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BOOK REVIEWS

A Philosophy of Evidence Law: Justice in the Search for Truth BY HO HOCK LAI
[Oxford and New York: Oxford University Press, 2008. xiv + 347 pp.
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What we cannot speak about we must pass over in silence[1]

Fact, Truth, and Justice, in the ideation of people who have a deep sense of the world and the language that describes it—people such as lawyers, philosophers, and linguists—are paradoxical subjects that, instead of being synonymous or complementary, often appear antithetically to one another. A court may find as a *fact* that an accused person was guilty of the murder of *X* when the *truth* is that he did not kill *X*. What, then, is the nature of *justice* in such a case? What if the accused person was convicted of killing*X*, whom he did not kill, but was not convicted for the murder of *Y*, whom he did kill? The test of truth implies that there must yield an absolute result (since a thing is either true or it is not) whereas a test for accepting or rejecting a *fact* may not. The latter test operates by means of an uncertain device of proof on a balance of probabilities, and, sometimes, a fact is established or dismissed on the basis of a reasonable doubt.[2] Institutional concepts such as the many that are established in the realm of law and jurisprudence are intelligible only against the complex background in which they function, which in turn requires the complex background be understood. In *A Philosophy of Evidence Law*, Ho Hock Lai analyses the normative descriptions of fact, truth, and justice and the process at trial by which they are extracted from the evidence, thus setting himself the formidable task of simplifying and demystifying the quest for truth and justice, and wading through that swampy quagmire known as *facts*.

In respect of facts, Ho discusses what facts are and how the fact finding process in court might yield acceptable factual results. He begins with a discussion of deep problems that make the fact finding exercise difficult, gradually introducing these problems in chapter one before going on to discuss them more fully in the rest of the book. He raises the basic but important point that the question "what to believe" operates at a different level from the question "what to find". Facts can be such slippery things. The law of the excluded middle, an ostensibly attractive notion that

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[1] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (Routledge, 1974) at 74.

[2] That is, the fact that an accused was guilty or not guilty depended on whether the court has accepted evidence which it considers to have created or not created a reasonable doubt regarding the guilt of the accused.

is attributed to Aristotle, may be too extreme in modern theories of *fact* finding, especially in the findings of fact in a court of law, but it is still relevant when one talks about *truth*. How does one apply the law of the excluded middle (either p or $-p$) if absolutes are not necessary in fact finding? What takes its place? If John shot Henry then John cannot not have shot Henry. Thus, Donald Davidson observed that not every statement has its facts—only the true ones do. If the linguistic turn in philosophy has indeed given us a different perspective to analytic philosophy, jurisprudence cannot be unaffected by it. Thus, those in the business of the law—lawyers and judges—cannot ignore the influence and effect of linguistic philosophy since they work with (and on) words and statements. The question, however, is whether one can hold to the notion that a true statement is a statement that is true to the facts (the basis of all correspondence theories of truth) when he employs and accepts imperfect means of ascertaining facts; that is to say, when the necessity for a correspondence of statement to truth is gone.

In the chapter *Truth, Justice, and Justification*, Ho displays great clarity of thought in showing how the search for truth in a trial can be muddled by facts. Awareness of the instances under which such confusion can arise is an important step in clear and decisive fact finding. Polemical retorts to claims of truth are often made when one is least certain about the facts. In this regard, Ho tears away pretensions of fact finding founded on ignorance and sloth. For instance, while fully aware that the strength of one's belief does not adduce facts, Ho emphasized the importance of belief (in the sense of justification) in any fact finding mission. A fact might be correctly asserted even though not justified on the evidence. Ho says, "In such a case, one might say that no harm was done after all. But one should insist that something has gone wrong."[3] When it comes to proof of fact, how, it might be asked, in the parlance of linguistics philosophy, does one judge that (in fact) p? This is one of the problems under discussion in the chapter on *Epistemology of Legal Fact-Finding*. As Ho explains, "a witness who testifies to having caught the butler red-handed is not giving evidence of objective probability" he is "giving testimony of knowledge acquired non-inferentially by perception."[4] In *The Standard of Proof*, Ho considers the nature and extent of proof constituting facts. The exclusion of certain types of evidence in a trial may not be based entirely on the lack of probative value in them, but such evidence is often occluded from the process on policy and practical reasons, such as the prohibitive costs in terms of money and time involved in adducing them. Accepting this lapse as an implicit acceptance of the doctrine of utility (and that is always a problem to those who affirm deontology and denounce utilitarianism) one must move on to consider a more serious anomaly. References to standards of proof are anathema to truth since truth, being absolute, admits no standards and the variation and gradation that standards imply. As for *fact*, the meaning deteriorates and justification becomes dubious when facts are proved not in absolute terms but on a balance of probabilities. Ho invites the reader to consider the significance of context in the hope of justifying justified belief. "John is tall" is true when talking about John in the context of his being a jockey. "John is not tall" is also true in the

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[3] Ho Hock Lai, *A Philosophy of Evidence* (Oxford and New York: Oxford University Press, 2008) at 53. [Philosophy].

[4] *Ibid*,.. at 119

context of talking about John being a basketball player. Yet in both instances, it was the same man, John that was the subject.

In the last two chapters, Ho takes us through two complex areas in the law of evidence—hearsay and similar fact—and considers the foundation of such evidence and their role in the justification of belief. If a schoolboy can learn that there was a first world war from a teacher who had learnt about it herself from authorities, why, Ho asks, should hearsay evidence in court be differently received? He explains a variety of cognitive requirements for the reception of such evidence in order that they may strengthen the justification of belief. The difference between believing a witness's testimony *from* the testimony as opposed to *through* the testimony is one of the basic steps towards the appreciation of the qualitative nature of hearsay evidence.[5] From this basic perspective, he leads the reader to more difficult concepts such as the importance of "defeasible reasoning in rational deliberations."[6] In similar fact evidence, Ho wrestles with the justification of evidence of misconduct that had not resulted in criminal conviction, considered improper in civil jurisdictions, and the attendant dangers of judging by the expression, "once a thief, always a thief". He ventures to explore alternative bases to the 'forbidden chain of reasoning' in similar fact evidence.

It is difficult to conceive how one may find the truth to do justice, and to do justice in finding the truth if one does not appreciate the problems he will encounter in the process. This book is one of the best guides in print. Although *A Philosophy of Evidence Law* does not purport to expound any new theory, it is an excellent analytical survey of the problems that confront a fact finder, especially a court of law. If it is thought that an effort like this amounts to no more than a restatement of known problems and theories, one would have missed one of the more illuminating lessons in the history of philosophy - a clear restatement of known problems and established theories is a necessary prelude to a new and grander theory. That Tarski, Kripke, Davidson, Strawson, Dummett, Fish, and the long list of linguistic and phenomenological philosophers have drawn upon each other's restatements in order to construct their own theories support my optimism that something fresh will eventually emerge from Ho's marvellous effort. *A Philosophy of Evidence Law* takes us deep into the subterranean labyrinths of concepts that bind fact, truth, and justice, and the antitheses that repel one against the other. There are more, and deeper, caverns to explore in this field, and while it may be presumptuous to suggest that Ho would be the one to reach them, the torch is clearly in his hands.

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[5] Learning about X's cold from noticing the nasal tone of her voice and learning it from X saying she has a cold. *Philosophy*, at 242.

[6] *Philosophy*, at 270.