# ESSAY

## DETERMINING FACTS: THE MYTH OF DIRECT EVIDENCE

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### I. INTRODUCTION

American law trades heavily in facts. It is not just that trials are centrally concerned with the determination of facts or that the resolution of legal disputes conventionally requires the application of law to facts. More deeply, law itself, whether as

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common law or legislative interpretation, emerges for us out of the nuanced examination of factual differences among particular cases.

But what are facts? More precisely, what are facts within the contemplation of law? We might sensibly seek an answer to this question in the law of evidence, which offers an elaborate typology of facts sorted according to multiple criteria: relevancy, materiality, authenticity, reliability, prejudice, and so forth. And deep in the heart of the law of evidence lies a distinction that seems to furnish the key to understanding just what the law means by a "fact." The distinction I have in mind is that between direct and circumstantial evidence, for the promise of direct evidence is precisely that it brings the factfinder in direct contact with a crucial fact about the instant dispute, i.e., that it "proves a fact . . . without requiring any deductions."[1] By contrast, circumstantial evidence "give[s] you clues about what happened in an indirect way."[2] And so, if we can understand just what it means to apprehend a fact directly, "without requiring any deductions," then we should be able to understand facticity itself.

The importance attributed to the direct–circumstantial distinction is longstanding. The Talmud, for instance, makes clear traditional Jewish law's disdain for circumstantial evidence:

> The rabbis taught: What means a supposition? The court may say to them: Although you saw that one ran after his companion to a ruin and you ran after them, and found a sword in his hand from which the blood dripped, and you also saw the one killed move convulsively, you saw nothing (so long as he did not kill him in your presence).[3]

Modern day American judges continue this skeptical approach to circumstantial evidence, albeit with moderation. For example, while the Pennsylvania jury instruction on "direct and circumstantial evidence" in criminal cases notes that

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1. STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE § 1.06, at 6 (2d ed. 2004).

2. State v. Dodson, No. E1999-00640-CCA-R3-CD, 2000 WL 528404, at *12 (Tenn. Crim. App. May 3, 2000) (quoting with approval the trial court's jury instructions).

3. THE BABYLONIAN TALMUD: TRACT SANHEDRIN 111–12 (Michael L. Rodkinson trans., 1918), *available at* http://www.sacred-texts.com/jud/t08/t0807.htm (last visited Jan. 31, 2009). The question "What means a supposition?" refers to the following passage:

> How were the witnesses awestruck in criminal cases? They were brought in and warned: Perhaps your testimony is based *only on a supposition*, or on hearsay, or on that of another witness, or you have had it from a trustworthy man; or perhaps you are not aware that finally we will investigate the matter by examination and cross-examination.

*Id.* at 111 (emphasis added).

"[c]ircumstantial evidence alone may be sufficient to prove the defendant's guilt," it nonetheless proceeds to instruct jurors how to "decid[e] whether or not to accept circumstantial evidence as proof of the facts in question."[4] In other words, the instruction clearly communicates to jurors that reliance on circumstantial evidence is problematic in ways that direct evidence is not.

Curiously, such cautionary instructions persist notwithstanding empirical data strongly indicating that at least some types of circumstantial evidence are actually *more* reliable than familiar categories of direct evidence.[5] Indeed, the view that circumstantial evidence is actually not intrinsically less probative than direct evidence is established doctrine in the federal system[6] and in about half of the state jurisdictions that have considered the issue.[7] (It is a view also supported by contemporary scholarship.)[8] And yet we routinely encounter examples like Ohio. While its courts have held that circumstantial evidence is not inherently less reliable than direct

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4. PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 7.02A (2005).

5. Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 252–55 (2006).

6. *E.g.*, Holland v. United States, 348 U.S. 121, 140 (1954) (asserting in dicta that in terms of reliability, circumstantial evidence "is intrinsically no different from testimonial evidence"); United States v. Fiore, 821 F.2d 127, 128 (2d Cir. 1987); United States v. Rodriguez, 808 F.2d 886, 890 (1st Cir. 1986); United States v. Bell, 678 F.2d 547, 549 & n.3 (5th Cir. 1982); United States v. Davis, 562 F.2d 681, 689 n.10 (D.C. Cir. 1977); United States v. Carlson, 547 F.2d 1346, 1360 (8th Cir. 1976); United States v. Wigoda, 521 F.2d 1221, 1225 (7th Cir. 1975); United States v. Merrick, 464 F.2d 1087, 1092 (10th Cir. 1972); United States v. Hamilton, 457 F.2d 95, 98 (3d Cir. 1972); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969); United States v. Chappell, 353 F.2d 83, 84 (4th Cir. 1965); United States v. Conti, 339 F.2d 10, 12–13 (6th Cir. 1964).

7. Des Jardins v. State, 551 P.2d 181, 184 (Alaska 1976); State v. Harvill, 476 P.2d 841, 846 (Ariz. 1970); Henry v. State, 298 A.2d 327, 330 (Del. 1972); State v. Bush, 569 P.2d 349, 351 (Haw. 1977); Gilmore v. State, 415 N.E.2d 70, 75 (Ind. 1981); State v. Morton, 638 P.2d 928, 933 (Kan. 1982); State v. Cowperthwaite, 354 A.2d 173, 179 (Me. 1976); Finke v. State, 468 A.2d 353, 362 (Md. 1983); People v. Johnson, 381 N.W.2d 740, 742 (Mich. Ct. App. 1985); State v. Buchanan, 312 N.W.2d 684, 688 (Neb. 1981); State v. Jones, 279 S.E.2d 835, 838 (N.C. 1981); State v. Jenks, 574 N.E.2d 492, 502 (Ohio 1991); State v. Stokes, 386 S.E.2d 241, 241 (S.C. 1989). *Contra, e.g.*, *Ex parte* Williams, 468 So.2d 99, 102 (Ala. 1985); Smith v. State, 669 S.W.2d 201, 204 (Ark. 1984); Murdix v. State, 297 S.E.2d 265, 267 (Ga. 1982); State v. Lilly, 468 So.2d 1154, 1157 (La. 1985); State v. Andrews, 388 N.W.2d 723, 729 (Minn. 1986); State v. Easley, 662 S.W.2d 248, 250 (Mo. 1983); Smith v. State, 695 P.2d 1360, 1362 (Okla. Crim. App. 1985); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. John, 586 P.2d 410, 411 (Utah 1978); State v. Wyss, 370 N.W.2d 745, 751 (Wis. 1985).

8. *E.g.*, DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 80 (1984) ("Although there is a logical distinction between direct and circumstantial evidence, the law does not value one more highly than the other."); 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 26, at 957 (Peter Tillers rev. 1983) ("[I]t is out of the question to make a general assertion ascribing greater weight to one class or the other.").

evidence,[9] Ohio jury instructions nonetheless clearly communicate that circumstantial evidence is second best and single out circumstantial evidence for the cautionary point that "the weight of such circumstances, if the jury find that they occurred, are to be determined solely by you [the jury]."[10]

And not surprisingly, empirical studies show that jurors either respond to or already share the prejudice reflected in such instructions. "[J]urors routinely undervalue circumstantial evidence . . . and overvalue direct evidence . . . when making verdict choices[.]"[11] Indeed, they are likely to do so even when they estimate the probative value of the two types of evidence to be the same in a given trial setting.[12]

The problem with the direct–circumstantial distinction is not simply that common beliefs about the significance of the distinction are false. A more fundamental problem is that the distinction, while perhaps appealing on the level of intuition, makes no logical sense. There simply is no category of evidence that brings us into direct contact with crucial facts because no such contact is possible. All facts are a function of interpretation, and this unavoidability of interpretation makes all facts a matter of inference and all evidence, whether called "direct" or "circumstantial," nothing more or less than a contribution to that inferential process.

Fortunately, it turns out that understanding the illusory nature of the direct–circumstantial distinction gives us just the purchase we need to understand what facts are in the context of legal decisionmaking—and, by extension, what facts are generally.

The purpose of Part II of this Essay is to reveal the illusion by considering several arguments in support of the direct–circumstantial distinction. My conclusion is that all of these arguments fail—ultimately because they fail to account for the ineradicably interpretive dimension of facts.

If the argument of Part II is correct, then why the traditional preference for direct evidence—or perhaps more to the point, why the desire that there *be* such a thing as direct evidence? Here, I

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9. *Jenks*, 574 N.E.2d at 502.

10. OHIO JURY INSTRUCTIONS § 317.15 (2006) ("If a witness testifies from his personal knowledge, that is called direct or positive evidence; or if he testifies directly to something that he has seen or heard, that is called direct evidence, providing the evidence is material to be proven in the case. But it is not always possible to ascertain the truth by evidence of this character; hence the law permits the introduction of what is called circumstantial evidence.").

11. Heller, *supra* note 5, at 241.

12. *Id.* at 256–58 (discussing the "Wells effect").

think, we encounter an ancient, deep, and ultimately unavailing hope of access to an unimpeachable reality. And, indeed, that is the ostensible goal of the law of evidence: to help the factfinder find her way to the facts, to the truth about what happened in the past. What makes direct evidence seem special is that by means of a linguistic trick (a trick that will be described in Part II), such evidence appears to offer a retrospective window through which we can look accurately upon the past.

Examining why so-called direct and circumstantial evidence do not differ in any way that matters will raise some important questions about evidence and the facts to which evidence points us. These questions will be taken up in Part III. There I will explore the implications of discarding the direct–circumstantial evidence distinction and, in so doing, articulate the broad thesis of this Essay: that our interpretation of facts, which in the trial setting is structured by the rules of evidence, involves both an attempt to accurately reproduce the past and, at the same time, a projection of the kind of social world we yearn for.

This fact about facts—that they have a forward-looking, aspirational dimension—has surprising and important implications. We think about evidentiary facts as anchored in the past; accordingly, we think about the trial as a device for reconstructing the past. It turns out, however, that recapturing the past always implicates the future and always expresses a moral perspective. When factfinders determine "what happened," they simultaneously pronounce how the world should be. Understanding why this is so and that this is so changes how we understand facts, the law of evidence, and the function of the trial.

## II. THE MYTH OF DIRECT EVIDENCE

Popular discourse often disparages certain claims by saying that they are based "merely on circumstantial evidence."[13] The derogatory use of the label reflects a widely held belief that circumstantial evidence is less probative of the ultimate facts at issue in a trial than is direct evidence.[14]

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13. *See* BINDER & BERGMAN, *supra* note 8, at 80 ("Although there is a logical distinction between direct and circumstantial evidence, the law does not value one more highly than the other. This may surprise those who have been raised in front of television lawyers who scream, 'It's nothing but a bunch of circumstantial evidence.'"); Paul Bergman, *A Bunch of Circumstantial Evidence*, 30 U.S.F. L. REV. 985, 985–86 (1996) (citing examples in movies of prejudice against circumstantial evidence).

14. *See* Heller, *supra* note 5, at 247–58 (discussing jurors' misevaluation of the probative value of evidence).

This bias in favor of direct evidence rests, in turn, on the understandable, albeit mistaken, belief that certain kinds of observations are "better" because they require no interpretation, in contrast to other kinds of observations that do require interpretation. To illustrate this mistake, consider the following two witnesses testifying in a rape prosecution: Witness number one testifies that she saw the defendant sexually assault the victim. Witness number two, a scientist–expert, testifies that she performed laboratory tests on a torn shirt recovered from the defendant's home and discovered on it traces of the victim's blood.

We immediately recognize the testimony of the first witness as direct evidence and that of the second witness as circumstantial evidence. The former evidence seems to give the factfinder immediate access to the facts constituting commission of the crime, while the latter evidence does not. Put another way, the testimony regarding laboratory tests on the torn and bloody shirt, if true, seems at most to increase the probability of the defendant's guilt to a degree still short of one hundred percent, whereas the testimony of the eyewitness, if true, seems to satisfy the elements of the offense. Consequently, if this direct evidence is reliable, it appears to "conclusively establish[ ] the defendant's guilt" in a way that the circumstantial evidence does not.[15]

Put yet differently, the testimony of the eyewitness seems to require no interpretation to support the proposition that the defendant committed the rape. After all, the eyewitness saw it. With her own eyes. By contrast, the testimony of the expert witness does not immediately support the defendant's guilt. We have to add some additional steps—inferential steps—to do that.

But all this is mistaken. First, direct evidence is not more reliable as a type than circumstantial evidence.[16] It is well understood that eyewitnesses testifying about dramatic events might be more likely to be mistaken than an expert testifying about laboratory tests.[17] Second, and perhaps more surprisingly, direct and circumstantial evidence both turn out to stand in

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15. *Id.* at 247; *see also* TERENCE ANDERSON, DAVID SCHUM & WILLIAM TWINING, ANALYSIS OF EVIDENCE 76 (2d ed. 2005) ("Evidence is often said to be direct if it goes in one reasoning step to a matter revealed in the evidence. If you believe the evidence to be perfectly credible, that settles the matter. Evidence is said to be *circumstantial* if, even though perfectly credible, it provides only some but not complete grounds for belief in some probandum or proposition. In other words, circumstantial evidence, even though perfectly credible, is always just *inconclusive* on some probandum.").

16. *See supra* notes 5–10 and accompanying text.

17. *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 174 (1979) ("People find it harder to recall information about a violent event than a nonviolent one . . . .").

precisely the same logical relationship to the question of the defendant's guilt. Of course, the idea that direct and circumstantial evidence are logically related to guilt in just the same way seems wrong. Indeed, both legal doctrine and ordinary intuition hold that direct and circumstantial evidence are fundamentally different types of evidence: "[C]ircumstantial evidence is used indirectly through inferences. Direct evidence . . . . proves a fact—generally a material fact—without requiring any deductions."[18] That difference, I will suggest, is wholly illusory.

I will call the account of the direct–circumstantial distinction that rests on this difference—the idea that circumstantial evidence requires inferences not required by direct evidence—the "logical account." The bulk of this Part is designed to demonstrate that the logical account is profoundly mistaken. What I will show is that all testimony requires interpretation—i.e., inferences—to give it meaning; consequently, the connection between direct evidence and the "material fact" it "proves" is every bit as inferential as is the case with circumstantial evidence. In the rape example, the testimony of the eyewitness and that of the expert stand in exactly the same logical relationship to the facts to be determined. And once we understand that, we will then be in a position to address in Part III the really interesting question: What does it mean to determine facts?

### *A. The Logical Account*

*1. A Story.* I will return shortly to the example of the rape trial. But first I want to suggest how the distinction between direct and circumstantial evidence is problematic by relating a nonlaw story that my friend Alice tells of an incident early in her marriage when she entered a room in her in-laws' house and saw a man standing with his back to her. Believing the man to be her husband Rick, she embraced him from behind, only to discover to her embarrassment that it was not Rick, but his brother.[19]

When Alice entered the room, she might have reported that she "saw" her husband Rick. Put that way, Alice's report sounds like direct evidence. But we might object and say that Alice did

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18. FRIEDLAND, BERGMAN & TASLITZ *supra* note 1, § 1.06, at 6.

19. This story illustrates the sequence of abduction (hypothesizing that Rick is in the room), deduction (predicting that when the person turns around, he will appear to be Rick), and induction (hugging the person and causing him to turn around), described in *infra* note 22. A similar event occurs in the film *The Big Easy*. THE BIG EASY (Columbia Pictures 1987).

not directly see Rick; rather, she saw other things—a man's back and other physical characteristics—from which she inferred that the person in the room was Rick. Put that way, Alice's report sounds like circumstantial evidence.

But what, then, would be an example of direct evidence of who was in the room—evidence that required no mediating step of drawing an inference? Suppose Alice "testifies" that the individual was standing not with his back to her, but facing her from across the room, and that she had no doubt that this person was Rick. Now *that* report would seem to be direct evidence that Rick was in the room. However, if this person actually turns out to have been Rick's identical twin brother, we see that once again Alice is mistaken. And she is mistaken in exactly the same way that she was mistaken in the actual event: she had a perception, and based on this perception and her past experience she mistakenly concluded and reported that Rick was in the room. In other words, neither version of this story has Alice "directly" perceiving Rick's presence. In each instance she is interpreting her perception.[20] In each instance she is drawing an inference from her perception about the identity of the person. In each instance the "factfinder" hearing her "testimony" is hearing evidence mediated by that inference. And in each instance the inference happens to be mistaken.

Here is one important point: Even if Alice's inference had been correct—even if the person in the room had been her husband Rick—Alice would have reached this conclusion only by drawing inferences. That is, her conclusion that the person was, in fact, Rick would have been the result of her ongoing interpretation of her perceptions—an interpretation that remained consistent with the hypothesis that Rick was in the room. Again, any report made by Alice to a factfinder wanting to know who was in the room would be evidence mediated by those inferences and the resulting interpretation.

And here is a second important point: We cannot get to any kind of noninferential judgment by insisting that Alice not interpret—that she just report the facts. For if instead of

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20. The text describes perception in empirical terms. More specifically, it invokes an inferential theory of perception. *See* Joel Richeimer, *Familiarity and the Inferential Theory of Perception*, 16 THEORY & PSYCHOLOGY 505, 506–07 (2005) ("The basic idea is that the sensory input stands in the same relationship to the percept as evidence does to a conclusion. Perception functions as a logical inference. Perception understood in this way is a rational process and, as such, an instance of cognition."). Put another way, the textual references to "interpreting perception" should not be taken to suggest that there is a moment when we could be aware of an as yet uninterpreted perception. When we are conscious of perceiving, we are conscious of perceiving *something*.

reporting that Rick was in the room, she reports that she saw the back of a man with certain physical characteristics, she has not avoided interpretive inferences. The category "man's back" and the categories constituting the "certain physical characteristics" are themselves Alice's interpretations. They are explanatory (interpretive) hypotheses, and they mediate between perceptions and testimony about those perceptions.

*2. Facts and Inference.* "The basic difference between the two types of evidence is that circumstantial evidence allows an individual to draw an inference based on common experience while direct evidence is within a person's actual knowledge."[21]

Despite its surface plausibility, this statement cannot be true. Suppose I testify that yesterday I took a walk in the desert and saw off in the distance a shimmering pool of water. That sounds like direct evidence that there was a shimmering pool of water at a particular spot. But suppose there is good reason to believe that there is no such pool. Suppose, for instance, that ten people walk to the spot I indicated and report that there is nothing there but sand. That would suggest that the existence of the shimmering pool is not "within [my] actual knowledge" because an object of "knowledge" must be true. (If there is no shimmering pool, I cannot "know" that there is such a pool.)

So what happened? The simple answer, of course, is that I was mistaken; what I saw, we would say, was not a shimmering pool at all, but a mirage.

Of course, there is an explanation, largely involving principles of optics, which accounts for my perception; that is, we could determine that the physical conditions (ground temperature, air temperature, distance, and so forth) were just right for me to have such an experience. Moreover, there is an explanation, largely involving reference to my past experiences, which accounts for my interpretation of my perception; that is, in my repertory of experiences (physical encounters, looking at pictures, academic study, and so forth), there is prior data from which I concluded that my current perception fell in the category of "shimmering pool of water."

In sum, we can describe circumstances—specific physical conditions plus my particular past experiences—that explain why I formed the belief that there was water at the location in

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21. Chad E. Wallace & Andrew T. Wampler, Comment, *Skimming the Trout from the Milk: Using Circumstantial Evidence to Prove Product Defects Under the Restatement (Third) of Torts: Products Liability Section 3, Tennessee and Beyond*, 68 TENN. L. REV. 647, 662 (2001).

question. We can think of my forming such a belief as my forming a hypothesis to make sense of my perception.[22] However, my hypothesis could turn out to be incorrect, as it was in this case. Indeed, any such an interpretive hypothesis must be understood to be, in principle, fallible—vulnerable to being subsequently shown, based on subsequent experience, to be incorrect. Consequently, an interpretive hypothesis should always be understood to be provisional—to be subject, in principle, to reconsideration based on subsequent experience.[23] And so, if I walk to the spot where I believe the water is located, I might have a new perception, one that I interpret (based on physical conditions and past experiences) not as a shimmering pool, but as desert sand. I would then, using this new interpretive hypothesis, conclude that my earlier interpretation was mistaken—that my perception of a shimmering pool of water was a mirage. Of course, this new interpretive hypothesis is also, in principle, fallible and, therefore, provisional. Subsequent experience might lead me to conclude that this, too, is mistaken. (Perhaps I will later conclude that what I now perceive as sand is itself a hallucination brought on by heat exhaustion.)

In general, then, circumstances mediate between a perception and the interpretation of the perception—circumstances that crucially include the past experiences of the observer. Any such interpretation is necessarily fallible and,

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22. As Peirce explains, the explanatory hypothesis (abduction) for an object of perception generates predictions of what our future perceptions of that object should be (deduction). We then test our hypothesis against ongoing perceptions to determine whether our perceptions are consistent with the predictions. If they are, those ongoing perceptions confirm the hypothesis by induction. *See* Charles S. Peirce, Lecture Six of the Harvard Lectures on Pragmatism, *in* PRAGMATISM AS A PRINCIPLE AND METHOD OF RIGHT THINKING 225, 230 (Patricia An Turrisi ed., 1997) (1907). By the same token, ongoing perceptions might turn out to be inconsistent with our predictions, thereby disconfirming the original hypothesis. It is for this reason—the dependence of the truth of an explanatory hypothesis on ongoing perceptions—that any such hypothesis is necessarily fallible as argued in the text.

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> [W]hile empirical refutation shows that an hypothesis is false, what we call verification does not prove that an hypothesis is true, though it certainly provides a ground for accepting it provisionally. If from hypothesis *x* it is legitimately deduced that in certain circumstances event *y* should occur, and if in these circumstances *y* does not occur, we can conclude that *x* is false. But the occurrence of *y* does not prove with certainty that *x* is true. For it may be the case, for example, that the conclusion that in the same set of circumstances event *y* should occur, can be deduced from hypothesis *z*, which on other grounds is preferable to *x*. Scientific hypotheses can enjoy varying degrees of probability, but they are all subject to possible revision. In fact all formulations of what passes for human knowledge are uncertain, fallible.

8 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 307 (1966) (discussing the role of fallibility in the work of Charles Sanders Peirce).

therefore, provisional, as further perception might show the earlier interpretive hypothesis to be incorrect.

The fallibility of Alice's interpretation of a man's back as belonging to her husband and my interpretation of my "direct" observation as a shimmering pool of water have their parallels in the testimony of the expert and the eyewitness in the earlier example of the rape trial. Both the expert and the eyewitness must interpret their perceptions. Only by drawing on knowledge and past experience[24] can the expert make meaning of the laboratory results and communicate that meaning to the jury; the laboratory results require interpretation. Like Alice, who saw a man's back in the room, the expert has drawn on past experience to interpret the data in terms of an explanatory hypothesis connecting the defendant to the events that constitute the crime. Moreover, as we saw, even Alice's perception of a "man's back" was itself an interpretation based on prior experience. Similarly, the expert's perception of "data" is itself an interpretation based on past experience.

By the same token, the eyewitness to the assault had to draw on prior experience to interpret her perceptions. Imagine a person who had had no prior experiences relating to the concept of a sexual assault (including hearing stories or otherwise learning about the topic). Such a person would have a perception, but could not "see" a sexual assault—that is, could not interpret her perception in that particular way. Such an "eyewitness" would be unable to testify that a sexual assault had occurred—not simply because she lacked the requisite vocabulary, but more profoundly because she lacked an adequate conceptual framework for making that kind of sense of her experience. (For just these reasons, an infant cannot testify as an eyewitness to or as the victim of a crime.)

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24. References in the text to "past" and "prior" experiences should be understood to refer not merely to particular events but to all material that we draw on to give meaning to present experience. So, for example, this material would include what Roland Barthes called "doxa, that set of unexamined cultural beliefs that structure our understanding of everyday happenings," as well as the "stock narratives, ways that things 'are supposed to happen.'" Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 11 (2006) (citing Roland Barthes, *From Work to Text*, *in* THE RUSTLE OF LANGUAGE 56, 58 (Richard Howard trans., Univ. of Cal. Press 1984)); *see also* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 261–62 (1994) ("A strong theme of the storytelling movement is that stories are used to 'construct' our world. We understand, we 'know,' by relying on a stock of conventional stories . . . . These stories *are* our ordinary understanding of the world.") (citations omitted); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984) ("We see and understand the world through 'stock stories.'").

For both the expert and the eyewitness, their explanatory hypotheses are necessarily provisional: they are necessarily, in principle, subject to revision in light of subsequent information (i.e., subsequent experience). It may turn out that the expert's interpretation of the laboratory tests is mistaken. It may also turn out that the eyewitness is mistaken.[25] For example, in the film version of Ian McEwan's *Atonement*,[26] the thirteen-year-old Briony barges into the library in her house, discovers her older sister Cecilia engaged in unconventional sexual activity with Robbie, the housekeeper's son, and mistakenly concludes that Cecilia is being raped.[27] Mistakes might be caused by physical conditions, e.g., faulty equipment in the expert's laboratory or poor lighting when the eyewitness viewed the encounter between the defendant and the victim. Or mistakes might be caused by the inadequacy of past experience. For instance, in the case of the expert, the problem might be poor training. In the case of the eyewitness, the example of Briony shows us how youth, inexperience, and sexual jealousy can undermine the ability to accurately interpret perceptions.

*3. Evidence and Inference*. The fallibility of a witness's interpretation of her perceptions—the possibility of a witness being mistaken—highlights the further set of inferences required in the trial setting. The expert and the eyewitness must interpret their perceptions through the drawing of inferences (just as Alice had to interpret her perceptions in the room and I had to interpret my perceptions in the desert). However, in a trial, the jury or the judge must also draw inferences regarding the testimony being offered by the witness.

Thus, for example, because an eyewitness might be mistaken, the factfinder must always assess the credibility of the witness, which is itself an inferential process. Put another way, "Since the credibility of a witness always rests in part on circumstantial evidence, the probative value of all evidence always effectively rests on circumstantial evidence."[28] Accordingly, even eyewitness reports can never prove a fact "without requiring any deductions," if only because the

25. *See generally* LOFTUS, *supra* note 17 (presenting research on the various factors that can undermine the reliability of eyewitness testimony).

26. ATONEMENT (Focus Features 2007).

27. Or the witness might be lying. Briony later falsely states that she saw Robbie rape her cousin Lola.

28. ROBERT P. BURNS, A THEORY OF THE TRIAL 189 (1999).

conclusion that the report is accurate itself requires logical inferences on the part of the factfinder.[29]

Another ineradicable aspect of the interpretation of evidence by the factfinder is the requirement that evidence be *relevant*.[30] The relevancy of evidence, whether direct or circumstantial, is not immediately given. Relevant evidence is that which is "probative" of "a fact of consequence to the determination of the action."[31] Hence, the facts recounted in the rape trial are relevant only if they tend to establish the truth of "facts of consequence." And to determine whether the facts testified to by a witness are "facts of consequence," the factfinder must connect the testimony to the elements of the crime of rape.[32] And *that* determination requires logical inference. That is, relevancy *always* requires inferential steps, whether the evidence is categorized as circumstantial or direct.

We can see this clearly with respect to the expert's testimony about the blood on the defendant's torn shirt. In the context of the particular trial, the factfinder might, in the end, interpret that testimony to mean that the defendant had engaged in a violent struggle with the victim—a hypothesis consistent with the conclusion that defendant had sexually assaulted her. Alternatively, the factfinder might, in the end, interpret that testimony to mean that the defendant discovered the victim injured and bleeding and used his (already torn) shirt to assist her. Each interpretation makes sense of the expert's testimony about the traces of blood on the torn shirt, and each interpretation might be correct or incorrect.

Like the expert, the jury needs to draw on knowledge and prior experience to choose what interpretation best fits the

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29. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 1, § 1.06, at 6.

30. In the evidentiary logic of trials, the issue of the relevance of the testimony is prior to the issue of the truth of the testimony. That is, the testimony's relevance must be established before the question of its truth can be considered. With respect to relevance the traditional distinction between circumstantial and direct evidence holds that "[c]ircumstantial evidence requires an inference to be drawn from it for the evidence to be relevant. . . . Direct evidence does not require an inference to be drawn from it to be relevant." *Id.*

31. *Id.* § 3.04, at 6; *see, e.g.*, FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

32. Of course, in a jury trial, the judge serves as gatekeeper regarding the admissibility of evidence, including questions of relevancy. FED. R. EVID. 104(a). Nevertheless, the significance of evidence admitted as relevant (or admitted because unobjected to) must be determined by the jurors in order to carry out their responsibility to reach a verdict. That, in turn, requires their connecting the evidence to the definition of the crime as instructed by the judge.

evidence, including the expert's testimony.[33] Even more fundamentally, the jury needs to draw on that fund of knowledge and experience to attach any meaning at all to the testimony. And the same is true with respect to the testimony of the eyewitness. Put simply, to a judge or juror lacking the relevant and adequate knowledge and prior experience, the testimony of either the expert or the eyewitness might sound like gibberish.

In sum, all evidence goes through two phases of inferential processing before it can illuminate a fact of consequence. First, a witness's testimony is always subsequent to the witness's own "making sense" of an experience (otherwise, she could not testify at all); that is, the factfinder's encounter with testimonial evidence is always preprocessed by means of the witness's interpretive framework.[34] Second, the factfinder must also interpret each instance of testimony in order to make sense of the testimony and in order to determine whether it connects to a fact of consequence.

The interpretive frameworks employed by the witness and the factfinder will be constructed out of past experience and, in the context of a trial, out of the formal legal elements of an offense, a claim, or a defense. Wherever it comes from, the frameworks are a necessary constituent of the witness's making sense of an experience and then of the factfinder's making sense of the witness's testimony.[35] If that is so, then distinguishing

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33. *See* Reid Hastie & Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on* The People of the State of California v. Orenthal James Simpson, 67 U. COLO. L. REV. 957, 973 (1996) (suggesting that African-American jurors in the *Simpson* case used their background knowledge to construct an interpretive story that included elements of police misconduct).

34. *See* BINDER & BERGMAN, *supra* note 8, at 79–80 ("Because a factfinder is confronted not with reality, but rather with a witness' verbal re-creating of reality, a factfinder's acceptance even of direct evidence requires inferences. When Lefter testifies, 'She is the woman who took my shoelaces at knifepoint,' the factfinder must make inferences before it can accept Lefter's testimony. It must infer that Lefter observed the incident well enough to tell about it, that she is able to remember it, that she is sincere in reporting it, and that words to Lefter have the same meaning as they do for the factfinder—e.g., Lefter does not belong to a cultural group whose word for 'cooked spaghetti' is 'knife.'"); BURNS, *supra* note 28, at 57 (arguing that the testimony of witnesses about their perceptions in response to direct examination necessarily reflects the witness's interpretation).

35. The reader may object to the account in the text on the ground that I have conflated two different evidentiary problems: "(1) the probability that the defendant is guilty if the evidence is true; and (2) the probability that the evidence is true"—that is, the problems of "probative value" and "reliability." Heller, *supra* note 5, at 247 (emphasis omitted). However, I intend the analysis in the text to suggest a deep connection between them. Reliability is always a matter of probability because evidence is interpretive "all the way down." Rapanos v. United States, 547 U.S. 715, 754 & n.14 (2006) (alluding to the classic story concerning what supports the earth). Thus, the conclusion that "the probative value of all evidence always effectively rests on circumstantial evidence" has to

between direct and circumstantial evidence on the ground that only the latter "is used indirectly through inferences"[36] is a mistake, for a factfinder is never brought into unmediated contact with facts through any evidence—"direct" or "circumstantial"—proffered by a witness.

*4. The Linguistic Trick*. What tricks us into thinking that there is a real difference between direct and circumstantial evidence is the fact that "direct" evidence names the "fact of consequence" directly, while circumstantial evidence names a different fact, which is connected to the fact of consequence by inferential steps. We think this linguistic difference has epistemological significance because we think that a witness who directly names the fact in question has herself direct knowledge of that fact. Thus, the witness who testifies that she saw the defendant assault the victim seems to have direct knowledge of that fact of consequence, whereas the witness who presents data about blood found on the defendant's torn shirt does not. (She has direct knowledge of the torn and bloody shirt, which is linked inferentially to the fact of consequence.) Accordingly, if hearing the testimony of the eyewitness is hearing the testimony of someone with direct knowledge of one or more facts of consequence, then we, in turn, appear to have access to that direct knowledge. By contrast, hearing testimony about the shirt appears to give us access not to direct knowledge of facts of consequence, but to other facts—circumstances—that remain at an inferential remove from any fact of consequence.

We can see now why this view is mistaken. In reality, the witness whose testimony explicitly names the fact of consequence has no more direct knowledge of that fact than the witness who explicitly names some other fact that must be then linked to the fact of consequence. All evidence is interpretive. All evidence is constituted by hypotheses posited to make sense of perception. All evidence is thus inferential. All this is true of both circumstantial and direct evidence, which is to say: there is no essential difference between the two.

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do with more than the fact that "the credibility of a witness always rests in part on circumstantial evidence." BURNS, *supra* note 28, at 189. The deep connection between reliability and probative value lies in the fact that all evidence is interpretive and thus, in principle, fallible and subject to revision. Accordingly, the relationship between any testimony and a fact of consequence is inferential.

36. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 1, § 1.06, at 6.

### *B. A Brief Look at Two More Accounts*

The logical account of the direct–circumstantial distinction is the one most embedded in evidence doctrine. However, there are other conceptualizations, and I want to treat them briefly here. The first of these is a variation of the logical account that I will call the "weak version." The second is a way of thinking about the distinction, recently suggested in a *Michigan Law Review* article by Kevin Jon Heller,[37] which I will call the "rhetorical account."

*1. The Logical Account (Weak Version)*. It is tempting to think that, even if all testimonial evidence requires inferences that explain (interpret) perceptions, some inferential chains are shorter than others and that this constitutes the real difference between direct and circumstantial evidence. In other words, we might apply the label "direct" to short chains and the label "circumstantial" to longer chains. This distinction, like the logical argument discussed earlier, focuses on the logical relationship between evidence and facts of consequence. Unlike that argument, however, the distinction I am now discussing seems to be one of degree, rather than kind. Accordingly, I will call it the "weak version" of the logical argument.

For instance, a seemingly short chain of inference leads from a perception interpreted as "defendant is sexually assaulting the victim" to the conclusion that the defendant has sexually assaulted the victim. By contrast, the chain of inference leading from the perception interpreted as "laboratory data indicating traces of the victim's blood on the defendant's torn shirt" to the conclusion that the defendant has sexually assaulted the victim appears longer. Recognition of such a difference might justify calling the perception of a struggle "direct" and the perception of the torn and bloody shirt "circumstantial."

However, this sense of significantly different lengths of the inferential chains connecting these different perceptions to the fact in question is just as illusory as the notion that "direct" information requires no interpretation. That is because the interpretation of perceptions does not involve a chain at all. As noted above, perceptions evoke a need to understand, to make sense of the perception. That, in turn, stimulates explanatory hypotheses to account for the perception. The "chain" metaphor suggests that a good hypothesis leads by links to an independent fact of the matter. But there is no independent, uninterpreted

37. *See* Heller, *supra* note 5, at 264–68 (discussing the differences between circumstantial and direct evidence).

fact of the matter; there is only interpretation. A particular hypothesis interpreting a perception might or might not be confirmed by subsequent hypotheses interpreting subsequent perceptions (including perceptions in the courtroom of other testimony). But the logical relationships are among the interpretations; there is no path away from that web of interpretations that leads to some independent fact.[38] The proper question is how clearly in focus is the web of connections among past, present, and future interpretations.[39]

Regarding the eyewitness's "direct" evidence of a sexual assault, the web might be sharply in focus: the explanatory hypothesis might come immediately to mind, and both the witness and the factfinder might be utterly confident of the fact that a sexual assault took place. However, all that is just as likely to be true for the expert's "circumstantial" evidence concerning the defendant's torn and bloody shirt.

In sum, the weak version of the logical argument fails because its premise is wrong. Facts do not appear at the end of chains, long or short. "Fact" is the honorary title we give to an explanatory hypothesis that survives ongoing testing against past, present, and future perceptions.[40] It is a declaration of confidence—a confession of faith that our conclusions will enjoy a long and robust future.

*2. The Rhetorical Account*. Heller, in a recent, important article, has offered a set of "epistemological differences" between circumstantial and direct evidence.[41] I want to focus on two of these—namely, that direct evidence is "representational" and "narrative," whereas circumstantial evidence is "abstract" and "rhetorical."[42]

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38. *Cf.* Peirce, *supra* note 22, at 83 (stating that inferences are valid only if the hypothesis "conforms more or less to the state of things in the outward world").

39. For an important explication of this point, see generally WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 42–43 (2d rev. ed. 1961), which uses, instead of "web," the metaphors of "man-made fabric" and "field of force"; and compare James O. Young, *The Coherence Theory of Truth*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), *available at* http://plato.stanford.edu/archives/fall2008/entries/truth-coherence, which discusses arguments for and against coherence theories of truth).

40. *Cf.* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM, at xxv (1982) ("On [William] James's view, 'true' resembles 'good' or 'rational' in being a normative notion, a compliment paid to sentences that seem to be paying their way and that fit in with other sentences which are doing so.").

41. Heller, *supra* note 5, at 264.

42. *Id.* (emphasis omitted). Heller proposes four such distinguishing criteria. In addition to those I consider in the text, Heller argues that direct evidence is "univocal" and "unconditional," whereas circumstantial evidence is "polyvocal" and "probabilistic."

Regarding the representational–abstract distinction, Heller argues: "Perhaps the most obvious difference between direct and circumstantial evidence is that direct evidence is a verbal representation of the crime itself, whereas circumstantial evidence is an abstract statement about the connection between the defendant and an incriminating physical trace of the crime, such as blood or fingerprints."[43]

In one sense, this example simply restates the linguistic point that direct evidence names facts of consequence, while circumstantial evidence does not. But Heller clearly has something stronger in mind. He illustrates his point by contrasting vivid eyewitness testimony of a shooting in a murder case (direct evidence) with tedious testimony of the lab results of DNA tests performed on bloodstains in another murder case (circumstantial evidence). Accordingly, Heller asserts that direct evidence, in contrast to circumstantial evidence, helps the factfinder in a criminal case "imagine how the defendant actually committed [the crime]."[44]

Ironically, this assertion is undermined by another example with which Heller begins his article (a variant translation of an example used at the beginning of this Essay):[45] "He[, the Judge,] says to them: Perhaps ye saw him running after his fellow into a ruin, ye pursued him, and found him sword in hand with blood dripping from it, whilst the murdered man was writhing [in agony]: If this is what ye saw, ye saw nothing."[46] Surely, the witness's account in this illustration helps the factfinder "imagine how the defendant actually committed [the crime]."[47] Indeed, the difference in that regard between this account and one by someone who actually saw the defendant strike the blow would be pretty marginal.

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*Id.* (emphasis omitted). For a discussion of these criteria, as developed by Heller, see *supra* Part II.A.1–4, B.1.

43. Heller, *supra* note 5, at 264.

44. *Id.* at 265. *But see* Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 232, 236–37 (Peter Brooks & Paul Gewirtz eds., 1996) ("What is it about stories as such that makes them so believable? . . . As one who bursts into tears at columns of figures, I have no idea why 85 percent of federal workers can be known to be sexually harassed for a decade, but not until one of them embodies the experience on national television does sexual harassment in the federal workforce become real in some sense." (footnote omitted)).

45. *See supra* text accompanying note 3 (reciting a different version of the translation).

46. Heller, *supra* note 5, at 243 (quoting HEBREW–ENGLISH EDITION OF THE BABYLONIAN TALMUD—SANHEDRIN 37b (I. Epstein ed., Jacob Shachter trans., new ed. 1969)) (alterations in original).

47. *Id.* at 265.

With respect to the narrative–rhetorical distinction, Heller invokes Jerome Bruner's distinction between narrative and rhetorical modes of thought. The former "involves 'good stories, gripping drama, [and] believable (though not necessarily "true") historical accounts.'"[48] By contrast, the rhetorical mode of thought "deals in general causes, and in their establishment, and makes use of procedures to assure verifiable reference and to test for empirical truth."[49] Unlike the narrative mode, which depends on "the imagination of the novelist or poet,"[50] the rhetorical mode relies on "procedures for establishing formal and empirical proof."[51] Heller's claim is that "[b]ecause direct evidence is representational, it functions in Bruner's narrative mode"; by contrast, circumstantial evidence, because it is abstract, "functions in Bruner's rhetorical mode."[52] Heller summarizes: Circumstantial evidence "is an *argument*, not a *story*."[53]

I am tempted to simply point once again to Heller's own example of circumstantial evidence from the Talmud as stark refutation of the notion that circumstantial evidence does not tell a story. But Heller's point is worth lingering over a bit. The argument criticized earlier—that there is a difference in the logical relationship between facts of consequence and direct evidence of those facts, on the one hand, and circumstantial evidence of those facts, on the other hand—translates readily into Heller's rhetorical argument. That is, the belief (shared by Heller) that direct evidence does not require inferential steps to connect it to the fact of consequence is a belief that direct evidence brings the factfinder face to face with the crime itself and is, therefore, consonant with Heller's linguistic claim that direct evidence presents a more vivid, gripping, and dramatic story than its circumstantial counterpart.[54]

Because the rhetorical argument relies on the now-discredited notion that a person can have unmediated access to independent facts, the argument must fail for the same reason that the logical arguments failed. It is a mistake to think that only direct evidence tells stories. As we saw earlier, all evidence reflects the construction of narratives—hypotheses—to make

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48. *Id.* at 265–66 (quoting JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 13 (1986)) (alteration in original).

49. *Id.* at 266 (quoting BRUNER, *supra* note 48, at 13).

50. *Id.* (quoting BRUNER, *supra* note 48, at 13).

51. *Id.* (quoting BRUNER, *supra* note 48, at 11).

52. *Id.*

53. *Id.*

54. *See id.* at 264–66 (describing direct evidence as "narrative" and circumstantial evidence as "rhetorical" (emphasis omitted)).

sense of perceptions. That is, all evidence tells stories, and the construction of those stories, along with concomitant judgments about their relationship to the truth, always depends on inferential reasoning—for "direct" evidence every bit as much as for "circumstantial" evidence.

## III. DETERMINING FACTS

I chair panels that determine facts and decide guilt or innocence in disciplinary hearings at my university. One case involved a fight between two groups of students. Both the alleged perpetrators and alleged victims testified about what happened at the time of their fight. That is, both groups of witnesses gave what is traditionally called "direct evidence." And the two stories were significantly different.

The two groups encountered one another on the streets of North Philadelphia following an earlier argument at a party. One group, the "Athletes," testified that the other group, the "Not-Athletes," was looking to continue and to escalate the confrontation. As the two groups came close together, the Athletes saw the Not-Athletes pick up some bricks. The Athletes spread out and acted to protect themselves. On the other hand, the Not-Athletes testified that it was the Athletes who were looking to continue the fight by surrounding them, and when that became apparent, the Not-Athletes picked up some bricks lying on the street to defend themselves.

As it happened, there was a color videotape of the event, made by a surveillance camera so positioned that it recorded the preliminary movements of the students, the fight itself, and the scattering of the participants afterwards. Now, a videotape is the epitome of direct evidence. Indeed, when we think of direct testimonial evidence, we might well have in mind, as the ideal, testimony that replicates the objective reporting of a video camera.

So we on the panel viewed the tape—probably a dozen times. And what we saw fit both stories.

There were a couple of reasons for this. One was that while the tape was reasonably clear, it was not clear enough. Because of the camera's distance from and perspective on the scene (mounted high up on a building and pointing at a downward angle) and because of the lighting of the scene (by street lamps at night), certain details that might have been crucially important were indistinct or not there at all on the tape. The second reason was that the tape, of course, could not record intentions directly (the viewer was left to draw inferences about the intentions of

the participants by viewing their actions, i.e., circumstantially), and an important difference between the two groups' stories had to do with the intentions of the combatants.

Ultimately, what we are concerned about with any evidence is how much confidence the evidence gives us that certain "facts of consequence" are true. As I argued in Part II, there is nothing about so-called direct evidence that makes it logically conclusive as to such facts. The videotape in my disciplinary case illustrates this point emphatically.

Like Briony, whose eyewitness account of the encounter between Cecelia and Robbie cannot give us all the information we need to determine whether a sexual assault occurred (for instance, information regarding intentions and consent), so the videotaped recording of the students' fight did not give us all the information we needed to determine whether the offense charged had been committed. But the problem with the tape was not just the absence of information about the physical details and the students' intentions. Much more to the point, the tape could not tell us what its images meant. Like all evidence, the tape could only make sense when a narrative was supplied—by a witness or by a viewing factfinder. If our ultimate concern was confidence that we could discriminate between true and false assertions, then that confidence could not come from the tape's congruence with the truth (which is what we were trying to find out!); rather, it had to be a function of the degree to which the explanatory narrative made sense. In terms of the videotape of the students' fight, the narrative that made the most sense was the one that did best on criteria such as internal consistency, consistency with other evidence, consistency with our past experiences of human intentions and actions, and so forth. In sum, the narrative that made the most sense was the one that best hung together with everything else that we, the factfinders, knew.[55]

In an important sense, the insufficiencies of the tape paralleled the insufficiencies of the students' testimony. Each group told a story that brought into focus certain facts, but not others—the latter remaining vague or altogether invisible. And the testimony about intentions did not give the factfinders direct access to those intentions, but rather verbal representations of

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55. *See* Hastie & Pennington, *supra* note 33, at 960 (arguing that jurors will select the "best" story through use of "certainty principles," including "coverage," "coherence," and "uniqueness" (emphasis omitted)); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 527 (1991) ("The principles that determine [a juror's] accepta[nce] of a story and the resulting level of confidence in the story[ ] are called certainty principles." (emphasis omitted)).

past intentions (just as the tape did not give direct access to the combatants' intentions, but offered pictorial images of physical actions from which intentions could be inferred). Of course, what could the students do other than try to make sense of their experience by molding it into a story—by selecting some facts but not others, by emphasizing some facts but pushing others into the background, by connecting facts to one another in ways that resembled other stories that they and others had told and heard in the past? The students who testified did just that—had to do just that—in recounting their experiences on the night of the fight; otherwise, those experiences would not have made sense to them, let alone to the factfinders. The videotape was not exempt from this need to become a story, from this need to make narrative sense.[56]

This point about the necessity of narration is just a variation of the point made earlier about the indispensability of explanatory hypotheses. I have a perception during a walk in the desert and make sense of it by hypothesizing that a shimmering pool of water is at a certain spot; Alice has a perception when she enters the room in her in-laws' house and makes sense of it by hypothesizing that her husband Rick is in the room. These explanatory hypotheses make sense of perceptions by telling stories about them: stories that draw on past experiences and make sense insofar as they cohere with those past experiences and insofar as they continue to cohere with our ongoing experiences. (When I walk to the spot where the shimmering pool should be and find only what appears to be sand, I will need an alternative hypothesis to explain what I initially saw. Similarly, when Alice embraces the man who then turns around and appears to be Rick's brother, she will need an alternative hypothesis to explain what she initially saw.) Moreover, this need to make narrative sense of perceptions is replicated for the factfinder tasked with listening to the witness's testimony and determining "what happened."

All this is well known to trial lawyers. These ideas are at the heart of what litigators call the "theory of the case"—the story that the attorney uses to integrate the undisputed facts with the attorney's version of the disputed facts to create "logical, consistent positions" at trial.[57] On this view, the overt structure of a trial can be understood as a battle of competing theories of the

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56. *See generally* BURNS, *supra* note 28 (providing an analysis of the narrative structure of the trial as a whole).

57. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES § 9.6, at 381 (3d ed. 1992).

case, i.e., of competing narratives.[58] Conventional wisdom holds that the trial will be won by the narrative that seems the "more plausible" explanation of "what really happened."[59] Accordingly, much labor is expended by litigators in presenting narratives that will resonate and cohere with the past experiences of the jurors. (It is, in large part, for this reason that determining through the voir dire process the composition of the jury, with its particular set of past experiences, is so crucial.)

Particular pieces of evidence are given meaning by their positions within one or more of these competing narratives. Sometimes the meaning of evidence will be uncontroversial. In principle, there are always different explanatory hypotheses—different narratives—that give different meanings to any evidence.[60] Nonetheless, in many instances some explanatory interpretation will seem more probable in light of past experience than any of its potential competitors, and all parties might formally or informally stipulate that probable meaning.[61]

On the other hand, just as perceptions in ordinary life might be truly ambiguous (Is that a shimmering pool of water or a mirage?), the meaning of evidence might be highly controversial. (Depending on the totality of the evidence in the rape trial, testimony that the defendant's torn shirt was stained with the victim's blood might signify a violent struggle, possibly a sexual assault, or it might mean that the defendant came to the aid of the victim, who was injured and bleeding.) This was the case with the videotape in my disciplinary case. The two groups of student witnesses offered different narratives that gave different interpretations of the images on the tape, both of which seemed plausible. What then?

Bias can clearly play a role in resolving interpretive ambiguities. Consider, for example, the assassination of Imad Mugniyah, a senior military commander of Hezbollah, on February 12, 2008.[62] Responsibility for the killing was ambiguous. While some speculation focused on Israel, comments by Israeli officials on the day of the incident had been

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58. *See* BURNS, *supra* note 28, at 50 (describing trial opening statements in the context of "a battle about the frameworks within which events should be understood").

59. MAUET, *supra* note 57, § 9.6, at 381.

60. *See* BURNS, *supra* note 28, at 91 ("[T]he meaning or significance of bits of evidence is often indeterminate. As trial lawyers say, 'Every fact has two faces.'").

61. For a discussion of the "web" metaphor, a variant of the discussion in this paragraph, see *supra* text accompanying notes 38–39.

62. *See* Robert F. Worth & Nada Bakri, *Bomb in Syria Kills Militant Sought as Terrorist*, N.Y. TIMES, Feb. 14, 2008, at A1, *available at* http://www.nytimes.com/2008/02/14/world/middleeast/14syria.html?th&emc=th.

ambiguous.[63] Nonetheless, on that same day, without revealing any additional information specifically linking Israel to the death, the Hezbollah-run television station Al Manar read a statement asserting that Imad Mugniyah had been "killed at the hands of the Israeli Zionists."[64] Hezbollah's apparent certainty on this matter seemed significantly influenced by its biases regarding Israel. My point is not that Hezbollah was incorrect, but that its judgment about a particular matter of fact seemed generated to some degree by a predisposition to see Israel as the cause of events harmful to Hezbollah.

Similarly, we can imagine that Alice, newly married, might have been somewhat predisposed to interpret the perception of a familiar looking figure in the room as her husband. This bias, accordingly, might well have contributed to her confidence that it was Rick in the room.

In the case of the fight between groups of students, the evidence indicated that the earlier confrontation at the party was between one of the Not-Athletes and one of the Athletes, the latter of whom subsequently alerted his friends by cell phone of the situation. As you may have gathered from my naming of these two groups, I suspect that biases having to do with athletes may have played a role in the decision made in this case, which resulted in a finding that the Athletes violated the *Student Code of Conduct*.[65] Specifically, I suspect that perceptions of an entrenched athlete culture as inimical to a thriving academic culture and stereotypes of athletes as inclined to instigate violence in support of a team member perceived to have been offended may have affected how some of the factfinders judged the relative persuasiveness of the two narratives.

I have just argued that bias can play a role in resolving interpretive ambiguities. Of course, what counts as an "ambiguity" is a matter of perspective. Part of the allure of direct evidence is that it seems unambiguous. Unless the perspective or lighting was distorted, the eyewitness's testimony seems to clearly establish what took place. But the distorting influences on observation might be even more obscure than, say, the optical factors that led me to believe that there was a shimmering pool in the desert. Consider the eyewitness to a sexual assault. In the film version of *Atonement*, the movie audience sees what Briony sees in the library, but unlike her, we do not judge Robbie's

63. *Id.*

64. *Id.*

65. Other factors also may have played a role, including, for example, the significant difference in the sizes of the two groups.

actions to be an assault.[66] For one thing, we know more about the situation than Briony. For another thing, we understand Briony's interpretation to be biased by her youth, inexperience, and sexual jealousy. To Briony, however, Robbie's conduct was unambiguously violent and nonconsensual.[67]

Moreover, the characterization of such biases as "distortions" may miss the essential point. Bias is deeply rooted in past experience. In fact, "bias" is often a derogatory term for what we all do: we make sense of present experience by fitting it into a larger narrative formed in very large part by our past experiences. In this fundamental sense, bias is an ineradicable aspect of judgment.[68] When we aspire for "unbiased" testimony or unbiased factfinders, we aspire for a "neutral" interpretation of perceptions and evidence.[69] But what could that mean? Should the factfinder interpret evidence without preference for certain understandings based on past experience? The Athletes and the Not-Athletes gave different accounts of the fight that provided different interpretations of the video. At some point a decision had to be made. One interpretation had to be chosen above the other. One had to be preferred. To make that selection required evaluation based on past experience—experience that ultimately made one interpretation appear more plausible than its competitor. And that is precisely what bias is.

But while bias is deeply rooted in the past, it operates in the other direction as well. Our biases do more than reflect our understanding of how the world is based on past experience. Our biases also reflect our aspirations—how we want the world to be.[70] If Alice was predisposed to believe that the person in the

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66. ATONEMENT, *supra* note 26.

67. *Id.*

68. *See* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, S. CAL. L. REV. 1877, 1905 (1988) (concluding that the question to a judicial candidate of whether he had "any preconceived ideas about any issue" that might come before the court and the candidate's subsequent denial "make[s] no sense at a factual level but must instead be understood as ritual[—a ritual requiring that the candidate] pretend to be other than human, to be 'an observer without perspective'"); *cf.* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 45 (1987) ("[The] aspiration to impartiality, however, is just that—an aspiration rather than a description—because it may suppress the inevitability of the existence of a perspective . . . .").

69. For a discussion of this aspiration in the context of what Burns calls the "Received View of the Trial," see BURNS, *supra* note 28, at 10–33.

70. Burns has made a related point in the context of the jury's overall responsibility for deciding the case:

> It is, then, by engaging in the process of common judgment that one takes responsibility for and decisively shapes what the community is becoming. . . . Because . . . the task of the jury is practical, because it must *do* something, its grasp must stretch into the future in a way that can never be

room was her husband, that predisposition might well have reflected not just past experiences, but a longing to be in the presence of her husband. Biases among the members of the disciplinary panel about student athlete culture reflected not just past experiences, but the members' ideals for the university life, ideals that might require radical change in the future for their actualization. Hezbollah's biases regarding Israel reflect not just their past experiences, but an entrenched political and military program for the future, alteration of which (encouraged by, say, different kinds of judgments about Israel's involvement in attacks on the group) would be enormously difficult.

Jurors similarly bring to bear on factfinding and decisionmaking their yearnings for how the world should be. (This is, for example, at the core of the occasional and controversial phenomenon of jury nullification.) Of course, those yearnings can be invidious. Like other biases, racial, religious, and ethnic prejudices not only reflect beliefs that an individual might have formed from past experience, but also reveal the individual's yearning for a social world that is racially, religiously, or ethnically organized in a particular way. When the jury in *To Kill a Mockingbird* convicts the black defendant, Tom Robinson, of raping a white woman, Mayella Ewell,[71] we understand that the jurors' verdict reflects not just their stereotypes regarding African-American men and white women—stereotypes rooted in their past experiences—but also their desperate desire to maintain a social world organized hierarchically along racial and gender lines with white men on top.[72]

But how, then, are we to understand the function of the trial? We imagine that the purpose of a trial is to resolve disputes over one or more facts of consequence in litigation. We imagine

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pictured.

*Id.* at 174, 236.

71. HARPER LEE, TO KILL A MOCKINGBIRD 211 (1960).

72. The text emphasizes the agency of the jurors in placing evidence within a particular interpretive narrative. We should keep in mind, however, that interpretive narratives are not simply freely chosen. We often employ conventional narratives to make sense of facts—narratives that themselves "are likely to express ideological effects and hegemonic assumptions." Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 212 (1995); *see also* López, *supra* note 24, at 3 ("We see and understand the world through 'stock stories.' These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social[,] and political values."). Narratives "also provide openings for creativity and invention in reshaping the social world." Ewick & Silbey, *supra*, at 222.

that the trial achieves this by providing a structured presentation of evidence from which the factfinder can determine what happened in the past. We imagine, moreover, that the factfinder performs the task of determining past events best when the factfinder's judgments most closely match that past reality—i.e., when the determination of what happened most closely matches what happened. Simply put, what we want from the factfinder is a *verdict*—a saying of the truth about the past.

But if what I have argued is correct, then the idea of a truth that is simply and solely about the past is incoherent. My point has not been that facts about the past are difficult to know or even impossible to know. Rather, I have argued that there are no facts strictly about the past. All facts are interpretative, and all interpretations are simultaneously oriented toward the past and the future.

The Janus-headed quality of interpretation is merely one illustration of something more pervasive. Just as we understand the narrative of our own lives as having both a past and a future, so the narratives we use to interpret our experiences generally are both backward- and forward-looking. We interpret in light of the past, in significant part, because we want stability in our world—we want the predictability that is obtained in a world in which there is continuity in the meaning of things. But our narratives are also about the kind of future we want—perhaps a future that will look very much like the past[73] or perhaps one that will look radically different. We interpret not just with an eye to how things have been, but also with a vision of how things should be.

Still, we want to say the truth is that the man in the room was Rick's brother, that the shimmering pool was just sand, and that Tom Robinson did not rape Mayella Ewell. And here we confront the moral dimension of facts. A juror who longs for a world in which African Americans are socially, politically, and legally subordinated to white people because of a presumptive inferiority will, in good faith, interpret the evidence presented at Tom Robinson's trial as establishing his guilt. Alternatively, a juror who yearns for a world in which all persons are accorded equal social, political, and legal dignity will, in good faith, interpret the evidence as establishing Tom Robinson's innocence.

Our judgment about facts is tied to our vision of the kind of world we want in the future, and visions of how the world should

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73. A past that is, in turn, constructed out of society's "stock stor[ies]" and our individual, idiosyncratic experiences—that is, a past that is, itself, an interpretation. López, *supra* note 24, at 23.

be are fundamentally moral in character. So understood, the problem with the jury's conviction of Tom Robinson is not that the jurors' biases got in the way of their determination of the facts. Bias is unavoidable. Rather, insofar as we judge their determination of the facts to be incorrect, the problem is that they had bad biases. Of course, those jurors would likely reach the same conclusion about our biases. Different interpretations of the evidence flow from different visions of what a good world looks like, and different visions of the good are different moral visions.

The implications of this argument for trials are unsettling. They suggest that the determination of facts depends incorrigibly on what kind of future we choose, i.e., depends on what we want the answer to be.

Consider a mundane fact: whether the blood on the defendant's torn shirt in my earlier scenario is that of the victim. The expert witness so testifies. Clearly at the core of the witness's testimony is a career full of experience with the analysis of scientific data. But just as clearly at the core of her testimony, as at the core of all such expert scientific evidence, is the belief that the world is and will continue to be predictably regulated by physical laws. Without that belief, the data collected by the expert is meaningless. But as has been long understood, the belief in a law-based universe is ultimately a matter of faith.[74] It is a belief that is corroborated, but never established by experience. Hence, the expert's judgment about the blood on the shirt is an interpretation simultaneously tied to past experiences and to the desire that the world be law-based. And we might add to that the expert's desire to be a certain kind of person—perhaps one who solves crimes by bringing the tools of science to bear on the interpretation of evidence. Accordingly, the expert's testimony depends on what she wants the answer to be in the sense that it is an answer that fits in the world as she wants it to be.[75]

I have argued elsewhere that the stories we tell ourselves as a community, reflecting both our past experiences and desires for how the world ought to be from now on, powerfully affect our

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74. For a good introduction to this problem, see generally John Vickers, *The Problem of Induction*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2006), *available at* http://plato.stanford.edu/entries/induction-problem.

75. Another all too familiar example is the tendency of some males to interpret explicit rejection of sexual advances as implicit acquiescence—i.e., to interpret "no" as meaning "yes."

interpretation of legal doctrine[76] and our understanding of the rule of law itself.[77] Here I argue that our answers to *factual* questions about the world—Is it Rick in the room? Is there a shimmering pool of water off in the distance? Did the Athletes surround and assault the blameless Not-Athletes? Did the defendant commit a sexual assault?—are similarly grounded in narratives constructed both to cohere with our past experiences and to pave the way for a desired future.

## VI. CONCLUSION

The direct–circumstantial distinction retains a powerful hold on the legal imagination. Even those who agree that this distinction has no functional significance continue to notice the linguistic difference—that direct evidence names facts of consequence, whereas circumstantial evidence names other facts.[78]

By explicitly naming facts of consequence, so-called direct evidence may seem more "apparent to our consciousness" and, therefore, more "simple, basic, or immediate" and, therefore, "most real, true, foundational, or important."[79] By contrast, circumstantial evidence may feel more removed from the facts than direct evidence—an imperfect copy of direct evidence, which is, therefore, less "real, true, foundational, or important."[80]

What makes direct evidence seem special is that by naming the facts of consequence, it generates confidence that now we have a retrospective window through which we can look accurately upon the past. If we have before us an eyewitness who knows "directly" what happened—who saw the shimmering pool, Rick in the room, the fight, the rape—we have correspondingly "direct" access to the truth. Conversely, if we have only circumstantial evidence—evidence that does not name the fact in question—then we feel we have less reason to be confident and then we consequently need an instruction like Pennsylvania's[81] or

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76. Richard K. Greenstein, *The Action Bias in American Law: Internet Jurisdiction and the Triumph of* Zippo Dot Com, 80 TEMP. L. REV. 21, 36–43 (2007).

77. Richard K. Greenstein, *Why the Rule of Law?*, 66 LA. L. REV. 63, 87–91 (2005).

78. My colleague, Eddie Ohlbaum, after reading a draft of this Essay, said, "I agree with you that the distinction has no importance, but there's still a difference."

79. J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 747–48 (1987) (discussing Jacques Derrida's "metaphysics of presence").

80. *Id.* at 748.

81. *Supra* text accompanying note 4.

Ohio's[82] that explains when we are justified in relying on circumstantial evidence.

But "direct" evidence no more gives us "simple, basic, or immediate" access to the truth about the past than does "circumstantial" evidence. For there is no truth—there are no facts—that is simply about the past. The truth toward which all evidence points is never simply about the past but is always also very much about the future.

When the factfinder finds facts—when the factfinder chooses among the competing narratives of the trial and the corresponding interpretations of the evidence—she is reconstructing the past in large part by constructing the future. Each trial decision, composed of intermingled interpretations of law and facts, is such an admixture of past and future, of description and hope, of belief about how the world was and aspiration for how the world should be. And each trial decision thereby contributes material from which that world might be created.

82. *Supra* text accompanying notes 9–10.