when the required number of oath-helpers was missing, or the dispute could not be settled in any other way.[13] Appeals to the deity were hence contemplated as a means of last resort — an act of desperation, as it were — when the nagging uncertainty persisted about the right outcome of litigation. As we shall presently see, this is a situation in which even contemporary philosophers disagree about what the rational course of action should be. Consider, in addition, that the prospect of divine intervention must have exerted a powerful psychological pressure on the litigant who knew he was in the wrong. He must have felt impelled to desist from pursuing a claim, or to confess. If we lose sight of this psychological pressure, it is because we no longer believe in the ongoing penetration of the world by sacred forces — a belief, however, that constituted a living social reality to medieval men and women. Even if the prospect of divine intervention did not cause the litigants to make dispositive admissions, the preparations for the administration of magical tests — solemn incantations in particular— must have produced "demeanour evidence" (e.g., the agony in those who felt guilty, or the serenity in those who felt innocent) that is still widely used for fact-finding purposes. Demeanour and body language may have influenced the calibration of the tests' severity, or the manner in which their results were checked, thereby opening up another avenue to litigational outcomes to which we would still subscribe.[14] Contrary to initial impressions, then, magical forms of proof could produce correct results, so long as they were supported by a world view that has not removed the sacred from everyday life, or broken the continuity between social and cosmic orders.

The predicament of medieval adjudicators asked to decide with insufficient knowledge stirs uneasy shadows; it flashes up,

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[13] *See* ARTHUR ENGELMANN ET AL., A HISTORY OF CONTINENTAL CIVIL PROCEDURE 154-55 (Robert W. Millar ed. & trans., 1927).

[14] *See* Rebecca V. Colman, *Reason and Unreason in Early Medieval Law*, 4 J. INTERDISC. HIST. 571, 589 (1974).

again and again, toward our own predicament. Are our responses to this situation free from rational absurdities? In lieu of mythical conceptions, science now asserts primacy in making sense of the world. So we appeal to scientific rather than divine expertise for intervention. But a paradox looms in this appeal, most obviously when experts testify about subjects beyond the fact-finder's ken. Observe that the fact-finder is urged to use experts because he lacks the necessary skill or knowledge, but that he is also expected to critically evaluate their testimony, even to resolve conflicts among them. But how can a person unsure of basic concepts of a discipline penetrate its complexities or arbitrate disputes between its high priests? No wonder that our judges can also be driven, when confronted with such Herculean tasks, to rely on the experts' demeanour, or similar, hardly compelling "outward signs" of the truth.

Oddly enough, this reliance is not without rational support. Theorists of "rational choice" tell us that it is sometimes more rational to be irrational than rational. Where the best decision is not sufficiently obvious, they maintain that the proper course of action is to leave the outcome to chance.[15] It is then the calculations of reason, no longer the voice of God, that induce us to accept an accidental result. And if a coin's toss can do as a means of decision in this situation, why not an expert's authoritative comportment on the stand or his personal idiosyncrasy — a psychoanalyst's impressive German accent, for example? To be rational is to try to bring about the best result possible under the circumstances.

3. *Logic and Reasons of the Heart*

In the adversary process of classical Rome, witnesses were strange creatures. They testified not only to the facts of the case, but were also expected to express solidarity with the party who called them to the stand.[16] Appeals to the decisionmaker's sentiment were not excluded from testimony, and the presentation of evidence was contaminated by advocacy. Argument was classified as a means of proof, and valued more than evidence in our sense of

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[15] "As in Kant's critique, the first task of reason is to recognize its own limitations and draw the boundaries within which it can operate." JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 17 (1989).

[16] *See, e.g.,* GIOVANNI PUGLIESE, *La Preuve dans le Proces Romain de l'Epoque Classique, in* 16 RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L'HISTOIRE COMPARATIVE DES INSTITUTIONS 281, 282, 312 (1964).

the word.[17] To have a persuasive person as a witness on one's team was often a matter of decisive importance. This fusion of evidence and argument, of logic and emotion, appears to us a lapse in rationality of a legal culture that is otherwise admired for its intellectual sophistication. The problem seems augmented by the unexplained nature of the court's judgment. Judges were not obligated to explain their decisions, and its rectitude could not be checked by examining reasons advanced in its support. It thus remains problematic whether the classical Roman court, exposed to the melange of evidence and rhetorical argument, could properly tell apart true from good forensic stories.

Were truth-conducive properties of Roman litigation trumped by other values? Or were Roman witnesses a transitory form from oath-helpers to our witnesses? I need not enter into this controversy. I note Roman "global" testimony only because it underscores our strongly negative reaction to procedural arrangements in which material for rational calculation is mixed and mingled with material addressed to the sentiment. The melange of logic and emotion appears to us detrimental to accurate fact-finding.

And yet we permit it.

Consider Anglo-American jury trials. At the proof-taking stage, counsel take great pains to eliminate information capable of unduly engaging the jurors' emotions, meticulously pruning evidence of argument and of opinion. At the close of evidence, however, they spread the peacock feathers of their rhetoric. Having first displayed great concern for the jurors' emotional vulnerability, they now openly play on the chords of the jurors' emotions. And as the jury retires to deliberate, it has been exposed, albeit serially rather than in connectionist fashion, to a mixture of material for logical inference and for "the logic of sentiment." Moreover, as with Roman judgments, the jury verdict is unexplained. It thus remains uncertain whether the jurors' decision has proper support in canons of valid reasoning, or whether the jury was unduly swayed by effective rhetoric with weak moorings in evidence.

Admittedly, we have come a long way from the days of Cicero. Today's decisionmaking material is conceptually much more differ-

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[17] Argument was termed "external" or "artificial" proof, with the adjective "artificial" approvingly referring to the "art" of the speaker. On the multiple meanings of *argumentum* in classical Rome, see J. PH. LEVY, *La Formation de la Théorie Romaine des Preuves*, *in* STUDI IN ONORE DI SIRO SOLAZZI NEL CINQUANTESIMO ANNIVERSARIO DEL SUO INSEGNAMENTO UNIVERSITARIO, 1899-1948, 425 (E. Jovene 1948).

entiated, permitting focus on "the facts of the case" — these small stubborn foot soldiers of veracity. Testimony not only stands apart from argument, but it is also more detached from the personal status of the witness, or from his moral character, than was the case in classical Rome. On the other hand, however, our fact-finding arrangements still remain vulnerable to criticism by sombre rationalists intent on securing precise analysis of evidence. They favor a cool calculation of probabilities, a calculation that is unaffected by "messy" processes of inner psychological acceptance. In other words, despite prevailing conceptions on optimal truth acquisition, we allow ample space for decisionmakers to deploy "reasons of the heart unknown to reason."[18]

4. *Epistemology and Common Sense*

Evidence scholars tend to insufficiently appreciate these discrepancies between prevailing epistemological theories and fact-finding for the purpose of adjudication. Much as the capacity of people in distant cultures is underestimated to react with practical common sense to problems that arise in administering justice, so is the impact on adjudication overestimated of dominant epistemological currents. This is easy to understand: underestimating the role of the pre-theoretical is a theorist's natural failing — his *deformation professionelle*. It is thus fitting to close these remarks on proof and culture by demonstrating the power of common sense in the eminently practical activity of adjudication.

The tenacity of common sense has already been illustrated by the example of proof practices of early medieval society. We have seen that a mythical conception of the universe then prevailed, and with it the belief that deity could be induced to reveal the truth in litigation. This belief, in turn, affected the proof "technology" of the period — most directly trials by ordeal. But as we have also seen, medieval people did not unreflectively act out their cultural schema. Although divine relevation of the truth was part of the epoch's "epistemology," they did not ask Divinity to produce *all* forensic evidence. On the contrary, many truth-revealing devices were employed that are still considered legitimate means of acquiring knowledge, despite the wide gulf that separates our contempo-

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18 *Le coeur a ses raisons que la raison ne connaît point.* BLAISE PASCAL, PENSÉES SUR LA RELIGION ET SUR QUELQUES AUTRES SUJETS 163 (3d ed. 1960).

rary common sense from its medieval ancestor.[19] In short, "mythical" forms of proof were not nearly as'important as it appears to one exploring connections between dominant conceptions of the universe and fact-finding arrangements.

The relationship between scholastic epistemology and the so-called "numerical proof" system that emerged in the Roman-canon procedure of the twelfth century is also distorted. Scholastic philosophers believed that knowledge springs from authoritative sources rather than from direct observation or empirical inquiry. This view on the sources of knowledge suggests a possible connection to Roman-canon rules of proof — the rule, for example, requiring two eyewitnesses or the defendant's confession as a prerequisite for a criminal conviction. If a confession or the testimony of two eyewitnesses was obtained, it can be argued the judge would proceed to automatically convict the defendant without weighing the evidence. This automatism seems to reflect scholastic attitudes toward knowledge. Knowledge is secured by fidelity to authoritative rules, rather than by personal inquiries or by inference from data supplied by the senses.[20] Admittedly, this parallel between scholastic epistemology and the "numerical" proof system is tempting to draw. A careful reading of primary sources reveals, however, that the architects of Roman-canon proof never contemplated that judges should merely count rather than evaluate evidence. Nor did an automatic application of evidence rules develop in practice.

In designing practical arrangements for their budding inquisitorial procedure, the architects of Roman-canon proof, if interested in philosophy at all, were much more attracted to fragments of Aristotelian epistemology that stressed the role of sensory perception in cognition than to the abstractions of schoolmen.[21] Truth

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[19] Remember the assessment of the litigants' demeanour in trials by ordeal, as well as the socio-psychological pressures on them to make dispositive admissions.

[20] The belief that the original Roman-canon proof system converted the judge into an automaton who counted rather than weighted evidence is widespread among evidence scholars. *See, e.g.*, JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 6-7 (1977); BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 3 (1991). For an example of the argument linking this automatism to scholastic philosophy, see J. D. Jackson, *Two Methods of Proof in Criminal Procedure*, 51 MOD. L. REV. 549, 550, 552 (1988).

[21] A widely influential fourteenth century commentator, Baldus de Ubaldis, even ridiculed aspects of the potentially applicable scholastic philosophy — the insistence, for example, on the impossibility of proving the negative. *See* Norbert Horn, *Philosophie in der*

as revealed by the senses was extolled by these founders of Roman-canon proof so much that their scheme, though colored by scholastic discourse, exhibits a pronounced proto-empiricist flavor.[22] Among sources of cognition, for example, pride of place was given to the judge's direct sensory experience; what he sensed directly needed no proof. Rules regarding witnesses were expected to be applied flexibly, always having regard to whether the testimony "moves" the fact-finder's mind. Demeanour evidence was greatly appreciated and noted in a special dossier. "It is impossible," wrote one of the greatest Roman-canon authorities of the *trecento*, "to devise true and certain rules on the reliability of arguments and witnesses, because of the varying nature of men, the multiplicity of their dealings, and the unknown veracity of witnesses."[23] The only "numerical rule" that was meant to be rigid in application was the ban on deciding factual issues on the testimony of a single witness. By far the greatest part of the massive Roman-canon evidence law consisted of non-binding "presumptions." They expressed much of what passed as common sense in the period, including its prejudices concerning gender, social class, religious affiliation, and the like.

So much for theory.

Whatever we can glean about court practice from *consilia* and similar sources suggests that judges were not automatons counting evidence. For example, it was enough for a judge to find inconsistency in the testimonial account of an eyewitness to refuse to apply the two eyewitnesses rule. Conflicting testimony was as common an occurrence then as it is today, and in resolving the conflict the judge greatly relied — as expected by the founders of the system — on the demeanour of witnesses. Greater numbers of witnesses mattered only when other things remained equal.[24] Reliance on authority in the acquisition of knowledge played a role mainly in the sense that the elevated social station of a witness counted more

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Jurisprudenz der Kommentatoren: Baldus Philosophus, in 1 Ius Commune 104, 138 (Helmut Coing ed., 1967).

[22] For a discussion of these foundational problems, see Mirjan Damaška, *Hearsay in Cinquecento Italy, in* 1 Studi in Onore di Vittorio Denti 59, 61-66 (1994).

[23] Walter Ullmann, *Medieval Principles of Evidence*, 62 Law Q. Rev. 77, 83 (1946) (quoting Baldus de Ubaldis).

[24] "Inter probationes adversantes," Baldus advises the judge, "sequi conscientiam suam." 4 Baldus de Ubaldis, Consiliorum sive Responsiorum Baldi Ubaldi Perusini 455 n.2 (Venice, Nicolino 1590).

in assessing the weight of his testimony than our present sensibilities find appropriate or justified.[25]

In summary, Roman-canon proof is seriously distorted when depicted as a rigid "numerical" arrangement. This holds true for the whole historical period in which scholastic views dominated the European thought on sources of knowledge. Long before empiricism and the inductive method dethroned scholasticism from its dominant position in epistemology, "inquisitorial" judges searched for the truth by seeking to ascertain traces that remained after an event in human memory. And like Umberto Eco's brother William, they also followed traces in the external world, engaging in "occular inspections" and drawing inferences from data supplied by the senses. On the whole, Roman canon proof rules were no more than minimal evidentiary requirements for the court's findings—a safeguard, we might say, against judicial arbitrariness.

But let us briefly return to the present.

We live in a period of transition in which discrepancies between dominant epistemological theories and common sense practices are again manifest. In fact, a radical discord is emerging between existing proof practices and influential epistemological currents. I say "radical" because the discord in question concerns the very foundation of fact-finding activity. Observe that fact-finding makes no sense unless a variant of the view is embraced that assumes some sort of a "match" between our statements about the world and the world itself. Failing this assumption, a trap door opens from under all Western evidentiary systems. Ordinary common sense takes this match for granted, of course, but not much of contemporary philosophy that treats "correspondence" theories of the truth with utter contempt.[26] Some influential "post-modern" philosophers go even so far as to posit a complete disjunction of language from external reference — to ascribe to words the capacity to represent reality — even if socially constructed, is branded as a vulgar illusion. So, then, must be our attempts to reconstruct reality in the courtroom.

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[25] "Ex qualitate testibus non minus quam ex numero informabit iudex animum suum in totum." *Id.*

[26] Even those philosophers who cling to the ideal of truth as a "match" or as "fittingness", often imagine truth as a "fit" of one socially constructed version of the world with other versions, rather than as a fit of a version to the world. *See, e.g.*, NELSON GOODMAN, WAYS OF WORLDMAKING 138 (1978). The covenant between word and world seems to have been broken.

This radical break between common sense and theoretical thought need not last very long, however. Presently fashionable theories could soon prove to be oversubtle fads, or even a form of intellectual pathology, without impact on such eminently practical activity as is fact-finding. This cannot confidently be said, however, for another challenger to common sense—modern science. Scientific methods have already penetrated into the courtroom, and their importance for factual inquiries is growing by leaps and bounds. But even as we salute this development as raising the "rationality quotient" of fact-finding, we must recognize tensions between proof arrangements based on common sense and those suggested by scientism. These tensions are likely to grow as more powerful scientific instruments became available.

Perform a small thought-experiment to begin to see what is at issue. Imagine that your are a fact-finder. Your intuition tells you a witness is lying, while the expert on an improved, more "objective" lie-detection method tells you the opposite. At what point do you abandon your belief, or your common sense inferences because of conflicting scientific evidence? As presently constituted, the administration of justice calls for information about concrete, unrepeatable events and diverse, often incommensurable qualities. In assessing this information, fact-finders strongly rely on common sense and on whisperings of intuition. Science, on the other hand, relies on quantified regularities; its messengers in the court room need not have any knowledge about the concrete circumstances that brought about the lawsuit. They may even pride themselves on conveying "counter-intuitive" information. Make no mistake; science steadily elbows common sense away from its privileged position among mechanisms with which to make sense of our life-world.

To be sure, our ordinary processes of cognition are still well-entrenched and in widespread use in court. The fact-finding component in the whole of adjudication should not be over-emphasized. Expert opinion, moreover, is still evaluated by such old-fashioned mechanisms as are inferences from the expert's behaviour on the stand. But as science continues to establish itself as the overall arbiter in affairs of everyday life, we might gradually begin to lose our present confidence to contradict or to critically assess scientific insight. Science may thus end up not only completing the removal of the sacred from the world, but also by completing the removal of common sense from adjudicative fact-finding.

How these potential developments relate to the Western rationalist proof tradition is not altogether clear. But this is a theme for another occasion.