University of Arkansas at Little Rock Law Review

Volume 3 | Issue 2 Article 2

1980

The Facts of a Case

Irving Younger

UNIVERSITY OF ARKANSAS AT LITTLE ROCK
LAW JOURNAL

VOLUME 3 1980 NUMBER 2

THE FACTS OF A CASE

*Irving Younger**

The man whose name is the name of this occasion was a farmer and a lawyer. Of agricultural affairs my ignorance is total, and I can think of nothing to say. About the law, however, I have been struggling for two and a half decades now to become better informed. I profess no success in the enterprise, but I am able to report that the effort has produced a vagrant thought or two, wandering mote-like through the profound vacuum separating my ears. It is with such a thought or two that I shall try to bemuse the minutes which have been allotted me, hoping that the spectacle of a former trial lawyer and judge teasing out a description of the phenomena hidden away in a phrase commonplace among those in the litigating branch of the profession will not be thought a wholly inappropriate commemoration of the memory of Ben J. Altheimer.

The phrase is "the facts of a case." In that or some variant form each of us heard it during the first class we attended on the first day of our first term at law school. "Mr. Smith," the instructor in torts may have said, "what were the facts in *Brown v. Kendall*?"[1] Or in property, "Miss Jones, state the facts of *Armory*

* Irving Younger is the Samuel S. Leibowitz Professor of Trial Techniques at the Cornell Law School.

This is the text of the second Ben J. Altheimer Lecture, as delivered at the law school of the University of Arkansas at Little Rock on October 19, 1979.

1. 60 Mass. (6 Cush.) 292 (1850).

v. Delamirie."[2] And we palpitatingly did, thus commencing that progress in subtlety which marks both the development of a lawyer and the growth of the law. "The facts were," recites Mr. Smith, "that Kendall tried to separate two fighting dogs by beating them with a stick. He raised the stick over his shoulder and struck Brown in the eye. Brown sued Kendall for the resulting damages." "In the *Armory* case," says Miss Jones, "a chimney sweep found a jewel in the dust. He took it to a jeweler to be examined and when the jeweler refused to return it, sued for it in King's Bench." Mr. Smith and Miss Jones know that these are the facts of the case because the opinion in the casebook says they are. How the author of the opinion came by those facts is a question beyond their fathoming on that first day of law school, and understandably. "Ars longa est, vita brevis," Seneca says, quoting Hippocrates. Or as our own Geoffrey Chaucer puts it:[3]

> The lyf so short, the craft so long to lerne,
> Th'assay so hard, so sharp the conquerynge. . . .

But I wander. The facts, we tend to think at the beginning, are like acorns on an oak tree. When they are ripe, they drop to the ground. If you want some, just bend down and pick them up. Observe how they are arranged. Should they fall into the pattern we designate "negligence," Brown wins his suit against Kendall. If the pattern is that of one of the bundle of rights called "property," Armory prevails over Delamirie. Why, there's nothing to it but learning the patterns. That, I repeat, is what we tend to think at the beginning. It is what teachers of the law seem to have thought for a very long time.[4]

With experience and reflection comes a deeper comprehension. Facts do not grow on trees, we learn. They must be investigated and proved. Cases are more often won before a jury than in the appellate courtroom. Sometimes the facts fall into a preexisting pattern, but sometimes a pattern is devised to their configuration, in accordance with whatever their arrangement happens to be. The facts, in short, are just as obscure as the law, just as malleable, just as controversial, and in determining the outcome of a lawsuit or

---

2. 1 Strange 505 (K.B. 1722).

3. G. CHAUCER, THE PARLIAMENT OF FOWLS, lines 1 and 2.

4. *E.g.*, Dean Christopher Columbus Langdell of Harvard said in 1886, "First, that law is a science; second, that all the available materials of that science are contained in printed books." CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917, at 231 (1918).

the elaboration of a rule, more important than paltry logic. This each of us has learned, some of us long since, and this teachers of the law began to learn about half a century ago.[5]

In acknowledging our hard-won intelligence about facts, I would not wish to be understood as embracing an untempered complacency. There is still something of the acorn on the oak tree about the way we look at facts. "Obscure, malleable, controversial, and important, of course," we say to ourselves, "but when you finally get down to it, a fact is a fact." It is a single category or class of things, as the Oxford English Dictionary tells us:

> Fact . . . (7) Law. The circumstances or incidents of a case, looked at apart from their legal bearing.

Or if this is too general to suit, one might follow Bentham in assigning facts to one of two categories. A fact, says the great Jeremy, is either a state of things, that is, an existence, or a motion, that is, an event.[6]

Now, I cherish the Oxford English Dictionary and I prostrate myself before Jeremy Bentham, but surely, I whisper, things as interesting as facts are something more than merely *that*. All descriptions are somewhat blunt by the standard of what they describe, yet should it not be possible to talk about facts with greater sharpness of point and edge than do the dictionary and the philosopher? I think so, and propose to start right now.

Gazing out over the numberless host of the tribe of facts, my mind's eye distinguishes among them no fewer than ten separate types or varieties. Others with a keener faculty may see more. If they do, I hope that they will add their observations to mine. Ten, however, is a fair, round number, quite enough to justify this rough attempt at a taxonomy of the facts of a case.

First. Every normal human being possesses the five senses of sight, hearing, touch, taste, and smell. Through these senses we receive data from the world outside us. When someone takes the stand and testifies to what he saw, heard, touched, tasted, or smelled, the witness is presenting to the judge or jury a fact of my first sort, that is, a fact which was the object of a witness' sensory perceptions. In *Brown v. Kendall*, for example, a witness might testify that he saw two dogs fight, that Kendall stepped between

---

5. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930).

6. I have here put into a sentence the burden of a long section of the Rationale of Judicial Evidence. 6 JEREMY BENTHAM'S WORKS 217 (Bowring ed. 1843).

them, that he raised his stick over his shoulder, and that the stick hit Brown in the eye. In *Armory v. Delamirie*, a witness might testify that he saw the chimney sweep pick a jewel out of the gutter, that he accompanied the sweep to the jeweler, that the sweep gave the jewel to the jeweler, who refused to give it back. Facts of this first sort were once, as these two old cases suggest, virtually the only sort of fact likely to be encountered in litigation. Today, it is not uncommon to run into any of the nine other sorts.

Second. The fact would be a fact of the first sort, the object of a witness' sensory perceptions, save that the witness' perceptions were aided or enhanced by some device in ordinary use. For example: the witness says that, through a pair of binoculars, he watched the airplane fly into the side of a distant mountain; or the witness says that, although he is appallingly near-sighted, he was able to see the stop sign some twenty-five feet away because he was wearing his eyeglasses at the time; or the witness says that, while he is hard of hearing, his hearing-aid was in place and functioning that morning and hence the witness heard what the plaintiff said to the defendant.

Third. The fact would be a fact of the first sort, the object of a witness' sensory perceptions, save that the witness' perceptions were aided or enhanced or altogether made possible by some device or procedure not in ordinary use but requiring special skill to employ. For example: the witness says that he felt the texture of the pebble on the far side of the moon, having got there by rocket and lunar landing module; or the witness says that he saw the material blocking the plaintiff's larynx by looking through a medical instrument introduced for the purpose into the plaintiff's mouth and down his throat; or the witness says that he heard what Chairman Brezhnev said to President Kosygin as they went through the line in the Kremlin coffee shop by plugging into the super-sensitive parabolic microphone maintained by the CIA on Magazine Mountain in western Arkansas.

Fourth. The fact would be a fact of the first sort, the object of a witness' sensory perceptions, save for the chance circumstance that no one exists or can be found who is able to take the stand and say, in effect, I perceived it. For example: two cars moving in opposite directions collide on a two-lane highway in the middle of the night. No bystander sees the accident and neither driver survives. It is necessary at trial for plaintiff to prove that the car driven by defendant's decedent was on the wrong side of the road.

Because this is a sort of fact different from the first, second, or third, the plaintiff will need to proceed differently.

Fifth. The fact would be a fact of the first sort, the object of a witness' sensory perceptions, save that there are impediments to producing a witness who will say, in effect, I perceived it, impediments which the technology of the future may permit our professional posterity to overcome. For example: how did Lincoln deliver the Gettysburg Address? Was his voice high or low, his pace slow or fast, his posture rigid or relaxed? It is presently impossible to call someone to the stand to testify, "I was there. This is what I saw. This is what I heard." Some day, conceivably, the technicians will have come up with a time-machine, by the help of which a fact of this fifth sort will be converted to a fact of the third sort. Put your investigator in the time-machine and send him back to the cemetery in Pennsylvania on November 19, 1863. Have him look and listen, then retrieve him to the present, march him onto the witness stand, and tell him to report what he perceived. Another example: what is the shape and approximate size of the Loch Ness monster? Those are facts capable of perception, but as yet the engineers have failed to contrive the television camera and floodlights able to pierce the sedimentary gloom of those prehistoric Scottish waters. They will before long, and then, by the aid of those devices, someone will perceive the facts in question. They will be facts of either the second or third sort, depending upon the complexity of the equipment. Of course, should Nessie lumber out of the depths some Sunday noon in full view of half a dozen dominies on their way home from kirk, there would be no need for the assistance of engineers: we would simply put our dominies on the witness stand to tell what they saw. It would be a case of facts of the first sort, plain and unadorned. In the present state of affairs, to recapitulate, the monster is an example of a fact of this fifth sort, incapable of being perceived due to the prevailing limits of technology.

Sixth. The fact cannot be a fact of any of the preceding sorts because by its nature the fact is immune to perception, no matter what technological aids are brought to bear. Here I presuppose that some kinds of machinery cannot be invented, that science is able to tell us only that the thing is impossible. For example: it is not and never will be possible to see an electron make a quantum jump from one energy level to another, or to hear the noise at the center of the sun, or to taste the vegetables grown on a planet of a star 100 million light years away. Still, lawyers must once in a

while try to prove facts of this sixth sort. Lest you scoff too soon, imagine yourself the prosecutor in a case of murder by explosion. The evidence showing that the fragments of the bomb came from a closet of materials accessible to the defendant rests upon a technique of the physics laboratory called neutron activation analysis. To persuade the judge to admit that evidence, you will need to prove facts very like an electron making a quantum jump from one energy level to another.[7]

Seventh. The fact is of a very different sort from the preceding six. This seventh sort of fact is not in any immediate sense a part of the physical universe either past or present. It is therefore impossible in principle to prove the fact through a witness' perceptions. But neither is the fact a fiction. The fact figures in the real universe, though it lacks tangibility. For example: in a murder trial, the defendant admits shooting the victim but says the revolver went off by accident. The prosecution contends that the defendant pulled the trigger intending to kill. The jury must determine the fact of *mens rea.* It is real. It exists. Yet it has no corporeal substance.[8]

Eighth. The fact is of a very different sort from the preceding seventh and from the six before that. It is not a part of any universe, the external one of physical reality or the internal one of state of mind. Instead, this eighth sort of fact is simply a question of definition, a point of language. For example: a witness testifies to facts of the first sort, namely, that the defendant-driver was, at a moderate rate of speed, approaching the last car of a line of cars stopped for a red light. A youngster hiding behind a tree at the side of the road threw a handful of pebbles at the defendant's car. They landed on the roof and rear window with a noise like a burst of a machinegun fire. Startled, the defendant looked around to see what was happening. He saw nothing. While seeing nothing, neither was he watching the stopped car ahead of him. Returning his head and eyes to the forward position, the defendant instantly saw that he had moved dangerously near the stopped car. He jammed on the brakes. Too late. The defendant's car rear-ended the stopped car. From these facts of the first sort the jury must now determine a fact of the eighth sort. Do these facts having to

7. *See* United States v. Stifel, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

8. *See* United States v. Staffs, 553 F.2d 1073 (7th Cir. 1977).

do with the defendant-driver's conduct, all objects of perception, fit the meaning of the phrase "reasonable care in driving a car," a fact not of perception but of definition?

Ninth. This sort of fact would be a fact of the eighth sort, save that the word or phrase the meaning of which may or may not encompass the circumstances of the case is not a word or phrase in ordinary use. Rather, the word or phrase is part of the specialized vocabulary of some science or discipline other than the law. A jury determining whether a certain corporation possessed monopoly power, for example, takes a phrase used and defined by the discipline of economics and decides whether the evidence warrants a finding that the phrase is fairly to be applied to the corporation at bar. Similarly, a jury determining whether the victim of an accident suffers from "traumatic neurosis" takes the psychiatrist's definition of the phrase and decides whether the evidence brings the plaintiff within its terms.

Tenth. This sort of fact would be a fact of the eighth sort, save that the word or phrase the meaning of which may or may not encompass the circumstances of the case comes from the jargon of the law. For example, his honor charges the jury as follows: "Members of the jury, the law defines the crime of murder in the first degree as. . . . You determine what the defendant did [facts of the first, second and third sort] and what was in his mind [a fact of the seventh sort], and if these facts comport with the definition I have given you, then you must find the defendant guilty of murder in the first degree."

Having exhibited to you my taxonomy of the facts of a case, let me lighten your depression by pointing out that the taxonomy's ten sorts of fact fall naturally into three groups, thus assisting the processes of memory. The first six sorts of fact, involving aspects of the physical universe, might be called in the aggregate matters of matter. The seventh sort of fact, involving aspects of the interior life, might be called matters of mind. The eighth, ninth, and tenth sorts of fact, involving the inquiry whether a certain word or phrase fits the case, might be called in the aggregate matters of term.

When composing a novel or a tragedy, it is well to begin softly, build by degrees to a crisis, and gradually wind down to a resolution of the mysteries and agonies which have gone before. A lecture is no different. One begins softly and builds by degrees to a crisis. I have begun. I have built. I come now to the crisis. It takes the form

of a question. It is a question presently in the mind of all of you. Were you less polite an audience, it would be on the tongue of not a few of you. It is a simple question. It is a direct question. It is this: what on earth is the use of your contraption? Taxonomy of the facts of a case indeed! We are students who will and lawyers who do try cases. We are judges who preside over cases. How will your ten sorts of fact help us in our professional work? Isn't this just that complication for the sake of complication with which we are already too familiar? And if it is, we heap denunciation upon your head and send you home to ponder what it is that law and life are really all about.

Well, ladies and gentlemen, I want to answer your question. I want to answer it because, unless I do, I can never get past the crisis and on to the business of winding down, and winding down is always the best part of a lecture. So much do I want to answer your question that I shall answer it fives times. I say that there are five uses for my taxonomy of the facts of a case, and although each overlaps and shades off into the next, the best way of putting them before you is to state and illustrate them one by one.

I begin with deftness, deftness of analysis. The more distinctions you make, the readier your hand to untangle the tangle of fact which most lawsuits present. Nuance is all, as every experienced trial lawyer knows, and nuance is impossible when you paint with but a single brush.

Take an easy example. A lawyer must establish that his client suffered a myocardial infarction which caused scarring to the muscle of the heart. Should the lawyer tell me that *that* is the fact he must prove, I will not quarrel with him. But later, after he has won his case, I might insinuate to him that it is aesthetically more satisfactory to take note of the separate facts which constitute his one unparticularized sack of fact, and that it is possible, with my taxonomy, to give a different name to each of them. *Ecce*: the wavy lines on the electrocardiogram tape are a fact of the first sort (or perhaps of the second sort if a magnifying glass is necessary to see them properly); that these lines are aptly described as those characteristic of a myocardial infarction is a fact of the ninth sort; and that someone who has suffered a myocardial infarction is left with a scar on his heart muscle is a fact of the fifth sort.

For a second, more elaborate, example, I refer to *Davis v.*

John Hancock Life Insurance Co.,[9] an opinion whose persuasiveness is rather considerably enhanced for me by the happy circumstance that I wrote it myself.

A young woman said goodnight to her mother and went out for the evening. She never returned. A week later, her body was found on the roof of a tenement building. Those are facts of the first sort. The medical examiner performed an autopsy, in the course of which he made certain observations and measurements of the internal viscera. Those are facts of the third sort. On the basis of those observations and measurements, the medical examiner concluded that the young woman had died of "acute and chronic intravenous narcotism." That is a fact of the ninth sort. The young woman owned a life insurance policy which provided that double the face value would be paid to the beneficiary were the young woman to die "solely from accidental bodily injury." The jury concluded that death was accidental within the meaning of the word as used in ordinary speech, which was the meaning it had in the policy. That is a fact of the eighth sort.

I assert that deftness of analysis, being a virtue in itself, is its own reward. Some of you may not be so sure. To enlist your concurrence, let me discuss a second use of my taxonomy. It permits a trial lawyer to prepare and prove his case with great delicacy of focus. Recognizing differences in type among a multitude of facts, the lawyer will marshal his evidence assuredly and exactly. Juries regard this kind of precision as the seal of professional competence and salute it with favorable verdicts.

For illustration, I use my taxonomy to help me think about when it is that lay testimony will do and when it will not, the latter contingency making it necessary for the proponent of the fact to prove it by expert opinion testimony. For facts of the first and second sorts, the object of sense perception assisted at most by binoculars, eyeglasses, or hearing aid, lay testimony does the job. For a fact of the third sort, special skill is needed to drive the lunar landing module or to use the medical instrument, but that is not the same as to say that expert opinion testimony is necessary: once the astronaut or laryngologist uses the special device or procedure, what he perceives could have been perceived by anyone, even the most inexpert. The testimony describing what was perceived is therefore lay testimony. The fourth sort of fact is capable of being

9. 64 Misc. 2d 791, 316 N.Y.S.2d 722 (Civ. Ct. 1970).

perceived, but by chance no one is available who did perceive it. Here, we start with facts of the first sort. Recall my example of the head-on collision with no survivors. Witnesses testify that, when they came on the scene, the skid-marks were thus, the debris so, etc. They perceived these things. Now, from such facts of the first sort the jury is obliged to deduce the fact of the fourth sort—on which side of the road did the cars collide—for that tells us which driver crossed the line. Whether the jury must make the needful deduction on its own or whether the jury may have the assistance of expert opinion testimony will depend upon which of two rules is preferred in that jurisdiction to determine the admissibility of an expert opinion—a subject beyond my writ this evening but to be set forth in an exquisite footnote to the printed text.[10]

The fifth and sixth sorts of fact, incapable of being perceived because of the present limits of technology or the permanent bounds on the capacity of science, will almost always be proved by expert opinion testimony from a witness who possesses the requisite specialized knowledge.

The seventh sort of fact is a matter of mind. When the person whose mental state is of interest testifies to that mental state, he testifies on personal knowledge and consequently is a lay witness. This might be treated as a fact of the first sort, except that we do not "perceive" our own states of mind in the usual sense of the word "perceive." When a witness states his perceptions of the person whose mental state is of interest, we deal with facts of the first sort. From those facts the jury will be told in many cases to infer the actor's mental state. If the witness is permitted to characterize those perceptions, for example, as "crazy," we deal with a matter of term, a fact of the eighth sort. When a witness characterizes his or another's perceptions of the person whose mental state is of interest, for example, as "schizophrenic," we deal with a different matter of term, a fact of the ninth sort.

The eighth sort of fact, a matter of term involving ordinary

---

10. One rule has it that an expert's opinion is admissible only when, without it, a jury would be helpless to decide. *E.g.*, Kulak v. Nationwide Mutual Ins. Co., 40 N.Y.2d 140, 351 N.E.2d 743, 386 N.Y.S.2d 87 (1976). The other requires merely that the expert's opinion "assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, Federal Rules of Evidence. Apply the former and the jury in our head-on collision case must calculate on its own, from skid-marks, debris, etc., where the impact occurred. Stafford v. Mussus Potato Chips, Inc., 39 A.D.2d 831, 333 N.Y.S.2d 139 (1972) (mem.). Let the latter be the law and an expert in the reconstruction of accidents may give the jury his opinion. Een v. Consolidated Freightways, Inc., 120 F. Supp. 289 (D.N.D. 1954).

words or phrases, a jury determines for itself. Average people, which is what jurors are, can decide without help from anyone whether the evidence before them meets a definition drawn from everyday language. The ninth sort of fact, a matter of term which is part of the vocabulary of some science or discipline other than the law, must be proved by expert opinion testimony, for only an expert will be able to define the term for the jury. The tenth sort of fact, involving legal words or phrases, the jury determines by applying the court's definition of the word or phrase to the facts of other sorts in the case and deciding whether they fit.

This use of my taxonomy to organize the little I know about the rules regarding lay testimony and expert opinion sets off in my mind a different though related chain of thought. I seem to hear myself pointing out that it is incorrect to label a witness lay or expert at once, the label to remain in place so long as the witness is on the stand. My purpose in calling the witness is to prove certain facts. The witness' status will therefore vary with the sort of fact about which the witness testifies. One moment the witness may be a lay witness, the next an expert, and so on. To be sure I grasp my point, I think of the treating physician. When he testifies that he examined the plaintiff and felt a stiffness of the muscles of the back of the neck he testifies to a fact of the first sort. He is a lay witness. Now the physician says that, using a tongue depresser, he looked down the plaintiff's throat and observed red, swollen patches. This is a fact of the third sort: only a physician knows how to use a depressor to hold down a patient's tongue, but once the device is in place, anyone can perceive the state of the patient's throat. The physician is a lay witness. You see, I hope, that the characterization turns on the subject of the testimony, not the title of the witness. Proceeding, the physician says that these observations led him to diagnose a strep throat. That is a fact of the ninth sort, provable only by expert opinion. The physician becomes an expert witness at this point. "My bill was twenty dollars," he says, as a lay witness. "That is the fair and reasonable value of my services": he is an expert again.

The practical consequences of this fastidious discernment will be plain to all of you. If nothing else, lay testimony is compellable, expert testimony not.[11] For the lay elements of his testimony, it would have been proper to subpoena the physician. Only as to the

11. *See, e.g.*, Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (1944).

diagnosis and the opinion on the value of his services were the traditional arrangements for compensation necessary.

But there is a good deal else. Take a case like *Meier v. Ross General Hospital.*[12] Plaintiff's deceased had a long history of mental trouble evidenced chiefly by attempts at suicide. He was placed in the care of the defendant hospital, which, with knowledge of the deceased's history, assigned him an unsecured upper-story room. Result: defenestration. On which note the plaintiff rested. He had produced no expert opinion to the effect that the hospital had been unreasonably careless, and the trial judge thought this a deficiency. Let us analyze. The deceased's history and the hospital's conduct are all facts of the first sort, proved by lay testimony. The hospital's knowledge is a fact of the seventh sort, a matter of mind, also proved by lay testimony that the hospital's staff was told of the deceased's history. What remains? A matter of term. Do these facts warrant the label "unreasonably careless assignment of a room?" That is a phrase used in ordinary discourse. It is not part of the vocabulary of any science or discipline (that would be a fact of the ninth sort) and, while it is the jargon of the law, we may treat it as a fact of the eighth sort as well as a fact of the tenth sort because the term is used in everyday speech with the same meaning it has for the law. Nothing before the jury is beyond their unaided comprehension; the jury possesses the necessary facts; and so the plaintiff has a prima facie case. That is just what the California Supreme Court decided, though for reasons innocent of anything like a taxonomy of facts.

So beguiled am I by this illustration of the utility of my taxonomy that I yield to the temptation to set forth another. Some of you may have tried what over a martini is called a spleen-out case. A little boy on his way to school is hit by a speeding car. The ambulance gets him to a hospital within minutes, where a surgeon performs exploratory surgery. It is discovered that the boy's spleen has been ruptured by the impact with the car. The surgeon removes the injured organ, and the boy makes an uneventful recovery. He is now perfectly well, except that he lacks a spleen. Plaintiff's counsel will argue that the spleen plays a vital though as yet not fully understood role in the body's immunological system. Lacking a spleen, the boy's life expectancy is short, and the amount of the verdict should therefore be large. Discourse with

12. 60 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968).

me. That the boy was hit by a car and taken to the hospital are facts of the first sort: use lay witnesses to prove them. That a ruptured organ was found in the course of exploratory surgery is a fact of the third sort. Only a surgeon can perform the surgery, but anyone, layman or otherwise, who was present to perceive it may testify that a bit of tissue in the boy's abdomen was torn in two. That this bit of tissue is the spleen is a fact of the ninth sort: someone with medical training tells the jury that that is its name. Only the surgeon knows how to remove the spleen. That it was removed is a fact of the third sort: anyone who was there may testify that he saw it done. The role of the spleen in the body's immunological system is a fact of the sixth sort. Only an expert in immunology may testify to it, giving his opinion on the spleen's properties.

I now seize the opportunity to suggest yet a third use of my taxonomy. It permits one to mark out with great clarity the border between a witness' terrain and the jury's. My illustration is *Washington v. United States*,[13] decided at a time when the District of Columbia applied the *Durham*[14] rule to determine exculpation on the ground of insanity. That rule, you will recall, provides that a defendant is "not criminally responsible if his unlawful act was the product of mental disease or defect." The courts of the District had fallen into the habit of permitting psychiatrists to testify that, in their expert opinion, the defendant did have a mental disease or defect, that the unlawful act was its product, and that the defendant was consequently not guilty by reason of insanity. In *Washington*, the Court of Appeals condemned this practice and laid down guidelines for psychiatric testimony in future cases. The physician is to diagnose; he is not to parrot back the *Durham* rule. "The clinical diagnostic meaning of this term [mental disease or defect]," said the court, "may be different from its legal meaning."[15] The facts with respect to the defendant's overt behavior are facts of the first sort, we see: lay testimony suffices. That the structure of the defendant's personality is of a certain type is a matter of term, a fact of the ninth sort, and a psychiatrist gives his opinion on it. That the defense of insanity has or has not been made out is a fact of the tenth sort—does the evidence fall within a legal word or phrase as defined by the judge? This is a determination

13. 390 F.2d 444 (D.C. Cir. 1967).
14. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
15. Washington v. United States, 390 F.2d 444, 457 (D.C. Cir. 1967).

solely for the jury to make, and hence expert opinion about it is inadmissible.

A fourth use of my taxonomy is to explain certain appellate decisions which are, without the taxonomy, a trifle confusing. We all know the standard on review of a jury's finding. What then are we to make of *United States v. Simon*?[16] The defendant accountants were convicted of certifying a false and misleading financial statement. How they had treated certain transactions was not in dispute. It was the quality of their treatment which was. Eight "leaders of the [accounting] profession," to use Chief Judge Friendly's words, "an impressive array of the leaders of the profession,"[17] testified that the defendants' treatment was consistent with generally accepted accounting principles. The Government's two experts, said the Chief Judge, "hardly compared with defendants' witnesses in aggregate auditing experience or professional eminence."[18] In view of this, one might at first blush have expected a reversal on the ground that the verdict was contrary to the weight of the evidence. But slow! The Court of Appeals unanimously affirmed. Why? My taxonomy of the facts of a case shows why. The entries the defendants made are facts of the first sort, and in any event are not in controversy. That the defendants' professional behavior was or was not consistent with good accounting practice is a fact of the ninth sort: hence both sides called experts in accountancy. But this fact of the ninth sort was not what the jury had to determine. The indictment did not accuse the defendants of failing to comply with generally accepted accounting principles. Had that been the charge, it is likely that the Court of Appeals would have reversed the conviction as contrary to the weight of the evidence. The crime alleged in the indictment was different. It was that the defendant had certified a false and misleading financial statement. This is a fact of the tenth sort. Do the entries on the statement make it false and misleading, as those words are defined by the judge? The jury alone decides facts of the tenth sort, which is why the disparity in the quality of the evidence adduced by the defense as against that adduced by the Government was of no moment.

The fifth and last use I will mention for my taxonomy is

16. 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).
17. *Id.* at 805.
18. *Id.*

merely a speculation, a possibility for further consideration. In the last two or three years, the Chief Justice of the United States and others have wondered aloud whether some cases are not too complex to be tried by a jury. One trial judge has recently held that, because the evidence was so voluminous in a case at law and the issues so tricky, trial by jury would not be allowed: a bench trial was mandatory.[19] That kind of ruling is troublesome where there exists a constitutional guarantee of jury trial, as in the seventh amendment to the Constitution of the United States or as in various state constitutions. The language of those constitutional guarantees typically runs something like this: "In suits at common law, the right of trial by jury shall be preserved." If one asks what is the scope of the guarantee, the response usually is historical, a reference to the forms of action. Since the Constitution preserves the right to trial by jury in suits at common law, those forms of action which were triable to a jury of old are triable to a jury today. A contract case was tried to a jury in the time of Henry II. Then it is tried to a jury in the time of Governor Clinton. That the evidence is voluminous and the issues tricky counts for nothing. A judge who rules otherwise may violate the Constitution. It's hard to see any other conclusion if you define the constitutional guarantee of jury trial by reference to the forms of action.

Now, our taxonomy of the facts of a case opens up a different and perhaps more satisfactory approach to the problem. Yes, only certain types of cases were tried to a jury in the time of Henry II. But further, in that time only certain sorts of fact were determined by juries—facts of the first, second, seventh, eighth, and tenth sorts. Facts of the other sorts, which are just those sorts of fact which tend to involve voluminous evidence and tricky issues, were not determined by common law juries for the very good reason that the life of the times was not complex enough to engender such questions of fact. No jury before the last hundred years was ever called upon to find monopoly power or the scientific basis of neutron activation analysis. The energies of juries before the last four or five decades were devoted to such questions as "Did Brown try to separate the two fighting dogs?" or "Did Armory find a jewel in the gutter?" Might one not argue, in light of all this, that the constitutional guarantee of trial by jury extends only to facts of the sort decided by juries at common law rather than to forms of ac-

19. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978).

tion triable to a jury? Might one not argue that this gives the constitutional guarantee of trial by jury a scope truly in accord with its historical context? Might one not argue that this permits striking a better balance between the right of trial by jury and the exigencies of complex litigation? I think these are possible arguments, and for them, please note, we have my taxonomy of the facts of a case to thank.

Well, ladies and gentlemen, my time is used up. It has been a very great honor to me to deliver this lecture, and now, at its end, we ought to be mindful of our reciprocal obligations. Mine, as guest, is to say, "Thank you. Good night. It's been a wonderful evening." And yours, as host, is to agree, no matter how mercilessly I have abused your patience and your good nature.