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FACT SKEPTICISM AND THE JUDICIAL PROCESS

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When Jerome Frank made his devastating analysis of fact-finding processes in *Courts on Trial*, it was high time to smash some icons. He proved an effective iconoclast. He checked the jargon of the law against what he saw with his own eyes and recorded his shock at the haphazardness of our hallowed ways. His bold irreverence stirred many a lawyer into a painful awareness of how inadequate are the accepted processes for eliciting facts. No one can now think of fact-finding without immediately being troubled by visions of ancient jousts or of litigants weighed on scales. His forceful thinking has done much to overcome the force of habit that binds men to ancient ways, however superstitious their origin and however irrational their perpetuation.

It is heartening that so many now stand ready to mend these ways. The question now is how. Perhaps the most effective way to advance upon that question is through interchange of the ideas and experience of professors, judges, and lawyers as at the recent round-table of the Association of American Law Schools,¹ organized to discuss

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1. This paper was first presented at the Jurisprudence Round Table on Jerome Frank's Fact Skepticism, sponsored by the Association of American Law Schools as a memorial to Judge Frank at its meeting in San Francisco, December 29, 1957. It is an *aperçu* rather than an exhaustive study, in conformance with a fifteen-minute time limitation and the prescriptions that "fact skepticism" be defined in terms of the main themes of Judge Frank's book, *Courts on Trial*, and that each address at the Round Table "(a) Give one or more examples of the way the substantive rules in a specific field of law already reflect 'Fact Skepticism,' and (b) give one or more examples of the way the substantive rules in the same field might profitably be changed to reflect the insights of 'Fact Skepticism.'"

various aspects of Jerome Frank's fact skepticism. Perhaps in time such meetings will lead to concrete revisions.

The problem is that the facts are forever gone and no scientific method of inquiry can ever be devised to produce facsimiles that bring the past to life. The judicial process deals with probabilities, not facts, and we must therefore be on guard against making fact skepticism our main preoccupation. However skillfully, however sensitively we arrange a reproduction of the past, the arrangement is still that of the theater. We acknowledge as much when we speak of re-enacting the crime or the accident or perhaps some everyday event; we know better than to speak of reliving it. The most we can hope for is that witnesses will be honest and reasonably accurate in their perception and recollection, that triers of fact will be honest and intelligent in their reasoning, and that appellate courts will frame opinions with enough perspective to guide others in comparable fact situations and preclude their disputes from festering into litigation. As Max Radin² and Edmund Cahn³ have reminded us, our objective should be a settlement of present controversies that will restore litigants to normal living much as a hospital restores the ailing and the injured.

Once we recognize perfect fact reproduction as an illusion, however, it does not follow that gross imperfections in our so-called fact-finding processes are a necessity. Still we should regard any a priori conclusions, including Jerome Frank's, with his very skepticism; we gain nothing by generalizing from insufficient data. Objective studies such as the jury project now under way at the University of Chicago should yield new insights as to how rational our present processes are. More light on the motives, methods, and reasoning of triers of fact should help us to know whether fact determinations for the most part emerge in an aura of conscientious and intelligent appraisal.

But can we ever learn enough when triers of fact do not articulate the reasons for their determinations? Ideally they should inform the losing litigant why he lost, why he is now to be deprived of his property or liberty or even life, what the specific facts were that determined his case. A litigant who lost on X would then no longer speculate vainly on why he lost. He might be able to show that X was an irrelevant fact, or perhaps an unsupported conclusion representing the trier's fireside justice.

At present, in trials before a court sitting without a jury, the findings frequently no more disclose the basis of decision than would

2. RADIN, *LAW AS LOGIC AND EXPERIENCE* 62, 78, 95, 146 (1940).

3. Cahn, Book Review, 59 *YALE L.J.* 809, 810-11 (1950).

a general jury verdict. Why is there such reluctance in the trial court to reveal the actual basis of decision? Why do trial judges so frequently adopt general, all-inclusive, or conclusionary findings prepared by winning counsel? Are they too busy to articulate the actual basis of their decisions? Are they intent on blocking avenues to reversal? Or is it that losing counsel fail to make a challenge of proposed findings that would compel a clean articulation of what was decided?

Special interrogatories in jury trials, as well as specific findings in court trials, have the appearance of constructive reform. It would seem to make sense that judges, and the lawyers on whose proposed findings they so largely rely, should be able and willing to draft special interrogatories skillful enough to disclose the actual basis of decision. The blunt reality is that they seldom do so. Thus, even though special interrogatories are permissible in California,⁴ they are seldom used. What accounts for the uneasiness about them? Is it that many trial attorneys, preoccupied with results, are content with general verdicts on some mathematical speculation that their chances of success are as good or better when determination of a case reveals only the result and not the basis therefor? Is it that they are loath to invest the time and effort necessary to prepare searching interrogatories? Do they perhaps feel that juries would adapt their answers to special interrogatories to accord with a predetermined conclusion? Are they apprehensive that more often than not such interrogatories would serve only to confuse juries and become another fertile source of reversible error? Are they skeptical of new opportunities for mystification because of the present multitude of lunatic communications that pass as instructions from judge to jury? Or do they possibly fear that insistence on fine articulation would create new rituals of magic words akin to the old forms of action?

The explanation of the present resistance to the articulation of fact determinations may be some one or all of these reactions and something more, a sense that perhaps the main problem in fact-finding is not whether fact determinations emerge in an aura of conscientious and intelligent appraisal, let alone whether they are articulated, but whether the evidence is presented in an aura of full disclosure of whatever is reasonably relevant to intelligently stated issues.

Here actual practice has for so long been so lamentably short of the ideal that there is widespread agreement that reform is long overdue. Unfortunately there has been all too little will to bring it about, despite the splendid groundwork of Professor Morgan and the American Law

4. CAL. CODE CIV. PROC. ANN. §§ 624, 625 (West 1955).

Institute in the *Model Code of Evidence* and the Commissioners on Uniform Laws in their proposed *Uniform Rules*. Perhaps the recent rapid development of pre-trial and discovery procedures, born of necessity to rescue courts from the welter of ever-mounting litigation, augurs well for other reforms.

We should be mindful, however, that such reforms may sometimes ironically do more harm than good unless there are attendant reforms in substantive rules. At present, triers of fact can achieve a rough justice by circumventing rules long out of tune with community values while appearing to enforce them, letting legally irrelevant considerations prevail over the facts presented or passively accepting an incomplete presentation. The dilemma is that such circumvention corrupts fact-finding.

“Perhaps in no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. The withered dogma that divorce can be granted only for marital fault, variously and eccentrically defined from state to state, is rendered still more irrational by the widespread rule that recrimination is an absolute defense. The result has been a triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys with the tacit sanction of the courts.”⁵

Such corruption can be dispelled only by reforms that begin with the substantive rules. More would be lost than gained by a reform of fact-finding that would only compel righteous adherence to the wrong rules.

Likewise in personal injury law the geometric growth of litigation has compelled scholars to re-examine substantive rules that are beginning to show cracks. For the most part they rest on the theory that liability is based on fault. In our ultra-hazardous age, however, some scholars are reasoning that this should give way in many areas to strict liability. They observe that juries, responsive to the needs of accident victims, may in fact impose liability without fault by adapting to that end instructions on such fluid concepts as proximate cause, negligence, last-clear chance, *res ipsa loquitur* and the like.

If we are moving toward an expansion of strict liability, we should do so openly, not by declarations of fictitious negligence or denials of actual negligence. If we are not willing to do so openly, then of course

5. Traynor, *Law and Social Change in a Democratic Society*, 1956 ILL. LAW FORUM 230, 236.

fictions have a certain utility in circumventing unrealistic rules. But why not do so openly and thereby impose uniform operation of the law? Again, any reform should begin with substantive rules. Again, we would lose more than we would gain by a reform of fact-finding that would only compel righteous adherence to wrong rules.

Whatever the drift toward strict liability in some areas, personal injury cases nevertheless still turn in the main on an issue of actual negligence. Sometimes, however, as in *Summers v. Tice*,⁶ it is impossible for the plaintiff to present enough evidence to establish that it was more probable than not that the negligence of any one or more of several defendants caused his injury, even though all were within the field of causation. The court there held that both of two negligent hunters could be held liable for plaintiff's injury, although the act of only one could have been the cause. Concerned lest plaintiff be deprived of a remedy against either hunter, it impaled them both by shifting the burden of persuasion to them even though their mystification matched that of plaintiff. In effect it ruled out the fact-question of causation, thus obviating any occasion for fact skepticism.

At the other extreme, a court may be so imbued at the outset with fact skepticism as to a conceivably provable fact that it arbitrarily assumes so large a hazard of untrustworthiness in any evidence to establish causation as to rule out any cause of action. Thus in cases involving prenatal injuries or mental suffering, the courts have been so concerned lest blameless defendants be subjected to liability that they have until recently denied any remedy for such injuries, even when the plaintiff was prepared to show a causal relation between the defendant's conduct and the injury. They have made the fact of causation irrelevant, not because of confidence that the defendant was at least in the field of causation, but because of skepticism that he was in it at all.

Courts as well as legislatures have sometimes also evinced a strong fact skepticism in such formulas to preclude evidence as the Statute of Frauds and the Parol Evidence Rule. Sometimes a moderate skepticism has combined with a strongly entrenched public policy to preclude evidence, as in the absolute privileges that attend the law of defamation and other torts and in such conclusive presumptions, applied with varying rigor, as the one that a child born to a married woman is legitimate. In either event the risk of erroneous determinations of fact has been so serious as to engender rules that preclude a litigant from even attempting to prove his case.

6. 33 Cal. 2d 80, 199 P.2d 1 (1948).

It would clarify our thinking to realize that so-called ordinary cases differ only in degree from these extreme cases where the uncertainty of the facts is so overwhelming as to compel courts to dispense with their litigation altogether. In certain areas they may be closer to the extreme than we have customarily supposed. We might do well to note those issues of fact that chronically engender litigation and inquire whether the risk of erroneous determinations is so serious that we should dispense with their litigation also. Salient among these is the issue of fault in motor vehicle cases, now the main preoccupation of trial courts. When cars collide with each other or with a pedestrian, we ordinarily know who was driving and who was hurt, but how accurately do we ascertain the facts beyond that? Can we accept with any assurance conclusions as to causation that give no indication that the triers of fact made a discriminating determination that the injury was caused by negligent conduct when it is in a context of an otherwise non-negligent activity? Even assuming that they are aware of the necessity of isolating negligent conduct from such a context, what assurance do we have as to the rationality of the *ad hoc* standards of care by which they measure conduct?

The thought pervades in these questions, as in those posed earlier, that at least in some areas our first concern should be with the substantive rules. Of course we want rational fact-finding processes. There can be little quarrel with the triple objective of conscientious and intelligent appraisal of the evidence, a reasonably articulated explanation of why the losing party lost, and rules of evidence that facilitate disclosure of whatever is reasonably relevant to intelligently stated issues. If we achieve these objectives without making attendant reforms in the substantive rules, however, we may accomplish too much too early. For given our chronic inertia, archaic rules might then persist, immune in the glare of eminently sane processes from that quiet distortion that presently adapts them to the needs of a rough justice.