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Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases

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FORMAL LEGAL TRUTH AND SUBSTANTIVE TRUTH IN JUDICIAL FACT-FINDING – THEIR JUSTIFIED DIVERGENCE IN SOME PARTICULAR CASES

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ABSTRACT. Truth is a fundamental objective of adjudicative processes; ideally, 'substantive' as distinct from 'formal legal' truth. But problems of evidence, for example, may frustrate finding of substantive truth; other values may lead to exclusions of probative evidence, e.g., for the sake of fairness. 'Jury nullification' and 'jury equity'. Limits of time, and definitiveness of decision, require allocation of burden of proof. Degree of truth-formality is variable within a system and across systems.

KEY WORDS: burden of proof, evidence, formal legal truth, jury, legal values, substantive truth, truth

I. INTRODUCTION

A primary function of trial court procedures (which I will also call adjudicative processes) and of rules of evidence in cases before courts in which facts are in dispute is to find the truth. Some natural scientists, some social scientists, some philosophers, and many others regularly assume that truth finding is the only important function of trial court procedures and the rules of evidence. It is true that without findings of fact that generally accord with truth, the underlying policy goals or norms of the law could not be served. For example, a rule designed to secure safety on the highways by

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setting a speed limit of 70 mph and by punishing those who exceed it can not effectively serve its purpose if fact finders fail to find the true facts as to the speed of actual offenders and so let speeders go free of penalty. And if a party charged with speeding really did not speed, yet was found guilty and punished, this would also violate norms of justice as well as fail to implement the policy of highway safety as such.

Further, without judicial findings of fact that generally accord with truth, it would not be possible to test and improve upon the law in light of genuine experience with it in its concrete applications. If a rule of law is judicially applied to the true facts it envisions, the rule can also be tested for the adequacy of its formulation and for the soundness of any means-goal hypothesis it embodies. If, in light of the true facts, the rule is found wanting, then a legislature or perhaps even a court higher in the system may modify the rule in some way.

Also, without judicial findings of fact that generally accord with truth, citizens would, over time, lose confidence in adjudicative processes as fair and reliable tribunals of justice and as effective means of dispute resolution, both in civil and criminal cases. Interestingly, this would be undesirable also because it might lead to more litigation rather than less, for fewer parties would fear that truth adverse to their positions would come out in court proceedings, and so would be less disposed to settle out of court. Thus, in general, and without more, a legal finding of fact in a court proceeding should accord with the actual truth. I will call actual truth "substantive truth."

I define as "formal legal truth" whatever is found as fact by the legal fact-finder (judge or lay jurors or both), whether it accords with substantive truth or not.[1] In a well designed system, judicial findings of formal legal truth generally coincide with substantive truth in particular cases, and from the foregoing we can readily see

[1] Hans Kelsen once drew a similar distinction: "In case a fact is disputed, the judicial decision which determines that the fact has occurred . . . 'creates' legally the fact [formal legal truth] and consequently constitutes the applicability of the general rule of law referring to the fact. In the sphere of law the fact 'exists', even if in the sphere of nature the fact has not occurred [i.e. is not substantively true]." H. Kelsen, Sovereign Equality of States, 53 *Yale Law Journal*, 207, 218 (1994).

powerful reasons why the two ought to coincide.[2] But formal legal truth may, in a particular case, fail to coincide with substantive truth. There are two quite different types of possible explanations for such failure when it occurs. (And I do not mean to imply that we are always aware of, or can easily determine, the existence of any such divergence.)

First, trial court procedures and the rules of evidence, even though primarily directed at substantive truth, may, in a particular case, nevertheless lead to formal "findings of fact" that diverge from substantive truth not by design, but merely because this is the way the process happens to work, under the peculiar circumstances of the case. In such a case, any one of a host of factors may explain this divergence, including grossly unequal lawyer representation as between the parties before the court, inequality of resources available to the parties for trial preparation, prejudice or bias on the part of particular fact finders, sheer lack of competence of the fact finders in grasping and weighing evidence, fortuitous events such as the death of key witnesses prior to trial, and more. In some of these cases, when we are aware such findings are erroneous, we may be able to remedy them through appeal, reversal, a new trial, or the like. The divergence between substantive truth and formal legal truth in this first type of case cannot itself be justified on policy or related rationales. Of course, the divergence calls for explanation, and, in some particular cases, perhaps for rectification. Often the divergence simply reflects a concession to larger necessities, especially cost considerations. The law itself cannot guarantee equality of legal representation at trial, for example.

Second, there are cases where trial court procedures and rules of evidence fail to find substantive truth for quite a different sort of reason. In these cases, substantive truth and formal legal truth diverge in a particular case because the trial court procedures and the rules of evidence, though generally directed at substantive truth, are also designed to serve other ends that actually come into play

[2] Edmund M. Morgan once stressed: "The trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the adjustment of a dispute between litigants. Still it must never be forgotten that its prime objective is to have that basis as close an approximation to the truth as practicable." Edmund M. Morgan, *Some Problems of Proof Under The Anglo-American System of Litigation* 128 (N.Y. 1956).

in a particular case. For example, a rule of criminal evidence law forbidding the use of even highly inculpatory evidence procured by an illegal search of a private home protects privacy. To cite a second example, a rule of evidence may forbid the court from considering a confession of guilt by the accused criminal, and also any evidentiary fruits thereof, where the police procured the confession by beating the accused. As a result of the operation of this rule excluding evidence, the court may, in the end, fail to find the true facts. Not all coerced confessions are false. But such resulting divergence between formal findings of fact and substantive truth can still be justified on policy or other grounds. It is simply not so that the exclusive business of a trial court in all disputed cases is to find the actual truth. Indeed, with respect to civil cases, a noted English jurist once wrote:[3]

> Perhaps the greatest of all the fallacies entertained by lay people about the law is one which, though seldom expressed in terms, an observant lawyer may quite commonly find lurking not far below the surface. This is that the business of a court of justice is to discover the truth. Its real business is to pronounce upon the justice of particular claims, and incidentally to test the truth of the assertions of fact made in support of the claim in law, provided that those assertions are relevant in law to the establishment of the desired conclusion; and this is by no means the same thing.

Yet given the acknowledged importance of finding the truth in the generality of cases, we have here something of a puzzle, or perhaps even a paradox. That it might be possible to justify the failure of a court to find the truth when what is at stake is something of such importance as the policy against crime, or the policy in favor of justice as between civil disputants, will at first strike many as strange, or at the very least anomalous.

Just what is going on in particular cases of this second type in which the system, partly by design, yields findings of fact that do not accord with substantive legal truth? What type of policy or other justification might at least alleviate some of our concern over the failure to achieve substantive truth in such cases? My focus here will be on these two questions, and I will draw mainly on examples from

[3] Frederick Pollock, *Essays in the Law* 275 (Oxford 1922).

experience in Anglo-American systems of law. My general analysis applies also to leading civil law systems (though with variations).[4]

II. HOW FACT FINDINGS IN COURT MAY RATIONALLY DIVERGE FROM SUBSTANTIVE TRUTH

A. *Unavailability of Evidence*

A variety of types of factors may operate individually or in some combination to justify excluding or at least limiting relevant evidence in a court proceeding. Yet, other things equal, deciding on the basis of all relevant evidence reasonably available should approximate actual truth better than deciding on something less than all the relevant evidence reasonably available. Thus when relevant evidence is excluded, there is often an increased risk of divergence between formal legal truth and substantive legal truth. For example, privileges of certain witnesses not to testify are recognized in the law of evidence of various countries. For example, a husband may not be required to testify against a wife, yet this may be truth defeating in a particular case. Certainly it will be truth hostile, if not truth defeating, in the mine-run cases in which the privilege is successfully invoked. The main rationale for this privilege is simply the preservation of marital harmony.

Consider another example. Because of the limited "jurisdictional reach" of the trial court, it may not be possible to introduce before the court even evidence so highly relevant and weighty that it would be decisive if presented to the court. For example, it may not be possible to compel witnesses who are outside the jurisdictional territory of the court to appear and testify, and it may not be possible even to procure admissible written testimony from them, at least assuming the opposing party objects for lack of opportunity to test such evidence on cross examination. Yet if live or written testimony from such a party were heard, the fact-finder might well find the facts differently and truthfully so in some such cases. Here the rationales for any divergence between substantive truth and formal

[4] For some confirming analysis with respect to the German system, see Benjamin Kaplan, Civil Procedure – Reflections on The Comparison of Systems, 9 *Buffalo Law Review* 409 (1960).

legal truth are partly that some concession must be made to the inevitabilities of systems in which courts have territorial jurisdiction and partly that such "extra" jurisdictional evidence, if merely written, may lack reliability.

Thus, the concept of formal legal truth is shaped partly by various exclusionary doctrines in the law of evidence. These rules relate to privileged communications, as above, exclusions for hearsay evidence, as above, exclusions where the evidence was procured through invasions of privacy, exclusions for coerced confessions, and more. Similarly, the so called parole evidence rule in the field of contracts operates in some cases to keep highly relevant evidence of the actual tenor of the parties' understanding from the fact-finder in the interest of protecting the reliance of parties on carefully drafted written agreements. In the criminal law, it is familiar that there are various specialized rules of exclusion, and these are not confined to the exclusion of coerced confessions and their fruits. Furthermore, the accused may even refuse to testify in the proceeding at all. These rules serve various policies. Some regulate police practices that coerce the accused, invade privacy or the like. There is also a concern to avoid the taint that would go with a conviction based on evidence secured by unlawful means. The procedure allowing the accused to refuse to testify is based partly on the notion that it is deeply contrary to human dignity to compel self-incrimination.

All such exclusionary and related rules have their own justifications, even though they keep relevant evidence from the fact-finder, and so may cause divergence in a particular case between substantive truth and formal legal truth. Many of the rules even have rationales that are partly or entirely truth oriented in nature. It is, of course, true that to exclude hearsay evidence in some particular case may be to defeat the truth. Yet one rationale for the general exclusion of hearsay evidence is simply that the fact-finder is likely to accord such evidence too much weight, given that the party who would merely be quoted in court is not actually present before the court and so is not available for cross examination. And another rationale, also truth serving in nature is that exclusion of hearsay may induce

the hearsay's proponent to introduce instead the live testimony of the witness who would then be subject to cross examination.[5]

Evidence may be kept from the fact-finder also because of the intrinsic requirements of the client-representational roles of lawyers in an adversarial system of trial. In some systems, the so called "attorney-client privilege" operates to exclude evidence of communications from a litigant to his or her lawyer, communications which may actually conceal the truth in a particular case. Canons of professional responsibility that impose duties on lawyers not to disclose confidential communications from clients also affect fact finding in some cases. These legal doctrines are justified partly on the ground that they facilitate the successful functioning of the lawyer as representative of the client. If the law required the lawyer to disclose such matters to the court, this would impair the effectiveness of the lawyer in a representational role. A lawyer cannot represent a client in a factual vacuum. The client must have every incentive to disclose all to the lawyer. The client will not have that incentive if the lawyer must or is free to divulge all confidential communications. Accordingly, many systems do not, for example, put the lawyer defending someone accused of crime on the witness stand in open court and call on this lawyer to state what the criminal defendant said to the lawyer in private interviews. While in some particular cases, such rules doubtless allow divergence between formal legal truth and substantive truth that would not otherwise occur, it may well be that, the attorney-client privilege is more truth oriented than truth defeating, overall. That is, more complete disclosure by the opposing parties to their lawyers will in the end more effectively lead to application of the relevant substantive law.

In a civil proceeding, the law in some systems generally does not require a lawyer to introduce evidence known to that lawyer but which would be adverse to that lawyer's client. Why? Among other things, it is sometimes said that this would "break the adversarial spirit" of the adjudicative process, and the "adversary system of trial" itself generally serves important values, including truth find-

[5] Dale A. Nance, The Best Evidence Principle, 73 *Iowa Law Review* 227 (1988).

ing.[6] Relatedly, some systems generally do not provide for, or encourage, the judge or jury to make any independent investigation of the facts. Instead, the fact-finder is merely to sit back and hear evidence presented by the opposing lawyers, evidence which at least in some cases would fall short of the whole truth that might be found were the court itself to make an independent investigation. Here, too, however, it may be that this constraint is overall more truth oriented than truth defeating. If the adversaries were to ease up their own efforts to gather evidence on the expectation that the tribunal would itself ferret out the facts, the risk of divergence between formal legal truth and substantive truth might well rise.

Evidence may be kept from the fact-finder because of the time constraints operating within an adjudicative process, and because of the importance of finality. Fact finding must take place in definite time periods, and such processes cannot go on forever. Yet their conduct may not, for a variety of reasons, coincide with a time when most of the testimony of witnesses and other evidence likely to be nearest the truth is readily available. In these terms, a trial may occur "too late" or "too soon". And when it is held, it will be necessary to get it over within a discrete time period. Disputes must be settled, and settled with finality. The law includes many doctrines which, in part, reflect such time factors. It is familiar that the doctrine of res judicata bars the relitigation of disputed issues of fact once finally resolved, even when the evidence in the new preceding would certainly be decisively different. Consider, for example, a defendant in a car accident case who has had to pay damages to an injured woman for her inability to have children, and who, in light of new evidence that the woman later had a child, could now show that the damages should therefore be reduced. The policy of finality and repose would foreclose introduction of such new evidence, after a given period of time following the trial. Of course, in the long run, general refusal to reopen a final judgment to allow new facts to be proved may tend to lead courts in some cases to arrive at the true solution in the original proceeding itself. This is because

[6] For a perceptive account of some of the distinctive virtues of adversarial process, as such, see Lon L. Fuller, Report of Joint Conference on Professional Responsibility, 44 *American Bar Ass'n Journal* 1159, 1160–61 (1958).

such refusal may encourage litigants to devote more effort at the beginning of trial to search for all relevant evidence then available.

Sometimes a case arising under a given substantive law may be of a type in which there is such chronic paucity of reliable evidence that the risk of divergence between formal legal truth and substantive truth is eventually seen to be intolerably high. In this type of circumstance, the legal system may take Draconian steps. It may reform the substantive law itself so that its applicability simply does not require such fact-finding at all. Consider, for example, a rule of substantive law apportioning fault between two disputants in a negligence case involving a high speed collision of two vehicles unwitnessed by third parties. Here the law may take the view that the type of fact finding task required to apportion fault between the parties is not really effectively "performable" in a sufficiently reliable way, or that while performable in some cases it would not be so in others, and the two cannot be reliably classified in advance. In sum, there are simply limits to law – here limits to the fact-finding efficacy of law's machinery.[7] In turn, these limits may be a factor justifying a quite different alternative general legal approach to the problem: introduction of "no-fault" accident law in which auto owners, for example, all carry their own insurance against their own injuries and any other damage losses from highway accidents.

B. *The Not Irrational Bearing of Certain Non-Evidentiary Factors*

Even when all relevant evidence is available, a variety of other factors may explain and also justify, or rationally account for, the failure of a trial proceeding to find the actual truth, and so justify or rationally account for the resulting divergence between substantive truth and formal legal truth.

The necessity for a definite and immediate decision, for or against one party, may rationally account for a divergence between substantive truth and formal legal truth in a particular case. The law almost invariably calls for a definite decision, for or against one side to litigation. Among other things, this means that some facts may be formally found or not found, even though the substantive truth be otherwise. Because of any of a number of factors, one side may fail to introduce enough evidence to establish a fact, even though

[7] Roscoe Pound, The Limits of Effective Legal Action, 27 *Ethics* 150 (1917).

the evidence is available. If the party so failing has the "burden of proof" that party will lose then and there, i.e., the facts alleged will be taken to be "not proven", even though the facts alleged may in fact be true. Insofar as this factor is operative, the judicial proceeding may be characterized less as a search for substantive truth than as a search for a definite winner. It is sometimes said that in a lawsuit there can be no ties. But this search for a definite winner, too, serves distinctive ends, and so is not unjustified. There is a strong interest in the resolution of controversy as such. Controversy can be highly unproductive for the parties involved. It often interferes with what are far more fruitful pursuits. And it is also costly to the community.

The very nature of the type of legal consequences at stake may justify a divergence between formal legal truth and substantive truth. The consequences at stake may even affect what will legally count as fact–as truth–in judicial proceedings. Thus, in some systems, standards of required proof to establish facts in issue vary with what is at stake. In Anglo-American systems, it is familiar that in a criminal case the truth of facts against the accused must be established "beyond a reasonable doubt," and in certain civil cases, e.g., where punitive damages may be awarded for fraud, the truth of facts against the defendant must usually be shown by "a clear and convincing preponderance of the evidence". The more that is at stake, e.g., criminal blame, or punitive damages, the higher the standard of proof. In an ordinary civil case involving an ordinary claim for damages, the facts against the defendant need only be shown by a "balance of probabilities", a significantly lower standard of truth. Thus, depending on the relevant standard of truth, the very same evidence would warrant a finding of truth in one type of case but not in another. Thus truth varies with standards of proof, and standards of proof vary with what is at stake. Yet, as indicated, there are good reasons for these variations in standards of truth. In criminal cases for example, we accept a higher risk of erroneous acquittals in order to minimize the risk of erroneous convictions. Moreover, this may have the effect of increasing the total number of erroneous verdicts. Our tolerance for the risk of divergence, here, goes up the more that is at stake.

The so-called doctrines of "jury equity" and "jury nullification" of law may be characterized as "personnel-oriented" factors that

lead to divergence between substantive truth and formal legal truth in many Anglo-American systems, and in some others, too. Some systems allow juries as lay fact-finders – as special personnel – to modify or nullify criminal law, and also some civil law, by refusing to find relevant facts even though the evidence is entirely sufficient to support such findings, or by finding relevant facts "differently" from the way the evidence would rationally dictate in the particular case. Professors Hart and McNaughten have had this to say about jury equity and jury nullification:[8]

> One more characteristic of legal fact-finding needs to be noted–one which enjoys clandestine respectability in the law but which in other disciplines is a hallmark of intellectual dishonesty: the facts are sometimes "bent" to serve an ulterior purpose. It is important to proper administration of the law that the public believe in the humanity and justice of decisions. This value the law seeks to serve partly through the institution of the jury trial. The jury, representing "the people", is deliberately inserted as a kind of cushion between the individual on the one hand and the coercive power of the state on the other. The jury, always in criminal cases, and within broad limits in civil cases, is allowed to thwart the law's commands–in effect to find the facts untruthfully–if it is not satisfied with the justness of the commands as applied to the case in hand.

Of course, sometimes what appears to be a divergence between formal legal truth and substantive legal truth, is really not. Thus, the very same evidence may be sufficient to justify a finding of fact for the purposes of one law or doctrine, but not for purposes of another, and not because of appropriate differences in standards of proof, but because of differences in the appropriate meanings to be attributed to the same word in different laws. Consider, for example, two rules each of which uses the word "drunk". One rule allows the police to take a drunk man off the street and have him "dried out" in a medical facility. The other rule forbids a drunk person from driving a car. Now, assume that the evidence of Edgar's drunkenness is not strong enough to justify police in finding him so drunk as lawfully to empower the police forcibly to take him off the streets to be "dried out" for several days in a local medical facility. Yet this very same evidence of Edgar's drunkenness could still be strong enough to

[8] Henry M. Hart Jr. and John T. McNaughton, "Evidence and Inference in Law" in *Evidence and Inference* (D. Lerner, ed. Chicago 1958), and in 87 Daedalus 40–64 (1958). See also, P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* ch. 6 (Oxford 1987).

justify a finding of fact that Edgar, if he were to get into his car and drive off, would be "driving under the influence of alcohol" and thus guilty of that offence, and this very evidentiary finding could empower the police to prohibit Edgar from driving his car. In turn, in a subsequent court proceeding, the judge could, if the issue be contested, confirm this finding and the exercise by the police of such a power to intervene. Thus, the nature of the law or legal doctrine at stake – the nature of the specific "legal difference" it makes – can also rationally reduce what is to be taken as truth for the law's purposes.[9] It does not, however, follow that in such cases there is any divergence between formal legal truth, and substantive truth.

Similarly, many so called (by lawyers) "findings of fact" in legal proceedings are partly, and sometimes in major part, not really factual at all. Rather, they are to some extent highly evaluative determinations in which truth as such is only partly at stake. In the law, as elsewhere, the line between the merely factual and the evaluative is often not sharp. Examples include such "findings of fact" as that a defendant in a civil case was negligent, or that a defendant in a civil case induced the plaintiff reasonably to rely on the defendant's promise, or that a defendant in a criminal case was understandably provoked by the party assaulted, or that a defendant in a criminal case acted recklessly, or maliciously. In all such cases, and many of these arise in the law, it is not really accurate to say that only truth is at stake, even though the issues, in their entirety, are usually characterized as issues of fact. It follows we should recognize that, to a significant extent, scope for divergence between substantive truth and formal legal truth really does not exist in such cases. Of course, here there can still be a difference between apposite evaluative characterization and inapposite evaluative characterization.

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[9] Compare Hans A. Linde, Book Review of Harold Jacobson and Eric Stein, *Diplomats, Scientists and Politicians* (U. of Michigan 1966), 81 *Harvard Law Review*, 922, 925 (1968): "But lawyers know the inverse relation of fact-finding to decision-making. Conclusions are needed if someone's right or power to act depends on them; they will be reached with an eye to the consequences. The legal conclusion at issue determines what 'ultimate facts', what factual inferences must be obtainable from the reconstruction of past events; the requirements of that process in turn determine the characteristics of the evidence needed." See also, John Lucas, On Not Worshiping Facts, 8 *Philosophical Quarterly* 144 (1958).

III. APPROPRIATE TRUTH FORMALITY

If we consider what the fact-finding would likely have been (1) in the absence of rational restrictions on availability or presentation of evidence, and (2) in the absence of the play of other types of rational factors considered here, then it is indisputable that formal legal truth diverges in some cases from substantive legal truth. And, as I have tried to show, this can, in some types of cases, even be justified.

It follows that the very nature of the law itself is correspondingly affected. Rules of law cannot have intended meaning and significance unless applied to concrete states of fact. Every legal rule or precept contemplates a state of fact. Insofar as that state of fact is taken to exist or not to exist, the law accordingly applies or does not apply, assuming that the law itself is sufficiently determinate to allow for correct application in the first place. Thus, if merely a formal, and not also a substantive, theory of truth is in play in a particular case, the law might or might not apply, or might apply very differently, from what would occur if only a substantive theory of truth were in play whereby fact-finding occurs in accord with actual truth.

A high degree of truth formality diverging from substantive truth is not necessarily appropriate in any particular case, nor is low truth formality that almost never diverges at all always appropriate. What is appropriate depends on the type of circumstances. Yet, in my view, the burden of persuasion should always be on those designers of the system who wish to justify the recognition of any factor that may lead to divergence. If such diverging factors as those treated here are not in play, or not significantly in play, high truth formality diverging from substantive truth is not appropriate. Indeed, absent diverging factors, which are by no means always significantly in play, high truth formality would be inappropriate, for, other things equal, legal fact-finding ought to approximate truthful fact-finding, i.e., ought to accord with substantive truth.

Overformality of fact-finding in a particular case occurs where the rational factors considered here are not in play or not significantly in play, yet facts are found that are contrary to the actual facts. Or such overformality may even occur with regard to an entire system of judicial procedure, one designed faultily. For example, in such a system, cases may be too readily disposed of on mere points

of procedure rather than ultimately in light of their factual merits, as where a plaintiff's case is dismissed merely for a minor flaw in pleading, as occurred regularly in former times in Anglo-American systems.[10]

Underformality of fact-finding occurs in a particular case where one or more of the factors that may justify divergence of formal legal truth from actual truth is appropriately in play, yet the court disregards the force of this in pursuit of the true facts, as where, for example, a court reopens a civil case too readily because of newly discovered evidence identified long after entry of judgment, or a court admits a coerced confession. At the same time, the system could be inappropriately designed, as where a court in disputed contract cases is always to hear all parole evidence of the existence of agreed contract terms, except evidence strictly contradictory of the written terms, even though there is a written agreement that appears entirely comprehensive, and which itself recites as much.

IV. CONCLUSION

Formal legal truth and substantive truth may diverge in a particular case, with the court finding facts that do not represent the actual truth. While it is, for many important reasons, generally desirable that this not occur, and that substantive truth, or the closest approximation to it, generally prevail, in Anglo-American systems in some cases the divergence occurs, in effect, by design. The rationales for this can themselves be weighty, and so justify the divergence. As explained here, these rationales, some of which are themselves truth-oriented in the general run of cases, are highly varied and complex. Moreover, those that are truth hostile if not truth defeating in some particular cases, cannot be reduced to any single formula such as the "protection of individual rights" or the like.[11] It follows that the concept of "formal" legal truth, in those cases in which it diverges from substantive truth, is not necessarily

[10] Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 *American Law Review* 729 (1906).

[11] In a thoughtful essay, the author at one point seeks to reduce all these rationales for divergence to "…protecting the individual from possible injustice and from the coercive power of the state …" At other points, the author's formu-

something to be disparaged at all. If the system is well designed, and if, in a particular case of divergence, relevant rationales for such divergence are in play, the divergence is merely the price we pay for having a complex multi-purpose system in which actual truth, and what legally follows from it, comprise but one value among a variety of important values competing for legal realization.

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lations are more commodious. See Nicolas Rescher, Evidence in History and in Law, 56 *Journal of Philosophy* 561, 578 (1959).