Taking epistemology seriously: ‘truth, reason and justice’ revisited

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Abstract Underlying orthodox evidence theory is a number of epistemological assumptions about the ability of reason to deliver true descriptions which accurately describe and correspond to the ‘real’ world. Drawing extensively on both traditional philosophical and contemporary, particularly postmodernist, scepticism this article provides a detailed critique of realist epistemological assumptions about reason, truth and knowledge. It argues that claims to reason, truth and knowledge can never escape the impact of individual perspective, community standards and power relations. At the same time, however, it rejects the realist assertion that subjectivism and relativism are oxymoronic or self-defeating positions. Instead, it is argued that epistemological scepticism is a healthy political position to adopt in that it guards against the complacent acceptance of seemingly authoritative assertions of reason, truth and knowledge.

Keywords Evidence theory; Epistemology; Realism; Scepticism

In 1995 I wrote an article, entitled ‘Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse’, which drew on critical legal theory and postmodernist epistemology to critique the dominant strand of evidence theory. It is now received wisdom that the core tenets of what Twining,
its original excavator, called the Rationalist Tradition,² involve a holy trinity of truth, reason and justice, interrelated as follows: the primary aim of fact-finding is truth about facts; the means to that truth is through reason; justice is achieved by applying law to the truth using reason. Moreover, truth is conceptualised as objective truth corresponding to reality, reason as the application of logic and especially inductive reasoning, and justice as the correct application of substantive law to true facts. More recently, a significant strand of the so-called ‘New Evidence Scholarship’³ has questioned whether fact-finders always evaluate evidence ‘atomistically’ in terms of the logical relationship between individual facts rather than ‘holistically’ in terms of the overall coherence of stories. However, while questioning the Rationalist Tradition’s assumptions about reason and occasionally flirting with the idea that holism in reasoning implies a coherence rather than correspondence theory of truth,⁴ what I will call ‘modified rationalists’ seem to remain wedded to its conception of objective truth and what Twining calls ‘expletive justice’.⁵

In this article, I do not intend to revisit my earlier criticism of expletive justice to the effect that seeing justice simply as constituted by the correct application of the law to true facts via the process of reason ignores and may obscure the fact that the law itself may be substantively unjust. I also argued that, together with the Rationalist Tradition’s conception of truth and reason, expletive justice creates a form of political and moral closure around the values contained within law. As far as I am

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aware, there has been no response to this critique from mainstream evidence theorists. However, many have taken issue with critical and postmodernist arguments from myself and a few other evidence theorists about the subjective and relativist nature of truth, reason and justice. In general, they are regarded as involving a self-defeating or oxymoronic position for those seeking to contribute to debates over evidence and proof. More specifically, Roberts has denied that ‘strong’ forms of scepticism and relativism ‘follow by necessary implication from critiques of more traditional, rational epistemologies’ or are supported by ‘sophisticated theoretical arguments’. However, apart from citing a few favoured philosophers, orthodox evidence theorists have done little to provide a positive defence of traditional epistemologies which underlie orthodox evidence theory.

The main aim of this article is therefore to revisit the epistemological foundations of orthodox evidence theory, and to undertake a more detailed examination of whether its approach to truth and reason can indeed resist the challenge of postmodernists and other epistemological sceptics. For reasons of space, I will not engage with the details of the myriad positions and key protagonists within both traditional and more contemporary epistemology. Instead, I will provide a comprehensive sketch of their broad differences in order that the two positions may engage each other in further and more fruitful debate. I will also not deal directly with the relatively similar meta-ethical questions of whether there exist objective standards of justice and whether they can be ascertained in a morally neutral fashion. Not only is the issue not explicitly addressed by evidence theorists, but given that the case for objectively ascertainable truth in the factual as opposed to moral domain of life seems more plausible and is in fact far less philosophically

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8 Roberts, above n. 5 at 325.

9 See, e.g., Roberts, above n. 5; Twining, Rethinking Evidence, above n. 2 at ch. 4.
controversial.\textsuperscript{10} I will concentrate on evaluating the position actually and most plausibly adopted by orthodox evidence theorists. In doing so, I will explore postmodernist and other critical theory in greater detail than my earlier admittedly sketchy discussion, and will draw on the long history of sceptical thought contained within more traditional epistemology which predates postmodernism. In this way I hope to show that there are indeed ‘sophisticated theoretical arguments’ for ‘strong forms of scepticism and relativism’ and that, contrary to Roberts, scepticism and relativism are perfectly compatible with the important task of ‘taking epistemology seriously’.\textsuperscript{11}

I will also seek to meet the complaint that ‘aspects of [my] argument are opaque’\textsuperscript{12} and that critical and postmodern writing tends to be ‘jargon-laden’ and hence likely to come across as ‘incomprehensible, indigestible, irrelevant and possibly all three at once’\textsuperscript{13} by translating as far as is possible the terminology of postmodernist and critical theory into a language more familiar to traditional epistemology. Arguably, this attempt to enable the rival epistemological traditions to compete on the same playing field involves giving up ‘home advantage’ in that the language and concerns of a particular discourse carry with them certain in-built assumptions about what count as relevant and good arguments.\textsuperscript{14} However, given that most mainstream evidence theorists, like the epistemologists that they cite, appear unwilling to play away from home\textsuperscript{15} in order to make an impact beyond their existing fan-base, it seems that critical epistemology has little option but to challenge orthodox theory on its own turf. Before setting out the critical challenge, it makes sense to introduce the opposing sides and their key players, starting with the home team.

The opposing sides: realism versus scepticism

As its name suggests, the Rationalist Tradition involves the belief that the proof of facts can and should involve human reasoning in relation to the presented evidence. It thus entails a rejection of earlier medieval forms of proof in the West which involved some sort of test through which an omniscient god revealed where
truth lay. This rejection reflected a major change in Western thought from the pre-modernist approach of seeing knowledge as flowing deductively from some authority, such as the church, the Bible or early scholastic writers, to the new modernist belief in the power of man to know and shape his world. Modernism took off in the 17th century with the advent of the Enlightenment or Age of Reason. It was inspired by the great scientific discoveries of Copernicus, Galileo and Kepler, which were based on scientific observation and rational thought. However, Anglo-American evidence theorists did not turn to the ‘pure reason’ espoused by Descartes and Kant, exemplified by logical deduction from abstract principles, themselves derived \textit{a priori} by reason without reference to human experience. Instead, they were primarily\textsuperscript{16} influenced by philosophers such as Bacon, Locke, Hume and Mill, who espoused what is variously called British Empiricism, scientific rationality or the classical scientific method since it is modelled on the experimental methods used by scientists like Boyle and Newton. On this approach, knowledge is sought in a mixture of information derived from the observation of human senses and the drawing of inferences from this basic data, using general principles such as cause and effect which are themselves based on experience of how the world works. In epistemological terms, this approach to knowledge is described as empirical or experiential foundationalism because it sees knowledge as built on the secure foundations of what is perceived with one’s own senses.\textsuperscript{17}

Since this form of rationality and the resultant knowledge is based on the drawing of inductive inferences from perceptions of the real world, it is not inappropriate to group it with the other philosophical beliefs of orthodox evidence theory under the label of realism. Certainly, the assumption by most Enlightenment thinkers and evidence scholars that there exists a real world out there independent of human observation is commonly described as involving \textit{ontological} or \textit{metaphysical realism}.\textsuperscript{18} More recently, the idea that the meaning of ‘assertoric’ statements of facts\textsuperscript{19} is affected by and may reflect the world out there has been called \textit{semantic}, \textit{linguistic} or \textit{representational realism}. Asserting the licence of the non-philosopher, I will also


\textsuperscript{17} But cf. Nicolson, above n. 1, where ‘foundationalism’ was used more generally to denote the idea that knowledge can be objectively grounded; R. Rorty, \textit{Philosophy and the Mirror of Nature} (Princeton University Press: Princeton, NJ, 1979) \textit{passim} denoting the idea that philosophy grounds all other disciplines.


\textsuperscript{19} As opposed to those that express some feeling (e.g. ‘yuck’) or perform a ‘speech act’ (e.g. ‘With this ring I thee wed’ in a marriage ceremony).
describe orthodox evidence theory as adopting a realist epistemology, although the term is far less common.\textsuperscript{20} Thus its ‘cognitivism’ holds that knowledge about the real world is possible, whereas its correspondence theory of truth sees truth as involving beliefs which accurately reflect this objective reality.

While all these positions can be more or less plausibly described as realist, they do not comprise a job-lot. One can, for instance, adopt metaphysical realism and a correspondence theory of truth, but reject the realist view of rationality. Moreover, one can adopt all or some aspects of realism in one sphere of human activity, such as the natural sciences or psychology, but reject all or some in other spheres, such as the human sciences or morality.\textsuperscript{21}

The same applies to scepticism—the term usually used to describe the position challenging realism.\textsuperscript{22} Scepticism is as old as philosophy itself\textsuperscript{23} and varies in intensity. A mild form, which can be called anti-dogmatic scepticism,\textsuperscript{24} merely questions the possibility of infallible and certain knowledge, pointing to the unlikelihood of human knowledge ever being complete or free from errors, preconceptions or biases. However, philosophers usually have in mind a more thorough-going cognitive scepticism which questions the very possibility of obtaining knowledge or at least of legitimately deriving knowledge from the evidence of one’s senses. Closely related is the more recent semantic scepticism which denies that assertoric statements are affected by and reflect material reality. Finally, ontological scepticism goes even further to deny the existence of objective reality. Thus, certain forms of idealism or its close relation, phenomenalism, argue that the world exists only in people’s minds and ideas.\textsuperscript{25}

Recently traditional scepticism has been given a more radical edge by the loose collection of postmodernist and other critical writers. Their scepticism extends


\textsuperscript{21} But cf. J. Dancy, \textit{Introduction to Contemporary Epistemology} (Wiley-Blackwell: Oxford, 1985) 8, arguing that ‘local’ scepticism tends to quickly slide into more ‘global’ forms.

\textsuperscript{22} This term is preferred to ‘anti-realism’ because the latter is usually confined to semantic scepticism and has negative overtones, suggesting that one is unrealistic, whereas as argued below scepticism can be regarded in positive terms.


\textsuperscript{24} Following Williams, above n. 20 at 251.

\textsuperscript{25} See, e.g., Musgrave, above n. 23 at ch. 7.
beyond philosophy to virtually all disciplines and arguably represents more than just a theoretical position, but a new way of looking at the world.\footnote{See, e.g., S. Best and D. Kellner, \textit{Postmodern Theory: Critical Interrogations} (Palgrave MacMillan: New York, 1991); J. Flax, \textit{Thinking Fragments: Psychoanalysis, Feminism, and Postmodernism in the Contemporary West} (University of California Press: Berkeley, 1990) ch. 1; N. Murphy, ‘Scientific Realism and Postmodern Philosophy’ (1990) \textit{British Journal for the Philosophy of Science} 291; D. Harvey, \textit{The Condition of Postmodernity} (Wiley-Blackwell: Oxford, 1989).} This was largely sparked by the perceived failure of many aspects of the Enlightenment project. Thus there have been increasing doubts about the ability of science, its founding discipline, to discover the truth about the world and make it a better place. Indeed, many contemporary problems such as large-scale environmental destruction are a consequence of technological ‘advances’, whereas some of the most horrific episodes in human history, such as Hiroshima and the Holocaust, were made possible by science and rational planning. Similarly, modernism’s grand political experiment of ‘scientific socialism’ ended in failure, but without the capitalist or liberal democratic alternatives delivering the promised social utopia. Instead, politics is marked either by apathy and cynicism or rising religious and nationalist fundamentalism, and the economy by rampant consumerism juxtaposed with widespread starvation.

Modernism’s failure has led some ‘dilettante’ postmodernists to celebrate the irrational, incoherent, and contradictory, and to either accept an ‘anything goes’ attitude to truth, reason and justice or abandon politics and ethics altogether for a self-indulgent ‘slide around in the joys of textual analysis’.\footnote{R. C. Douzinas, S. McVeigh and R. Warrington, \textit{Postmodern Jurisprudence: The Law of Text in the Texts of Law} (Routledge: London, 1994) 9.} However, a more engaged form of postmodernism\footnote{Cf. W. Twining, \textit{Globalisation and Legal Theory} (Cambridge University Press: Cambridge, 2000) 196, who instead distinguishes pejoratively between ‘imaginative’ postmodernism which recognises ‘the elusiveness of reality, the fallibility of what passes for established knowledge, the importance of attending to multiple perspectives and points of view, a resistance to closure’ and ‘irrational’ postmodernism which adopts fairly radical forms of epistemological scepticism, ‘cultural relativism’, ‘anti-rationalism’ and ‘irrealism’. Engaged postmodernism includes all these dimensions except anti-rationalism and, if it means more than a rejection of realism, perhaps also irrealism.} espoused in this article sees the assertion of the relativity of truth, reason and justice, not as a denial of their importance as ideals, but as a means of exposing and ending injustice. Building on philosophers such as Nietzsche, Heidegger and Wittgenstein, and influenced by various critical theories such as feminism and Marxism and a variety of disciplines such as literature, psychoanalysis and the sociology of knowledge, writers such as Lyotard, Derrida, Foucault and Rorty have launched a thoroughgoing critique of modernist philosophy, which goes beyond merely adopting the sceptical side of existing debates to provide a unique and highly political take on these debates. Thus...
knowledge is seen, not just occasionally or even frequently, but as always partial in both senses of the word: as both incomplete and affected by subjective perspectives and values. Indeed, postmodernists view knowledge, truth and reason, not just as impossible dreams, but as imbued with and legitimating existing relations of power; as linked with domination and oppression as much as with emancipation and progress. Similarly, language is seen, not only as a value-laden means of constructing rather than describing truth, if not reality itself, but along with other forms of communication as a means of constructing individuals, thus challenging the Enlightenment idea of autonomous epistemological subjects whose minds represent a mirror onto which reality is reflected and who are able to stand above and outside their historical and geographical context. Moreover, ‘grand (or meta-) narratives’ which attempt to construct macro (‘totalising’) theories of complex and wide-ranging phenomena are rejected in favour of provisional, small-scale theories that pay attention to a plurality of different voices, stories and experiences. Finally, instead of science and philosophy being held up as the paradigmatic foundations for all knowledge, postmodernists even reject the continuing value of epistemology and metaphysics, with its search for universal foundations for knowledge and adjudicating truth-claims, in favour of hermeneutics, politics and ethics.

As orthodox evidence theorists now realise, they can no longer plausibly claim—if indeed they ever could—that philosophical sceptics are ‘rare birds’. The issue is now whether evidence theory is better grounded in realism or scepticism. The legal principle that she who asserts must prove and the difficulty of proving a negative suggest that the burden rests with the realists to establish that there exists an objective truth that reason can reveal. However, the failure of orthodox evidence theorists to mount a positive case for realism suggests that they assume the opposite. Indeed, they could argue that a presumption in favour of realism is created by the apparent existence of an objective reality, the ease with which we can grasp at least certain aspects of it, and the common assumption that true statements are those which correspond with reality. In response, one can doubt how far common sense and conventional usage can take us. After all, an important aim of philosophy is to evaluate the plausibility of our common-sense conceptions of the

29 For example, Allen above n. 5 at 310–11; Damaška, above n. 5.
30 Twining, Rethinking Evidence, above n. 2 at 110, though acknowledging at 142 that he has yet to respond to recent critics like myself.
world. Nevertheless, given the dominance of realism amongst evidence theorists and in order to avoid a potentially never-ending jockeying for position, I will concede for the purpose of argument that the burden lies with scepticism.

I will also accept that there exists an objective factual (but not moral) reality external to the individual. Few contemporary sceptics deny that there is an ‘out there’ out there. And, while it is not possible to provide any non-question begging arguments in favour of ontological realism, I see little point in debating the esoteric and ultimately irresolvable issue of whether there is an objective world made up of people, things and events that is independent of human knowers. Instead I shall address the question of whether knowledge of such an objective reality is possible. The standard epistemological definition of knowledge is ‘justified true belief’. Truth is required in order to distinguish belief from knowledge, whereas justification excludes lucky guesswork from counting as knowledge. There must therefore be adequate warrant for beliefs, though as with much traditional epistemology, this is just a matter of accepted definition, there being no reason why lucky guesses cannot amount to knowledge: if someone knows something and it is regarded as true, they can be said to have knowledge irrespective of how it was acquired. Nevertheless, given that set battles between realists and sceptics take place on the plane of the standard definition, I will examine whether realist accounts of justification and truth can withstand the sceptical challenge.

I will start with justification given that this requirement is regarded by traditional epistemologists as more fundamental and has been most extensively targeted by cognitive sceptics, who argue that it is never possible to achieve justified
knowledge. Indeed, an evaluation of traditional theories of justification enables us to evaluate simultaneously the Rationalist Tradition’s approach to rationality. This is because theories of justification overlap with theories of rationality in the sense that a rational belief is regarded as one that is adequately justified (even if not necessarily true). Accordingly, I will first explore the various traditional theories of rational belief and their responses to traditional scepticism, with the aim of showing how deep disagreement amongst traditional epistemologists about what counts as a universally valid theory of justification strongly suggests that no such theory is possible. I will then turn to the arguments of contemporary sceptics who argue that, not only are attempts to justify knowledge claims unable to escape existing social conventions, but that this renders knowledge claims inextricably affected by partial perspectives and existing power relations. However, given that the justification criterion for knowledge only overlaps with what is called theoretical or epistemic rationality (i.e. what is rational to believe), I will go on to a more general critique of rationality as also encompassing what is called practical rationality, which is concerned with what is rational to do, or intend or desire to do, though more commonly with the rationality of the means to one’s ends rather than the ends themselves. Finally, I shall turn to the concept of truth, which is so central to the claims of orthodox evidence theory and which more than anything else marks out the difference between orthodox and critical views.

We have already seen that within scepticism there are differences between those who accept and reject ontological realism, and between engaged and dilettante postmodernists, though examples of the latter positions among evidence theorists are rare. Similarly, we have seen that modified rationalists accept that evidence is not always or even often obtained rationally through the drawing of inferences from personally observed data, though Twining at least seems to regard this as regrettable, albeit inevitable. Moreover, we shall also see that many like Twining are prepared to recognise ‘the elusiveness of reality, the fallibility of what passes for established knowledge, [and] the importance of attending to multiple perspectives and points of view ...’. There is thus a position within realism more nuanced and sophisticated than the optimistic assumption about the possibility of

41 Unless one counts the rather throw-away comments of Graham, above n. 6.
42 See at n. 140 below.
43 Twining, above n. 28 at 19. See also Twining, Rethinking Evidence, above n. 2 at 109; Ho, above n. 5 at 55; Stein, above n. 5 at 58–9.
obtaining true knowledge held by what Twining calls complacent Rationalists.\textsuperscript{44} However, while these views are shared with postmodernists, postmodern and other sceptics insist that truth as correspondence with reality is not just difficult but impossible. It is this which unequivocally\textsuperscript{45} represents the clear blue water between the realist and sceptical positions within evidence theory, notwithstanding the spectrum of views on other issues.

**Justification and reason**

**Realist theories**

The overlap between theories of justification and reason is confirmed by the fact that the Rationalist Tradition’s favoured form of rationality, that of experiential or empiricist foundationalism, also describes the classical theory of justification. This theory holds that most of our knowledge—what are called ‘derived beliefs’—is built inferentially on the foundations of ‘basic’ beliefs, which themselves are not inferentially based. Instead, they are provided by what is immediately given to us by the evidence of our senses.

Over the centuries sceptics have devoted much energy to raising numerous problems with empiricist foundationalism.\textsuperscript{46} One is that it drastically reduces the range of possible justifiable knowledge.\textsuperscript{47} This is because most of the knowledge on which we quite reasonably, or at least inevitably, rely is gained, not by our own perceptions, but indirectly from others—parents, teachers, books, television, etc.—and much of this in turn was gained from others, who also gained it from others, and so on.

But even within the narrow confines of directly observed evidence, which after all is what is usually at stake in legal fact-finding, sceptics have long noted the fallibility of our senses. It is not just that they frequently deceive us, but that they can never provide us with knowledge of the external world; only with knowledge of what we currently perceive—of how things appear, not how they really are. Moreover, different people perceive the same things differently. Even the same person can perceive things differently according to which sense is involved or the conditions of observation. Our perceptions might even be the result of dreaming

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\textsuperscript{44} See, e.g., Twining, *Rethinking Evidence*, above n. 2 at 79.

\textsuperscript{45} Modified rationalists are also likely to have more faith in reason to deliver truth and in objectively valid justification criteria, but as yet have done little to defend realism in this regard: see below at nn. 140–2.

\textsuperscript{46} See, e.g., Haack, above n. 20 at ch. 2; Williams, above n. 20; Dancy, above n. 21 at ch. 1; Musgrave, above n. 23 at chs 3–8 passim; Rescher, above n. 31; Fumerton, above n. 38 at 210–20.

\textsuperscript{47} A point even admitted by the arch-empiricist, Locke (Musgrave, above n. 23 at 64–5) and see further text following n. 93.
or hallucinations. For all we know, as Descartes famously hypothesised, all our perceptions might be caused by an evil demon deceiving us into thinking that we perceive the real world rather than one of his making. Furthermore, sceptics argue that there is no non-circular way of justifying our beliefs based on sensory perceptions. This is because we can only attempt to distinguish what is real from mere appearance according to prior beliefs. Yet, if these beliefs are based on prior experiences, the same problems arise. As Kant argued and psychological research confirms, what we perceive—both in terms of our interpretation of perceptions and what we attend to in the first place—is inextricably linked to prior beliefs. Perceptions of reality are not simply given to us by our senses; we have to use subjective creativity to make sense of them. This involves using pre-existing concepts to categorise information (‘this is pain’, ‘that looks red’, etc.), which in turn involves a comparison with past experiences, thus undermining the foundationalist nature of the experiential ‘givens’. Moreover, we do not know such experience words like ‘pain’, ‘red’, etc. simply through direct acquaintance. Experience is usually filtered through the medium of language, which, as I shall argue in more detail later, contains sets of categories which themselves are not derived directly from experience.

Nevertheless, even if our senses did provide us with infallible unmediated knowledge of the world, Hume persuasively argued that we cannot use such knowledge to make infallible inferences about things we do not experience. This is because we can never be certain that future events or unobserved past events will repeat the pattern of past experiences. For instance, just because bread has nourished me every day from Monday through to Saturday does not mean that it will do so on Sunday, let alone always nourish me or everyone else. There is always an inevitable evidential gap between our beliefs about future events and other unobserved facts, and our evidence for them. Consequently, induction can never generate certain conclusions about unobserved or future facts, even if we assume that events follow regular patterns. This is because this assumption relies on previous observations, taking us back to Hume’s original point. Consequently, he concluded that our everyday way of understanding the world through

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48 See the references below at n. 56.
49 See the references below at n. 57.
51 See, e.g., Fumerton, above n. 38 at 216 ff.
53 See ‘The correspondence theory and its critics’ below.
55 Example taken from Musgrave, above n. 23 at 151–4.
inferences from past experiences is irrational, albeit inevitable. If persuasive, this could be devastating to the Rationalist Tradition’s claim to rationality.

One solution would be to derive foundational knowledge from ‘pure reason’ rather than empirical observation. Thus, Descartes attempted to build up all his knowledge of the world from the one fact of which he could be sure, namely his own existence—hence his famous ‘cogito’: ‘I think therefore I am’. 56 This suggested to him that ‘the things we conceive very clearly, and very distinctly are all true’, but in order to negate the possibility that these conceptions are caused by an evil demon he invoked the existence of an undeceiving God. This, however, leads to circularity in that he used his method for ascertaining truth to prove God’s existence, but relied on God to guarantee the method’s reliability. It is also unlikely to persuade atheists, if not most rationalists. Indeed, Descartes’ only response to those who cannot see what is self-evident to him is to accuse them of prejudice or being deficient in reason. This reveals an unresolved problem with self-evidence as the source of justified beliefs; is it revealed by the actual acceptance of human knowers—in which case, why do apparently reasonable people disagree over what is self-evident—or is it an intrinsic feature of belief—in which case, what is the mysterious quality which makes a belief indubitably self-evident?

Kant avoided this problem by replacing self-evidence with logical necessity as the source of reason. 57 First, he drew two important epistemological distinctions. The first is between a priori knowledge, which can be obtained independently of experience, and a posteriori knowledge, which can only be gained from experience. The second involves the important logical or semantic distinction between analytical truths, which are true by virtue of the meaning of words (such as all bachelors are unmarried), and all other truths, which he describes as synthetic. He then argued that at least some synthetic knowledge is gained a priori, holding that certain propositions about the world, such as the concepts of space, time and causality, are necessarily true because without them it would simply be impossible to have any experience at all. For instance, one cannot experience a boat moving down a river without experiencing ‘a train of events ordered in space, in time and in the causal links between its various parts’. 58

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58 Dancy, above n. 21 at 217, summarising Kant’s own example.
However, for a number of reasons, Kant failed to provide an adequate rationalist version of foundationalism. First, a core premise of the argument about synthetic a priori knowledge—the a priori nature of the concept of space—is no longer universally accepted. Secondly, Kant admitted that synthetic a priori knowledge does not provide access to external reality, but merely to the world of appearances. Thus while stopping short of full-blown idealism, he came very close to it. Thirdly, as we shall see in more detail below, the distinctions between analytical and synthetic truths and a priori and a posteriori knowledge are now regarded by many as untenable—all truths are synthetic and all necessary truths are subject to revision in the light of empirical evidence. Finally, even without these problems, as Kant conceded, much synthetic knowledge is gained a posteriori and thus the infallible foundations provided by reason can cover only a portion of all knowledge. Reason might be the ultimate arbiter of truth, but its role is limited.

Accordingly, few if any philosophers now regard pure reason as capable of providing an adequate alternative to empiricist foundationalism. Instead, two alternative routes have been sought either individually or in combination. The first is to resile from ‘strong’ or ‘radical’ forms of empiricist foundationalism and, as modified rationalists have done, accept the anti-dogmatic sceptical position that absolutely secure foundations for knowledge are impossible. Thus, it is argued that cognitive sceptics only establish that particular items of knowledge are fallible; not that secure knowledge is never possible. For instance, while our senses sometimes deceive us, they do not always do so. Similarly, while it is of course theoretically possible that our perceptions are caused by an evil demon, we need only exclude realistic, not remote, let alone highly unlikely, scenarios in order to claim justified knowledge. More generally, it is argued that epistemological standards must be realistic and reflect the real world in which we live and act rather than a ‘highly rarefied, theoretical context’. Consequently we can accept various anti-dogmatic sceptical positions, arguing, for instance, that knowledge claims can never be certain, exact and incorrigible, or that we can never possess all the facts relevant to knowledge claims or rule out all possibilities of error or new explanations for our beliefs, without having to accept that
knowledge claims can never be justified. According to Rescher, ‘[i]f we have done all that reasonably can be asked of us, the best that can reasonably be done, then there can be no need for further assurance ... A wholly justified claim to certainty and knowledge is compatible with a nagging element of theoretical doubt’.  

This seems reasonable and suggests that Hume was wrong to conclude that we cannot rationally rely on past experience to make inferences about future or other unobserved facts. Accordingly, we can put the ‘rationality’ back into the Rationalist Tradition, especially as it follows Enlightenment philosophers like Locke who accept that once one moves away from spheres of knowledge like mathematics to those concerned with past events, absolute certainty is impossible and that the best that can be achieved is conclusions based upon an assessment of probabilities that no reasonable person could doubt. However, while good pragmatic reasons exist for eschewing a standard so high that it is rarely met, two problems remain. The first is that, as the problems with fixing the legal standard of proof illustrate, once we abandon absolutely certain basic beliefs as the source of our derived beliefs, it is difficult to know how far down the line to stop—virtually certain, reasonably certain, fairly certain or merely more likely than not? And even if we can fix on a standard, applying it to the facts involves a great deal of discretion and hence further scope for watering down what we accept as sufficiently justified knowledge.

The other problem is that accepting a realistic standard of certainty only addresses problems of reliability in classic foundationalism. There still remains the criticism that derived beliefs are based purely on observations, but that the latter involves a combination of current perceptions and prior beliefs. We still need a persuasive theory for objectively justifying knowledge claims. Accordingly, many traditional epistemologists develop alternative theories of justification as the other response to problems with foundationalism. However, as none of the many proposed alternatives have been canvassed, let alone adopted, by modified rationalists, nor has one managed to vanquish its competitors, I will concentrate on reviewing the advantages and disadvantages of only the more popular theories with the aim of illustrating the apparently impossible task of identifying a truly objective theory of justification.

65 Rescher, above n. 31 at 40–1.
66 See references in n. 2.
67 Cf. also Rescher, above n. 31 at 79–80, who denies that probabilities provide a sufficiently robust method of deriving justified beliefs.
69 But see at n. 142 below.
Initially, foundationalism’s main rival was coherentism, which treats justification holistically by seeking particular beliefs as warranted if they cohere with a set of other beliefs. Thus, instead of justification being built up atomistically from basic beliefs to derived beliefs in the form of an inverted pyramid, it is analogised to a raft in which no belief is more fundamental than any other, but each forms part of a web of mutually supporting beliefs. However, consistency alone does not justify beliefs; the belief set must also be comprehensive—otherwise justification can too easily be ensured by simply omitting inconsistent beliefs.

This approach has many advantages. One is that it fits actual practice better than foundationalism. We naturally rely on a mutually supportive mixture of prior beliefs, empirical observations and other forms of acquiring knowledge, which we recognise merely as provisional and subject to revision in the light of conflicting evidence. Moreover, our beliefs can derive not just from perception or reason but from the reports of others. Thus, instead of seeing individuals as struggling to construct their own beliefs, we can recognise the crucial social dimension to epistemology. Finally, as we shall see, coherentism accords with holistic theories of meaning which hold that the meaning of sentences cannot be ascertained in isolation, but depend on the meaning of all other sentences, and with contemporary scepticism which argues that we have no access to anything beyond language and existing beliefs and hence that coherence provides the only possible justification.

On the other hand, coherentism is regarded by many traditional epistemologists as both too strong and too weak a standard of justification. It is too strong in suggesting that even one small inconsistent belief can ‘destroy the possibility of there being any epistemic justification for believing any proposition’. It is also too strong in requiring us to be aware of the enormous number of beliefs which must necessarily cohere before we can justify even simple acts of knowing. For instance, to say that a siren is sounding we need to be aware of numerous enabling

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70 The following draws on Williams, above n. 20 at 228–33, ch. 7 ff.; Haack, above n. 20 at 17–33, 52–7, 60–1; Dancy, above n. 21 at chs. 8 and 9; Audi, above n. 39 at 27–9; Moser, above n. 38 passim, esp. at 87–90, 226–30, 241, 288, 356–8, 500–1; L. Bonjour, ‘The Dialectic of Foundationalism and Coherentism’ in J. Greco and E. Sosa (eds.), The Blackwell Guide to Epistemology (Blackwell: Oxford, 1999) 117.

71 See further text following n. 85, esp. at n. 95.

72 See ‘Knowledge, perspective and power’ and ‘The correspondence theory and its critics’ below.

73 It is also argued that most forms do not escape foundationalism because applying a test of coherence requires prior meta-beliefs about how one’s first-order beliefs hang together. As these cannot without circularity be justified by coherence itself, they must be foundational.

74 Fumerton, above n. 38 at 227.
conditions (both practical, such as having normal hearing, and conceptual, most notably that we possess the concept of a siren) and to exclude countless alternatives for the sound.\textsuperscript{75} And if it is unrealistic to expect one to be aware of these myriad enabling conditions in relation to a single fact, it is even more unrealistic in relation to all one’s knowledge.\textsuperscript{76}

But coherentism is also too weak in suggesting that coherence and comprehensiveness are sufficient to justify beliefs. Even if beliefs must, as some coherentists require, also be entailed by each other or be mutually explanatory, and even assuming that coherent sets of beliefs are more likely to be true than incoherent sets, Descartes’ evil demon scenario shows that it is still possible that a set of beliefs can be perfectly coherent yet have no basis in reality. In addition, coherentism is said to be incapable of explaining the role played in our belief set by perception, memory and other sources of knowledge, and to treat beliefs acquired by wishful thinking on a par with the painstaking evaluation of evidence. Without some explanation of how consistency of belief somehow delivers truth, contrary to some legal scholars who favour a coherence theory of justification,\textsuperscript{77} its adoption seems to be incompatible with realism’s correspondence theory of truth.\textsuperscript{78}

Rather than abandoning coherentism, however, some realists have sought to combine it with foundationalism in a way that resolves the problems of each. The most illuminating account is Haack’s ‘foundherentism’ which pays due regard to both experiential evidence and existing prior beliefs.\textsuperscript{79} Instead of a pyramid built in a linear fashion or a raft strapped together through mutual support, she analogises justification to a crossword puzzle with experiential evidence representing the clues and background information the existing entries. Justification is then established when tentative entries fit with existing entries. While providing a more persuasive account of how evidence can be mutually supportive, the main advantage over coherentism is that justification is rightly seen not merely as a matter of mutual support amongst beliefs but also as being anchored in experience. However, there is nothing as far as I can see logically preventing coherentists deriving beliefs from experience and, if so, it is difficult to see why

\textsuperscript{75} Example taken from Audi, above n. 39 at 28.
\textsuperscript{76} Coherentists could respond by requiring only coherence within narrower areas of knowledge, but the narrower the area the more it can be said that coherence is a matter of coincidence rather than justification.
\textsuperscript{77} See, e.g., Ho, above n. 5 at 57; Moore, above n. 15; and possibly also MacCormick, above n. 4.
\textsuperscript{78} Paterson, above n. 18 at 49; L. Coleman and B. Leiter, ‘Determinacy, Objectivity and Authority’ (1993–94) 142 U Pa LR 549 at 613–5.
\textsuperscript{79} Haack, above n. 20. See the somewhat similar view of Audi, above n. 39 at 31–3.
foundherentism is any more grounded in reality than sensible accounts of coherentism that pay due attention to the evidence of one’s senses. But whatever its merits, like other ‘mixed’ theories, foundherentism has failed to garner much support amongst traditional epistemologists.\(^{80}\)

Instead, many epistemologists have abandoned ‘internalist’ approaches to justification, which require epistemological subjects to be aware of the factors thought to justify their knowledge. Instead, externalists look for guarantees of truth which need not be known by the subject.\(^{81}\) While there are various versions of such forms of externalist justification, the most influential is reliabilism.\(^{82}\) This simply requires reliably produced beliefs, which are said to be justified because they are probably true. This approach is said to involve a common-sense response to cognitive scepticism in arguing that as long as our normal sources of knowledge (perception, memory, introspection, logical intuitions and reason) are reliable, it matters not that we can never know whether they are reliable. Equally, it avoids foundationalism’s problems of circularity and coherentism’s undue demands on the abilities of epistemological subjects, while also allowing justification to vary in degree according to the level of reliability of the belief-producing method.

However, a number of problems with reliabilism and with externalism generally have limited its appeal. One is that there is no universally acceptable measure of reliability, and there is a danger that, if set too high, knowledge becomes impossible, or, if set too low, we are back to the problems raised by scepticism. More generally, traditional epistemologists point to examples such as that of clairvoyants, who through some unknown process are in fact able to produce reliable beliefs, as indicating that externalist accounts of justification are counter-intuitive and that, even if there is an epistemological role for reliabilism and other externalist accounts of justification to play, some form of internalist justification is required.

Others argue that ‘[w]e cannot be simply “reliable”: we can only be reliable about certain things under certain conditions’.\(^{83}\) This has led to the development of a contextualist approach to justification, which argues that it is impossible to have a consistent system of knowledge across all knowledge contexts and that different

\(^{80}\) Fumerton, above n. 38 at 230–1, but cf., e.g., B. Lightbody, ‘Virtue Foundherentism’ (2006) 20 Kriterion 14.

\(^{81}\) On the two approaches, see Bonjour, above n. 70; E. Sosa, ‘Skepticism and the Internal/External Divide’ in J. Greco and E. Sosa (eds.), The Blackwell Guide to Epistemology (eds.) (Blackwell: Oxford, 1999) 145.

\(^{82}\) See Haack, above n. 20 at ch. 7; Dancy, above n. 21 at 31–2; Fumerton, above n. 38 at 220–3; Greco, above n. 45; Bonjour, above n. 70.

\(^{83}\) Williams, above n. 20 at 329 (emphasis in original).
epistemic communities may require different standards of justification, as can be seen by comparing law with science, or more fundamentally may regard certain beliefs as in no need of justification. Consequently, contextualists argue that justification can only be legitimately demanded within localised areas of knowledge such as within particular disciplines like philosophy or law or particular activities such as scientific experimentation or legal fact-finding.

However, while contextualism provides additional reasons for being sceptical about the possibility of universally infallible knowledge, it is questionable whether it constitutes an independent approach to justification, rather than simply a qualification to reliabilism or other externalist theories of justification, or more radically a denial of the possibility of objective standards of justification. Moreover, by making the standards of justification relative to each epistemic community, it undermines the evaluative aspect of traditional epistemology's justification criteria.

**Contemporary scepticism**

**Introduction**

These criticisms raise the much wider question of whether standards of justification and truth can ever provide objective and universal standards by which to judge knowledge claims and distinguish mere belief from knowledge, as realists claim, or whether as sceptics, particularly contemporary critical theorists, argue, knowledge, justification and truth always bear the imprint of social values and power relations.

One reason for this difference is that contemporary sceptics take far more seriously Quine’s call for epistemology to be ‘naturalised’.

Motivated by the failure of, particularly experiential, foundationalism to ground objectively justified claims to knowledge, Quine argued, at least initially, that epistemology should be replaced by the psychological study of how people actually form beliefs. Given that this removes epistemology’s evaluative role altogether, such ‘replacement naturalism’ finds very little support even amongst critical

theorists. Nevertheless, reliabilists, contextualists, and those who adhere to more traditional theories of justification, as well as some evidence theorists, accept that epistemology needs to be informed by the lessons of psychology, sociology, anthropology and other natural sciences. As one epistemologist rhetorically asks, ‘how could our psychological and biological capacities and limitations fail to be relevant to the study of human knowledge?’.

At the same time, there are considerable differences in the extent to which epistemologists use information about how people actually acquire knowledge. Broadly speaking, traditional epistemologists use it along anti-dogmatic sceptical lines to limit some of the more ambitious claims about the possibility of true and justified knowledge, while continuing to treat issues of justification and truth both separately from each other and also as theoretically severable from the messy business of knowledge acquisition. On the other hand, critical epistemologists tend to treat justification and truth together as suffering from similar problems stemming largely from the realities of knowledge acquisition. Moreover, they are far less concerned with analysing either concept or debating the merits of traditional theories of justification and truth. Instead, they attack the idea that knowledge can be objectively true and justified for all people at all times and in all places, and argue that claims to knowledge, reason, and truth are relative to place and time and implicated in existing power relations.

Nevertheless, despite this more holistic approach, it is possible to distinguish contemporary sceptics’ views on the plausibility of realist conceptions of rationally justified knowledge from their views on the truth requirement. Consequently, I will first canvass criticisms of traditional approaches to justification and reason, before turning to the debate between realist and sceptical approaches to truth.

88 See, e.g., Goldman, above n. 52.
Knowledge, perspective and power

A central criticism of traditional epistemology is that its highly selective view of how humans learn about the world results in it ignoring issues of power, overestimating its ability to understand and improve the processes of knowledge acquisition, and radically underestimating the impact of perspective on knowledge and the degree of uncertainty inherent in knowledge claims.

Thus, traditional epistemology treats knowledge of the subject-matter of scientific research or inanimate medium-sized objects like rocks or chairs as paradigmatic, rather than more complex phenomena like people or events. Indeed, knowledge is narrowly conceptualised as propositional knowledge of the kind: ‘S (a person) knows that P (some fact that can be formulated in a sentence or other proposition)’, rather than practical knowledge, such as how to ride a bicycle or knowledge of other people, such as knowing Janet or John. By excluding knowledge of others, traditional epistemology ignores, not only the earliest form of knowledge which humans develop, but also a form which is as important, if not more important, than propositional knowledge. Contrary to the impression given by experiential and rationalist foundationalism, we do not obtain most of our knowledge of the world from personal observation and/or reason, but, as already noted, from the personal reports of others, as well as from books, films and television, etc.

This is highly pertinent to law because legal fact-finders frequently lack personal access to the facts in issue. Instead, they usually have to infer the facts from witness testimony. Here, what is just as, if not more, important than this use of logic, introspection or any other source of knowledge emphasised by traditional epistemology is the question of credibility and the more or less instinctive and emotional, and hence far more complex and uncertain, decision as to whether to trust someone. According to Code: ‘Knowledge of other people develops, operates,
and is open to interpretation at different levels; it admits of degree in ways that knowing the book is red does not. ... [K]nowing other people ... is an ongoing, communicative, interpretative process. It can never be fixed or complete ...’. 94 This and the fact that acquaintance with others might alter both parties’ perspective contrasts markedly with the stable and permanent knowledge associated with physical objects in which neither subject nor object is affected by the process of knowledge acquisition and with the traditional epistemologist’s image of individuals sitting alone in their studies contemplating whether they are being manipulated by an evil demon or using a microscope in a laboratory. Indeed, knowledge production is a highly social activity in which questions of credibility and trust in others, and communal practices of acknowledgement, correction and critique, are as essential as perception and reason.

This has led some traditional epistemologists to develop what Goldman calls ‘social epistemology’, which is marked by its focus on the social routes to knowledge and on groups of knowers. 95 However, whereas Goldman is concerned with ascertaining which practices ‘have a comparatively favourable impact on knowledge as contrasted with error and ignorance’, 96 critical theorists are more interested in what the social nature of knowledge acquisition tells us about the possibility of justified and true knowledge. 97

But even propositional knowledge is far less stable, certain and objective than the most non-dogmatic realists acknowledge. While personal perspective might not affect knowledge of physical objects, it seems to be ineradicable in relation to knowledge of events, which is far more relevant to legal fact-finding. As the proto-postmodernist Nietzsche asserted: ‘[t]he eye ... in which the active and interpreting forces, through which alone seeing becomes seeing something, are supposed to be lacking [is] an absurdity and a nonsense. There is only a perspectival seeing, only a perspectival knowing’. 98 For instance, different people may differ as to whether they regard some form of physical contact as mere touching, a slap or an aggressive hit. Indeed, even those experiencing the contact may themselves be unsure as to how to categorise it. As already noted, 99 phenomena are not simply absorbed by blank minds as images are captured by

94 Above n. 92 at 37–8.
96 Goldman, above n. 52 at 6.
97 Cf. Allen and Leiter, above n. 90 at 1497–8, dismissing such ‘debunking social epistemology’.
99 Text following n. 49 above.
photographic material. The mind makes sense of any incoming information in terms of its pre-existing categories. However, these categories are not simply part of the mental apparatus with which children are born, but are formed in response to individual experiences, as well as received information from others, and hence will depend crucially on each person’s background. For instance, men subjected to childhood violence and women in general might be more likely to interpret physical contact as violence than men from different backgrounds. In other words, epistemological subjects are not neutral observers, substitutable one for another, but embodied individuals with specific histories and located in specific communities with particular ideas and values which inevitably affect how they interpret new experiences and indeed which parts of reality they notice. As Rorty puts it: to ‘notice a sort of “thing” is to notice under a description, not just to respond discriminatively to it’. Thus whenever we attend to certain aspects of the world and draw similarities with other aspects, we lose sight of aspects that others or later generations might regard as relevant.

According to contemporary sceptics, there is no escaping the categories and concepts by which we view the world. Knowledge is therefore constructed by language and other means of communicating ideas (the clothes we wear, art, architecture, etc.)—collectively described as ‘discourses’—which in turn are constructed by their cultural setting. And, when it comes to interpreting events, we rely heavily on narratives: commonly occurring stories with self-contained narrative structure and in-built significance and interpretations of matters like causation, motive and responsibility. Echoing more traditional coherenstism, contemporary sceptics argue that the plausibility of narratives is evaluated in terms, not of their correspondence to some independently existing reality, but their internal coherence and consistency with existing stories about the world. And when we move from individual events to complex phenomena such as the causes of physical phenomena like evolution and social phenomena such as the crime rate, wealth creation and political dissent, it is argued that the facts under-determine our theories used to explain them—in other words, that more than one incompatible theory can be consistent with the facts.

102 See esp. Jackson, above n. 4; Bruner, above n. 92; Scheppele, above n. 92 (both references).
103 A thesis famously developed by Quine: see, e.g., Dancy, above n. 21 at 92–5 and see further at nn. 169–71, but cf. S. Haack, Manifesto of a Passionate Moderate (University of Chicago Press: Chicago, IL, 1998) 128 who questions whether Quine was saying anything more than that the same data can attract different descriptions.
This means that evaluating facts can never be based ‘on the whole truth’. Nor can they be based on ‘nothing but the truth’. Value judgements and background assumptions, not to mention prejudice and biases, will inevitably affect the choice of what to attend to and how to evaluate it. Knowledge is, therefore, never point-of-viewless. It only appears so when we are exposed to the same phenomenon under the same conditions and share the same conceptual framework\(^\text{104}\)—or, in postmodernist terminology,\(^\text{105}\) participate in the same language games.

If values, and indeed all factors, which cause different people to have different perspectives on the world, affect belief and if, as critical theorists maintain, different individuals and social groups both have different values and perspectives and differing abilities to have their views heard, disseminated and imposed on others, then it seems obvious that what counts as knowledge in any society will reflect, legitimate and reinforce existing power relations. As critical theorists put it, the perspectives and values of the powerful in society are privileged, and their power and privileges are maintained by elevating their views from mere belief into knowledge.

Moreover, the process whereby some perspectives triumph over others is enhanced by the very ideas of objective standards of justification, knowledge reflecting truth and the possibility of producing a ‘single, authoritative representation of the “real” world’,\(^\text{106}\) stripped of all traces of human biography or social or cultural background. Accordingly, by seeking absolute and objective foundations to knowledge, traditional, especially Enlightenment, epistemology is argued to constitute an exercise in the legitimation of the status quo.\(^\text{107}\) By purporting to be able to discover the universal grounds that distinguish opinion from knowledge, belief from truth, and fact from value, and to provide the universalistic and objective foundations of knowledge and truth-claims, knowledge appears to be cleansed of perspective, politics and power.

Even more radically, following Nietzsche,\(^\text{108}\) it is argued that the will to knowledge is indissociable from the will to power. According to Foucault, ‘there is no power...
relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations’. Thus, as well as emancipation and progress, the Enlightenment ideals of knowledge and truth can be associated with increasing control and repression. Foucault argues that we live in a ‘disciplinary’ society where power is exercised most effectively through subtle processes, involving ‘devious and supple mechanisms of power’, which persuade individuals to uphold social and legal norms specifying appropriate behaviour. Such normalisation occurs through the knowledge and techniques of various disciplines, such as pedagogy, medicine, psychiatry, and demography, which since the Enlightenment have sought to ‘qualify, measure, appraise and hierarchize all aspects of human life, thus subjecting individuals to increasing surveillance and control.

**Reason and exclusion**

Given that such categorisation, classification and other forms of ordering and the subjecting of human to scientific knowledge are often associated with Enlightenment ideals of rationality, Foucault, like many contemporary theorists, is equally critical of these ideals. Here, the criticism goes beyond theories of justification to also cover practical rationality, which is combined with epistemic rationality in what is sometimes called the ‘Standard Picture’. This Standard Picture sees both rational beliefs and behaviour as controlled by the intellect and specifically by rules of logic, probability and various others like consistency, uniformity, coherence, simplicity and efficiency.

As we have seen, modified rationalists themselves accept that as a matter of psychology fact-finders do not decide on the existence of facts solely by drawing

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110 The History of Sexuality, above n. 109 at 86.

111 Ibid. at 144.


114 Text at n. 3 above.
logical inferences in an atomistic fashion from one fact to another, but evaluate facts holistically in terms of stories or overall theories. Psychologists also note that people regularly misapply probability theories in making decisions about facts and action, relying instead on various ‘heuristics’ (fairly rough and ready rules of thumb) which violate these theories. At the same time, however, they seem capable of making fairly reliable predictions in situations involving limited time, knowledge, brain power and other computational resources, leading to the view that just as we cannot expect absolute certain knowledge so we should be content with a satisficing concept of ‘bounded’ rationality.

But even this more realistic view of rationality comes up against the argument that belief formation and decision-making are based on an inextricable mixture of logic and other forms of conscious reasoning, as well as intuition, emotion and other forms of subconscious thinking. Following Freud, the idea of the conscious mind able to escape the murkier depths of the unconscious in order to engage the rational mind alone has been exploded. Instead of reason being unproblematically associated with truth, it may suppress the desire for truth, while simultaneously concealing this suppression from the conscious self. As Pascal famously put it, ‘[t]he heart has its reasons that reason knows nothing about’. Conversely, emotions such as curiosity, interest, amazement and anger may act more positively to stimulate, define and sustain investigations, concentrate the mind on the most relevant aspects of situations and short-circuit lengthy deliberation, thus marshalling cognitive resources. They are also useful in interpreting information, heightening memory and allowing us to respond to our beliefs. Moreover, according to Posner in investigating facts we use a ‘grab bag of methods [which] includes anecdote, introspection, imagination, common sense, intuition ... empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, the “test of time”, memory, “induction” ... “experience”’, as well as unconscious forms of tacit knowledge. Similarly, people assess evidence in ways which defy analysis. They confidently rely on

115 Summarised by the authors cited in n. 112 above.
116 Goldman, above n. 112 at 152, relying on H. Simon, Models of Bounded Rationality (MIT Press: Cambridge, MA, 1982). See also Stein, above n. 112 esp. at ch. 7.
118 Flax, above n. 26 at 59–63.
innumerable premises and beliefs that they cannot explain or articulate, but which may be no less reliable or legitimate because of that.\textsuperscript{122} Whether this makes their decisions irrational and whether or not Posner’s ‘grab bag of methods’ is regarded as involving forms of rationality and capable of leading to justified beliefs is a matter of definition.\textsuperscript{123} Unlike, for instance, ‘truth’ which carries with it fairly obvious connotations of an accurate description of reality, ‘rationality’ seems to be far more a matter of authorial fiat than common sense, let alone ontological essence.

This indicates that ‘reason’ and ‘rationality’ are not universal qualities,\textsuperscript{124} but are contextually specific, varying both historically and geographically. Even the rules of deductive and inductive logic are arguably no more than descriptions of the inferences we habitually accept.\textsuperscript{125} Moreover, as I have previously argued in more detail,\textsuperscript{126} the designations ‘reason’ and ‘rationality’ are often politically loaded, connoting more than simply behaviour which is controlled by the intellect or more specifically by logic, but a value judgement as to the behaviour’s soundness.\textsuperscript{127} Rather than being neutral, such judgements are likely to reflect social power differences, with the closer to dominant values and ideas the outcome the more likely they are to be deemed rational. In fact, it has been commonly assumed in Western society that women, black people and the lower classes are ruled less by logic and the mind, than by emotion and the heart. Accordingly, when they challenge those in power their views can be dismissed as irrational and overly emotional.

Thus, whether consciously or not, the centuries-old Platonic distinction between reason and emotion, which was revitalised by Descartes and Kant and solidified into the positivistic desire to expel values from knowledge, has acted to reinforce existing power relations in society. So has the positivistic belief that knowledge obtained through reason and empirical observation using sense-perception can be

\textsuperscript{122} Ibid. at 4; Graham, above n. 6 at 1231.
\textsuperscript{123} See Goldman, above n. 112 at 153.
\textsuperscript{125} Rorty, above n. 17 at 321; Barnes and Bloor, above n. 100 at 45–6.
\textsuperscript{127} See Greenspan, above n. 117 at 210.
objective, neutral and value-free, and that rational knowers can escape the distorting influences of their historical and geographical context to produce value-neutral knowledge. This neutral and objective stance is, however, only available to those who are socially and culturally constructed as ‘norm-al’.\(^{128}\) As the norm has always been constructed in terms of the experiences and perspectives of those with power in society—and, indeed, has always been constructed through depicting women, black people, homosexuals, etc. as the Other—the powerless in society are disqualified from the status of neutral and objective knowers.\(^{129}\) At the same time, the Enlightenment myth of a rational epistemological subject capable of achieving the ‘view from nowhere’\(^{130}\) helps to protect from challenge those values which are currently accepted as legitimate by those who exercise power in particular communities.

As we shall see in relation to realist attempts to undermine scepticism as illogical,\(^{131}\) a similar legitimising effect is achieved by the Standard Picture’s privileging of formal logic. Formal logic is likely to be emphasised by those who are content with the premises involved in a reasoning process.\(^{132}\) It encourages attention to be focused solely on their logical application rather than content. This is particularly so in the case of the Rationalist Tradition’s favoured form of logic: inductive reasoning.\(^{133}\) By involving only a two-stage reasoning process from minor premise to conclusion, it leaves implicit the crucial major premise from which deductive reasoning starts. This may conceal highly dubious generalisations about the world (if not downright prejudice), which may in turn encourage its unconscious acceptance by others.

Given these problems with the Standard Picture, critical theorists—and to some extent modified rationalists\(^{134}\)—have argued for rationality to be reconceptualised as including holistic, narrative and dialectic forms of thinking and decision-making, as well as practical judgement, common sense, intuition,
tacit knowledge and even emotion. Some also go beyond the decision-making processes of individual actors to see rationality as involving a commitment to the free, tolerant, non-dogmatic and respectful exchange of views in what Habermas describes as ideal speech situations. According to Rorty, rationality so conceived can be regarded, not as a method, but as a moral virtue or mark of civilisation denoting our willingness to use persuasion rather than force.

The problem here is that the further one expands the concept of rationality away from its traditional roots the less purchase it has in evaluating ways of thinking and acting, apart perhaps from excluding pure prejudice—and even then such ascriptions will be contestable. On the other hand, confining rationality more narrowly runs the risk of continuing to disqualify as irrational those, like women, who are seen as naturally irrational and to denigrate all forms of decision-making and behaviour that do not fit the Standard Picture. This is because there is no non-pejorative opposite of rationality—‘irrationality’ suggests prejudice, ‘emotion’ suggests irrationality and even the terms ‘non-rational’ or ‘a-rational’ have negative connotations. Very few of even the most radical sceptics are prepared to embrace the tag ‘irrational’. Consequently, it would seem better to disassociate legitimate decision-making from rationality, and instead of speaking of rational and non-rational, let alone irrational, forms of decision-making, speak of legitimate and illegitimate forms. This does not avoid the value judgement inherent in such evaluations, but it does avoid the inbuilt bias in favour of particular forms of decision-making traditionally associated with rationality and in favour of those values which are protected and legitimated by them, and against those traditionally regarded as less rational or even irrational.

The realist response

It is difficult to gauge the reaction of mainstream evidence theorists to this post-rationalist picture of epistemology and evidence, given that they have largely

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135 But cf. Stein, above n. 5 at 37, arguing that reliance on complex experiences and intuition which cannot be translated into linguistic form precludes distinguishing rationality from whim or bias.


137 Rorty, Objectivism, Relativism and the Truth, above n. 35 esp. at 36–7, 62. See also Code, above n. 92 esp. at 169.

138 Cf., e.g., Gey, above n. 31, eliding rationalism with a belief in truth, implicitly denigrating truth-scepticism as irrational.

139 But cf. Graham, above n. 6 at 1231, though tying this to recognition of a ‘multitude of rationalities’.
ignored the political (as opposed to psychological) critique of rationality. Indeed discussions of the justification condition of knowledge have been largely limited merely to listing some competing theories of justification.

A more developed response from epistemological realists relies on a distinction between the process of knowledge acquisition (often called ‘discovery’) and that of justification. Thus, while not denying that knowledge acquisition is affected by perspective and is a highly social activity and that the beliefs regarded as justified differ from community to community and epoch to epoch, realists argue that there are in fact universal standards specifying what counts as justified knowledge and these can be applied to knowledge claims to cure any problems of perspective deriving from the process of knowledge acquisition.

Sceptics, in turn, question whether even the more reflective processes involved in determining the legitimacy of acquired knowledge can completely erase the trace of individual perspective, language and human categories on knowledge acquisition rather than simply legitimate perspectives, vocabularies and categories that have yet to be questioned. Justification processes will always leave room for subjective factors to intrude and humans are not necessarily particularly well-suited to spotting and eradicating factors which influence their thinking. Furthermore, discovery and justification cannot be neatly separated. We may well shape our processes of knowledge acquisition according to what we know to be accepted processes of justification, whereas justification models are likely to

140 But cf. W. Twining, ‘Narrative and Generalisations in Argumentation About Questions of Fact’ in Å. Frändberg, U. Göransson and T. Hästad (eds.), Festschrift for Professor Stig Stromholm (Iustus Publishing: University Uppsala, 1997) 821, in which he raises the problem that narrative and indeed the generalisations contained with inductive reasoning, may ‘be used to violate or evade conventional legal norms about relevance, reliability, completeness, prejudicial effect etc … [appeal] to intuition and emotion and to be a vehicle for “irrational means of persuasion”’. However, in earlier comments (Theories of Evidence, above n. 2 at 149), he seems to opt for sweeping this under the carpet lest it undermine public confidence in the legal system.

141 Damaška, above n. 5 at 292–3 is more ambiguous. While asserting the correspondence with truth and objective knowledge is possible, he suggests that such objectivity can be delivered by agreement amongst communities or ‘cognitive methods’, whereas substantive legal norms can reduce the possibility of divergent views, but absent an idea of what he means by ‘cognitive methods’ it is difficult to see how this equates to the sort of objectivity assumed by realists—indeed his analysis appears more to fit with sceptical views.

142 Ho, above n. 5 at 57.

143 See Moore, above n. 15 at 909–11; Searle, above n. 31 at 51 ff.; Gey, above n. 31 esp. at 1709–10; Haack, above n. 103 passim but esp. at 94, 105 130–1, 142 ff.; Goldman, above n. 112; R. K. Sherwin, ‘The Narrative Construction of Legal Reality’ (1993–94) 18 Vermont LR 681 at 700 ff.


145 Bankowski, above n. 6 at 261–2.
reflect the processes by which traditional epistemologists think knowledge is acquired. More obviously, the process of justification only consciously commences once knowledge is acquired and if perspective excludes certain enquiries from being investigated or certain types of information from ever being noticed, there is little for justification to cure.

Even more fundamentally, it is difficult to see how we can escape existing categories, concepts and theories to distinguish justified from non-justified beliefs. To do so requires both universal standards of justification and the ability to measure their success according to an objective standard. The next section evaluates whether realist concepts of truth can play the latter role. But as regards objective, universalistic standards of justification, it can be asked why, if they existed, centuries of debate have failed to produce consensus on their content and what are the grounds for optimism that this goal is just around the corner. It might also be asked why, even with their differences, extant theories look suspiciously like the epistemic habits of Western, middle-class men, which in turn mimic the cool, rational and detached investigative methods of scientists.

If justification standards are universalistic, we might also expect cross-cultural uniformity in justification practices. Yet, not only do such practices differ across disciplines, as contextualists note, but they seem also to differ across cultures. Thus, for example, numerous studies have been summarised as finding ‘East Asians to be more holistic, attending to the entire field and assigning causality to it, making relatively little use of categories and formal logic, and relying on “dialectical” reasoning, whereas Westerners are more analytic, paying attention primarily to the object and the categories to which it belongs and using rules, including formal logic, to understand its behaviour’. This suggests that individual beliefs are transformed into knowledge, not by some objective process of ratification, but by being regarded as legitimate within particular epistemic communities. According to Rorty, belief ‘goes all the way down’ in that ‘nothing counts as justification unless by reference to what we already accept, and there is no way to get outside our beliefs and our language so as to find some test other than coherence’.

146 As Haack, above n. 103 at 143 implies. Cf. also Haack, above n. 20 at 185, referring to the progress made by epistemology.
148 Rorty, above n. 17 at xiii; see also C. Norris, ‘Law, Deconstruction and the Resistance to Theory’ (1988) 15 JLS 166 at 172.
149 Rorty, above n. 17 at 178.
Nevertheless, although contemporary sceptics believe that justification is merely a matter of community acceptance or at best the most coherent account of existing beliefs, realists could still rescue their notion of universally and objectively correct justification processes if they can show that particular forms of justification are in fact truth-indicative. This leads to the question whether there is such a thing as objective and universalistic truth which can play this role.

**Truth**

The correspondence theory and its critics

Compared to the millions of words devoted to justification, epistemologists pay relatively little attention to the concept of truth, perhaps because it seems obvious that, as Aristotle asserted, truth is ‘to say of what it is, that it is, or of what is not, that it is not’. Certainly this is how most people understand truth. This leads to what is broadly described as the correspondence theory, which, as we have seen, defines a true proposition (statement, sentence, thought, etc.) as one which corresponds with the reality, the facts, the world out there, etc. For example, ‘the cat is on the mat’ is true if the cat really is on the mat. Truth thus acts as a ‘disquotational’ criterion of success for statements in that if we remove the quotation marks from the words on the left side of the statement they correspond with those on the right.

This conception of truth is inextricably linked with semantics. ‘True’ does not refer to the world or reality; the world or reality is not true, it is just the world or real. ‘True’ refers to a statement’s status as accurately reflecting how things really are. The correspondence theory thus adopts a referential, representational or cognitivist theory of meaning in which language is assumed to be capable of accurately representing the world and which analogises language as a picture of the facts, and the mind as a mirror on which the world is reflected.

Sceptics see profound problems in this view of truth and language. One is that it can only apply to descriptive rather than evaluative statements and struggles to cope with negative statements like ‘the cat is not on the mat’ or those with vague

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150 See, e.g., Haack, above n. 20 at 196, 199. This strategy is particularly associated with reliabilism: see, e.g., Goldman, above n. 52 at ch. 1.
151 *Metaphysics* (1908): 1011b26–9, quoted in Haack, above n. 103 at 21.
152 See Musgrave, above n. 23 at 248 citing empirical research.
153 For overviews, see Musgrave, above n. 23 at ch. 14; Searle, above n. 31 at ch. 9; Goldman, above n. 52 at ch. 2 esp. 59–66.
155 Rorty, *Objectivism, Relativism and the Truth*, above n. 35 at 80.
predicates like ‘the man is bald’. More fundamentally, the correspondence theory is isomorphic in treating two different things—language and the world, reality, etc.—as the same. Admittedly, the rules or conventions of language can deliver analytical truths—in other words, those statements Kant described as true by virtue of semantic definition. However, if intended to be more than metaphorical, the correspondence theory leaves mysterious how the world makes a meaningful contribution to language and hence delivers synthetic truths.

To work, the correspondence theory seems to require ‘truth-makers’—worldly entities which correspond to and hence make factual statements synthetically rather than analytically true. The most obvious candidate is to be facts (or states of affairs), but they seem to fall onto the ‘language’ rather than the ‘reality’ side of the correspondence equation. This is because facts come embedded with language or, as contemporary sceptics put it, are constructed by language (and other forms of discourse). They do not exist pre-packaged in the external world, but have to be isolated and described. For instance, events like an assault have no natural start or end point, or natural boundaries determining what contemporaneous factors are included or excluded (motive, facial expressions, etc.). Nor is there a natural word to describe an act like putting one’s hands on another’s neck: was it caressing, touching, pressing or throttling? Even the favoured facts of traditional epistemology—physical objects like rocks or ‘mid-sized’ objects like chairs—are creations of language: when, for instance, does a pebble become a stone, a rock or a boulder? As already noted, we never encounter reality except under a description. Consequently, if Searle is correct that institutional facts are those which depend for their existence on human institutions and analytical truths are propositions which are true by definition, it would seem there are no

158 Cf. the more technical criticism discussed and plausibly refuted by Musgrave, above n. 23 at 258–9.
159 See, e.g., Paterson, above n. 18 at chs. 1 and 3 passim; Rorty, above n. 14 at ch. 1; Rorty, above n. 17 esp. at ch. VI; Rorty, Objectivism, Relativism and the Truth, above n. 35 at 78 ff., 120 ff. and 151 ff.; Rorty, Consequences of Pragmatism, above n. 92 esp. the Introduction, chs. 1 and 9.
160 As Murphy, above n. 26 at 298 puts it: ‘no one has been able to make clear what exactly is meant by “picturing”, or “fitting”, or “matching”, or, for that matter, “the world”’.
161 Recognised even in an early 20th century law article: W. W. Cook, ‘“Facts” and “Statements of Fact”’ (1936–37) 4 U Ch LR 233 at 238. See also L. Loewinger, ‘Facts, Evidence and Legal Proof’ (1958) 9 West Res LR 154 at 157–8, but cf. Damaška, above n. 5 at 291 who, while accepting that facts are linguistically constructed, sees them falling onto the reality side of the equation.
162 Example taken from Scheppele, ‘Foreword: Telling Stories’ above n. 92 at 2086.
163 At n. 101.
164 Searle, above n. 31 esp. at 1–2, 27.
such things as Searle’s ‘brute’, non-institutional, facts or synthetic truths: all facts are institutional and all truths analytical.

This is not to say that the world with all its components—the things we call assault, rocks, chairs, etc.—does not exist or impacts on us. After all, when we use language to convey propositional knowledge we are not trying to describe nothing. It is not metaphysical reality which truth sceptics deny, but epistemological and semantic realism which assumes we can access a world unmediated by language and the values it contains. Facts can thus be seen, not as naturally occurring, but as hybrid entities composed of ‘physical stimuli and our antecedent response to such stimuli’ which are mediated via language, concepts and categories. Moreover, as illustrated by the many Eskimo words for snow or Orcadian words for rain and even more strikingly by the fact that the Karam of New Guinea categorise bats as birds, but cassowaries as sui generis, different cultures categorise reality differently. In other words, the world does not represent itself. It has to be represented through some means of communication such as language and all such means are human creations. There may be ‘natural’ kinds of events like ‘death’, as realists assert, but what we mean by ‘death’ is a function of the conventions of language users (even if these comprise the small group of experts who study death).

And whereas it may seem that the world decides between different descriptions contained in simple isolated sentences (‘is or is not the cat on the mat?’), this becomes less plausible when we move to groups of sentences and beyond that to whole theories. According to Quine, statements are too small a unit to be reducible to experience. Just as theories are undetermined by data, ‘fact is richer than diction’, as J. L. Austin famously quipped. Moreover, sentences do not exist and have meaning in isolation from each other, but form part of more general theories. Meaning, Quine argues, belongs to theories rather than to sentences and

165 Rorty, Objectivism, Relativism and the Truth, above n. 35 at 83.
166 Musgrave, above n. 23 at 265.
167 Barnes and Bloor, above n. 100 at 38.
168 Cf. M. S. Moore, ‘A Natural Law Theory of Interpretation’ (1985) 58 South Cal LR 277, esp. at 293 ff. arguing that the world makes its contribution to ‘natural’ events like ‘death’ via the ‘best scientific theory we can muster about what death really is’, thus simply replacing the community at large with the scientific community as the source of conventions.
170 Quoted by Moore, above n. 168 at 293.
it is the former not the latter which are matched against the world or, in his phrase, face the ‘tribunal of experience’. Under his holistic theory of meaning, the meanings of sentences are interdependent such that the meaning of one depends upon that of all others. Consequently, when faced with recalcitrant experience which does not fit existing theories, the whole of the theory needs to be altered, and because no individual sentence can be altered on its own, Quine concludes that there are no analytical truths reducible to sentences. More generally, this means that if all synthetic truths are in fact analytical and all analytical truths are only true by virtue of holistic theories, truth seems to be a matter of a theory’s coherence.

But even if we see truth as residing in simple sentences, it is difficult to see how the world can decide between different truth-claims. Rather, it is our common view of the world as expressed through our accepted language conventions that decide. In other words, the world does not decide that the cat is on the mat. Instead, we all agree that what we call a ‘cat’ is what we call ‘sitting’ on what we call a ‘mat’. Put more abstractly, influenced in particular by Saussure’s structural semiotics which sees meaning as dependent on the structure of language rather than individual surface meanings and ordinary language theorists who see language in terms of use rather than meaning, non-referential, anti-representational or conventional theories of language see the meaning of words as constructed within languages and determined by common use or convention, not by reference. We learn and understand the meaning of words by seeing how other people use them or, as Wittgenstein put it, by learning the rules of

172 See, e.g., B. S. Jackson, *Making Sense in Law: Linguistic, Psychological & Semiotic Perspectives* (Deborah Charles Publications: Liverpool, 1995) ch. 1. Some extend Saussure’s approach even further (see Best and Kellner, above n. 26 at ch. 1; Mitchell and Rosen, above n. 20). Whereas Saussure at least links what he call the ‘signifier’ (a word, such as ‘cat’) with the ‘signified’ (a concept such as the thing we call a cat), postmodernists (or more accurately poststructuralists) see signifiers as referring only to other signifiers not to concepts, let alone ontological entities. This means that the signified cannot be grasped as such, for it always gives way to other signifiers, just as dictionaries lead us from one word to another. There is thus no way of escaping language to appeal to objects outside language as anchors of meaning. Conventional theories of language do not, however, need to go as far as seeing meaning as an endless play of signifiers. Instead they can argue that, even if meaning is constructed in relation to brute reality, in the sense that not all worldly entities can be referred to by any word, this is because of convention rather than because entities come with signifier or meaning embedded.
174 See e.g. Paterson, above n. 18 at 9–11, 48–9; Mitchell and Rosen, above n. 20; Coleman and Leiter, above n. 78; Lepore and Smith, above n. 173 esp. at chs. 2, 3, 11, 30, 38; Norris, above n. 148.
particular language games.\textsuperscript{175} Meaning is not a matter of matching sentences with their truth-conditions—the state of affairs which makes them true—but a matter of assertability. Meaning is simply what we are allowed to say by other language users or the rules of our community.

Faced with the difficulties of explicating how exactly true statements can correspond with reality, realists have retreated from the isomorphic view of correspondence to less ambitious approaches. One sees truth as that which is fated to be agreed to by all who pursue rational inquiry sufficiently far under ideal epistemic conditions.\textsuperscript{176} However, this compromise is unlikely to satisfy realists or sceptics. The latter question whether anyone can step outside culture to determine when agreement is reached. Consequently, truth remains a matter of whoever can persuade others of the accuracy of their views. Alternatively, its determination is deferred to some indefinite future date, thus robbing the truth-condition of any useful role, especially if accessible only to fictional inquirers in hypothetically ideal conditions. Realists would agree, but add that there is no guarantee that even rational inquirers will agree on truth, or if they do, that this will correspond with reality. Furthermore, if their views do correspond with reality, nothing is added to the correspondence theory.

Another response is to admit that no theory has provided a completely ‘satisfactory and fully general statement’ of the correspondence theory of truth, but still insist that it remains valid,\textsuperscript{177} presumably in the hope that such a theory will subsequently emerge. Perhaps another two-and-a-half centuries of philosophising will do it! Less optimistically, some realists accept that there can be no one-to-one correspondence between a statement and a fact or any other worldly entity. Instead, any part of reality which makes a proposition true fits the correspondence theory, which is merely a shorthand way of saying that a true statement accurately represents how things are.\textsuperscript{178} Without any account of how this might be determined, it is a short step from here to a third position which severs the relation between truth and reality altogether. Instead of seeing words as corresponding with reality, words are seen simply as corresponding with other words, and truth is seen as merely specifying the condition which will make a sentence true.\textsuperscript{179} While this might be useful for certain semantic

\textsuperscript{176} Haack, above n. 23 at 153–4; Musgrave, above n. 23 at 254–5; Goldman, above n. 52 at 12, 46–7; Coleman and Leiter, above n. 78 esp. at 264 ff.; C. Wright, ‘Realism, Antirealism, Irrealism, Quasi-Realism’ (1988) 12 Midwest Studies in Philosophy 25 at 37–8.
\textsuperscript{177} Haack, above n. 103 at 21–3.
\textsuperscript{178} Searle, above n. 31 at 210 ff.; Goldman, above n. 52 at 59 ff.
\textsuperscript{179} See Musgrave, above n. 20.
purposes, there seems to be little point in realists exploring a concept of truth which no longer specifies when knowledge claims are true in terms of something outside language.

Ultimately, sceptics argue, truth cannot play this role because someone, somehow would have to be able to adopt what is variously called the ‘view from nowhere’, ‘God’s Eye point of view’, or ‘Archimedean point’ and step outside both language and the world, as well as their own biases, motives, interests, values and preconceptions, to inform the rest of us when we finally arrive at the truth. Given the impossibility of doing so, truth is downgraded to the most coherent account of things or warranted assertability, with the normative role of evaluating knowledge now shouldered entirely by the justification condition. Even less robustly, truth is sometimes seen merely as a term of commendation—‘a compliment’—and sometimes merely an empty compliment—paid to the beliefs which we think so well justified that, for the moment, further justification is not needed. Alternatively, truth is seen pragmatically as that which is good, congenial or useful to believe, which helps us best cope with the particular issue facing us, or more cynically as what ‘our peers will ... let us get away with saying’. But, however described, sceptics deny that there exists some objective truth which enables knowledge to be distinguished from mere belief.

The realist rejoinder

While admitting that there might be multiple true descriptions of phenomena, each focusing on different aspects or using different vocabularies to describe things, realists nevertheless insist that there ‘really are facts, and truth and

180 See Rorty, *Objectivism, Relativism and the Truth*, above n. 35 at 154 and *Consequences of Pragmatism*, above n. 92 at xxvi.
181 Rorty, above n. 17 at 281–2; see also *Consequences of Pragmatism*, above n. 92.
182 Nagel, above n. 130.
184 See, e.g., Rorty, *Objectivism, Relativism and the Truth*, above n. 35 at 155; Nelson, above n. 87 at 129.
185 See Jackson, above n. 6, esp. at 41 and 19; Rorty, above n. 17 at 178, *Objectivism, Relativism and the Truth*, above n. 35 at 90, 101; Dancy, above n. 21 at 112–6.
186 Rorty, above n. 17 at 280, 308. See also Norris, above n. 148 at 171.
188 Rorty, *Objectivism, Relativism and the Truth*, above n. 35 at 23–4. See also Rorty, above n. 14 at 8 and above n. 17 at 385; Flax, above n. 26 at 201.
190 Flax, above n. 26 at 201.
191 Rorty, above n. 17 at 176.
objectivity’. It is their insistence on this point that clearly places modified rationalists on the realist side of the epistemological divide.

The first line of the realist defence of objective truth argues that truth-scepticism is self-refuting in that one cannot deny truth (or indeed the possibility of obtaining knowledge) without relying on the concept of truth (or knowledge). Put pithily, ‘if scepticism is right, it is wrong; and if it is wrong; therefore it is wrong’. Sceptics could respond that, while objective truths about the physical world are impossible, one can legitimately assert abstract truths about the possibility of such ‘factual’ truth. But this is unlikely to satisfy realists or indeed many sceptics. A more promising avenue is to note that the realist argument is itself illogical in being question-begging because it assumes that what sceptics explicitly, wittingly deny—the existence of objective truth—is the same as what they implicitly, unwittingly affirm—again, the existence of objective truth. In fact, when sceptics deny objective truth they would not assert this as an objective truth—merely a warranted belief. But realists can then respond that if the denial of truth is not objectively true it remains logically possible that it may exist.

At this point, rather than pursuing whether such a marginal and highly esoteric ‘flaw’ can stem the tide of contemporary scepticism and whether the whole edifice of objective truth can be supported by the mere logical possibility of its existence, sceptics might be tempted to respond with a ‘whatever’. Thus, instead of competing on the terrain of formal logic with its in-built bias in favour of the status quo and in the vocabulary and conceptions of realist epistemology which are so well entrenched that attempts can be made to portray sceptics as self-deceiving fools, when not abandoning the concept altogether, most

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192 Sunstein, above n. 7 at 196..
193 See generally, e.g., Moore, above n. 15 at 897, 912–4; Gey, above n. 31 at 1720–1; Williams, above n. 20 at 270; Goldman, above n. 52 at 35, 40; P. K. Moser, ‘Introduction’ in P. K. Moser (ed.), The Oxford Handbook of Epistemology (Oxford University Press: Oxford, 2002) 1112; and of evidence theorists, Stein, above n. 5 at 59; Twining, ‘Hot Air in the Redwoods’, above n. 7; Redmayne, above n. 5; Sunstein, above n. 7 at 197.
194 Allen, above n. 5 at 314 (thought not endorsing this position).
195 Cf. Allen, above n. 5; Rescher above n. 31 at 14–15, but see also at 54–7.
196 Cf. Herrnstein-Smith, above n. 14 at 84.
197 See e.g. Douzinas, McVeigh and Warrington, above n. 27 at ch. 4 responding to the self-refutation argument with parody; S. Benhabib, ‘Epistemologies of Postmodernism: A Rejoinder to Jean-François Lyotard’ in L. Nicholson (ed.), Feminism/Postmodernism (Routledge: London, 1990) 107 at 116, noting that postmodernists self-consciously draw upon it to develop new ways of communication. Cf. also Marshall, above n. 5 at 23, admitting that its logic rings hollow.
199 Cf., e.g., Rorty, above n. 14 at 8 and above n. 17 at 280.
contemporary sceptics simply get on with epistemology without seeking to elucidate the essential nature of truth.\textsuperscript{200}

However, they do need to meet a second and more substantive realist response to truth-scepticism. This argues that there is something deeply wrong with making ‘truth’ a matter of agreement or even coherence,\textsuperscript{201} and making meaning dependent on convention and use.\textsuperscript{202} As regards meaning, it is argued that when we discover new ‘facts’ about events like death, such that we would no longer regard those as dead who were so regarded by previous generations, we do not regard death’s meaning to have changed. Instead, we regard previous generations as wrong. Conventionalism is thus seen as blocking the ability to declare factual statements to be wrong (except to the extent that they run counter to convention). Admittedly, it is odd to say that people who we now regard as in a coma were in fact dead because previous generations so regarded them, but it is not odd to say that they were regarded as dead by previous standards, just as we regard people as dead who might not be so regarded by future generations. Moreover, it is only odd if we work with the idea of things being absolutely and universally right or wrong—which is what realists are trying to establish in the first place. Arguably, it is no stranger than the realist way of thinking of ‘word and world hooking up in a way that provides a normative check on our linguistic practices’.\textsuperscript{203}

Realists also argue that descriptions are not rendered true simply by being coherent or agreed upon even by everyone. Equally, they argue, descriptions may be true even if people do not agree or even if they are incoherent. But this argument again depends on the very assumption in question, namely that there is something more to truth than coherence or acceptance.\textsuperscript{204} Indeed, to focus closely on the merits of coherence or acceptance as alternatives to correspondence misses the point by taking contemporary scepticism too literally. Sceptics are not necessarily asserting, as realists assume, that truth can only be seen as coherence or acceptance and that they provide new tests of truth, such that, for example, truth is regarded as a matter of explicit agreement with a statement or explicit negotiation within communities.\textsuperscript{205} Instead, I would merely argue that to expect more

\textsuperscript{200} In fact, as Hernstein-Smith, above n. 14 at 94, notes, postmodernists prepared to do this would be pretty problematic postmodernists.

\textsuperscript{201} Damaška, above n. 5 at 291–2, 295, 298; Williams, above n. 20 at 229–3, 267–74, 300, 314–5; Haack, above n. 20 at 19–20, 27, 61; Goldman, above n. 52 at ch. 1, esp. 10–2.

\textsuperscript{202} See, e.g., Coleman and Leiter, above n. 78 at 262–3; Moore, above n. 168 at 290 ff.

\textsuperscript{203} Paterson, above n. 18 at 11 (emphasis removed), echoing Rorty, above n. 17 at 211.

\textsuperscript{204} Dancy, above n. 21 at 115.

\textsuperscript{205} See, e.g., Goldman, above n. 52 esp. at 11–12.
than acceptance, coherence or the like from descriptions of the world ignores the point that no matter how close we think that descriptions come to representing reality, language and other forms of communication always intercede, making the description valid only in terms of its coherence with language or other means of communication as a whole, or in terms of conventional understandings of the elements of such communication. Moreover, given that language and other forms of discourse are social constructions and that society is hardly a value-free environment, descriptions of the world may involve moral and political value judgements—by no means always, but more than most people recognise. For example, while the sexism of using ‘men’ and other male terms to include women or as an allegedly gender-neutral designation for positions of authority (chairman, Ombudsman, Lord President, etc.) or valued occupations (policemen, firemen) is perhaps now widely recognised, it is still likely to influence children as they learn language. Moreover, the sexism of words like ‘seminal’ is far less obvious, as is the tendency for men to be named before their female partners.206

The final line of the defence of realist conceptions of truth argues that truth-scepticism has dangerous political or moral consequences in undermining, if not totally negating, the ability and indeed the desire to search for truth and to challenge injustice and the impact of bias on truth-claims.207 In responding, I will not repeat my earlier comments on the wider reaches of some of the rhetoric employed here,208 but given the central importance of the issue and the durability of its motivating assumptions, it does not seem unreasonable to draw on my earlier response.

One enduring assumption is that truth-scepticism and the consequent relativism remove the ability to evaluate knowledge claims and related action as valid or invalid; in other words, that ‘truth’ can only act as an ideal or goal to be strived for and as a means of evaluating knowledge and resisting biased and oppressive knowledge claims if understood in objective terms; as ‘Truth’.209 However, it is
difficult to see why a recognition that perspective, language and other forms of discourse always intercede between knowledge claims and ‘Truth’ means that ‘truth’, understood as the most persuasive, comprehensive and coherent account of facts, cannot be an ideal for sceptics—especially as realists have recognised, not only that absolute certainty is unattainable, but also that what is really being sought are ‘theories [which are] better or worse supported by the evidence’ or the ‘best reasons’. In other words, abandoning the notion of ‘Truth’ does not necessarily mean ‘sawing off the branch of the tree of knowledge on which evidence is perched’ or abandoning ‘truth’ as an ideal or aspiration. Rather than understanding truth in terms of correspondence or similar realist fashion, we can understand it as involving the best possible description or explanation we can muster of all relevant information—what can be called ‘truth as aspiration’—and a commitment to being as assiduous and as honest as we can in our inquiries and communications—what can be called ‘truth as integrity’.

Nor does the denial of objective truth entail, as realists seem to assume, a form of relativism which accords all views equal value. Admittedly it does entail that there are no objectively ‘valid or invalid’ arguments (at least if ‘objective’ means more than correspondence with community standards). But this does not mean that there are no ‘strong or weak arguments’. Although sceptics cannot claim to rely on Truth (or Reason or Justice similarly conceived in objective terms), they can argue that their views are more coherent both in terms of internal logic and compatibility with existing beliefs, better grounded, more accurate or at least more convincing (or rational or morally superior) than competing views. Such arguments can be

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210 Haack, above n. 103 at 131.
211 Stein, above n. 5 at 56–60.
212 Roberts, above n. 5 at 325–6.
214 Cf. Rorty, above n. 14 at 385.
215 This idea, but not the exact phrase, derives from Jackson, above n. 6 at 172–3.
217 Cf. Rorty, above n. 14 at 337–8, 361; Coleman and Leiter, above n. 78, who speak of this as minimal objectivity and the idea of truth as that which is determined by someone in ideal epistemic conditions as ‘modest objectivity’.
persuasive because, in relation to issues of factual persuasiveness, they can draw upon a world of sufficiently common experiences and because, in relation to issues of morality and justice, they can draw upon a language and system of values understandable within prevailing discourse.\(^{219}\) Thus, while not seeing concepts like truth, justice and due process as having some foundation beyond social discourse, they are equally available to sceptics as part of their ‘immanent’ critique of social practices. Indeed, to worry that there is nothing outside existing discourse to provide the foundations with which to criticise social practices suggests little faith in our society’s existing values and openness to new values.\(^{220}\) Even those within more repressive societies are not bereft of the means to criticise repression. To believe that there is nothing beyond community beliefs does not entail, as some imply,\(^{221}\) that one is limited to one’s immediate community or that community beliefs cannot change in response to the challenges of even a few dissenters.

Realists, however, have one more throw of the dice. Thus, even accepting that the denial of objective truth does not logically preclude sceptics from being concerned with factual inquiry and criticising beliefs or action which are poorly supported by evidence, they argue that in practice a belief in objective truth is likely to be more effective in highlighting and combating biased and abusive knowledge claims.\(^{222}\)

In response, as I previously noted, dominant groups have throughout history legitimated various forms of oppression through recourse to the language of ‘Truth’, ‘Reality’, ‘Normality’, ‘Human Nature’, etc. Moreover, the hegemony of their views is then defended by portraying relativism and scepticism as leading to a moral abyss. It is obviously tempting for those confronting this hegemony to take up contrary absolutist positions. But, according to sceptics, this refuge is dangerous in that challenging one ‘Truth’ with another ‘Truth’ carries with it the danger that one, allegedly biased and oppressive claim to truth might simply be replaced by another, perhaps less obviously, biased and oppressive claim to truth. Moreover, it maintains the idea that there are absolute truths and that it is simply a question of who has access to them. Given the intersection between truth and power in society,

\(^{220}\) Cf. Hutchinson, above n. 216 at 1572.
\(^{222}\) This position is in fact shared by some contemporary critical theorists, such as feminists who see truth-scepticism as merely the latest ruse of the powerful: Harding, above n. 218 at 85; C. Di Stefano, ‘Dilemmas of Difference—Feminism, Modernity, and Postmodernism’ in L. Nicholson (ed.), *Feminism/Postmodernism* (Routledge: London, 1990) 63 at 75.
this runs the risk that most disputes over competing versions of these absolute truths will be resolved by truth following power, thus reducing the chances of successful challenges to hegemonic views.223

Indeed, it can be argued that as long as sceptics avoid the slide into nihilism or an ‘anything goes relativism’ which allows dominant groups to use their greater access to existing truth regimes to maintain their hegemony in the ‘free market’ of ideas,224 scepticism offers a more effective bulwark against oppression, immorality and injustice since realism arguably encourages ethical and political complacency.225 Thus, it is a short step from believing in objective notions of truth, reason and justice to accepting that particular claims to truth, reason or justice are that absolute version. Rather than condemning one to silence, the denial of objective truth may compel one to constant reflection, evaluation and critique. Constant awareness that claims to truth can never be more than just claims discourages complacency and constantly invites the questions: under what conditions has this truth-claim been made, by whom and whose interests is it likely to serve? It is perhaps revealing that such questions have only been vaguely and half-heartedly raised in relation to the Rationalist Tradition by modified rationalists.226 While not arguing that there is necessarily a link between their realist epistemology and the failure by individual writers to question the politics of the Rationalist Tradition, it is arguable that a theory which denies the existence of objective truth and which focuses on the social construction of truth is more likely to keep alive a critical approach to all truth-claims.227 If so, this meets Damaska’s objection that, irrespective of its merits, postmodernism is of little use in the evidential domain.228

Conclusion

Here, however, we are clearly very much in the realm of conjecture and counter-conjecture. Realism is said to prevent complacency by encouraging the ‘humbling recognition’ that one’s beliefs can always be wrong.229 Scepticism, on the
other hand, claims that it is more likely to prevent the too ready acceptance of apparent authoritative knowledge claims.\(^{230}\) Obviously, it is impossible to establish which prediction is more accurate. This suggests that the question of whether realism can withstand the sceptical attack on its conceptions of truth, reason and justice must be decided on the plane of pure philosophy. It has been argued here that what is regarded as truth, reason or justice is not capable of neutral, value-free and acontextual assertion, but is tied up with community standards and implicated in existing power relations. This is not just a matter of seeing the critique of traditional epistemology as leading necessarily to ‘strong forms of scepticism and relativism’, as Roberts criticises postmodernist and critical evidence scholars for assuming\(^{231}\)—though the fact that centuries of debate have not delivered the one true realist theory of truth, reason or justice does strongly suggest that the search is futile. Instead, my central argument has been that the fact that human knowledge and truth-claims always have to be couched in language, other forms of discourse and our existing concepts and categories means that the socially constructed nature of truth, reason and justice is ineradicable even if all individual biases and perspectives could be overcome. Whether my reliance on more traditional as well as contemporary and particularly postmodernist forms of scepticism and whether couching my arguments in more traditional philosophical language is enough to persuade orthodox evidence theorists that contemporary scepticism is indeed supported by ‘sophisticated arguments’ remains to be seen.

It is possible that they might respond that they had in mind only strong forms of scepticism and relativism which involve ontological scepticism and ‘anything goes’ relativism rather than the more ‘modest’ and engaged form of postmodernism and critical theory proposed in this article.\(^{232}\) Thus while denying that claims of truth can map neatly onto reality or claims about reason and justice can reflect anything other than existing community standards, I have argued that we should continue to work with the ideals of ‘truth as aspiration’ and ‘truth as integrity’ and to rely on—but seek constantly to improve—existing theories of justification to evaluate knowledge claims. Whether this represents some common ground with orthodox evidence theorists or whether they will continue to defend all forms of realism against the sceptical challenge also remains to be seen.

In fact, however, the seemingly intractable nature of the centuries-old debate between realism and scepticism seems to suggest that the choice of which side to support is more a matter of psychological orientation than philosophical

\(^{230}\) See, e.g., Code, ‘Taking Subjectivity into Account’ above n. 124 at 41, also noting that scepticism avoids a perfectionist and paralysis-inducing search for absolute certainty.

\(^{231}\) Roberts, above n. 5 at 325.

\(^{232}\) Ibid.
reasoning. Whilst in no way intending to suggest psychological immaturity, continued adherence to realism might owe less to a conviction about its philosophical soundness and the failures of scepticism than to a reluctance to jettison the psychological comfort afforded by the certainty of objective truth and facts, coupled with the misapprehension that this necessitates an ‘anything goes’ relativism. By contrast, like other sceptics I am unfazed by being cut adrift from objective standards of truth, reason and justification, and by the alleged logical flaws in scepticism. This does not, however, mean that I find persuasive Rorty’s call to abandon epistemology in favour of hermeneutics and continuing ‘the conversation of mankind’ about the political and ethical questions of what sort of people we want to be—not least because hermeneutics is arguably a form of epistemology. While I recognise that knowledge needs to be understood hermeneutically in terms of existing categories and standards of justification and truth, rather than in terms of its ability to mirror faithfully reality, and that ethics and politics are ultimately more crucial concerns than epistemology, I agree with Roberts that evidence scholars need ‘to take epistemology seriously’. At the same time, while agreeing that there remains important epistemological work to be done, rather than seeing this largely in terms of a search for the one true theory of justification or a plausible alternative to truth as correspondence, I would suggest that we follow naturalised and social epistemology to focus on learning as much as possible about how knowledge is actually acquired and its acquisition improved. Moreover, in seeking ways to improve knowledge acquisition, I think we can learn from critical theorists who argue that, given that perspective and personal interest is an inevitable epistemic fact of life, an awareness and recognition of their impact is more likely to achieve accurate information than attempts to replicate the allegedly detached and neutral stance of scientists. Similarly, while recognising that more voices may cause clarity and

233 Cf. Hernstein-Smith, above n. 189 at 150.
234 But cf. Harmon, above n. 6 at 496, relying on W. G. Perry, ‘Cognitive and Ethical Growth: The Making of Meaning’ in A. Chickering et al. (eds.), The Modern American College (Jossey-Bass: San Francisco, CA, 1981) 76 to the effect that adults develop from a ‘dualist’ belief in right/wrong answers to seeing all views as equally valid and finally to recognising that a recognition of multiplicity does not preclude strong commitment to chosen ideas or values; Rorty’s even more scathing comment that: ‘the realistic true believer’s notion of the world is an obsession rather than an intuition’: Consequences of Pragmatism, above n. 92 at 13.
235 Rorty, above n. 14 at 264, quoting Michael Oakshott; also ibid. at 209 ff., 373–8, and above n. 17 at 68.
237 Roberts, above n. 5 at 325–6.
238 See Nelson, above n. 87; Code, above n. 92 at 40–1.
accuracy to be lost in a babble of noise,\textsuperscript{239} it is worth exploring postmodernist calls for a plurality of views and localised rather than universalistic knowledge claims.\textsuperscript{240} At the very least, given that knowledge is always produced from the partial perspective of individual knowers, one is likely to obtain more plausible accounts of the world if one draws upon as many relevant perspectives as is possible in something approaching Habermas’ ideal speech situation.\textsuperscript{241} Obviously space constraints prevent a discussion of the enormous challenges faced in reforming existing fact-finding processes to reflect these ideas. Nevertheless, at the very least this survey of sceptical approaches to epistemology should indicate that it is no longer tenable to continue as if the Rationalist Tradition’s concepts of knowledge, truth and reason (even in modified form) are philosophically, ethically and politically unproblematic.

\textsuperscript{239} Cf. also Twining, above n. 28 at 213: ‘merely cumulating descriptions may be tedious and laborious, with a prospect of diminishing returns’.


\textsuperscript{241} See at n. 136 above, esp. Jackson, above n. 4, who draws on Habermas to suggest reforms to fact-finding in criminal procedure.