EVIDENTIARY BARRIERS TO CONVICTION
AND TWO MODELS OF CRIMINAL
PROCEDURE: A COMPARATIVE STUDY

MIRJAN DAMAŠKA†

TABLE OF CONTENTS

INTRODUCTION .................................................. 507

PART I. COMPARISON OF EVIDENTIARY BARRIERS TO
CONVICTION .................................................. 513

A. Activities Preliminary to Proof-taking ................ 513
   1. Admissibility Rules Designed to Improve
      Factfinding Accuracy ................................ 514
   2. Admissibility Rules Governed by Considerations
      Extraneous to Truth-finding ....................... 521
   3. An Overview ........................................... 525

B. Presentation of Evidence ............................... 525
   1. The Defendant as an Evidentiary Source at
      Trial .................................................. 526
   2. Operation of Corroboration Rules ................ 530
   3. Counterbalancing Factors .......................... 531
      a. Prima facie Presumptions of Guilt ............ 531
      b. Disclosure of Evidence Compared ............ 533

C. Weighing of Evidence .................................. 536
   1. Different Rules Governing Voting ............... 536
   2. Professional and Lay Propensities to Convict 538
   3. Trial Structure and Evidentiary Needs .......... 544
   4. The Mechanics of the Persuasive Burden ...... 546
      a. Guilt Presumptions Affecting the Burden
         of Persuasion .................................. 546
      b. Affermative Defenses and the Burden of
         Proof ............................................ 548

D. Summary and Perspective ............................. 550
   1. The Interrelationship of Fact-finding Styles .... 550

† Professor of Law, University of Pennsylvania. Formerly Professor of Law, University
   of Zagreb (Yugoslavia), Dr. jur. 1960, University of Ljubljana (Yugoslavia).

The author gratefully acknowledges the help of Professor Bruce Ackerman who read
and commented on an earlier draft of Part I of this Article and suggested the writing of
Part II. While he has thus contributed to the present shape of this Article, he is absolved
of any responsibility for the views expressed within its contents. The author’s warm
thanks go to Mrs. Elzine Garntz for encouragement in working on Part II.

PART II. BARRIERS TO CONVICTION AND TWO RIVAL
PROCEDURAL MODELS ....................................... 554

A. Essential Characteristics of Adversary and Non-
   adversary Systems ....................................... 555
   1. Continental Scholarship ........................... 555
      a. The Historical Approach ....................... 555
      b. Two Narrow Technical Views .................. 560
      c. Procedural Models and the Analytic
         Approach ............................................ 561
      d. Procedural Types in Marxist Literature .... 565
   2. American Opinions and Scholarly Writing ....... 569
      a. The Manichean Dichotomy ....................... 569
      b. A Narrow View .................................... 570
      c. Rival Models of Procedure ..................... 571
   3. Choice of the Proper Dichotomy ................. 577

B. Rival Procedural Systems and Commitment to the
   Discovery of Truth ..................................... 578
   1. Pursuit of Truth and Procedural Structure ..... 580
   2. The Search for Truth and Ideological
      Preconceptions ....................................... 583
   3. Commitment to Truth Examined in the Light
      of Historical Considerations .................... 584
   4. A Final Caveat ..................................... 587

INTRODUCTION

Comparative research of criminal justice systems is still in its
infancy. It is not surprising, then, that when questions are asked
transcending the concerns of a single system very little is actually
known, and answers tend to be mostly in the nature of impressionistic
beliefs and vague hypotheses. One such belief, frequently voiced, is
that the rules of evidence under the common law adversary system of
criminal procedure present much more formidable barriers to conviction
than do corresponding rules in the non-adversary civil law system.
This belief is then related to a more general feeling that the "higher
evidentiary barricades" to conviction somehow emanate from the very
nature of adversary proceedings and that their lowering smacks of the
"inquisitorial" continental procedure. Both beliefs are interesting to
a comparatist.

1 A recent example of such views can be found in the vigorous dissent of Justice
1. COMPARISON OF IMPORTANT BUSINESS TO CONVICTION

The presence of corporate email communications, the use of social media, and the increasing prevalence of virtual meetings have led to a shift in the focus of regulatory enforcement. In many cases, emails and social media can provide evidence of potential violations. These electronic communications can be accessed and analyzed to determine the potential impact on the company. It is important to note that electronic communications can be used to support or contradict testimony given during a trial. In some cases, electronic communications can be used to impeach a witness or to establish a pattern of behavior.

In addition to electronic communications, companies should also be aware of the potential for verbal communications to be recorded. This includes phone calls, video conferences, and other forms of electronic communication. Verbal communications can be recorded and used as evidence in a trial. It is important to ensure that all communications are recorded with the consent of the parties involved.

When it comes to virtual meetings, companies should be aware of the potential for participants to be monitored. This includes video conferencing and other forms of electronic communication. It is important to ensure that all parties involved in a virtual meeting are aware of the potential for monitoring.

In conclusion, companies should be aware of the potential for electronic and verbal communications to be used as evidence in a trial. It is important to ensure that all communications are recorded with the consent of the parties involved. Additionally, companies should be aware of the potential for monitoring during virtual meetings.

---
RATIONALITY AND CONNECTION

The question of how rationality is connected to the environment in which it operates is a central one in the philosophy of science. There are many different theories of rationality, each with its own account of how rationality is connected to the world. Some theories, such as the theory of instrumental rationality, hold that rationality is simply about making the best choices given the available information. Other theories, such as the theory of teleological rationality, hold that rationality is about achieving some desired goal. Still other theories, such as the theory of institutional rationality, hold that rationality is about conforming to the rules of a given institution. In this essay, I will argue that rationality is best understood as a combination of these different theories. I will begin by discussing the theory of instrumental rationality, which I will argue is the most important of the three. I will then discuss the theory of teleological rationality, which I will argue is the most complementary of the three. Finally, I will discuss the theory of institutional rationality, which I will argue is the most difficult of the three to understand. In conclusion, I will argue that rationality is a complex and multifaceted concept, and that it is important to understand all of the different theories in order to fully understand it.