JUDGING WITNESS CREDIBILITY: A TALMUDIC PERSPECTIVE

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I. INTRODUCTION

[1] Witness credibility may rightly be regarded as the lacuna,[1] at the center of Anglo-American law. The purpose of a trial is, of course, to establish the facts of a matter in dispute.[2] In an adversarial system[3] favoring one continuous proceeding, the trial is a party's ultimate means of persuading the tribunal to accept its version of the events.

[2] The evaluation of witness credibility is crucial to the process of fact-finding, but there is no law of witness credibility. There are rules that disqualify certain classes of witnesses: minors, spouses, and incompetent persons. There is also the trial lawyer's familiar arsenal of impeachment weapons. Beyond these rules however the determination of the credibility of a witness is the province of the finder of fact, whether judge, jury or hearing officer.[4] It is a foundational principle that, absent glaring error by the trial court, an appellate court will not review the findings of fact

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[1] **Editor's note:** A lacuna is, "[a]n area of a manuscript, painting, or other material, that is completely missing as a result of any type of damage." ETHERINGTON & ROBERTS DICTIONARY at http://palimpsest.stanford.edu/don/dt/dt1982.html (last modified July 8, 2003).

[2] "[T]rials are necessary to resolve disputed questions of historical fact. The court must first determine what occurred in the past - the historical facts - before it can apply the substantive law to decide the parties' rights and obligations. . . . Indeed, as has been suggested, perhaps 'lawsuits are misnamed: They should be called fact suits.'" DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 11 (1984) (citations omitted).

[3] An adversarial system can be defined as: "[A] system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive." MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 74 (1997).

[4] BINDER & BERGMAN, *supra* note 2, at 11.

made at trial.[5]

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[5] JENNY MCEWAN, EVIDENCE AND THE ADVERSARIAL PROCESS: THE MODERN LAW (2nd ed, 1998) 267-8. "Operating within the adversarial system, [the appellate court's] reasoning since its inception inevitably has been dominated by the 'day in court' and the principle of the primacy of the jury [or finder of fact]. 'We are not here to re-try cases which have been heard by a jury " (citing *McNair* (1909) 2 Cr. App. R. 2).

[3] A common rationale for deference to the trial court's findings of fact is that only the finder of fact has had the opportunity to see and hear the witness and to judge her demeanor. An appellate court, deprived of this opportunity, would only be "second-guessing" the trier of fact were it to review a credibility determination.[6] *Weinstein's Federal Evidence* describes the centrality of demeanor evidence as follows:

> Tradition has it that the trier of facts can better evaluate credibility by observing the witness on the stand. Although doubt has been cast on this proposition, and it has proved all but impossible to articulate what the trier of facts looks for, the tradition nonetheless endures . . . . The constitutional right of confrontation . . . rests in part on this premise.[7]

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[6] In one case, Judge Jerome Frank explained the court's refusal to disturb a trial examiner's finding of credibility by noting,

> Repeatedly, the courts have said that, since observation of . . . 'demeanor evidence' is open to a trier of the facts when witnesses testify orally in his presence, and since such observation is not open to a reviewing tribunal, that fact-trier's findings, to the extent that they comprise direct or 'testimonial' inferences, are ordinarily unreviewable.

Nat'l Labor Relations Bd. v. Dinion Coil Co., 201 F.2d 484, 487 (2d Cir. 1952). *See also* 5A Moore's Federal Practice, 52.03[1].

[7] JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 802.02[2][b], at 802-8 (Joseph M. McLaughlin ed., 1997) (citations omitted). *See also* JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE (editor ed., 1946):

> The *demeanor of the witness on the stand* may always be considered by the jury in their estimation of his credibility. So important has this form of evidence been deemed in our system of procedure that by a fixed rule of confrontation the witness is required to be present before the tribunal while delivering his testimony. The main feature of contrast between the civil law and common law systems of taking evidence was the difference between 'viva voce' testimony and written depositions. Only when the former cannot be procured is the latter allowed to be employed.

[4] It has been impossible to define with any precision the nature of demeanor evidence. In his *Dinion Coil Company* opinion, Judge Frank attempted to articulate what the trier of facts looks for.[8] Among the key aspects of demeanor evidence, he noted, are the witness's "specific reactions, e.g. that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation."[9] Judge Frank, however, acknowledged that, "methods of evaluating the credibility of oral testimony do not lend themselves to formulations in terms of rules and are thus, inescapably, 'un-ruly'."[10]

[5] Among more recent commentators, Binder and Bergman describe demeanor evidence as:

> [A] variety of elements which combine to form a person's unique style: physical attractiveness; tone of voice; eye contact; hesitancy; apparent sincerity; physical gestures and body language; naturalness; sense of humor. If this list is not exhaustive, it is at least suggestive of the elements of style and demeanor which make one person appear more credible than another.[11]

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[8] Nat'l Labor Relations Bd. v. Dinion Coil Co., 201 F.2d 484 (3d Cir. 1952).

[9] *Id.* at 487.

[10] *Id.* at 488-89.

[11] BINDER & BERGMAN, *supra* note 2, at 152.

It seems, then, that Weinstein is right to call the faith in demeanor evidence a "tradition."[12] This faith in the reliability of demeanor evidence is probably closer to a folk belief such as "the eyes are the mirror of the soul" than it is to a testable proposition. In fact, some empirical evidence suggests that evaluation of demeanor is both more difficult and less reliable than is generally believed.[13]

[6] While it is not uncommon to invoke intuition as an explanation of what underlies such judgments, the term may denote little more than the unexamined operation of prejudice. In this context, intuition is an entity devoid of empirical content and is, therefore, all but immune from exploration. Those who invoke intuition claim that the finder of fact is able to grasp the veracity of the testimony, thereby answering the question of who is telling the truth. But this appeal to intuition acts to foreclose inquiry into the actual basis of the judgment.

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[12] WEINSTEIN & BERGER, *supra* note 7.

[13] *See* MCEWAN, *supra, note 5.* Among the notable findings, "there is a general tendency for people to over-estimate their capacity to identify persons who are telling the truth. . . . there is a tendency to believe witnesses who have a great deal of confidence. . . . [but] [r]ather than being fidgety and tense, *habitual liars are still and calm*" (emphasis added). *Id. See also* ELIZABETH F. LOFTUS AND JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 1-8 (2nd ed. 1992) (Corroborating these findings with research on juror response to eyewitness testimony). *See also* Henry S. Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A. J. 580 (1961). Sahm's many years of service as a trial examiner for the NLRB may have helped him to conclude, with refreshing humility, that, "Truth . . . is so elusive that it is not given to mortals ever to know it with certainty . . . . The trier of facts must find consolation, therefore, in the aphorism that knowing the truth is a divine and not a human attribute." *Id.* at 584.

[7] The jury selection process implicitly acknowledges that preconceptions play a role in credibility judgments. Of course, if jurors were somehow able to grasp the truth-value of testimony, juror demographics would not be such a paramount concern. Trials attorneys know that intuitive judgments can differ greatly, depending upon who is intuiting.[14]

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[14] *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (explaining what may underlie such intuitive judgments). Amsterdam and Bruner observe that judgments depend, to a great degree, upon how we categorize the person, event, or thing to be judged, that the act of categorizing is generally a precursor to the judgment. They cite the research of cognitive psychologists,

> [S]uggesting that category placements are often made by assimilating the thing-to-be-categorized to a *prototype* rather than by comparing its observed attributes with a checklist of definitional components. So, jurors deciding whether a defendant is guilty or innocent of murder might well respond not only to the legal elements of the crime of murder as defined in the judge's instructions, but also to their prototype of what a 'murderer' looks like.

Id. at 43 (emphasis in original). *See id.* at 33-37 (discussing a potential counterweight to reflexive categorical thinking).

[8] One commentator has observed that the importance of oral testimony is a logical outgrowth of certain key features of adversarial adjudication.[15] The parties bring before the court a dispute in which the court itself has no interest and no investigative role. Hence, "the judge's umpireal role and the evidence-gathering function of the parties," dictates that, "each party will be anxious to attack the evidence of the other, and this is easier if the emphasis is on oral testimony."[16]

[9] Within this competitive regimen, the rules of evidence play a prophylactic role. The function of the rules is to guard against the most obvious kinds of prejudice and error, allowing the finder of fact a clear perception of the witness' testimony.[17] The determination of witness credibility is then left to the judgment of the trier of fact. It is tacitly acknowledged, however, that the basis of this judgment remains unknown, perhaps unknowable.

[10] It is unclear whether the determination of witness credibility must be a matter of gut feelings or whether it is possible to develop a set of reasoned guidelines to assist a finder of fact in making such determinations. An interesting and instructive response to this question comes from an unlikely source: the Talmud.

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[15] MCEWAN, *supra* note 13, at 2-5.

[16] *Id.* at 3.

[17] 1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE §8a, 621 (rev. 1983). The prophylactic function of rules of evidence is especially important in a jury trial: "The rules of evidence are mainly aimed at guarding the jury from the overweening effect of certain kinds of evidence. The whole fabric is kept together by that purpose, and the rules are supposed to enshrine that purpose." *Id.* This function is markedly less central in the juryless civil law system. *See* DAMASKA, *supra* note 3, at 74-124.

II. AN OVERVIEW OF THE TALMUD

[11] The Talmud represents the vast repository of teachings of the ancient Jewish sages. The Talmud records the discussions of sages, which took place roughly between 100 BCE and 500 CE at academies in Babylonia and Palestine.[18] It is a storehouse of closely reasoned, sometimes arcane, discussions on an exhaustive variety of topics, many of which have legal import.[19]

[12] The word "Talmud" is derived from the Hebrew root meaning "to study."[20] The Talmud is comprised of two major documents: the Mishnah and the Gemara.[21] The Mishnah, which takes the form of a legal code with occasional narrative interpolations, was compiled around 200 CE in Palestine.[22] The sages of the Mishnah are called "Tannaim."[23] The Gemara, on the other

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[18] Shmuel Safrai, *The Era of the Mishnah and Talmud (70-640)*, *in* A HISTORY OF THE JEWISH PEOPLE 307-82 (H.H. Ben-Sasson ed., 1976) (the author provides a historical overview of the Talmudic period).

[19] The contemporary writer Jonathan Rosen has suggested that the most fitting present-day analogue to the Talmud may be the Internet. He writes: "the Talmud, which, like the Internet, I also think of as being a kind of terrestrial version of [John] Donne's divine library, a place where everything exists, if only one knows how and where to look." JONATHAN ROSEN, THE TALMUD AND THE INTERNET: A JOURNEY BETWEEN WORLDS 6 (2000).

[20] LOUIS JACOBS, THE TALMUDIC ARGUMENT: A STUDY IN TALMUDIC REASONING AND METHODOLOGY, at xii (1984).

[21] *Id.* at xiii.

[22] *Id.* at xii.

hand, is a multi-voice commentary on the Mishnah, redacted into its final form around 500 CE in Babylonia.[24] The Gemara's commentators are called "Amoraim."[25]

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[23] *Id.*

[24] *Id.* at xii-xiii.

[25] JACOBS, *supra* note 20, at xiii.

[13] While the Gemara reports the discussions of the Amoraim, it is not a verbatim record.[26] There are passages of text written as though the conventional participants of society are exchanging ideas, sitting together in one room. Moreover, the Gemara evinces an organization and an artistry that could not be the result of mere compilation. As one modern scholar has said, "argument leads on to further argument, in neat and logical sequence. . . . the compilers were creative artists, reshaping all the earlier material to produce a literary work."[27] Interestingly, the redactors of the Gemara chose to remain anonymous.[28]

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[26] *Id.* at 20.

[27] *Id.*

[28] *Id.*

[14] The Talmud is one of a group of Jewish texts that claim to draw their ultimate authority from divine revelation. In the canon of ancient Jewish literature, the apex of the hierarchy is the Torah.[29] The Torah is comprised of the first five books of the Hebrew Bible. Just below the Torah stand the remaining books of the Hebrew Bible, followed by the Mishnah and then the Gemara.[30] In such a system, one would expect to find that the earlier the text, the more authoritative than it is held to be, since it is closer to the original revelation. It is therefore striking to note that the Amoraim treat Mishnaic texts critically, interrogating them closely to determine if their general pronouncements survive a string of detailed hypothetical problems. The Amoraim approach the Mishnah with a kind of skeptical and probing respect that is unique among the sacred literatures of the world.

[15] The Talmud's unusual combination of deference and challenge is among the factors that

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[29] According to the tradition, there is a Written and an Oral Torah. Louis Jacobs explains their relationship this way, The Torah, which means the teaching, is conceived of as God's revelation to Jewish People. LOUIS JACOBS, THE JEWISH RELIGION: A COMPANION 562 (1995). The name Torah applies to the laws and teachings given to Moses on Mount Sinai, but also embraces all of the subsequent teachings of Judaism in which the original Torah receives its application. *Id.* The latter is known as the Oral Torah because it originated in the laws and teachings believed to have been imparted to Moses verbally and then elaborated upon by the Jewish sages. *Id.* The Talmudic literature is the great depository of the Oral Torah. *Id.* Like the Talmudic sages, post-Talmudic authorities developed the teachings further, each in accordance with their own temperament and social background, while preserving the essential unity of the whole. *Id.* The Torah, in its wider meaning, thus embraces the whole of authentic Jewish doctrine. *Id.*

"Torah" has been defined very broadly by the ancient rabbis who believed that the "Torah was the Divine Wisdom which had existed before the world came into being . . . indeed, the blueprint according to which Creation had followed its proper course. Torah included *all possible knowledge of God's will* . . . . All things, from the most trivial to the most sublime, were within its realm." Robert Goldenberg, *Talmud*, *in* BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS 129-30 (Barry W. Holtz ed., 1984) (emphasis added).

[30] *Id.*

make its comprehension difficult. This is especially true for the vast majority of readers, Jews and non-Jews alike, who were not introduced to the Talmud in childhood. It is common, for example, for the sages portrayed in the Talmudic text to use the tools of logical argument and then to cite a scriptural verse to clinch the matter.[31]

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[31] *See* JACOBS, *supra* note 20, at 16. Jacobs reviews the entire range of techniques of logical argumentation used in the Talmud, many of which are familiar. For example, "The *argument by comparison* is the deduction of a rule, not stated explicitly, from an accepted teaching to which it bears a strong resemblance. The refutation of this consists in demonstrating that although the two cases do appear to be analogous they are, in fact, different." *Id.* at 14 (alteration in original). But along with these familiar argumentative techniques, there is the argument from authority, which provides "a proof or support of the correctness of a theory by an appeal to an incontrovertible source, i.e. Scripture or a Tannaitic source . . . . Where the attempted proof is from Scripture the only way to refute it is to interpret the relevant verse or verses differently." *Id.* at 13.

[16] A perspective offered by the Israeli scholar, Menachem Fisch, helps to elucidate the Talmudic method.[32] Fisch argues that the Talmud's constructive skepticism toward received texts has much in common with the scientific method.[33] He explains that both share the premise "that no knowledge is set forever, that all knowledge needs to be questioned for its deficiencies, that former rulings and sensibilities have to be constantly reinterrogated."[34] Fisch calls the skepticism embodied both in Talmudic and scientific method "constructive" because,

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[32] MENACHEM FISCH, RATIONAL RABBIS: SCIENCE AND TALMUDIC CULTURE (1997).

[33] *Id.*

[34] *Id.* at xx.

> although they share a basic mistrust in the capacity of humans ever to attain the ultimate objectives of . . . science and Torah-study, they share a profound and philosophically maintainable belief in the capacity of humans to achieve real progress in such endeavors, as opposed, say, to mere variation. And above all . . . [they] share a basic openness, an intellectual modesty, and a genuine pluralism . . . .[35]

[17] In Fisch's view, the incessant questioning that characterizes Talmudic discourse is close to the scientific method as portrayed by the twentieth century philosopher Karl Popper.[36] Popper critiques the widely accepted notion that science is, essentially, the activity of proposing theories for verification through experiment.[37] He pointed out that this notion is based upon a logical fallacy. Fisch describes the fallacy in this way:

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[35] *Id.*

[36] *Id.*

[37] Such "hypothetico-deductive models of inductive support," as Fisch terms them, have been a part of the understanding of scientific method since the innovations of Francis Bacon in the seventeenth century. FISCH, *supra* note 32, at 8. *See generally*, ANTHONY QUINTON, FRANCIS BACON 28-30 (1980).

> [T]he fact that theory *T* logically entails the occurrence of an event *E*, coupled with the fact that *E* is in fact found to occur, does not, and can not teach us anything about the truth value of *T*. This is because although *E* may follow logically from *T*, *E's* actual occurrence could have been due to any number of causes other than those suggested by *T*. . . . [Hence] the very notion of empirical confirmation, let alone verification, of any general hypothesis is in principle worryingly unfounded.[38]

[18] Fisch continues to explain that the Popperian view, while the inductive method is unable to lead us to ultimate truth, "by prudently criticizing, rather than seeking to verify our efforts, we are sometimes capable of ascertaining that we were wrong."[39] This yields the insight for which Popper is, perhaps, most famous. He explains that what distinguishes scientific propositions from others is their falsifiability.[40] Any scientific theory is, in principle, susceptible to being proven wrong. Pseudoscientific "theories" (for example, psychoanalysis) cannot be falsified; they can account within their terms for any event that may occur.[41] Popper identified falsifiability as the "line of demarcation" between science and non-science.[42]

[19] In Popper's view, what distinguishes science from other human endeavors is that it

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[38] FISCH, *supra* note 32, at 8-9.

[39] *Id.* at 17.

[40] KARL POPPER, CONJECTURES AND REFUTATIONS 37-39 (1968).

[41] *Id.*

[42] *Id.*

> is not the power of science to secure and amass true or even well-confirmed knowledge. On the contrary, science is ideally rational exactly when it elects to treat each and every item of general knowledge as a *tentative and potentially refutable conjecture*, attempting persistently to lay bare its apparent deficiencies, and willing at all times to modify or replace even its most cherished convictions.[43]

[20] Though Popper adheres to a philosophical realism, his approach dispenses with the common notion of science as a search for ultimate truth. Arguments about whether or not there is a real world "out there," which science must "get right," are rendered simply irrelevant. As Fisch notes,

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[43] FISCH, *supra* note 32, at 19 (emphasis added). *See* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 40-43 (rev. 1968).

The British philosopher Bryan Magee, a friend of Popper's and perhaps his most able explicator, emphasizes the centrality of Popper's insight that there is

> a radical asymmetry between verification and falsification . . . [t]hat although unrestrictedly general empirical statements are not verifiable they are falsifiable. Although no number of observations can prove that a statement of the form 'All A's have the characteristic x' (e.g., 'All swans are white') is true, one single observation of an A that does not have the characteristic x (e.g., a black swan) conclusively proves it to be false. This means that scientific laws, although not verifiable, are falsifiable, *and that means they can be tested.* This last step is the crucial one.

BRYAN MAGEE, CONFESSIONS OF A PHILOSOPHER: A JOURNEY THROUGH WESTERN PHILOSOPHY 50 (1997) (alteration in original).

> unlike all forms of traditional skepticism, the deep mistrust that is thus premised with regard to all general scientific knowledge-claims is not destructive or dismissive of the scientific enterprise itself. On the contrary, by flatly rejecting the traditional equation of science with truth, the constructive skeptic is able to equate scientific rationality with systematic criticism, and to present a constructive and inspiring vision of scientific advance and accomplishment grounded upon no more than the logic of scientific trial and error.[44]

[21] To put the point more forcefully, Fisch distinguishes between constructive skepticism and the more familiar brands of radical skepticism in this way:

> Constructive skeptics do not cast wholesale doubt on everything that can in principle be doubted. They are not motivated by doubting their existence, their sanity, or the existence of a world out there - all of which they take for granted. What they doubt systematically is the quality of the job they are doing.[45]

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[44] FISCH, *supra* note 32, at 20-21.

[45] FISCH, *supra* note 32, at 20. One must take care to distinguish Popper's critique of the positivist view of the scientific enterprise from that put forward by Thomas Kuhn. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1973). There, Kuhn disputed the positivist model of science in which scientists continually discover and verify truths, and so cumulatively and steadily build an edifice of firm knowledge. Kuhn argued instead that the history of science reveals practitioners working within paradigms, or frameworks of assumptions, until such frameworks are shattered by findings and observations they cannot accommodate. *Id.* What happens then is a shift from a period of "normal science" to one of "revolution" and finally, the establishment of a new paradigm. *Id.* at 171.

In Popper's view, even Kuhn's approach assumes too much; it preserves the equation of science with progress toward truth, though a relative and shifting truth rather than the fixed truth presupposed by positivists. For Popper, as Fisch observes, "scientific advance and accomplishment [are] grounded upon no more than the logic of scientific trial and error." FISCH, *supra* note 32, at 21. So, Fisch notes, "It follows that according to this approach, all talk of . . . Kuhnian paradigms should be dispensed with. Even in the case of a striking refutation, all science can claim to know remains, for the Popperian, blatantly conjectural." *Id.* at 20.

[22] The Talmudic and scientific methods also share the avoidance of closure and the preservation of a plurality of voices.[46] It is, of course possible, as Orthodox Judaism has done, to deduce set rules from the Talmudic text. The typical mode of Talmudic discourse, however, is plural and open-ended.[47] It admits that multiple views are possible regarding any problem and that all answers are tentative. Answers are not believed to be resolutions but rather ways forward, through the never-ending thicket of problems and dilemmas that constitute human existence.[48]

[23] Turning to the problem at hand, there is good reason to systematically doubt the quality of the determinations of witness credibility based upon demeanor evidence. The belief that, once the more obvious sources of prejudice have been eliminated, the fact finder can trust her ability to

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[46] *See* PAUL FEYERABEND, AGAINST METHOD (3rd ed., 1993) (providing a strong argument for the importance of using a plurality of theories in scientific practice).

[47] *See* DANIEL BOYARIN, UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MALE (1997) (providing a notable example of the multiplicity of meanings to be gleaned from the Talmudic text). Boyarin finds, in the Talmud, a basis for a male ideal that is gentle and studious and can serve as a counter to traditional male ideal in which physical heroism is paramount.

[48] It is often said that argument for its own sake, rather than as an instrument for solving practical problems, is what the Talmud values most.

> Even when the discussion centres [sic.] around an actual case . . . the [Talmudic] discussion itself is for its own sake, with no practical consequences. Unless this element of study of the Torah for its own sake, of occupying the mind with the word of God in much the same way as the pure scientist may be indifferent to the practical use to which his work may be put, is recognised, [sic.] there is a total failure to understand the Talmud.

JACOBS, *supra* note 20, at 210.

judge demeanor and determine truthfulness lacks actual support. But it may be possible to acknowledge the lack of a firm foundation for this belief yet maintain that, despite its shortcomings, the demeanor approach is the best we have. It is here that the Talmud's restless querying can help. The Talmudic will not to rest easily with an answer. In the brief excerpt that follows, the Talmud suggests the possibility of a different approach to the issue of determining witness credibility. The approach closely considers the application of a presumption of truthfulness.

[24] The following text is Tractate Kethuboth 18b-19b.[49] At issue is the authentication of witness signatures on a promissory note. The note requires two witness' signatures, and these signatures must be authenticated by live testimony. Absent this authentication, the note is not enforceable.

[49] 2 THE BABYLONIAN TALMUD 106-106 (Dr. Rabbi I. Epstein ed., 1978).

[25] The text considers which circumstances will entitle a witness to a presumption of truthfulness, where the witness seeks to deny the validity of his signature and no other relevant evidence is available. The Talmudic term for such a presumption is *miggo*.[50] Here, the relevant miggo is: "the mouth that bound is the mouth that loosened."[51] That is, if a witness comes forward and begins the presentation of evidence with a claim that is less advantageous than another he could have made, he is presumed to be telling the truth. The miggo may be stated as follows: where witnesses come forward and confirm their signatures, (rather than claiming, for that the signatures are forgeries) [T]hey are also believed in the attendant reservation made by them in regard thereto."[52]

[26] The concise nature of the Talmudic text and its meandering, conversational structure make its comprehension difficult. What follows, therefore, is a rough translation, with bracketed interpolations to help convey the sense, an outline of the major points of the text, followed by a discussion.[53]

A. The Text

> [27] MISHNAH. If witnesses say: 'this is our handwriting, but we were forced, we were minors, [or] we were disqualified [from acting as] witnesses, they are believed.' But if there are witnesses

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[50] Rabbi Steinsaltz gives this definition of miggo: "If one of the litigants could have made a claim more advantageous to his cause than he actually did, we assume he is telling the truth." ADIN STEINSALTZ, THE TALMUD: A REFERENCE GUIDE 215 (1989).

[51] 2 THE BABYLONIAN TALMUD 103 (Dr. Rabbi I. Epstein ed., 1978).

[52] *Id.* at 101-102 n.14 (1978).

[53] The paragraph structure of the text has been modified to help ease its comprehension. Furthermore, material has been added, in brackets, by the author of this article, as well as by the translator, to aid in the comprehension of the material.

[testifying] that it is their handwriting, or [evidence that it is] their handwriting comes out from another place, they are not believed.

[Sugya 1] [54]

GEMARA. Rami Bar Hama said: They taught this only when they said: We were forced [by threats] with regard to money, but [if they said], we were forced [by threats] with regard to [our] life, they are believed. Raba said to him: Is it so? After he has once testified, he cannot again testify! And if you say [that] this applies only to an oral testimony, but not to testimony in a document – did not Resh Lakish say: If witnesses . . . [have] signed on a document it is as if their testimony had been examined in court? No; if it has been said, it has been said with regard to the first clause, [where it is stated:] THEY ARE BELIEVED. Whereupon Rami b. Hama said: They taught this only when they said, 'We were forced [by threats] with regard to [our] life,' but if they said, 'we were forced [by threats] with regard to money,' they are not believed, because no one makes himself [out to be] a wicked man.

[54] A sugya is "a complete Talmudic unit" of argument. JACOBS, *supra* note 20, at 215.

Our Rabbis taught: They are not believed. . . . This is the view of R. Meir; but the Sages say [that] they are believed. This is right according to the Rabbis, who follow their principle 'the mouth that bound is the mouth that loosened,'[55] but what is the reason of R. Meir? I grant you [with regard to] DISQUALIFIED WITNESSES,' [because] the creditor himself examines well [the witnesses] beforehand and [then] lets [them] sign. [With regard to] 'MINORS' also [it can be explained] according to R. Simeon b. Lakish, for Resh Lakisk said: It is a presumption that the witnesses do not sign a document unless [everything] was done by adults.[56]

But what is the reason with regard to 'FORCED?' R. Hisda said: R. Meir holds that if one said to witnesses, 'sign a falsehood and you will not be killed,' they should rather be killed and not sign a falsehood. Raba said to him: Now, if they would come to us to ask [our] advice, we would say unto them: Go [and] sign and do not be killed, for a Master said: 'There is nothing that comes before the saving of life except idolatry, incest and bloodshed only.' Now that they have signed, can we say to them: why have you sign?

But the reason of R. Meir is in accordance with what R. Huna . . . said [that] Rab said: If he admits that he has written the bond, there is no need to confirm it.

[To revert to] the main text: R. Huna said [that] Rab said: If he admits that he has written the bond, there is no need to confirm it. R. Nahman said to him: Why do you go round bout? If you hold with R. Meir, say: the *halachah* is according to R.Meir. He [then] said to him: And how do you Sir, hold? He said to him: When they come before us in court, we say to them: go [and] confirm your documents and [then] come to court.

[Sugya 2]

Rab Judah said [that] Rab said: If one said: This is a [loan-] deed of trust, he is not believed. Who said [it]? If the debtor said it, is plain; why should he be believed: If the creditor said [it], may a blessing come upon him! And if the witnesses said [it], - [then] if their handwriting comes out from another place, it is plain that they are not believed, and if their handwriting does not come out from another place, why should they not be believed?"

Raba said: Indeed, the debtor said [it], and [it is] according to

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[55] Those who validated the document also have the power to invalidate it.

[56] By this, he means that the document is not actually signed, unless signed by an adult.

R. Huna, for R. Huna said [that] Rab said: If he admits that he has written the document, there is no need to confirm it.

Abaye said: Indeed, the creditor said [it], and it is a case where he would injure others. And [this is] according to R. Nathan, for it has been taught: R. Nathan says: Whence [do we learn that], if one has a claim of a *maneh*[57] against his fellow and that fellow against another fellow, we take out [the sum of the *maneh*] from this one and give it to that one? The Writ says *And he shall give [it] to whom he owes [it]*. R. Ashi said: Indeed, the witnesses said [it], and [it is in a case] where their handwriting does not come out from another place; and as to your question, Why should they not be believed, [the answer is] as stated by R. Kahana, for R. Kahana said: It is forbidden for a man to keep a [loan-] deed of trust in his house, because it is said: *Let not unrighteousness dwell in thy tents*.

And R. Shesheth, the son of R. Idi, said: From [the words of] R. Kahana can be inferred [that] if witnesses said, 'Our words were regarding a matter of [trust],' they are not believed, for this reason: Since it is 'unrighteousness' [we say that] they must not sign on [what is] unrighteousness. R. Joshua b. Levi, said: It is forbidden for a man to keep a paid bill of indebtedness in his house, because it is said: '*Let not unrighteousness dwell in thy tents'*.

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[57] A *maneh* was a coin in use during the Talmudic period. STEINSALTZ, *supra* 50, at 291 n.26.

> In the West[58] they said in the name of Rab: [It is said]: *If iniquity be in thy hand, put it far away.* This is a [loan-] deed of trust and a deed of good-will; [and it is said]: '*And let not unrighteousness dwell in thy tents'*. This is a paid bill of indebtedness. He who says [that it applies to] a paid bill of indebtedness, how much more [does it apply to a [loan-] deed of trust. [And] he, who says [that it applies to] a [loan-] deed of trust, [would hold that it does apply to] a paid bill of indebtedness, because sometimes they keep it on account of the scribe's fees.

[28] The Gemara's principal moves may be summarized as follows:

[29] In Sugya 1, Rami Bar Hama says that the witnesses are believed only where the duress involves a threat to life. Raba asks whether a witness can retract his testimony? Rami Bar Hama says that they are not believed where the duress involves money, because this would be tantamount to self-incrimination. Rabbi Meir holds they are not believed, even when the duress involves threat to life. Raba explains that Rabbi Meir's view applies where the borrower has acknowledged the note, so that no authentication is needed. Finally, Rab Nachman says you should let the lender make certain of the note's authentication and then come to court.

[30] In Sugya 2, Rab Yehuda explains that witnesses who say, "We signed this, but it is a note signed on trust," are not believed. Rab Ashi says that they are not believed because a note signed on trust is by its nature suspect. In the Gemara, the Palestinian sages say that the keeping of a note signed on trust, or a paid note, is wicked. Rab Ammi explains that a note signed on trust, yes is wicked; but a paid note may be retained for up to thirty days where the scribe's fee is outstanding.

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[58] "The West" is a reference to the Palestinian Academies.

B. Discussion of the Text

[30] The Gemara distinguishes between two cases of witnesses who both acknowledge their signatures and then claim that they signed under duress.[59] Witnesses who claim economic duress are not believed, while those who claim physical duress are believed.[60] So, it is the nature of the alleged threat that is determinative of credibility.

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[59] 2 THE BABYLONIAN TALMUD 101-106 (Rabbi Dr. I. Epstein ed., 1978).

[60] *Id.* at 102.

[31] Raba then raises a precedent question: Can a witness qualify his testimony in this way?[61] Once the witnesses has testified, by virtue of his signature, can he come back and testify again seeking to qualify his earlier testimony?[62] In raising this question, Raba anticipates a possible objection. Raba's claim, based upon the authority of Resh Lakish, that the rule prohibiting the retraction, whether full or partial, of sworn testimony applies equally to testimony in court as to the witnessing of a document. Raba's question, if answered affirmatively, would render the Mishnah practically moot. If a witness cannot retract or qualify the validity of his signature then the distinction set forth in the Mishnah is a nullity. Though the Gemara does not address Raba's question, it doesn't excise it either. This represents one of many examples of the preservation of divergent views in the text.

[32] Returning to the main argument, the Gemara next addresses the logic underlying the distinct treatment of economic duress, as opposed to physical duress.[63] Where witnesses base their reservation on an alleged economic duress, they are, in effect, already admitting wrongdoing.[64] That is, they have admitted that they gave false testimony for monetary reasons. They are thus said to have made themselves out to be "wicked,"[65] and the court may not admit such self-incriminating testimony.

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] 2 THE BABYLONIAN TALMUD 102 (Rabbi Dr. I. Epstein ed., 1978).

[65] *Id.*

[33] The phrase, "Our Rabbis taught"[66] signals the introduction of a Baraita, a Tannaitic text not included in the Mishnah.[67] Though not a part of the Mishnaic canon, a Baraita comes from the generation of Tannaim, and so continues to represent formidable authority.[68] This Baraita appears to be directly opposed to the Mishnah under discussion. It is attributed to Rabbi Meir, and says that the witnesses referred to in the first clause of the Mishnah, are not believed.[69]

[34] The Gemara must attempt to resolve this apparent dichotomy. It explains that Rabbi Meir is presuming that the lender will take great care to avoid the use of ineligible witnesses.[70] The text then questions, asks rhetorically, why Rabbi Meir says that the witnesses are not believed, even when their claim is based upon physical duress?[71] It is Rabbi Meir's position, the text explains, that witnesses should prefer to let themselves be killed rather than sign a falsehood.[72]

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[66] *Id.* at 102

[67] The inclusion of a Baraita, a non-cannonical Mishnaic text, is yet another example of the value the Talmud places on the preservation of a plurality of views. A Baraita could be regarded as simply a record of a rejected approach to a particular issue, analogous to an alternative statutory provision that is preserved in the legislative history of an enactment but never adopted. In our legal world, it would then be regarded as of no authority, and without significance except as an indicator of the legislative intent behind the adopted version. The Talmud presents the Baraita without editorial comment, as simply an alternative view and not one that has been overruled by the version codified in the Mishnah.

[68] *See supra* ¶14.

[69] 2 THE BABYLONIAN TALMUD 102 (Rabbi Dr. I. Epstein ed., 1978).

[70] *Id.* at 103

[71] *Id.*

[72] 2 THE BABYLONIAN TALMUD 103 (Dr. Rabbi I. Epstein ed., 1978).

[35] The Gemara then considers whether Rabbi Meir's position and its harsh result, though logically consistent, is acceptable.[73] Raba responds: if asked, we would have advised the witnesses to sign the false document and save their lives.[74] The law holds that only the avoidance of one of the three evils merits the loss of life.[75] These three evils are: incest, idolatry or murder.[76] So, Raba asks once the witnesses have signed, can we ask them why they signed."[77] The answer must be no.[78]

[36] The next speaker in the text is Rab Judah who, in the name of Rab, explains that Rabbi Meir is referring to an instance in which a borrower admits that he wrote a note.[79] Where the borrower has made this admission, the lender is relieved of the burden of authenticating the document and the issue of whether or not to believe the witnesses does not arise.[80] Hence, there is no conflict of authorities. In a moment of unexpected drama Rab Judah is confronted by Rab Nahman, who asks him, "Why do you go round bout?"[81] By this, Rab Nahman means, why do

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[73] *Id.* at 103.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] 2 THE BABYLONIAN TALMUD 103 (Rabbi Dr. I. Epstein ed., 1978).

[78] *Id.* at 104.

[79] *Id.*

[80] *Id.*

[81] *Id.*

you pretend to offer your own view, when you are simply repeating verbatim the opinion of Rabbi Meir? Rab Nahman continues saying "If you hold with R. Meir", say "the *halachah* is according to R. Meir."[82] Rab Judah asks him, perhaps with a hint of sarcasm, "And how do you Sir, hold?"[83] Rabbi Nahman answers, "When they come before us in court, we say to them go [and] confirm your document and [then] come to court."[84] In Rabbi Nahman's view, the burden of authentication remains with the lender, even where the borrower acknowledges having written the note.[85]

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[82] *Id.* (emphasis in original)

[83] 2 THE BABYLONIAN TALMUD 104 (Rabbi Dr. I. Epstein ed., 1978).

[84] *Id.*

[85] *Id.* at 105.

[37] The text then considers the application of "miggo," where the document at issue is a "note signed on trust."[86] Rab Judah begins the discussion by saying that someone who says that they have a promissory note signed on trust, is not to be believed."[87] The Gemara then asks, who is speaking in this hypothetical: the borrower, the lender or the witnesses.[88] If it is the borrower, the Gemara observes, it is obviously in his interest to make this claim and so he is not to be believed.[89] If it is the lender, however, may a blessing come upon him," for making this admission so plainly against interest and he will surely be believed.[90] Last, if it is the witnesses, and their claim is a part of the acknowledgment of their signatures they shouldn't be believed, for this is exactly the case to which the Mishnah applies the "miggo."[91]

[38] Rab Ashi responds, however, that where the witnesses say this, they are not to be believed.[92] To support this interpretation, he invokes the authority of Rab Kahana, who said that it is forbidden to hold a note signed on trust.[93] Rab Kahana's authority for this statement is

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[86] *Id.* at 104. A note signed on trust is a note evidencing a transaction which has not actually taken place.

[87] *Id.*

[88] *Id.*

[89] 2 THE BABYLONIAN TALMUD 104 (Rabbi Dr. I. Epstein ed., 1978).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 105.

[93] *Id.*

a verse from the Book of Job (11:14),[94] which states, "Let not unrighteousness dwell in thy tents."[95] Rab Shesheth concurs, that we may understand from Rab Kahana that witnesses who sign on trust are not to be believed.[96] This is because such a note is false by its nature and witnesses who would sign such a note are not entitled to the application of the "miggo."

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[94] JEWEISH PUBLICATION SOCIETY, THE HOLY SCRIPTURES ACCORDING TO THE MASORETIC TEXT 1045 (1955).

[95] 2 THE BABYLONIAN TALMUD 105 (Rabbi Dr. I. Epstein ed., 1978).

[96] *Id.*

[39] Rabbi Joshua ben Levi continues with this issue, albeit away from the main argument.[97] He argues, that based upon the verse from the Book of Job, it is forbidden to keep a paid promissory note in one's house.[98] He supports this by quoting the first part of the verse, "If iniquity be in thy hand, put it far away."[99] It is evident, in his view, that retention of a paid note has the potential for mischief and confusion, and is as deserving of condemnation as the note signed on trust. The text also mentions, without further comment, a view from one of the Palestinian academies.[100] The Palestinian Academies teach that the two clauses of the verse from Job refer, respectively, to a note signed on trust and to a document of persuasion.[101]

[40] The Gemara next considers whether one, who keeps a note signed on trust, and one, who keeps a paid promissory note are equally culpable.[102] The text observes that there could be a legitimate reason for retaining a paid note as the scribe who drew the note is entitled to collect a fee from the borrower, and may not have done so by the time the debt was paid.[103] In such a case, retention of a paid note for a period of time would be justified. In contrast, holding a note

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[97] *Id.* at 106.

[98] *Id.*

[99] *Id.*

[100] 2 THE BABYLONIAN TALMUD 106 (Rabbi Dr. I. Epstein ed., 1978).

[101] *Id.*

[102] *Id.*

[103] *Id.*

signed on trust is never justified.[104]

[41] The Gemara concludes its consideration of this point by suggesting that thirty days might be a reasonable limit for retention of the paid note.[105] This is based upon an analogy to the principle, stated by Rabbi Ammi, that where a Torah scroll contains a scribal error, the scroll may be kept for up to thirty days before it is corrected.[106] If the paid note is kept any longer, the holder has become one who lets unrighteousness dwell in his tents.[107]

[42] The hypothetical with which we began presents a lender who is seeking to enforce a promissory note. As part of his burden, he must present live testimony from the two persons who have signed as witnesses. The witnesses acknowledge that they have signed, but give further testimony undermining the validity of their signatures.

[43] This may be considered an unlikely scenario to modern practitioners. A present-day attorney, faced with the prospect of such testimony from her witnesses and unable to present additional corroborative evidence, might choose to seek a settlement rather than proceed to trial. Once the lender presented competent evidence in the form of testimony, and the borrower had had the opportunity to present evidence in refutation, the fact finder would make a determination based upon its own impression of the witness credibility. The evaluation of demeanor would be a key element in this determination.

[44] Presumptions play little, if any role, in the judgment of credibility. The exclusion of

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[104] *Id.*

[105] 2 THE BABYLONIAN TALMUD 106 (Rabbi Dr. I. Epstein ed., 1978).

[106] *Id.*

[107] *Id.*

testimony from spouses may be viewed as both a substantive rule of evidence and a conclusive presumption that such testimony is biased. However, aside from this possible counter-example, presumptions are rarely used to aid the finder of fact in credibility determinations.

[45] The Talmud pursues a different strategy, attempting to give guidance to the finder of fact for making credibility determinations and offering a set of presumptions about truth-telling. For example, the Talmud provides that those who are willing to come forward and give their accounts of what has happened, and who do so before they know what other evidence may be offered, are presumed to be telling the truth. They have simply told their stories, without calculation of how those stories may fit with the accounts of others. In contrast witnesses are not believed when they claim subjection to bribery or other forms of pecuniary influence, because such witnesses have already admitted to dishonesty. In instances where the lender and borrower agree on the authenticity of the loan document, or where the lender has already obtained other authenticating evidence, witnesses are not needed and the question of their credibility does not arise. Additionally, witnesses who have been involved with inherently suspect documents, such as notes signed on trust or paid notes held for more than a brief period, are not entitled to a presumption of truthfulness.

[46] The readiness to examine, reject and continue to seek appropriate rules for the application of presumptions regarding truthfulness is at odds with the generally complacent acceptance of demeanor evidence in contemporary adjudication. This is attributable, perhaps, to the primacy of argument *qua* in the Talmudic text. Like "the pure scientist [who] may be indifferent to the

practical use to which his work may be put,"[108] the Talmudist tends to focus on what justice and logic require in a given case. In the instant case, an American court would be likely to take a pragmatic approach, allowing the finder of fact to make the best possible assessment of credibility given the evidence. The American court would then allow the fact finder to determine the enforceability of the note. The Talmudic approach, with its emphasis on the demands of logic and justice, would put a heavier burden on the party seeking to enforce the note. This would result in making it more difficult to enforce promissory notes and like documents, an outcome not likely to encourage commerce.

[47] Additionally, the Talmudic setting differs from the American system in its absence of lawyers. In the instant text, it is the element of spontaneity, the readiness of the witness to speak without calculation as to the effect of his testimony, that makes the testimony presumptively credible. When lawyers prepare and rehearse witness testimony any possibility of real spontaneity, as opposed to the appearance of spontaneity, is lost.

[48] Awareness of these differences, and our limited knowledge of the operation of the Talmudic court, requires that we exercise caution in applying Talmudic insights to the American legal system. At the same time, this bit of text forcefully demonstrates how, with just a bit of reflection, we can begin to generate reasonable guidelines for determining witness credibility.

[49] Keeping in mind the many differences between the Talmudic world and our own, the instant text may nonetheless be relevant to fact-finding in certain contemporary contexts. The Talmudic court setting, inferred from the text, consists of only a judge who hears the testimony

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[108] JACOBS *supra*, note 20.

of unrepresented parties. One present day analogue is the administrative hearing where, in many cases, a lone administrative law judge is charged with determining the credibility of *pro se* parties; the unemployment compensation hearing and the "fair hearing" in public assistance are examples that come to mind. Small claims court is another example. These are low visibility venues, operating out of public sight, with participants who tend to be of low or moderate income. In such settings the *ad hominem* nature of much demeanor evidence is especially troubling, because of the omnipresent possibility that a determination will be based on little more than the preconceptions of the fact finder, and that such biases will control determinations in case after case, with no meaningful appellate or public oversight.

[50] A partial correction to this tendency is suggested by a salient feature of the Talmudic text: its separation of logic and narrative.[109] Though known as a repository of complex, even tortuous logical argument, a significant portion of the Talmud's text takes narrative form. The rather consistent segregation of narrative and logic in the Talmud may be taken as a *sotto voce* recognition that these are complementary ways of knowing.

[51] Some have argued that all of human knowledge is essentially narrative, that is, that "[s]tory - is the fundamental instrument of thought."[110] The centrality of narrative in

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[109] In Talmudic terms, *halakhah* means "the legal material in the Talmud," while a*ggadah* means "the non-legal material in the Talmud." JACOBS, *supra* note 20, at 214.

[110] MARK TURNER, THE LITERARY MIND 4 (1996).

> We imagine realities and construct meanings. The everyday mind performs these feats by means of mental processes that are literary and that have always been judged to be literary. Cultural meanings peculiar to a society often fail to migrate intact across anthropological

adjudication has recently received serious attention. As Amsterdam and Bruner[111] explain:

> Narrative in its very nature makes it *humanly* possible to relate the Grand and Timeless Principles of a *corpus juris* to the current particularities of the cases we adjudicate. . . . It is through narrative, rather than some impeccable, impersonal argument from first precepts, that we show how or why the plaintiff's or defendant's case is to be judged as we judge it.[112]

[52] It is no doubt true that narrative is indispensable to the work of applying general legal principles to specific cases in an intelligible way. But the dependence of narrative upon stock situations and characters is both its strength and its weakness.[113] Telling a story is a tremendously effective way to explain a case result; it is also a potent means for over-generalizing, eliding important differences, and even justifying an unjust result.

> or historical boundaries, but the basic mental processes that make these meanings possible are universal.

Id. at 11.

[111] AMSTERDAM AND BRUNER, *supra* note 14.

[112] *Id.* at 141.

[113] *Id.* at 42-53.

[53] The analogous danger in credibility determinations is that the finder of fact mechanically imposes a stock character type upon the witness. So the administrative law judge might, unbeknownst to herself, be making her determinations based upon a gallery of mental images of presumptively credible witnesses. The common tendency to "think in pictures" raises special concerns in adjudicative settings.[114] Talmudic reasoning does not silence the narrative element in cognition, but places it in the background.

[54] In Popperian terms, the claim to be made here is that the approach to credibility determinations described above can be improved by seeking a complementary perspective. A case example may clarify this point.[115]

[55] Ms. D, a thirty eight year old African-American woman, is employed as a chambermaid in a motel in suburban Philadelphia. She lives in an inner-city neighborhood and commutes to work by train and bus. She is due in at 7:00 o'clock each morning and must leave her house by 5:30 a.m. to arrive at work on time. She has been at the job for about eight months, an impressive tenure for this type of work. Ms. D is the single mother of three children and, before getting this job, she had been receiving public assistance.

[56] On one especially harsh winter morning, transit delays cause Ms. D to arrive one and one quarter hours late. She is fired. The grounds for her dismissal include tardiness and a failure to call in. She applies for unemployment compensation and the Bureau of Employment Security, a

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[114] *Id.*

[115] The following example is based upon a case whose handling the author supervised while teaching in the clinical programs at the University of Pennsylvania Law School.

state agency, denies her claim. The denial is based upon the employer's filing of a form which says that Ms. D was dismissed for intentional misconduct.[116] Ms. D appeals the denial and is given a hearing before a Bureau "referee." The motel manager, unaccompanied by counsel, attends the hearing on behalf of the employer. He is a middle-aged white man dressed in a suit and tie.

[57] Relevant case law establishes that a pattern of repeated tardiness or absence may support a finding of intentional employee misconduct. The manager presents a document titled "Acknowledgment of Employee Discipline and Counseling," as evidence supporting the employer's contention that Ms. D is guilty of a pattern of tardiness and failure to call in and inform the motel that she will be late. The document, purportedly signed by Ms. D and the manager, is a carbon copy of a pre-printed form. The filled-in portions of the form are hard to read and Ms. D's signature is barely legible.

[58] Ms. D could plausibly claim that she did not sign the document. Instead, she admits that she signed it but says that she did so under coercion: the manager told her that if she did not sign she would be fired. The manager denies this and insists that she signed voluntarily. Ms. D adds that she did not want to sign the document because she did not accept the accuracy of its contents; she had, in fact, called in and left messages with the front desk clerk on both prior occasions.

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[116] Under unemployment compensation law, an employer who dismisses an employee has the burden of proving that the dismissal was the result of intentional misconduct by that employee. *See* 43 Pa. C.S. 802(e) (2004).

[59] Applying the Talmudic miggo, Ms. D's admission that she signed the document entitles her to a presumption of truthfulness on the issue of coercion. This is a small but significant bit of guidance for the referee in making this credibility determination. In my experience, such determinations are reduced with depressing frequency to veiled arguments over which narrative should apply: whether Ms. D is a feckless and irresponsible product of welfare dependency or a conscientious person doing what she can to better herself. Conversely, middle-aged men dressed in suit and tie and bearing the title "manager" fit readily into a narrative of legitimate authority and hence, trustworthiness. While such thinking cannot be excised from the mind of a finder of fact, the application of the miggo may at least shift the focus.[117]

III. CONCLUSION

[60] The Talmudic insistence on exposing and attempting to falsify, in often painstaking fashion, the basis of credibility determinations offers many more opportunities for reflection than the willed aporia entailed by the demeanor approach. The sages insist that our inability ever to know with certainty whether we have reached the truth does not excuse us from trying always to do better. Implicit in Talmudic method is a demand that those who are professional finders of fact examine more closely and articulate more clearly the basis of their credibility determinations. The Talmudic text offers us a model of how to do so.

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[117] I have chosen to discuss the application of *miggo* in an administrative hearing because it appears to be the present-day setting most analogous to a Talmudic court. While some of this discussion might be relevant to other settings even perhaps jury trials, this is properly the subject of another article.