

1-1998

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Recommended Citation

Ronald J. Allen, *Truth and its Rivals*, 49 HASTINGS L.J. 309 (1998).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol49/iss2/2

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Truth and its Rivals

by
RONALD J. ALLEN*

The topic of this conference is Truth and Its Rivals, the topic of this opening session is The Goals of Evidence Law, and I have twenty minutes to discuss these matters. I tried to hire the fast talking actor who used to be on Saturday Night Live and who could read the entire Columbus, Ohio, phone book in ten minutes, to present my paper. After reviewing the material, he thought the Columbus phone book was considerably more interesting, and so declined.¹ I thus was left with no choice but to fall back on the Shakespearean consolation that at least sometimes brevity is the soul of wit. And so, to go straight to my task, I have taken the titles of the conference and this panel at face value and intend to analyze what it might mean for truth to have rivals when viewed from the perspective of the law of evidence. To anticipate where we will arrive in another nineteen minutes or so, I think we will reach the somewhat surprising conclusion that truth has no rivals, rather than the conclusion that truth either trumps or is trumped by its rivals. And along the way, there may be some other somewhat counterintuitive results. Let us see.

The conference's topic and this panel's topic obviously anticipate that there is something that goes by the name of truth, and that there are other things distinct from it that collectively can be labeled its rivals. In addition, they—the two topics together—suggest that the law of evidence may regulate the relationship between truth and its rivals. Indeed, more accurately perhaps, these titles suggest that truth is one of the various competing goals that the law of evidence can pursue. We thus need to ask what these various competing goals might be, what do we mean by the term "truth," and how might they compete with each other?

I begin with what is, from my point of view, the simplest of the points: What are truth's competitors? Our conference organizers provide a lengthy list that includes speed and efficiency of adjudication, protection of privacy, promoting party satisfaction and public acceptance of verdicts (and thus social peace), achieving catharsis, and promoting substantive political ends. Bearing in mind that my

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1. Actually, I don't remember what the fast talker talked about, and thus my use of the Columbus, Ohio, phone book is likely apocryphal. For that matter, I don't remember if I saw him on Saturday Night Live. Still, I suspect everyone "knew" exactly what I was talking about, a point of some significance for the topic under consideration.

twenty minutes is ebbing away, I will simply accept this statement as accurate and unproblematic in any respect. To be completely frank, though, I think this list is laced with many interesting and deep analytical and philosophical questions of the kind we are about to encounter in thinking about the truth. I also think it is seriously underinclusive. Some parties to litigation, for example, are engaged in vindictive exercises, others the pursuit of strategic advantage of various kinds. The legal system as a whole has numerous attributes with highly variable objectives: state bureaucrats involved, such as court reporters and bailiffs, want jobs; members of the media want newsworthy activity; lawyers want a continuation of their profession; and so on. Each of these objectives of the legal system actually has programmatic implications for the rules of evidence. Still, this is not what I want to discuss. I am personally more interested in the concept of truth, and thus will spend most of my time on it.

The conference organizers also tell us that "evidence scholars have debated the feasibility, coherence, wisdom, and justice of treating the pursuit of truth as the dominant goal of trial." Here I must part ways with the organizers, for I am aware of no such debates. I am aware of various assertions that goals other than truth should be pursued at trial. I am aware of much work, such as the probability debates, in which certain concepts of truth are taken as given. I am aware of William Twining's popularization of the term "optimistic rationalism," and his various assertions to the effect that "philosophical scepticism² is a difficult posture to maintain consistently."³ And I am aware of Professor Damaška's recent assertion exactly to the contrary that "[i]nfluential currents of contemporary thought posit a radical disjunction of language from external reference: to ascribe to words the capacity to represent reality—no matter how constructed—is branded as a vulgar illusion."⁴ None of these works, however, contains a philosophically sophisticated engagement with the meaning and significance of scepticism; they were all going in different directions. To deal with truth and its rivals, however, one must come to grips with the philosophical significance of the concept of truth, and its true rival, scepticism.

The justification for this effort is well demonstrated by the

2. The philosophical debates apparently have resolved the lexicographical issue in favor of the British spelling. Parasitic as I am on the philosophical debates, I accept their convention.

3. WILLIAM TWINING, *Some Scepticism about Some Scepticism*, in *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 92, 126 (1990).

4. MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 94 (1997). I assume Professor Damaška was making a claim about truth or epistemology, not meaning or reference, although the passage is ambiguous.

widely disparate comments of Professors Twining and Damaška. Two of our leading theorists of evidence have sharply opposed views, apparently, of the significance of philosophical scepticism. Moreover, I believe both are wrong. Professor Twining clearly is. As we shall see, there is nothing unintelligible, incoherent, or inconsistent in the positions of philosophical sceptics. Quite the contrary, the persistence of scepticism flows directly from the overwhelming logical force of their arguments. If the paralyzing tendency of philosophical scepticism is to be removed from the field of evidence (or any other), it will not be through a demonstration of its logical inadequacies; some other strategy will be required. Does that then leave Professor Damaška holding the field? I think not. Philosophical scepticism, once understood, can be, and has been, cabined, as it were. Indeed, the primary “influential currents of contemporary thought” that embrace scepticism in the manner suggested by Professor Damaška do not reside in the Philosophy departments or in any other in which propositions with truth value are central to its mission. Rather, they reside primarily in the English departments, the very same English departments that have enthusiastically embraced Freudian psychoanalysis as it is being systematically rooted out of the nation’s medical schools precisely because it is bad science.⁵ These “currents of contemporary thought” are wonderfully interesting, however, just like scepticism is, and like scepticism, are a marvelous elixir for stimulating the human imagination. They belong in the English departments, and I mean no disrespect by the suggestion.

The justification for coming to grips with the significance of philosophical scepticism runs deeper than analyzing this apparent disagreement between Professors Damaška and Twining, although in my view that alone would be a sufficient justification. I assume we have been called together to discuss, among other things, the rivals to truth. The claim that justified knowledge is impossible (or its more popularized derivatives such as “there can be no objective truth,” “knowledge can only be socially constructed,” “everything is relative,” and so on) open up space for arguments on behalf of truth’s rivals. If truth cannot be obtained, those who think it should be the objective of litigation (or any other pursuit) are just wasting everybody’s time and resources. Rather than just throw good money after bad, we may as well try to obtain something that is obtainable, like political objectives or vindication of moral views, or whatever. Like

5. See Hilary Putnam, *Sense, Nonsense, and the Senses: An Inquiry Into the Powers of the Human Mind*, 41 J. PHIL. 445, 446 (1994) (“Today, the humanities are polarized as never before, with the majority of the new wave thinkers in literature departments celebrating deconstruction *cum* Marxism *cum* feminism . . . and the majority of the analytic philosophers celebrating materialism *cum* cognitive science . . .”).

air rushing to fill a vacuum, as truth is swept from the field, its rivals will rush in to occupy the available space.

So, we need to know whether truth has been swept from the field, as Professor Damaška, I believe, suggests modern thinking has concluded, or whether there is anything to Professor Twining's complacency, even if reached by a different route than he takes. For, if Professor Damaška is right, and the modern thought he refers to in passing is correct, his strategy of simply ignoring truth's defeat and going on to conventional evidentiary relationships will not stand against the assault of truth's rivals. No false and empty concept could stand against the combined assault of the various human interests that comprise truth's rivals. Fortunately, at least from my point of view, an understanding of scepticism tames it, and makes it manageable. Understanding scepticism may even reduce it to practical insignificance from the legal system's point of view. And if scepticism survives, it will be as acidic on the claims of truth's rivals as on truth itself. The rivals to truth require, just as much as historical (note that this is the first time I have used that term) truth requires, the establishment of an external world, its objects, and the power of induction. Thus, either scepticism can be dealt with, leaving truth and its rivals to compete on a level playing field, or it infects all claimants to the goals of the legal system, again leaving the playing field level. In either event, truth and its rivals will have to compete as equals in light of the relevant human interests at stake. No trumping of one by the other can occur. Let us now see if I can justify these assertions.

The philosophical problem of scepticism is whether knowledge of the external world is possible. The problem arises in the following fashion. First, intuitions are appealed to concerning the meaning of knowledge, and it quickly becomes evident that knowledge precludes ambiguity. Assume you have asserted that you know something and you are later shown to be wrong. You, and everybody else, would say that you really did not know what you claimed to know. Second, your knowledge of the external world rests on your experiential knowledge. You know what you do of the world because of what your senses have told you. Now, third, it is logically possible for you to have all the experiences you have had but for them to bear no relationship to the world as it is in itself. This, of course, is Descartes' point as he reflects on whether he indeed knows he is sitting by his fire, pen in hand, about to make one of the landmark contributions to philosophy. He would, he says, be mad to deny that he knows he is sitting there, but, he says:

At the same time I must remember that I am a man, and that consequently I am in the habit of sleeping, and in my dreams representing to myself the same things or sometimes even less probable things, than do those who are insane in their waking moments.

How often has it happened to me that in the night I dreamt that I found myself in this particular place, that I was dressed and seated near the fire, whilst in reality I was lying undressed in bed! At this moment it does indeed seem to me that it is with eyes awake that I am looking at this paper; that this head which I move is not asleep, that it is deliberately and of set purpose that I extend my hand and perceive it; what happens in sleep does not appear so clear nor so distinct as does all this. But in thinking over this I remind myself that on many occasions I have in sleep been deceived by similar illusions, and in dwelling carefully on this reflection I see so manifestly that there are no certain indications by which we may clearly distinguish wakefulness from sleep that I am lost in astonishment. And my astonishment is such that it is almost capable of persuading me that I now dream.⁶

As Professor Stroud has said:

With this thought, if he is right, Descartes has lost the whole world. He knows what he is experiencing, he knows how things appear to him, but he does not know whether he is in fact sitting by the fire with a piece of paper in his hand. It is, for him, exactly as if he were sitting by the fire with a piece of paper in his hand, but he does not know whether there really is a fire or a piece of paper there or not; he does not know what is really happening in the world around him.⁷

Descartes cannot, of course, doubt his own existence, for even if he is being fooled by his senses, it is he, whatever he may be, who is being fooled. Thus, he knows of his own existence and that he has no good reason to believe that he knows of an external world. And so the mind-body problem is created. We cannot doubt our own existence, for we are directly cognizant of our own consciousness and our own sensory input, but we have no good reason to believe that we have knowledge of an external world. We do not know whether we dream or not, and thus our beliefs can never reach knowledge, for they rest on our potentially misleading sensory experiences. We logically could have all the experiential knowledge that we possess—in other words, we could have all the sensory inputs that we have—and the world could be completely different from our beliefs about it. To conclude that we have knowledge of the world, then, we must put aside all our purported knowledge of the world and analyze it as a whole. We must then come up with a reliable method that allows us to bridge the logical gap between our experience and the world as it is, and that method must not itself rely on our purported knowledge

6. BARRY STROUD, *THE SIGNIFICANCE OF PHILOSOPHICAL SCEPTICISM* 11 (1984) (quoting RENE DESCARTES, *Meditations on First Philosophy*, in 1 *THE PHILOSOPHICAL WORKS OF DESCARTES* 141, 145-46 (Elizabeth S. Haldane & G.R.T. Ross eds. & trans., 1986)). I am indebted to Professor Stroud's work for much of what I discuss in this paper.

7. STROUD, *supra* note 6, at 12.

of the world, for otherwise the effort would be circular.

The argument of the sceptic is logically impeccable. If you grant his assumptions, his conclusions follow with irresistible force, and thus to dismiss philosophical scepticism for its logical inconsistency is simply to misunderstand it. The irresistible nature of the logic of scepticism is precisely why such a crazy idea endures. How can such an obviously wrong doctrine appear so invulnerable to attack? And it persists for a second reason: Until scepticism is rebutted, it will call into question all claims to knowledge, and thus its central importance to contemporary philosophy. Some apparently think it has not been rebutted, and thus Professor Damaška's references, I suspect. And it is clearly correct that most efforts at rebuttal are demonstrable failures. To give an indication of the depth of the problem, I will give a few examples:

1. Some have tried to dismiss scepticism on the basis of the argument, which apparently traces its roots to pre-Platonic days, that if scepticism is right, it is wrong; and if it is wrong, it is wrong; therefore it is wrong. In other words, if scepticism is right that knowledge is impossible, it is wrong because you at least know that knowledge is impossible. If it is wrong, it is also wrong, and thus it is wrong given all possible states of the world. This argument largely fails to confront the philosophical problem. Scepticism does not claim all knowledge is impossible. It claims knowledge of the external world is impossible, and it makes that claim based on the direct experiences that every cognizing human has of sensory inputs and the state of dreaming.

2. Professor Twining relies on A.J. Ayer's dismissal of scepticism to reach his comforting conclusion, but Ayer's dismissal misses the point by again failing to engage the central claim of scepticism. As Twining relates, Ayer's dismissal is captured by his assertion that "it is by insisting on an impossible standard of perfection, that the sceptic makes himself secure."⁸ But what, exactly, is the impossible standard? Is it that knowledge precludes the possibility of error? Again ask yourself whether you knew something that later turned out to be false. If that answer is no, scepticism is once again secured.

3. Perhaps one of the steps in Descartes' reasoning is vulnerable, such as his assertion that you cannot know whether you are dreaming or not. But, as Professor Stroud points out, for you to know you are not dreaming means you must have a test that indicates you are not dreaming.⁹ "But how could a test or a circumstance or a state of affairs indicate to [you] that [you are] not dreaming *if* a condition of

8. TWINING, *supra* note 3, at 100.

9. See STROUD, *supra* note 6, at 21.

knowing *anything* about the world is that [you] know [you are] not dreaming? It could not."¹⁰ And even if you had such a test, you would have to know it was applied correctly and that you were not just dreaming that it was. And so on.

The logical imperviousness of scepticism does not mean that no knowledge of the external world is possible. It simply means that such knowledge cannot be justified as the sceptic calls for. That point in turn opens up three avenues for adequately cabining the implications of scepticism:

1. The first is to recognize that even the most ardent sceptic does not doubt the existence of the external world or our knowledge of it. This was G.E. Moore's point in holding up his two hands as proof of the existence of mind-independent objects. Perhaps it is scandalous that we do not know how to rebut the claim of the sceptic, but as Stroud implies it is a scandal in philosophy:¹¹

The question philosophy must answer while avoiding the traditional sceptical account is how our knowledge of the world around us is possible. It is not enough simply to demonstrate *that* it is possible, or even that it is actual. We have seen that there is a way in which Moore can be said to have done that. What is wanted is an *explanation*.¹²

Admittedly, without the explanation, claims of knowledge appear corrigible. We are left with either the truth of scepticism, and thus the inaccessibility of the external world, or the truth of our knowledge of the external world, and thus the falsity of scepticism. Everybody knows which of these is true, just as most who study the problem believe that the truth has yet to be established. Thus the persistence of scepticism in the ongoing philosophical endeavor to prove the obvious but elusive truth of the correspondence between our experience and the external world. The disproof of scepticism is the philosophical holy grail, much like the proof of Fermat's last theorem has been for mathematics and the unified field theory is for particle physics. The inability to solve Fermat's conjecture did not lead to the belief in the inadequacy of mathematics, just as the continuing elusiveness of unifying quantum physics and relativity theory has not led to the rejection of the many truths of physics. These metaphors are not perfect, but they are adequate. There is indeed an important philosophical puzzle, but it primarily is how to explain what is obviously true.

2. The preceding point will not satisfy everybody. In the absence of the formal disproof of scepticism there will always remain to

10. *Id.*

11. *See id.* at 142.

12. *Id.* at 143.

some the nagging possibility that it is true. On its own terms, the argument seems impervious, but are those terms adequate? My colleague, Professor Michael Williams, has established in my judgment that they are not. His argument is subtle and I will present only a brief outline here.¹³

Scepticism relies heavily on its aura of logical invincibility that flows from the logical consequences of apparently uncontroversial intuitions about the nature of knowledge and the relationship between experiential knowledge and knowledge of the external world. If those intuitions can be undermined, can be shown to rest on controversial propositions themselves, much of the power of the sceptical argument will be blunted. Professor Williams shows that this is the case. In particular he demonstrates that scepticism presupposes the controversial doctrine of foundationalism, or what he refers to as epistemological realism.

Epistemological realism is the idea that “[b]eliefs, in virtue of their contents alone, fall into *natural epistemological kinds*.”¹⁴ According to foundationalism, “the intrinsic and inalienable epistemic characters of our various beliefs, and not any features of the contingently evolving problems, questions, and interests that inform particular contexts of inquiry, determine what can, in the last analysis, be called upon to provide justification for what.”¹⁵ This is crucial for the sceptic, because “[t]o see the constraints on justification embodied in the foundationalist’s epistemological hierarchy as imposed for a particular purpose is to see them as interest relative, and so less than fully objective.”¹⁶ To see, in turn, that the sceptic’s “constraints on justification” are not objective is to undermine his argument. His argument appears to be answerable only by a foundationalist response; but if instead his argument presupposes foundationalism, it is only as secure as foundationalism. And foundationalism is highly controversial.

Now, consider what the sceptic does. The sceptic invokes the intuition that all knowledge of the world rests upon experiential knowledge. This intuition entails, first, that there is an epistemological class, a natural kind if you will, of “knowledge of the world,” and second that “knowledge of our own thoughts and experiences is generally and objectively epistemologically prior to knowledge of the world.”¹⁷ This is to adopt foundationalism and epistemological real-

13. See Michael Williams, *Epistemological Realism and the Basis of Scepticism*, 97 MIND 415 (1988).

14. *Id.* at 419.

15. *Id.*

16. *Id.*

17. *Id.* at 427.

ism. Thus, his argument turns on the truth of foundationalism, the truth of which is at best unestablished.

The alternative to foundationalism is to see questions of justification as broadly contextualized, to see the standards of justification that are brought to bear on a task as driven by our purposes in undertaking that task. Professor Williams brings all these considerations together:

The idea of detachment, then, offers the sceptical epistemologist a powerful account of what is distinctive about the context of philosophical reflection. The underlying, objective structure of empirical justification is ordinarily obscured by economic constraints, limitations on time, and resources. In the course of philosophical reflection on our knowledge of the world, such constraints are temporarily suspended with the result that the real structure of empirical justification comes plainly into view. When this happens, the sceptic argues, we see that the only possible verdict on our knowledge of the world is that we do not have any. But it is only because he thinks of philosophical reflection as bringing to light objective constraints on justification that always lay behind ordinary practices that he is able to think of scepticism as a *discovery*. If he thought of his examination of our knowledge of the world as involving the creation of a new project—charting the relation of knowledge of the world to experience—difficulties internal to this one special undertaking would not necessarily reveal a deficiency in others.¹⁸

3. Perhaps there still remain some unconvinced that the implications of scepticism for the legal system are marginal at best. Reflect once more on the philosophical problem. It is that knowledge of the external world is not possible, making suspect claims as to how the world really is. We have no good reason to believe them. Thus, a system structured to generate just such statements about the world at best is hopelessly naive if not downright perverse. If so, the legal sceptic may argue, space is opened up for the pursuit of other interests. And thus we return to the rivals to truth identified by the conference organizers. If truth cannot be pursued, attention can be turned to them. But, the lesson of scepticism is that all statements about the external world are unjustified. The rivals to truth within the legal system are not radically solipsistic. They each require true statements about the external world. Political objectives must actually exist, for example, and be furthered by certain institutional arrangements or outcomes in order for the pursuit of political interests through the legal process to occur. And so on.

Human scepticism about induction is analogous to Cartesian scepticism about the external world. It privileges a certain kind of knowledge, observational knowledge, and asserts that all other

18. *Id.*

knowledge must be logically derivable from it. When you observe two balls crashing into each other, and thus diverted from their pre-crash paths, you do not observe causation. Nor is it logically inferable from your observation. Therefore, it is not justified. As the structures of Cartesian and Human scepticism are analogous, so too are the responses to them. And again, even if you are not convinced that Human scepticism has not been cabined, each of the rivals to truth assert causal relationships, without which they are gibberish. All the possible claimants to the law's largess, then, must rest on the rejection or cabining of the philosophical problem of scepticism and must presuppose that causal relationships can be identified. The playing field, in short, is level. The competing legal claimants must justify their claims through a thorough examination of the competing interests they promote. No trump cards can be played.

A few concluding points:

1. To say that the philosophical problems of scepticism are not acidic on the legal system is merely to argue for putting aside global claims that all knowledge of the external world is impossible or that no immediately nonobservable entities or truths have warrant. It is not to take a stance on particular problems, and there I recommend—matter of taste though it may be—a highly sceptical stance. For various reasons, the legal system in general and the legal academy in particular do not focus in as sustained and systematic a way as they should on the truth value of propositions. A good example of this is constitutional discourse. There is a constant stream of debate about constitutional matters at Northwestern School of Law, and it occurred to me a number of years ago that I could not quite make out the significance of many of the debates. And so, quite innocently, one day I asked two of the combatants over some issue of separation of powers what verifiable proposition they could articulate that would resolve their dispute. After a moment of silence, with who knows what thoughts going through their minds, they picked up their dispute exactly where they left off. Undeterred, I decided that henceforth that question should be introduced with regularity into the legal debates at the School of Law. And so it has. I must confess, however, that to some of my colleagues it is an irritating question, but the reason it is, I think, is because the truth is an irritant. It brings people up short, makes them justify what they have to say, and shifts focus from elegance and creativity to truth and facts. By doing so, it makes it considerably more difficult to argue for certain desired outcomes.

This is as it should be. One of the key ingredients to the expansion of knowledge is the irritation that comes from the requirements of justification and evidential support. In my view, this irritation is somewhat lacking in our law schools and our legal discourse, and the

scholars of evidence are those best situated to supply this needed ingredient. What distinguishes evidence from all other legal fields is its direct engagement with the nature of truth and its sophistication with fact-finding methodology. My point here is that I view us as having an obligation to employ this knowledge to the specific claims made in the legal debates transpiring across the country.

2. In my view, we Evidence scholars have the same obligation to apply our knowledge of how to examine propositions of purported truth value to ourselves.

3. To some extent, my admonitions here, if followed, may take some of the fun out of our work. Pursuing truth is a difficult task. Engaging in imaginative exercises is not, at least not in the same way. The work of the scientist differs from the work of the literary theorist. I am urging on us here the institutional self-conception of scientist, but I admit it is a matter of taste. Still, I cannot free myself from the facts that what the legal system does affects real people, and what law professors do may affect the legal system. A legal world in which facts and truth do not much matter would be, I think, an unpleasant place to inhabit. Security is lost. Planning is impossible. I thus view those of us who teach those who construct and run the legal system as having strong obligations to the truth. A strong obligation to the truth means a highly sceptical eye at the local level and a cabining of scepticism at the global level.

