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Facts, Evidence and Legal Proof

By Lee Loevinger

Law, in the traditional view, is a set of rules for the guidance of conduct and the determination of controversies. While the philosophers have debated whether the rules spring from divine pronouncements, the discoveries of man's reason, the lessons of experience, social compacts, the dominance of force, or other sources, they have not doubted that law is a means of governing social conduct and settling personal disputes by the application of recognized or established principles to the "facts" of specific situations. The difficulty in finding or formulating the proper rule to govern a given set of "facts."

Taking issue with the traditional view during the last quarter of a century is a group of legal thinkers that has usually, but roughly, been classified together as "legal realists." These have tended to minimize the importance of general principles as determinants of legal action and to emphasize the importance of the "facts" of the individual case. Although few lawyers or judges are either interested or informed enough to be aware of any doctrinal affiliation in legal philosophy, a very large part of the profession has been influenced, if not wholly persuaded, by the arguments of legal realism. It is commonly assumed by most practicing lawyers and trial judges that lawsuits are decided more often on their "facts" than on the "law." It is now widely recognized that all general legal rules are bounded on one side by numerous special exceptions, and on the other side by corollary rules compelling a contrary result. Whether a particular case shall be governed by Rule A, by the exceptions to Rule A, or by Rule Contra-A depends entirely upon what

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1 See Pound, An Introduction to the Philosophy of Law c. II (1922). For a discussion of the semantic significance of such theories of law see Loevinger, Jurimetries, 33 Minn. L. Rev. 455 (1949).

the court or jury believes the "facts" to be; and a very slight difference in the "facts" found by the tribunal may make a vast difference in the result of a case. Indeed, it is the observation of most experienced lawyers that at least 9 out of 10 cases are determined in their result by the opinion of the court or jury as to the "facts" of the case. Further, what is true in this respect of lawsuits is equally true of matters that are disposed of in lawyers' offices without reaching court, except that these are determined by the opinion of lawyers as to the "facts" rather than that of judges or juries.

In these circumstances it would seem that the law — which in this context must mean the body of the profession — should be much concerned with the methods by which "facts" are legally determined. Actually it is not. In all the overwhelmingly vast literature of the law, including reports of decisions, digests and encyclopedias, there is relatively little direct consideration of this problem. Although the problem of "fact" determination is involved in virtually all decided cases, it is explicitly considered in any of its aspects in no more than a minor fraction of one percent of the decisions. A few legal writers and thinkers, and the ubiquitous "reformers," have urged the importance of this part of the legal process, but most lawyers and judges do not seem to be much interested. Meantime the inevitable accommodation of general legal principles to the "facts" of specific cases continues to be accomplished by a proliferation of ostensible legal rules, refinements of rules, distinctions in the refinements, exceptions to the distinctions in the refinements, refinements and distinctions in the exceptions, and so forth ad infinitum.

When we look beyond the symbolic labels currently used to describe the legal process to see what the participants are actually doing, one thing stands out clearly; lawsuits are never decided on "facts." Neither judges nor juries, nor even lawyers in the usual situation, ever come in contact with the "facts" of any case, taking "facts" to mean the transactions or occurrences which gave rise to the controversy. Lawsuits are social post-mortems; they do not deal with the diagnosis of living situations, but with judgments as to dead and past events. All that is available by way of data for the task is the report that individuals can give of the present state of their recollection of past observation and whatever record may be contained in existing documents and, occasionally, other things. Recollections, documents and things relating to past events constitute the "evidence" on which courts and lawyers act and are the stuff out of which the "facts" are constructed. At best, lawsuits are decided on such evidence; at worst, they are decided on a refusal to
consider this evidence and on a hunch, rule or prejudice as to which party should be favored in the absence of evidence.

The determination of lawsuits on the basis of evidence rather than of "facts" is obviously not the result of some arbitrary principle of law, but is the inevitable consequence of the character of problems with which the law deals. In this the law is not so very different from many of the natural sciences. In all of the sciences from astronomy to zoology many of the questions to be answered concern phenomena that cannot be directly observed and that can be studied only on the basis of circumstantial and more or less remote evidence. Even in chemistry and physics today much of the frontier research deals with things and events, or perhaps more accurately concepts, that are so minute as to be incapable of direct observation and that can be studied only by their indirect effects.

Much the same thing is also true of everyday life. Relatively little of our knowledge is derived directly from personal observation of the "facts"; and everyone is constantly reaching and acting on conclusions and opinions based on various kinds of evidence relating to matters that cannot be personally observed. Information is acquired in ways too numerous to catalogue: through the mass media of newspapers, radio, television, magazines; through personal reports and letters, by word of mouth; from books; and from an infinite variety of other sources.

To make this observation is not to impugn in any degree the validity of information or conclusions based on sources other than personal observation. Indeed, the whole of what we call civilization depends on this very ability to accumulate information over a span of time and space greater than that accessible to any single individual. No individual and no generation could possibly learn for itself more than a small fraction of the information that passes for common knowledge among educated people in the contemporary world. Each generation stands on the shoulders of its predecessors to peer at intellectual horizons a little more distant than those seen before. The ability to express, record and accumulate data over a period of time appears to be the very quality that characterizes man and distinguishes him from the lower animals. Korzybski says that "man differs from the animals in the capacity of each human generation to begin where the former generation left off," and he calls this capacity "the time-binding function."3

This process turns out to be far more complex than casual observation might suggest. The time-binding function is not confined to transmitting clearly recorded and identifiable nuggets of information which,

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3KORZYBSKI, SCIENCE AND SANITY 539 (3rd ed. 1948).
when carefully examined, turn out to be separable from other nuggets of information that have been gathered by personal observation. Rather it is the case that literally everything that we know, believe or think is the product of both what we have been taught by others and what we have observed by ourselves. But while we can discern both the phylogenetic and the ontogenetic elements in all our mental content, we cannot distinguish one from the other in a specific case. Shocking as it may appear to naïve common sense, the very process of elementary perception itself is as much learned as it is innate. This is not merely an analytical hypothesis but a conclusion supported by sound experimental evidence. Our sense perceptions do not uniquely specify particular objects, but rather act as cues to an object, or an abstraction of an "object" from the space-time-energy-matter continuum constituting the environment. The world as we perceive it is as much a product of our learning as of our innate powers of perception.4 Thus, as Whorf concludes, "all observers are not led by the same physical evidence to the same picture of the universe, unless their linguistic backgrounds are similar, or can in some way be calibrated."5

To take a specific example, the color spectrum is a range of ocular stimuli consisting of light of varying wave lengths. For those in our culture, the colors represented by the spectrum are fairly clearly differentiated into familiar identifiable colors ranging from violet, through blue, green and yellow, to red. This seems like a perfectly "natural" kind of differentiation. However, investigation shows that there is no "natural" division of the spectrum. The colors that are differentiated by an observer depend upon the colors that he has been taught to differentiate and name.6 An observer with a different cultural background and different habits of language and thought "sees" different colors than we do in the spectrum and in a given ocular stimulus. Presumably the physiological reactions of various normal human retinas are the same to a given physical stimulus, and the variation in perceptive response results from a difference of some sort on the cortical level. However, this is not a significant matter for those concerned with problems of "evidence" or the "proof of facts." What is significant is that different observers will give different reports of the same physical phenomenon, and that the difference is not simply a matter of equivalent words in different languages, but represents varying responses which are often

4 See Kilpatrick, Perception Theory and General Semantics, 12 ETC.: A REVIEW OF GENERAL SEMANTICS 257 (1955); Gibson, Survival in a World of Probable Objects, 2 CONTEMPORARY PSYCH. 35 (1957) and the references cited and reviewed.
incapable of translation from one language into another. More than this, we must realize that even among the numerous individuals in any language-culture group variations in learning and experience, as well as some innate organic differences, inevitably produce differences in perceptive responses. This is not nearly so obvious as the differences that are associated with different language patterns, but is equally important. Even among those who use the terms "violet," "blue," "green," "yellow," and "red" to signify their responses to particular ocular stimuli, there is considerable variation in the matching of such verbal responses to particular stimuli. For a quick and easy demonstration of this, take a man and a woman (even a husband and wife will do) through the woman's dress department of a large store and ask each one to write down the name of the color of each dress viewed.

What is true of such a relatively simple matter as naming a color, is equally true of more complicated matters. Ordinarily the more complex the phenomena involved, the greater will be the variation in the perception and description of different observers. In matters complicated enough to be the subject of lawsuits, the variation in the versions of different observers will often be so great as to make the versions irreconcilable with each other, as well as with what we may regard as the "facts." This is not a new observation. Experienced trial judges and lawyers must necessarily learn this, although they have various rationalizations of it. Scientific demonstrations and reports have been made by numerous investigators. As long ago as half a century, Munsterberg reported some of these with the remark that "we never know from the material itself whether we remember, perceive, or imagine, and in the borderland regions there must result plenty of confusion which cannot always remain without dangerous consequences in the courtroom."7

Among the other consequences of these considerations, some of which will be mentioned later, is the conclusion that the differentiation between "fact," "opinion" and "evidence" is a much more vague and subtle one than the common use of these terms would suggest. It seems to be the common assumption of courts and lawyers that there are objective ascertainable things which we call "facts," that these can be somehow ascertained by weighing the "evidence" and that this "evidence" must consist of reports of immediate perceptions of the facts and not of subjective impressions, which are called "opinions." One of our best courts has recently stated:

"The difference between a 'fact' (such as an act, transaction, occurrence or event) and an 'opinion' is one of the fundamental differences in the

7MUNSTERBERG, ON THE WITNESS STAND 61 (1908).
law of evidence. A fact can be testified to by any witness, but, with a few exceptions, an opinion can be given in evidence only by an expert . . . .

If it is true that the law of evidence rests upon such a fundamental assumption — and it probably is — then its foundation is very unsound indeed. The difference between what a witness will report as his observation of a "fact" and what may be reported as an "opinion" may rest entirely on the degree of intelligence, education and sophistication of the witness; or it may rest upon the court's reaction to the testimony offered. In the case quoted above the court excluded medical records containing the opinion of psychiatrists as to the mental condition of the defendant on the grounds that such records were admissible only with respect to "facts" and not with respect to "opinions." (Three judges dissented.) However, in an earlier case the same court admitted similar records containing a doctor's diagnosis of a physical condition. There are several decisions of other courts to the same effect, and numerous other kinds of records have been held admissible for the purpose of showing the conclusions, or "opinions," of other experts. Some of these decisions expressly hold that the business records statutes do permit the reception in evidence of records containing the opinions of experts. However, it is purely arbitrary to characterize as either "fact" or "opinion" a statement as to a patient's condition, as to the cause of death, as to the cause of an explosion or accident, or as to any similar matter. The difference may lie in the degree of assurance felt or stated by the witness; and this, in turn, may depend upon his intelligence and education. The more intelligent and better educated the witness is, the more likely he will be to realize the limitations of his own observations and to state them with reservations. Thus it may well be that the "opinions" stated by one witness may be more reliable than the "facts" testified to by another because the source of the former is better qualified.

The basic difficulty here is that the distinction between "facts" and "opinions" implies a kind of differentiation that is misleading. There is no hard and clear distinction between "subjective" and "objective," or between "perceptions" and "conclusions" observable in the phenomena

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9 See, e.g., Thomas v. Conemaugh & Black Lick Railroad Co., 234 F.2d 429 (3d Cir. 1956); Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950); Pekelis v. Transcontinental & Western Air, 187 F.2d 122 (2d Cir. 1951), cert. denied, 341 U.S. 951 (1951).
with which we are dealing. We tend to think in these terms because the traditional patterns of both our vocabulary and language structure contain such dualisms. No doubt these dichotomies did suggest important distinctions and serve important functions in the development of thought. However, they are no longer accurate, adequate or appropriate to contemporary thought. We have learned that what we regard as the simplest perceptions are the product both of the immediate external stimuli and of our own concepts. This is true not only in social, psychological and biological fields, but also in the physical sciences. Heisenberg, father of the "indeterminacy principle" in modern physics, says of physical science:

Nature thus escapes accurate determination, in terms of our common-sense ideas, by an unavoidable disturbance which is part of every observation... We decide, by our selection of the type of observation employed, which aspects of nature are to be determined and which are to be blurred in the course of the observation. ... 13

When we talk about reality, we never start at the beginning and we use concepts which become more accurately defined only by their application. Even the most concise systems of concepts satisfying all demands of logical and mathematical precision can only be tentative efforts of finding our way in limited fields of reality. 14

To import the Heisenberg principle by a somewhat free paraphrase into the field of law, it is no longer valid to regard the "facts" and the "evidence" as wholly independent elements in the legal process or an individual case. The "evidence" does not simply disclose the "facts." The "evidence" is an indistinguishable part of the "facts," and the "evidence" determines the "facts" as much as the "facts" control the "evidence." When the law establishes principles for securing or receiving evidence, it thereby also determines or establishes the "facts" of cases in which those principles are applied, just as the methods of observation employed in physical science determine the character of the "facts" that will be discovered.

Apart from the peculiarities of the legal rules of evidence there is nothing in the process of legal proof that is unique, or even very unusual. The problem of legal "proof" is the task of reasoning from presently available data to a logical inference as to something that has occurred in the past. The law does have various standards of "proof," requiring more, for example, to sustain a conviction of a crime than a recovery of damages in a civil action. The significance of these varying standards of "proof" is too broad a topic for discussion here. It is sufficient to observe here that in the legal process "proof" means simply

14 Id., at 93-94.
a sufficient quantum of evidence to move the tribunal to act in a manner consistent with the existence of the proposition thus "proved." For most cases the degree of "proof" required is that expressed by the common phrase "a preponderance of the evidence," or the "greater weight" of the evidence. This means simply a "preponderance of probability," or a conclusion that it is more probable that the proposition is true than untrue.\footnote{For an excellent judicial discussion see Burch v. Reading Company, 240 F.2d 574 (3d Cir. 1957). See also MODEL CODE OF EVIDENCE 3, 75 (1942).}

These same standards are used by normally rational people in other fields, including everyday living, business and industry, and scientific research. One does not act upon a proposition unless it is believed more likely to be true than untrue unless there is, for some reason, an inducement or desire to gamble on a "long shot." In important matters one may desire a greater assurance than the "preponderance of probability" and so may withhold action until there is a greater quantum of evidence supporting the proposition on which action must depend. In science, conclusions are always stated in terms of degrees of probability, and scientific "proof" means establishing a degree of probability for a proposition, usually one that can be expressed in a quantitative form.

Thus the problem of legal proof is nothing more than a particular aspect of the universal problem of drawing valid inferences from data.\footnote{Loevinger, An Introduction to Legal Logic, 27 IND. L.J. 471 (1952).} The only aspect of legal proof that is unique is the relationship to the rules of evidence which determine the data that can be used in the process of proof in a legal case. These are without counterpart in any other field or discipline.

The rules of evidence, in all their full glory, constitute a body of law that takes at the least a volume and at the most several volumes to state fully and accurately. However they can be epitomized by a relatively few principles.\footnote{For suggestive similar treatment of the rules of evidence see the Introduction to MORGAN, BASIC PROBLEMS OF EVIDENCE (1954); Gustavus Loevinger, The Minnesota Exclusionary Rules of Evidence, 38 MINN. STAT. ANN., Cumulative Annual Pocket Part 32 (1956).} Basically the rules of evidence in our system of law state that:

A) Evidence not relevant to the legal issues before the court cannot be received.

B) Hearsay evidence cannot be received, except for numerous special cases in which such evidence is received. (Hearsay is essentially assertions, whether written or oral, made outside the courtroom.)
C) Testimony in the form of opinions or conclusions cannot be received, except from experts.

D) Secondary evidence as to the content or intent of writings cannot be received.

E) Privileged communications cannot be received. These include involuntary responses from one accused of crime; communications between spouses; communications to a lawyer, doctor or priest and other classes of communication established by statutes in various states.

F) Evidence must be offered in accordance with specified formal and procedural rules. Thus leading, argumentative and hypothetical questions are generally forbidden; interrogation at each stage of examination of a witness must be within the "scope" of the preceding stage; and so forth.

Of course the full statement of each of the rules of evidence contains numerous complex qualifications and even more numerous exceptions. Nevertheless, it remains true that the rules are basically principles of exclusion, the purpose and effect of which is to put various classes of evidence beyond the consideration of the fact-finding tribunal. Ostensibly the law has no criteria for weighing or evaluating evidence; and it is a cliche in the trial courts that the admissibility or inadmissibility of proffered evidence must be determined by reference to the rules but the weight of the evidence is wholly for the court or jury. Although it is not hard to find many expressions by lawyers and judges in panegyrical praise of the legal system and its operation, scholars who have studied the rules of evidence are nearly unanimous in finding them unsatisfactory and ill-suited to their function.

As early as the nineteenth century, Thayer, one of the first great students of evidence, said that "our law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system... (but) largely irrational in any other aspect,..."\(^{17}\) More recently Morgan, Reporter for the American Law Institute Committee on Evidence, has said that "... the hampering of investigation by the common law rules of procedure and evidence has become so irksome to litigants and legislators that greater and greater resort is being made to tribunals authorized to disregard them,..."\(^{18}\) and, "The law of evidence is in such a confused and confusing condition that it is almost impossible to draft a rule

\(^{17}\) THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 509 (1898).

\(^{18}\) Foreword to MODEL CODE OF EVIDENCE 48 (1942).
which is universally accepted without qualification." Davis says that there is "... virtual unanimity of evidence scholars in disapproving the exclusionary rules, ..." and that, "The technical rules are rejected not only as rules of exclusion but also as rules to guide the process of fact finding."  

Perhaps most significant as to informed professional opinion regarding the rules of evidence is the action of the American Law Institute. Formed as a permanent organization for the improvement of the law, the first task undertaken by the Institute was the Restatement of the Law. Successfully coping with all other important branches of the common law, the Institute refused to attempt a restatement of the law of evidence because of the confused and unsatisfactory principles established by the precedents. Instead the Institute prepared a "Model Code of Evidence." The Institute Director explained that "... the principal reason for the Council's abandoning all idea of the Restatement of the present Law of Evidence was the belief that however much that law needs clarification in order to produce reasonable certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it. The Council of the Institute therefore felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification."  

In the face of such widespread and weighty criticism further strictures would be supererogatory. But it is much to the point to seek the reason why, despite such criticism, the law of evidence is not responding to the need for simplification and rationalization even as rapidly — or slowly — as other parts of the law. Such an inquiry suggests that it is probably impossible to rationalize the rules of evidence so long as we continue to discuss and formulate them in language which itself contains the errors and fallacies that we seek to correct.

At the outset we are met by the fact that legal discussions of problems of evidence all ostensibly relate to the issue of "competence" or "admissibility," and not of the "weight" of the evidence which is said to be another matter not included within the field of consideration. Actually, however, the rationalization for most of the exclusionary rules rests on assumptions as to the unreliability of the excluded category of evidence.  

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evidence as compared with other categories not excluded. Since the
discussion is conducted with highly abstract, and frequently pejorative,
terms it is difficult to come to grips with the underlying assumptions.

Examination of the specific rules or principles of evidence discloses
that the important and troublesome ones are grounded on very little
more than tradition in the form of judicial precedent, generalization on
a level of high abstraction, and prejudice against change. For example,
the principle that only "relevant" evidence shall be admitted seems,
superficially, to be the very spirit of rationality. Certainly it cannot
reasonably be argued that the result of an inquiry should be influenced
by irrelevant evidence. But this is just the point of difficulty. Assum-
ing a fact-finder capable of dealing with an inquiry at all on a level of
rationality, it is obvious that irrelevant evidence will not influence the
decision. Evidence which is truly irrelevant need not be feared; the
only objection to its admission is the waste of time involved, and every
experienced trial lawyer and judge knows that usually far more time is
spent in haggling over relevance than would be wasted in admitting all
proffered evidence. What then is the real problem?

The true objection to most evidence which is excluded on the grounds
of "irrelevance" is not that it is logically irrelevant, or unrelated to the
subject matter, but that it is of a kind very likely to be influential with
the fact-finder but which should not be considered because of some
legal principle or policy. Sometimes an argument as to the "relevance"
of evidence is a convenient method of securing an early determination as
to the applicable principle of substantive law in a trial. More often, it
is a method of expressing a legal policy based on considerations other
than the logical relationship between the evidence and subject matter
in controversy. For example, ordinarily a court would exclude as "irrele-
vant" evidence as to the character of a party who has not put his char-
acter in issue, habit as showing action on a particular occasion, specific
incidents as indicative of character or reputation, other similar acci-
dents or claims in the past, prior consistent statements of a witness, and
many other similar matters difficult to state without undue detail or
reference to the facts of specific cases. In most cases evidence of this
character will be of a kind which a trained investigator, an agency
such as the F.B.I., or even the average intelligent person would regard
as sufficiently significant to be worthy of note and consideration in rela-
tion to the controversy. Indeed, most lawyers will seek to ascertain in-
formation of this kind for their own guidance in appraising a case even
though they know that the evidence will not be admitted at the trial.
Thus it is not the lack of logical "relevance" that causes the courts to ex-
clude such kinds of evidence. Rather it is a policy judgment that the
introduction of such evidence will consume undue time in relation to
the importance of the issues, the other work of the court and the other
demands for expedition, that the evidence may cause unfair surprise to
the adverse party, or that the evidence will be given more importance
than it deserves by the jury, thus causing prejudice to the other party.23
Such a judgment clearly involves weighing the evidence and comparing
its probative weight with other factors.

The hearsay rule even more patently involves concealed assumptions
as to probative weight. Like the rule as to relevance, the hearsay rule
has a superficial rationality that is appealing. In general it sounds
quite sensible to refuse to consider testimonial evidence which is not
given before the tribunal and subject to examination, and cross-examina-
tion, in the trial. Probably there was a period in the development of
legal procedure when this was an appropriate approach. What happened
then was that all evidence consisting of assertions offered for their truth
which were not given before the tribunal were given a name — "hears-
say." Thereafter lawyers and judges began to think of all such evidence
as being "hearsay," having some quality in common which differentiated
it from other kinds of evidence. The sheer necessity of getting the
work of the courts done required the creation of an increasing number
of exceptions to the rule of exclusion of "hearsay," but the professionals
continued to use the term and to think of it as designating some legiti-
mate class of evidence. Even the perceptive experts who refused to at-
tempt a restatement of the law of evidence and instead formulated a
"model code" continued to think and speak in terms of "hearsay," al-
though much liberalizing the rule of exclusion.

What is now needed most in the law of evidence is a new analysis
and re-formulation of the basic terms and concepts, particularly of the
important "hearsay" concept, rather than merely a liberalizing of the
rules based on these illogical and archaic classifications. The inescap-
able difficulty is that this never was a very useful concept and it is now
so inappropriate to the problems with which the law deals that the term
itself must be eliminated from the vocabulary of the lawyer. To begin
with, classing all assertions made outside of a particular courtroom in a
particular case as alike for any purpose is such a high order abstraction
that the differences it ignores are vastly more important than the single
adventitious similarity upon which it is based. It should be almost
self-evident that there can be little utility in a class which is so broad as
to include the prattling of a child and the mouthings of a drunk, the
encyclical of a pope, a learned treatise, an encyclopedia article, a news-

23Trautman, Logical or Legal Relevancy — A Conflict in Theory, 5 VAND. L. REV. 385 (1952); McCORMICK, EVIDENCE 314 (1954).
paper report, an unverified rumor from anonymous sources, an affidavit by a responsible citizen, a street corner remark, the judgment of a court, and innumerable other equally disparate sources of information. Some kinds of "hearsay" are obviously unreliable. Anonymous rumors and casual second or third hand reports are entitled to little or no credence and commonly are given none by responsible persons in or out of court. On the other hand, learned treatises by well known authorities, encyclopedias and almanacs, carefully drafted reports and affidavits by qualified and impartial observers are likely to be considerably more reliable than the testimony of the average witness, to say the least. In fact, a good deal of information is practically unavailable except from sources which the law classes as "hearsay."

The second basic objection to the hearsay concept, in addition to its inappropriateness because of its high level of abstraction or generality, is that it ignores the inevitable character of all human knowledge. The law regards as "hearsay" not only testimony which by its own terms repeats an out-of-court assertion by another, but also testimony which is based upon information secured from another, regardless of the form of the statement made by the witness.\(^2\) That the witness says "I know," "I determined" or "I was informed" does not change the hearsay character of the testimony. For legal purposes, this is determined not by the mode of expression but by the basis of the witness' knowledge. But, as has been noted, the characteristic quality of the human mind is its "time-binding" function. As a result of this, all of our mental data is inseparably compounded of elements derived from individual experience and elements learned from others. There may be some persons who know little more than they have learned from personal experience. If so, they must be among the most ignorant. Certainly the most educated have the highest proportion of the "hearsay" element in their fund of knowledge, for all of that which we call "book learning" is clearly legal "hearsay."

The courts are able to function at all only by ignoring their own rules in this respect a good deal of the time. Slight reflection will show that remarkably little of the testimony that passes unchallenged in ordinary proceedings is actually wholly free from the taint of recognizable "hearsay." No one could possibly know from anything but a hearsay source

\(^2\) Falknor, "Indirect" Hearsay, 31 Tul. L. Rev. 3 (1956). McCormick attempts to distinguish between the hearsay rule and an alleged "rule requiring first-hand knowledge." MCCORMICK, EVIDENCE 461 (1954). Most writers and courts treat the whole problem as one of hearsay; and, in any event, there seem to be no practical or logical consequences following from the two rules suggested by McCormick which are any different than those flowing from the hearsay rule in its common form and usage.
the answer to such questions as: "Who is your father?", "How old are you?" and "Where were you born?" (Incidentally, while such information might be secured under the "pedigree exception" to the hearsay rule, the answers are very seldom given in a form which would qualify under the technical requirements of that exception.) Although not necessarily so, there is usually no more than a hearsay basis for the answers to such common questions as: "How much money do you have in the bank?", "Who is the president of your company?", "What is the current price of that security?" and many similar questions relating to commercial activity. Even such simple questions as "What is (or was) the date?" and "What time is (or was) it?" require that we rely upon the assurance of a newspaper, a calendar or clock that we assume has been correctly written, constructed or calibrated by someone else. Similarly a strict insistence upon a first-hand knowledge basis for all testimony would preclude the utilization of an adding or calculating machine, a speedometer or ruler, or any other instrument of measurement that had not been constructed or calibrated by the witness. When the courts are unfamiliar with an instrument they do require such first-hand verification of its construction and operation, as, for instance, with the relatively new radar speed measuring devices.25 However, with familiar culture products of the time-binding process, such as clocks, calendars and measuring sticks, the courts conveniently forget the rules which they apply to more novel devices.

Of course, the point is not that the courts should reject such evidence because it is technically based on a second-hand foundation; but that the rule which purports to require a first-hand foundation for evidence is an invalid, unrealistic and ultimately unworkable one. There may well be a sound reason for differentiating between evidence based on clocks, calendars and calculating machines on the one hand, and on radar, drunkometers and other more recently developed devices on the other. The reason, however, cannot be that the latter evidence is "hearsay" or second-hand, whereas the former is not, because that reason is simply false. The reason, if it is to be valid, must be based upon a judgment as to the reliability of the respective devices. There is no purely formal ground for differentiating between such classes of evidence. A sound determination of such issues requires consideration of the substantive "weight" of the evidence.

Part of the confusion in this field arises from the tendency engendered by our language structure and the prevalence of teaching in terms

of Aristotelian logical forms to make judgments in terms of either-or, and A or Non-A, rather than in terms of degree or position on a scale. We tend to think in terms of mutually exclusive alternatives: evidence is said to be first-hand knowledge or hearsay; fact or opinion. Yet the dichotomy between "hearsay" and "first-hand knowledge" is as invalid as that between "fact" and "opinion." Both dichotomies point to valid differences. In the sense in which the terms are used in the field of evidence, "fact" and "opinion" point to the differentiations between levels of abstraction, "opinion" being a higher order of abstraction than "fact." Similarly, "hearsay" and "non-hearsay" point to the degree of verification in personal experience underlying an assertion. Both of these things are important matters for the consideration of a fact-finding tribunal in weighing evidence. However, we confuse and mislead ourselves by speaking and thinking of these things in terms of categorical differences rather than differences of degree on a continuum. The language and concepts presently employed by the law of evidence to deal with these points is as inadequate as would be an attempt to describe human stature by classifying everyone as either "tall" or "short" without using any modifying or quantifying terms. The absurdity and inadequacy of such an arbitrary attempt at categorization is self-evident, but it is self-evident only because we are familiar with the description of physical stature in quantitative terms that permit relatively precise description of the infinite variation that exists in this quality. The absurdity of forcing the infinite variety of the kinds of evidence into the Procrustean beds of "hearsay" and "non-hearsay," and "fact" and "opinion" is less obvious only because these are familiar terms.

Fortunately, there is beginning to be a wider recognition of the basic assumptions as to policy underlying the other rules of evidence. The "parol evidence rule" which excludes testimonial evidence as to intent in the drafting of written instruments is generally recognized now as a rule of substantive law. This means that the courts are excluding this class of evidence not because of some supposed vice in the quality of the evidence, but on the ground that as a matter of legal policy parties who assent to a written agreement should be bound by its terms without the privilege of seeking to alter them by oral evidence. Whether or not this policy is justified; this is the kind of judgment that should be made with respect to such an issue. Without undertaking a detailed examination of the other principles of the law of evidence, it may be remarked

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26 Smith v. Bear, 237 F.2d 79 (2d Cir. 1956); Jimmerson v. Troy Seed Co., 236 Minn. 395, 53 N.W.2d 273 (1952); but cf. McKELVEY, EVIDENCE, § 366 (5th ed. 1944).
that there is at least a beginning of a similar consciousness of their basis. Thus Louisell, writing of the general field of privilege, says:

I believe that the historic privileges of confidential communication protect significant human values in the interest of the holders of the privileges, and that the fact that the existence of these guarantees sometimes results in the exclusion from a trial of probative evidence is merely a secondary and incidental feature of the privileges' vitality.27

Taking the law of evidence as a whole, it can be said that all of the exclusionary rules comprising this body of law are based either on a judgment as to the supposed weight, or reliability, of a certain kind of evidence, or on a judgment as to the social desirability as a matter of policy of permitting an inquiry into certain matters. Both kinds of judgment are proper ones for the law to make. The difficulty with the law of evidence in its present form is that as to the most influential and commonly invoked rules the judgment is concealed and therefore not consciously or intelligently made, and the rules operate in terms of arbitrary and artificial categories with respect to data which cannot validly be categorized. The effect is that large quantities of important evidence are excluded on the basis of quite adventitious characteristics without any examination of the specific evidence offered in a particular case or rational consideration of its significance or reliability. This is not an attitude or procedure which should commend itself to those who purport to be reasonable.

Another difficulty with the present law of evidence is that it tends to interfere seriously with the process of securing testimony from witnesses. The process of securing testimonial evidence is, after all, nothing more than a specific problem in human communication.28 It involves, at the minimum, four distinguishable problems: 1) the observations or abstractions, made by the witness initially from the environment; 2) the retention in memory of these impressions by the witness; 3) the expression by the witness of his recollection; 4) the reaction, or comprehension, by the fact finder to the witness' expression. The relationship between the first element — observation or abstraction by the witness — and the hearsay and opinion rules has already been discussed. The law of evidence has almost nothing to say about the second element; so long as the witness is willing to state a recollection the tribunal will receive his statement, other conditions of the rules being satisfied.29

29A mere affirmation by the witness that he has in the past had a recollection which was recorded but no longer remains in mind will suffice to permit introduction of
The third and fourth elements — the witness' expression and the fact-finder's reaction to it — constitute the problem of communication in the trial process itself. The insistence by the courts upon the eliciting of testimony in the artificial manner of courtroom interrogation, rather than by normal narration, at its best necessarily imposes a severe handicap on successful communication. To a large extent the purpose of this insistence is to permit another even more serious interference with communication. The normal and effective expression of any witness, lay or expert, is impeded by the excision of all that the law has come to regard as "irrelevant" or "hearsay," and by the limitations on the expressions of "opinion," not to mention the atrocities of the current practice with respect to the hypothetical question. At least one court of appeals has noted the difficulty in communication between medical experts, who are frequent witnesses, and lawyers, and has suggested that the difficulty should be met by the doctors' learning to adapt their vocabulary to that of the lawyers. The Court of Appeals for the District of Columbia has been more realistic and rational in stating that one of the reasons for its recent change in the rule as to the test of insanity in criminal cases was "... to remove some of the barriers to communication between lawyers and physicians." For the lawyers to attempt to insist that the rest of the world must learn to speak in the artificial vocabulary and syntax of the law in order to express itself in the courtroom is to betray such a lack of understanding of humanity as to cast doubt on the ability of the lawyers to communicate successfully with others on any level. The burden is obviously on the legal profession to modify its principles and procedures so far as necessary to permit adequate communication with the rest of society or else to lose to others the task of finding facts and determining individual controversies.

The task of adapting legal principles of evidence to a more modern and rational system may not be as difficult as it seems at first impression. A good deal of scientific research and analysis has been done in recent years in the overlapping fields of communications, semantics and logic. One of the basic conclusions of this work has been that the reasoning required in dealing adequately with social data and human problems must be probabilistic, or many-valued, rather than syllogistic, or two-valued.
A syllogistic, or two-valued, logic requires that the data which is employed be cast in the form of categories and that all phenomena be classified as either included or excluded with respect to each category. It has no means of dealing with differences in degree or differentiations on a continuum. A probabilistic logic, on the other hand, specifically takes account of the differences of degree in its data. It does not require categorization into A and Non-A, and therefore is many-valued in its ability to deal with an infinite variety of phenomena that are differentiated only in degree or position on a continuum. Such an approach is now being used in scientific studies of communications, and similar problems. Thus the report of a recent study of communication and social systems states, "Our model is probabilistic, our measures are distributive, and our test of fit is correlational."³⁴

Although the law may not yet be able to achieve quite such a scientific standard in its investigations, it does have precedent for considerably more liberal and rational principles in the fact-finding field than the present rules of evidence. For nearly a quarter of a century the classical statement of the principle that should guide administrative tribunals has been: "Evidence or testimony . . . of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done."³⁵

This rule, which is far from revolutionary, is a many-valued rule which permits the differentiation between important and reliable "hearsay" and inconsequential and unreliable "hearsay," and which permits the reception of the reports of able observation or inquiry regardless of whether the report is offered as a cautious "opinion" or as a dogmatic "fact." Certainly the use of such a rule does not impair the validity of the conclusions reached by tribunals using it. As one court has observed:

> It is a mistake to suppose a conclusion cannot be reached safely by administrative bodies unless they proceed in accordance with jury trial rules of evidence. Most of the world's work is done without that.³⁶

The conventional objection to the use of this liberal principle in the trial of lawsuits in court is that the exclusionary rules are necessary in order to prevent the jury from being misled. This excuse does not explain the fact that courts generally follow the same rules of evidence whether the trial is before a jury or a judge (although the rules are usually interpreted somewhat more liberally in the latter case). This

objection also fails to suggest any basis for the assumption that fair-minded men are able to conduct their daily and more important affairs on the basis of reliable evidence outside the courtroom, but not when they are called to act as jurymen. The legal profession must face the fact that the problem of deciding what evidence is sufficient to support belief and induce action is not a problem for judges and lawyers alone, but is the daily concern of every man of affairs. Even so far as the government itself is concerned, in a democratic society every competent adult citizen is permitted to reach a decision as to who should control the legislative and executive branches of government, and, in many states, also the judiciary. The ability to reach such a decision presumably involves some ability to cope with the problem of weighing conflicting claims, arguments and evidence. In terms of the rules of evidence themselves, the objection that the exclusionary rules are required because of the incapacity of juries to act reasonably in their absence is an assumption based on an opinion derived from a surmise, and altogether lacking in evidence, competent or incompetent, to support it.

Nevertheless it must be recognized that the exclusionary rules do have certain practical consequences that are usually not taken into account in discussions of them. Being rules of exclusion that restrict the evidence that can be offered and received, they tend to handicap the party who has the burden of proof and to assist the party who does not have the burden of proof on any issue. Ordinarily the plaintiff has the burden of proof on most issues; and usually plaintiffs tend to be individuals, small businesses and economically less privileged, whereas defendants tend to be corporations, large businesses and the economically more favored. Thus, in addition to the usual division between those who favor and those who oppose almost any change, the fight for reform of the rules of evidence tends to enlist political "liberals" on one side in favor and political "conservatives" on the other side opposed. While there are numerous exceptions, and while all of the rules of evidence "cut both ways," as is often pointed out, there can be little doubt that much of the opposition to the badly needed reforms in the law of evidence stems from a realistic appraisal of the effects of the rules in their present form upon the economic interests of those who are most frequently involved in litigation as defendants.

A corollary of this is that in the continuing contest between government power and individual liberty the government itself is usually the plaintiff and the individual is usually the defendant. This is true of all criminal cases and of many civil proceedings between the government and the citizen. In such cases, the rules throw their weight on the side of the individual by imposing their handicaps on the government as
plaintiff. To this extent the exclusionary rules may serve, on occasion, to strengthen the position of personal liberty. However, the principal instrument for the enforcement of governmental authority over the life and activity of the citizen in recent decades has been the administrative agency. These agencies have never been bound by the rules of evidence, and although they have sometimes been charged with arbitrary action, their freedom from the artificial restrictions of the exclusionary rules has usually been counted as in their favor. It is responsibly contended that the administrative agencies should be emulated by the courts in this respect.37

A second practical consequence of the rules of evidence that is seldom noted is their effect in forcing the production of evidence that might otherwise not be secured. The rules themselves are cast almost wholly in terms of the exclusion of evidence, but as every experienced trial lawyer and judge knows, the practical effect of the rules often is simply to require that certain "foundation" material be made available to the court or opposing counsel. For example, secondary and even tertiary evidence of the contents of business records is often received by the court provided that the underlying books themselves are made available for inspection and auditing by opposing counsel. Ordinarily a court will prefer not to have the record cluttered up with voluminous records that are difficult to inspect and analyze and will rely upon the vigilance of the adverse party to assure that the summary offered is a correct one so long as the records are available to both parties.38 This is a sensible procedure. However, it should not require the inflexible and technical complications of the exclusionary rules in order to secure the production of records or witnesses that it is within the power of a party to produce. The simple and straightforward approach to this aid in the investigation of facts is to have the court exercise the power to require the production of witnesses or records whenever such production is appropriate and useful in the investigation of any issue before the court. Perhaps the courts have such a power now; but most courts are very reluctant to exercise it, and usually do so only indirectly by rulings that exclude proffered evidence unless certain "foundation" evidence is also produced.

The rule of general admissibility of evidence, suggested above, does not, of course, purport to deal with considerations of privilege which are based on judgments as to the social values served by forbidding certain inquiries. So long as such judgments are reached by a clear recog-

nition of the interests that are being served and the interests that are being sacrificed and by making an explicit choice between them, the principles of rational discourse are satisfied.

The general body of the rules of evidence do not satisfy the principles of rational discourse as they are recognized in other areas of contemporary thought and action for reasons which have been suggested. More than this, they are patently inadequate to the needs of society which law is supposed to meet, and are in large part responsible for the dissatisfaction with the legal process which is expressed directly in widespread criticism and indirectly in the establishment of non-judicial agencies of all kinds to supplant or substitute for the courts that still adhere to the exclusionary rules. So long as the legal profession continues to think and talk in terms of “hearsay,” “legal relevance,” “opinions and conclusions” and of “competent” or “incompetent,” “admissible” or “inadmissible,” it will not be able to struggle out of the morass in which the present law of evidence has mired it. The profession will not progress so long as it employs as its principal intellectual tools these arbitrary categories and the syllogistic thinking in which such categories are an indispensable part. The profession will begin to meet the needs of modern society and to make sense to its contemporary peers only when it recognizes that the problems with which it must deal are those of arriving at reasonable conclusions on the basis of the weight of all the evidence available for rational consideration of any issue; and that such problems can be handled only by a language that speaks of variations of degree, rather than discrete and exclusive categories, and by a logic of probabilities rather than syllogisms.

In specific terms this will mean: A) All evidence is to be received and considered that would influence a fair-minded man in deciding the issue before the tribunal; B) The tribunal may and should require the production of evidence and witnesses that are or may be appropriate and useful in the investigation of the issue before the tribunal and are within the power of the party to produce; and C) Inquiry should be forbidden into such topics, and only such topics, as have been recognized as privileged for reasons of social policy by the legislature or by explicit judicial decision. Such a body of principles will serve every legitimate interest now served by the rules of evidence, will avoid many of the defects of the present rules, and will permit and assist in making litigation a genuine search for at least some measure of truth.

Where reasons of social policy do not compel the creation of a privilege against inquiry but do justify some weighting of the scales in favor of a particular result (as in the case of the issue of criminal guilt or of the legitimacy of children born in wedlock), this should be accom-
plished by establishing an appropriate rule relating to the degree of proof required, rather than by artificial rules excluding classes of evidence. This is actually done today in all criminal cases and in an unrelated group of other kinds of cases where courts from time to time set up varying standards of proof. However, because the attention of the profession has been concentrated on the false problem of "evidence" rather than the practical problem of "proof," or the probative weight of evidence, there is not even a generally used and understood vocabulary in which to discuss problems relating to varying degrees of legal proof. The use of a language and logic of probability will at least permit rational discourse and thinking on this problem.

Ultimately this is all that semantics or logic or science can ever offer us. No symbols or system or devices or disciplines will ever supplant the intelligent mind or make a second-rate brain equivalent to a first-rate brain. But in order to function effectively at any level, every mind must take account of the learning and thinking that has preceded and must approach contemporary problems in terms of contemporary concepts. In order to do this in the important task of setting standards for the legal proof of "facts" by evidence, the legal profession must radically change its habits of language and thought. Not the least of the benefits it will gain from this will be a greater understanding itself of what it is doing.