AN EXPLORATION OF THE MEANING OF TRUTH IN PHILOSOPHY AND LAW

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The need for truth is a need more sacred than any other need. Yet it is never mentioned. One feels afraid to read once one has realised the quantity and monstrousness of the material falsehoods paraded … Thereafter one reads as though one were drinking from a contaminated well. **

Abstract

This article examines the meaning of "truth" in philosophy and in the law and it identifies notable dissonance between the two discourses. Deep divisions run within philosophy on the meaning of the term, while an examination of the term in the context of the law also reveals tensions. There are long held views that the truth is subservient to justice; and that proof rather than the truth is the justice system's main concern. That position, however, is not unanimous. A paradox that flows from this discussion is that there are at least two, potentially conflicting, kinds of truth in a trial – *substantive truth* and *formal legal truth*. The ramifications are significant.

I INTRODUCTION

This article has a bold objective. It inquires into the meaning of the term 'truth', a term that 'has always been at the centre of human endeavours',[1] and of interest 'not only to philosophers but to all those who desire to know about anything whatsoever'.[2] The term has exercised minds over the millennia but still eludes definition. Such an inquiry is formidable in any circumstance, and more so in a work

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** Simone Weil, *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind* (1978) 35.

1 Peter Vardy, *What is Truth?* (1st ed,1999) 5.

2 Lawrence E Johnson, *Focusing on Truth* (1st ed, 1992) 1.

of the present nature. This inquiry, however, is pertinent regardless of the boldness of the enterprise or any alleged futility. This inquiry is particularly significant in the context of a discussion on the role of truth in the trial process, which often attracts criticism for failing to uncover or to heed the truth. Instances of wrongful conviction illustrate the point well.[3] This article examines the meaning of truth in two important discourses – in philosophy and in law – and it exposes a significant disjuncture in the role truth plays in each of these discourses. The term 'discourse' is a critical one as it aids in an understanding of the term 'truth' in philosophy and in law. It sets out the ground rules to facilitate the communication of ideas. It will be shown that a considerable variance arises in the meaning of 'truth' between the two discourses. There are, for example, semantic, terminological and epistemological variations, so that in the final analysis, it is not possible to say that there is one true answer to the question: '*What is truth*'?

The traditional lexical reference, the dictionary, generally provides little succour. *The Australian Reference Dictionary* provides only the following meanings for 'truth': '1. The quality or state of being true or truthful. 2. What is true.'[4] The same dictionary defines 'true' as follows: '1. In accordance with fact. 2. In accordance with correct principles or an accepted standard; rightly or strictly so called; genuine, not false. 3. Exact, accurate … '.[5] The same degree of brevity can be observed with other everyday dictionaries.[6] The *Butterworths Australian Legal Dictionary*[7] defines neither 'truth' nor 'true'. An intellectual examination of the meaning of truth requires an elaboration of the lexical definition.

A *A Framework for the Truth Inquiry*

It must be declared at the outset that this article does not aim for a detailed analysis, exegesis or explication of truth theory. It aims rather

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3 See below n 249 on this point.

4 Anne Godfrey-Smith et al (eds), *The Australian Reference Dictionary* (Australian, ed, 1991) 828.

5 Godfrey-Smith et al (eds), above n 4, 828; Random House, *Webster's Everyday Dictionary* (2002) 566, defines 'true' in the present context as: '1. Conforming to reality or fact. 2. Real; genuine'.

6 See for eg, C Yallop et al (eds), *Macquarie Dictionary* (4th ed, 2005). Multi-volume encyclopaedic dictionaries provide more detailed treatments: see, for eg, John Simpson and Edmund Weiner (eds) *The Oxford English Dictionary* (2nd ed,1989) Vol XVIII; and Webster's, 'Webster's Third New International Dictionary (Unabridged)' (1986) Vol III. See, however, the brief treatment of 'truth' in Joyce M Hawkins and Robert Allen (eds), *The Oxford Encyclopaedic English Dictionary* (1991).

7 Peter E Nygh and Peter J Butt (eds), *The Butterworths Australian Legal Dictionary* (1997).

to flag the ways *truth* is thought about in the disciplines selected.[8] It is also aimed at exposing the multiplicity of the term's meanings and to, in turn, expose significant conundrums. Beyond, however, lies an expansive field of thought comprising a multitude of theories and a distinguished line of thinkers.[9] A central question in this article is what does truth mean in the two contexts under examination – philosophy and law? Common to the two contexts is the quest to identify the real state of things. No exercise of the present kind would be complete without a mention of 'post-structuralism' which 'names a theory, or a group of theories, concerning the relationship between human beings, the world, and the practice of making and reproducing meanings'.[10] That term is closely linked with 'post-modernism', a term which is regarded in a general sense 'as a rejection of many, if not most, of the cultural certainties on which life in the West has been structured over the past couple of centuries'.[11] These are by no means exclusive domains and their elements permeate the philosophical truth theories discussed below.

B *'Truth' – A Fraught Term*

Notwithstanding the significance of 'truth', it is a fraught term. Vardy notes that more than ever the search for truth seems to be folly.[12] Philosophers have considered it to be 'an indefinable concept'.[13] The vexed nature of 'truth' is illustrated in the often-cited classic biblical retort from Pontius Pilate to Jesus:

> "Truth?" said Pilate. "What is that?"[14]

Even the truth as to Jesus' answer to that question is elusive. It is said that Jesus did not reply. 'Was it simply that he could not answer?'[15]

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8 See for eg, the method of inquiry discussed in Edo Pivcevic, *What is Truth?* (1st ed, 1997) 19. Pivcevic discusses three basic approaches to an analysis of truth conditions, which he calls the *naturalistic*, the *phenomenological* and the *socio-historical* approach. He states that his objective is not to attempt a classification or exegesis of any existing theory, and that his use of these terms is merely 'a convenient device for flagging out certain ideal theoretical positions or *models of reasoning about truth*'.

9 Some leading thinkers are mentioned here in no particular order: Michel Foucault, Jacques Derrida, Friedrich Nietzsche, Claude Levi-Strauss, Roland Barthes, Luce Iirigaray, Jurgen Habermas, Judith Butler, Immanuel Kant, Friedrich Hegel, Karl Marx and John Stuart Mill.

10 Catherine Belsey, *Post-Structuralism: A Very Short Introduction* (2002) 5.

11 Stuart Sim, *The Routledge Companion to Postmodernism*, (2nd ed, 2005) *Preface* vii.

12 Vardy, above n 1, 65.

13 Donald Davidson, 'The Folly of Trying to Define Truth' (1996) 93(6) *Journal of Philosophy* 263, 265 referring to the works of G E Moore, Bertrand Russell, Gottlob Frege and Alfred Tarski.

14 *The New Jerusalem Bible* (1st ed, 1985) The Gospel of St John, Verse 18:38.

15 Vardy, above n 1, 179.

Was it that jesting Pilate 'would not stay for an answer?'[16] Or, did this exchange in fact occur, considering latter day doubts about Scripture accuracy?[17] The question – *what is truth?* – is one that 'people of every kind have struggled to answer'.[18] Is it a valid question in the first place? At one extreme is the view that truth is dead.[19] At the other it is said: 'It is a reasonable and a very fair question that has been asked by philosophers down the centuries'.[20] It is also suggested that the conclusion that we tend to presuppose in the question – *what is truth?* – 'is unjustified and false'[21] and it is 'the wrong question'.[22] The term 'truth' is said to have 'a complex structure [and] no simple formula can fully capture its meaning'.[23] Notwithstanding the befuddlement and despair reflected in the foregoing discussion some truth theorists hold the view that: 'Truth is a simple logical notion, which does not require any 'substantial' explanation theory'.[24] And further, that truth does not have 'some hidden structure awaiting our discovery'[25] and that 'truth is entirely captured by the initial triviality, so that in fact nothing could be more mundane and less puzzling than the concept of truth'.[26] This is an argument on the side of functionality and pragmatics, such that 'truth' does not have to have a universal essence in order to function well under certain (discursive) conditions. So, while there may not be a universal definition of 'truth', a good *working* definition is possible.

The foregoing discussion provides a foretaste of the challenge afoot. The character of truth is, as Horwich notes, 'peculiarly enigmatic' although he describes as 'wholly wrong' the impression that 'its underlying nature appears to be at once necessary and impossible'.[27] The following discussion reveals a plethora of attitudes and approaches towards truth *within* philosophy and *within* the law and *between* the

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16 Jaakko Hintikka, 'What is truth? Stay for An Answer' in Richard Schantz (ed), *What is Truth?* (2002) 238, 238.

17 For an illustration of doubts concerning the accuracy of the Scripture, see Ruth Gledhill, 'Catholic Church No Longer Swears by Truth of the Bible' *The Times* (Timesonline) 5 October 2005, <http://www.timesonline.co.uk/tol/news/world/europe/article574768.ece> at 17 June 2009.

18 Clifford G Christians et al, *Media Ethics: Cases and Moral Reasoning* (6th ed, 2001) 59.

19 See Bill Kovach and Tom Rosenstiel, *The Elements of Journalism* (2001) 40.

20 Vardy, above n 1, 179.

21 P Horwich, *Truth* (2nd ed, 1990) 2.

22 J Malpas, 'Truth, Lies and Democracy: Ethical Practice in Contemporary Australia' (Lecture delivered at the Curtin University Annual Ethics Lecture, Perth, 5 October 2005).

23 Pivcevic, above n 8, 15.

24 Pivcevic, above n 8, 28.

25 Horwich, above n 21, 2.

26 Horwich, above n 21, Preface, xi.

27 Horwich, above n 21, 2.

two spheres. The discussion begins with a discussion of the meaning of 'truth' in philosophy. This will be followed by a discussion of the term in the judicial context.

II Truth and Philosophy

It is necessary to confront the meaning of truth in philosophy because the term cannot be divorced from philosophy.[28] 'Truth' is a core concern of philosophy[29] and unlike the law, it boasts an illustrious tradition of intellectual exercise with respect to it. The inquiry in this work is useful even if it ultimately leads to a view that it contributes minimally to the broader inquiry.[30] The hurdle needs to be surmounted notwithstanding the earlier observation among philosophers that truth is 'an indefinable concept'.[31] As Davidson notes, however, being indefinable

> does not mean we can say nothing revealing about it: we can, by relating it to other concepts like belief, desire, cause, and action. Nor does the indefinability of truth imply that the concept is mysterious, ambiguous, or untrustworthy. Even if we are persuaded that the concept of truth cannot be defined, the intuition or hope remains that we can characterize truth using some fairly simple formula.[32]

In the realm of philosophy the time-honoured question – *what is truth?* – has been 'a focal point of philosophical discussion'. [33] As Schantz points out:

> Competing answers have been given: truth is correspondence, truth is coherence, truth is pragmatical utility, truth is a primitive unanalysable property, and truth is a disquotation. At first glance, this plurality of answers might strike one as surprising. Is there not a rather simple answer to this venerable question [?][34]

Alongside the preoccupation with that venerable question is the suggestion that 'a characteristic feature of contemporary thought is a turn away from the notion of truth',[35] that in many intellectual circles,

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28 See C M Bakewell, 'On the Meaning of Truth' (1908) 17(6) *The Philosophical Review* 579, 590-591.

29 Plato, in the *Republic*, characterised the genuine lovers of wisdom – the genuine philosophers – as 'those whose passion it is to see the truth': see J Malpas, 'Speaking the Truth' (1996) 25(2) *Economy and Society* 156, 156.

30 Johnson, above n 2, notes, 12-13: 'If it were to turn out in the end that we cannot answer, or develop, a worthwhile question [concerning the truth theory], then in finding that out, and finding out why, our investigations would have come up with something well worth knowing'.

31 Davidson, above n 13, 265, citing the positions of G E Moore, Bertrand Russell, Gottlob Frege and Alfred Tarski.

32 Davidson, above n 13, 265.

33 Schantz, above n 16, 1.

34 Schantz, above n 16, 1.

35 Malpas, above n 29, 156.

the notion is 'unfashionable'[36] or 'barely even mentionable'.[37] The implied proposition in the above quotation that there is no simple answer to this question becomes evident in the following discussion aimed at identifying some theories of truth and the major philosophical debates throughout much of this century. It is not suggested here that this work provides a comprehensive inventory of relevant theories and debates (of which there are several in ethics, philosophy of language, and metaphysics) or that the labels adopted here are necessarily clear-cut ones. Indeed, it may even be tautologous to argue that the concept of truth is contested philosophically because if a concept is central to philosophy as truth is, it follows that it remains contested. The following is merely a modest collation of key truth theories from the philosophical debates.

From the literature considered one determination is possible – in the epistemological heartland of 'truth', opinion as to what the term means is deeply divided. There is debate even as to how many theories of truth there are. On Vardy's count there are 'two basic theories of truth' – *realism* and *anti-realism*.[38] Schantz refers to three 'substantive' theories of truth – *correspondence, coherence,* and *pragmatic*.[39] The *Fontana Dictionary of Modern Thought* refers to four not necessarily identical groups.[40] It shortly becomes clear that these are not necessarily discrete or easily categorised theories. Furthermore the list, in fact, extends much further into a broader penumbra of complexity that is exacerbated by perplexing terminology,[41] terms imposed by the marketplace and which lack precision,[42] and what may appear to be abstract philosophical theorising. For present purposes, the various theories will be grouped under two headings – 'substantive' theories (comprising traditional views) and 'deflationary' theories (comprising views that are a radical alternative to traditional views).[43] Each is discussed in turn as follows.[44]

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36 Malpas, above n 29, 156.

37 Malpas, above n 29, 156.

38 Vardy, above n 1, 28.

39 Schantz, above n 16, 5.

40 Alan Bullock, Oliver Stallybrass and Stephen Trombley (eds), *The Fontana Dictionary of Modern Thought* (2nd ed, 1988) 876.

41 Bakewell, above n 28, 579.

42 Bakewell, above n 28, 579.

43 See A Gupta, 'A Critique of Deflationism' in Simon Blackburn and Keith Simmons (eds), *Truth*, (1st ed, 1999) 282, for another suggested way of 'organising' the philosophical debate categories.

44 I am assisted in arriving at this 'structure' by Pivcevic, above n 8, 29 and Schantz, above n 16, 1-8.

A *Substantive Theories*

The three substantive theories discussed below are the realism/correspondence theory, the anti-realism/coherence theory and the pragmatic theory.

1 *Realism/Correspondence Theory*

Realism involves a claim to reference or correspondence.[45] It is a venerable notion that truth is the property of *corresponding with reality*.[46] As Malpas suggests:

> The most common way of understanding truth, and the way that has often been assumed outside philosophy as well as within it, has been to treat it as simply a matter of correspondence between statements or sentences (which may be taken to express, for example, beliefs or particular theoretical claims) and the world or parts of the world.[47]

According to the classical correspondence theory 'a statement is true just in case it corresponds to a fact, and false just in case it does not correspond to a fact'.[48] The correspondence theory 'is at base simply the proposition that when this or that happens, it really is so and that the statement concerning it is true'.[49] For the realist, the meaning of a sentence is given by the conditions that make it true.[50] There are three main categories of realists: (a) naïve realists; (b) critical realists; and (c) internal realists.[51] They all use a correspondence theory of truth, that is, they maintain that the truth of any statement is based on successful reference.[52] It is said that nearly every philosopher reflecting on the nature of truth before the eighteenth century implicitly or explicitly accepted the correspondence theory.[53] Realists affirm bivalence, that is, they maintain that a statement is either true or false depending on whether it does or does not correspond to the state of affairs it sets out to describe.[54] This theory of truth claims that a statement is true if it corresponds to the state of affairs that it attempts to describe.[55]

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45 Vardy, above n 1, 15.
46 See Horwich, above n 21, 9, where the author also provides a useful summary of the varying formulations of the correspondence theory.
47 Malpas, above n 29, 158.
48 Schantz, above n 16, 1.
49 Zenon Bankowski, *The Jury and Reality*, cited in Mark Findlay and Peter Duff (eds), *The Jury Under Attack* (1st ed, 1988) 8.
50 Dennis Patterson, *Law and Truth* (1st ed, 1996) 5.
51 Vardy, above n 1, 13.
52 Vardy, above n 1, 13-14.
53 Schantz, above n 16, 1.
54 Vardy, above n 1, 13.
55 Vardy, above n 1, 12.

> This does not mean that we can necessarily KNOW whether a given statement is either true or false, but this epistemological uncertainty does not undermine the claim that there is a truth to be known. Realists maintain that truth claims are verification transcendent – they do not depend on their ability to be verified.[56]

This theory of truth confronts a number of difficulties. The notion that truth is a kind of 'correspondence with the facts', and which Horwich has described as a 'common-sense notion', however, 'has never been worked out to anyone's satisfaction'.[57] It is suggested further that many philosophers think that the traditional attempts to explain the notions of fact and correspondence 'have generated nothing but empty pseudoexplanations [and it is] a bad metaphysical theory because the central concepts it invokes possess no explanatory value at all'.[58] Another difficulty with the correspondence theory is that it is typically and naturally associated with metaphysical realism – the view that there is an objective reality whose existence and structure are independent of our language and thought.[59] A very popular objection to this combination of the correspondence theory and metaphysical realism is that it leads to epistemological scepticism.[60] For the correspondence theorist, truth is an epistemically unconstrained concept, hence, whether a statement is true does not depend on any epistemic virtue it displays.[61] Johnson speaks of 'severe problems' with the correspondence theory using the 'coffee cup on the table' analogy:[62]

> Certainly there is a great deal of intuitive plausibility to a correspondence theory in that it tells us that what is true is true because it fits (corresponds to) the facts. If I state or believe that a coffee cup is on the table, what I say or believe is true because it fits the fact that there *is* a coffee cup on the table. If I say that there is an elephant on the table, that does not fit the facts. These things are true or false by virtue of how what they say fits with what they say them about. What could be simpler or more obvious? The coffee cup is or is not on the table, without our having to concern ourselves with how that fits in with everything else or with some ineffable Absolute. Even so, while the correspondence theory as so presented may appear to be obviously correct, it comes to appear much less plausible and much less meaningful when we try to work out just what it actually amounts to.[63]

And therein lies the conundrum. As Johnson points out, first it must be explained what is this correspondence relationship which, when it obtains, makes true things true; and second, it must be asked what

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56 Vardy, above n 1, 13.
57 Horwich, above n 21, 1.
58 Schantz, above n 16, 2.
59 Schantz, above n 16, 2.
60 Schantz , above n 16, 2.
61 Schantz, above n 16, 2.
62 Johnson, above n 2, 40.
63 Johnson, above n 2, 40.

is related in that correspondence relationship.[64] It is one thing to say that true beliefs and statements or propositions (or whatever the relevant truth-bearers are said to be) correspond to the facts: 'But what *are* facts? What do they have to do with coffee cups and other things in the world?'[65] For the correspondence theorist truth is not a matter of whether a statement is justified, warranted or rational – truth is objective and hinges only on the way the world is.[66] The criticism, then, is that on classical correspondence realism we can never determine whether statements or beliefs are true because we cannot compare them with the facts to see whether they correspond to them.[67] Statements and beliefs, so it is usually argued, may be compared with other statements or beliefs to see if they harmonise with each other but we can never compare or confront statements or beliefs with the facts or with reality.[68] There is, so it is often said, no way to get outside our language or outside the circle of our beliefs and explore the facts themselves.[69] This epistemological objection was the main reason many philosophers renounced the classical correspondence theory and began to offer alternative substantive theories promising to be more faithful to our epistemic situation in the world.[70]

2 *Anti-realism/Coherence Theory*

In contrast to realism, anti-realism rejects correspondence and instead maintains that statements are true because they cohere with other true statements made within a particular form of life.[71] In the words of Horwich:

> A system of beliefs is said to be coherent when its elements are consistent with one another and when it displays a certain overall simplicity. In that case … the whole system and each of its elements are true. Thus truth is the property of *belonging to a harmonious system of beliefs*.[72]

The coherence theory is one 'which measures truths by their "fit" within a given system'.[73] Anti-realists do not dispute the realist's contention that truth is a matter of conditions – where they part company is over the question of whether truth conditions may be 'recognitionally transcendent'.[74] Anti-realists reject all attempts to make

64 Johnson, above n 2, 40.
65 Johnson, above n 2, 40.
66 Schantz, above n 16, 2.
67 Schantz, above n 16, 2.
68 Schantz, above n 16, 2.
69 Schantz, above n 16, 2.
70 Schantz, above n 16, 3.
71 Vardy, above n 1, 14.
72 Horwich, above n 21, 9.
73 Bankowski, above n 49, 9.
74 Patterson, above n 50, 5.

language mirror reality, and instead maintain that truth is essentially a human construct.[75] They reject bivalence and instead assert that truth claims are internal to the community in which these truths are expressed, that is, truth depends on what is agreed within the community and that depends on the rules of the language game, not on dispassionate inquiry.[76] With many philosophers renouncing the classical correspondence theory, epistemic accounts 'began to flourish, claiming that the truth of a statement does not consist in an external relation to a feature of reality but in its possessing a positive epistemic status within our conceptual scheme or within our experience'.[77] These theories hold that the truth of a judgment consists in its being a member of a comprehensive system of beliefs which is consistent and harmonious.[78] The basic core of the *coherence theory of truth* is the conception that beliefs, judgments or whatever truth-bearers are taken to be are 'true or false according to whether or not they fit in – *cohere*, with the body of other beliefs (or whatever) that are true'.[79] A related term when discussing *coherence* is *verificationism* which, simply put, espouses the view that the meaning of a word or combination of words is 'determined by a set of rules which regulate their use'.[80] The coherence theory has characteristically been the theory of truth espoused by *idealists* – those who maintain that reality, at least in so far as we can be aware of it, is of an inherently mental nature.[81]

One criticism of the *coherence* theory is that it has 'condemned itself to incoherence' by closing off any possibility of the commonsense response that certain principles it holds are 'not in fact our principles at all'.[82] Another objection to the coherence theory is that there might be more than one coherent system, equally consistent, equally interconnected by mutual implication, and both of sufficiently wide scope.[83] It is argued that the coherence theory of truth 'does not provide an adequate account of the nature of truth' notwithstanding its redeeming features.[84] A further criticism of the coherence theory of truth is 'its refusal to endorse an apparently central feature of our conception of truth, namely the possibility of there being some

75 Vardy, above n 1, 14.
76 Vardy, above n 1, 14.
77 Schantz, above n 16, 3.
78 Schantz, above n 16, 3.
79 Johnson, above n 2, 15.
80 Moritz Schlick, 'Meaning and Verification' (1936) 45(4) *The Philosophical Review* 339, 341.
81 Johnson, above n 2, 16.
82 Ralph C S Walker 'A Problem about Truth' in Schantz, above n 16, 312.
83 Johnson, above n 2, 27-28.
84 Johnson, above n 2, 38.

discrepancy between what really is true and what we will (or should, given all possible evidence) *believe* to be true'.[85]

3 *Pragmatic Theory*

The pragmatic theory, it is said, is primarily a method of settling metaphysical[86] disputes that otherwise might be interminable.[87] Pragmatic theories of truth insist that there is a close connection between the concept of truth and our human experience and practice.[88] According to the pragmatic maxim, the meaning of a concept or an idea consists in the practical consequences of its use and truth consists, primarily, in agreement with the world.[89] Thus, the pragmatists' approach to truth was to ask what difference it makes whether a belief is true.[90] Pragmatists approach truth from an epistemic point of view, which incorporates basic elements of coherence.[91] Pragmatic theories of truth are based on the pragmatist's conception of meaning, according to which all meaning is grounded in practice, with all difference in meaning involving some difference in practice, that is, truth is a matter of fitting in with practice.[92] Pragmatism, as expressed by William James, takes the following view:

> *True ideas are those that we can assimilate, validate, corroborate and verify. False ideas are those we cannot.* That is the practical difference it makes to us to have true ideas; that, therefore, is the meaning of truth, for it is all that truth is known-as.[93]

One criticism of the pragmatic theory is that pragmatists are guilty of a fundamental error, confusing *criteria* of truth with the *nature* of truth.[94] It is suggested that it is not that pragmatists were 'too stupid' to differentiate between criteria and essence – because they were well aware of the putative distinction – the objection rather is that the distinction is not viable in the long run.[95] Difference in meaning, the critics argue, must make a difference in real or possible practice, so

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85 Horwich, above n 21, 10.

86 'Metaphysics' is described as the investigation of the world, or of what really exists, generally by means of rational argument rather than by direct or mystical intuition: see Bullock, above n 40, 524.

87 Bertrand Russell, 'William James's Conception of Truth' in Simon Blackburn and Keith Simmons (eds), *Truth* (1st ed, 1999) 71.

88 Schantz, above n 16, 3.

89 Schantz, above n 16, 3.

90 Schantz, above n 16, 3.

91 For a more detailed discussion of the pragmatic theory see Schantz, above n 16, 3-4; and Johnson, above n 2, 64-74.

92 Johnson, above n 2, 64.

93 William James, 'Pragmatism's Conception of Truth' in Simon Blackburn and Keith Simmons (eds), *Truth* (1st ed, 1999) 54.

94 Johnson, above n 2, 66.

95 Johnson, above n 2, 66.

any difference in meaning between being true and meeting the criteria of truth must indicate some possible difference in practice.[96] Johnson states that there are 'problems for the pragmatist's conception of truth, and we may wonder whether they have successfully balanced the claims of brute reality with the relativity of our experience'.[97] It is said further:

> A pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards actions and towards power.[98]

The pragmatists are accused also of being 'absolutely dogmatic',[99] to the extent that 'the hypothesis that pragmatism is erroneous is not allowed to enter for the pragmatic competition; however well it may work, it is not to be entertained'.[100]

B *Deflationary Theories*

Deflationary theories are a radical alternative to traditional views (discussed above), and they comprise a family of arguments from those who hold deflationary or minimalist views of truth. According to these views the concept of truth is a clear and uncontentious concept – one that is philosophically much less interesting than the proponents of robust theories think. The deflationists claim that truth has no substantive role to play in philosophy.[101] Their view is that a search for a 'substantial' theory of truth is due to a misunderstanding, and they dismiss the difficulties besetting such an enterprise 'as windmills of muddled thought'.[102] Deflationary views of truth 'deflate the lofty pretensions of more "robust" theories of truth, such as the correspondence and epistemic theories'.[103] Deflationary theories of truth hold that truth is a relatively trivial concept with no important connections with other concepts such as meaning and reality.[104] Various brands of deflationism are advanced as a 'radical alternative to traditional views'.[105] Common to the various deflationary views is

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96 Johnson, above n 2, 66.
97 Johnson, above n 2, 66.
98 Russell, above n 87, 70-71 (reference omitted).
99 Russell, above n 87, 71.
100 Russell, above n 87, 71.
101 Schantz, above n 16, 5.
102 Pivcevic, above n 8, 28.
103 Michael P Lynch, *Truth in Context: An Essay on Pluralism and Objectivity* (1st ed, 1998) 111.
104 Davidson, above n 13, 265.
105 Schantz, above n 16, 5.

the conviction that substantive or robust theories of truth – such as *correspondence* or *coherence* or *pragmatic* theories – are 'all on the wrong track'.[106] According to deflationism, substantive theories share the assumption that truth has an inner nature, a nature that can be analysed in epistemic or semantic or metaphysical terms.[107] Deflationists categorically reject this assumption and hold the view that there is no single substantive property all true statements share and that truth has no underlying nature, no hidden essence.[108] As Schantz explains:

> The concept of truth expresses neither a natural or real property nor a natural or real relation. For this reason it cannot play a causal or explanatory role in good systematic theories. Since there are no interesting connections between the concept of truth and fundamental philosophical concepts, such as meaning, belief, statement, translation, and synonymy, *the concept of truth should not be given a central place in our philosophical reflections*. Rather, truth is a purely formal or logical concept whose correct explanation requires far less extravagant conceptual resources than advocates of substantive theories believe.[109]

Furthermore deflationary theories dismiss the problem of the inner nature of truth as a 'pseudoproblem' and that 'there is no "problem of the nature of truth" because there is nothing picked out by the words "true" or "truth" that could have a nature'.[110] Deflationary theory critics argue that the 'main problem with deflationism' lies in the descriptive account it gives of 'true'.[111] It is said further that the analysis the deflationists offer *is* simple, but, unfortunately, it makes truth far too complicated – it attributes to truth a vast ideology.[112] As Gupta explains:

> The deflationary account makes (and, to sustain its conclusions, needs to make) some very strong claims about the meaning of "true" – claims that on examination prove to be highly problematic … On the other hand when it is taken in the weaker way, the description is correct enough, but does not yield the deflationary conclusions … . Deflationists take the concept of truth to be transparent, one capable of a complete and simple philosophical analysis … *truth is a highly puzzling notion, one that defies all our attempts at its analysis*.[113]

Critics of the deflationary theory argue that deflationism deflates truth itself. Devitt states:

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106 Schantz, above n 16, 5.
107 Schantz, above n 16, 5.
108 Schantz, above n 16, 5.
109 Schantz, above n 16, 5-6 (emphasis added).
110 Lynch, above n 103, 112.
111 Gupta, above n 43, 284.
112 Gupta, above n 43, 307.
113 Gupta, above n 43, 284 (emphasis added).

> Deflationism is really a sort of eliminativism, or antirealism, about truth: it deflates truth itself. We might say, *very* roughly, that according to deflationism, there is no reality to truth. Since there is no reality to truth there is nothing positive to be said about the nature of truth. However, unlike some early eliminativists, deflationists have no objection to the use of the term.[114]

Another problem with the deflationary theory is the tendency of deflationism to 'blur the distinction between the linguistic and the metaphysical'[115] and the difficulty in capturing 'the deflationary metaphysics of truth'.[116] The complaint, in particular, is that remarks that should be about the truth term are often presented as being about truth itself, revealing sloppiness and confusion in the use of the term.[117]

C *Summary*

It is clear from the foregoing discussion that the philosophical discussion on the meaning of truth is steeped in complex terminology and a tangle of issues that confounds even the philosophers. Johnson captures the essence of the problem when he notes that 'much of truth theory, and not just the correspondence theory, has been undermined by conceptual muddles about what is related and about how they are related'.[118] The various positions represent a difference between a search for the universal essence of truth and an acceptance of pragmatic truth conditions. The conflicts, despite the long philosophical history behind the question of truth, and despite philosophy itself being capable of being regarded as constituted precisely through its interest in truth,[119] remain unresolved. The philosophical labouring, however, persists and remains robust. Eminent French philosopher Michel Foucault has commented that '[t]he task of speaking the truth is an infinite labour: To respect it in its complexity is an obligation that no power can afford to short-change, unless it would impose the silence of slavery'.[120] And the philosophers also generally recognise, perhaps, that 'if contemporary thought does indeed involve a move away from the notion of truth, then so too will contemporary thought involve a turn away from philosophy as a distinctive area and mode of inquiry'.[121]

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114 M Devitt, *The Metaphysics of Deflationary Truth*, cited in Schantz, above n 16, 60.

115 Devitt, above n 114, 61.

116 Devitt, above n 114, 61.

117 Devitt, above n 114, 61.

118 Johnson, above n 2, 40.

119 See Malpas, above n 29, 156.

120 Cited in Malpas, above n 29, 173.

121 Malpas, above n 29, 157. For eg, the author notes that within philosophy the rise of the redundancy view of truth seems almost to eliminate truth as a significant and interesting notion: Malpas, above n 29,156-157.

III Truth and The Courts

It has been said that the 'law has an extraordinary regard for truth'.[122] An examination of the attitude of the courts towards truth in the administration of justice, however, reveals a mixed response over the centuries, and shows a tension. This tension is between the pursuit of truth, on the one hand, and on the other, ensuring that the judge remains a passive spectator in the contest between the parties.[123] There are long held views that the truth in a trial context is subservient to justice; that truth is not the primary goal of the justice system; and that proof rather than the truth is the justice system's major concern. These views will now be considered in more detail.

A *Some Preliminary Matters*

A discussion on the role of truth in the judicial system requires an appreciation of a key aspect of the justice system itself – a feature that is commonly referred to as the 'adversarial system' with its bipolar configuration, in which is embedded notions about truth-seeking. There is a 'common belief' that the adversarial system is 'the best which can be devised for revealing the truth and ensuring fairness between the parties'.[124] The 'dominant pattern' in the Australian justice system is broadly described as adversarial[125] although it has been noted that changes have occurred in our system that make our civil justice system 'less adversarial than it was 30 or 40 years ago'.[126] Some attributes of the adversarial system are that 'the parties are in charge of the action'[127] and judges play a passive role.[128] At the risk of over-simplification, the adversarial system may be contrasted with the 'major alternative'[129] – the inquisitorial system.[130] In the inquisitorial system the courts theoretically play a dominant role.[131] It is said that 'adversarial systems focus on

122 John Anthony Weir, *A Casebook on Tort* (7th ed, 1992) 508.

123 D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part I' (1995) 69 *Australian Law Journal* 705, 713 where the author describes the tension as 'the inherent dichotomy'.

124 See G L Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (Paper delivered at the 20th Australian Institute of Judicial Administration Annual Conference, Brisbane, 12-14 July 2002) <http://www.courts.qld.gov.au/hidden/ca_davies.htm> at 29 March 2007.

125 P Vines, *Law and Justice in Australia* (1st ed, 2005) 241.

126 Davies, above n 124, 1.

127 See Vines, above n 125, 241; *Giannarelli v Wraith* (1988) 165 CLR 543, 578 (Brennan J).

128 Andrew Sanders and Richard Young, *Criminal Justice* (1994) 7.

129 Sanders and Young, above n 128, 7.

130 Vines, above n 125, 241 notes that this is a procedural classification.

131 Sanders and Young, above n 128, 7.

proof, and inquisitorial systems on truth'.[132] This distinction, however, is neither clear nor conclusive because, there is a common belief that the adversarial system better serves truth-seeking.[133] The two systems function in ways not always consistent with the theory.[134] For instance, within the elements of the adversarial system there is a great deal of scope for flexibility and adaptation but there is 'no unanimity in this regard'.[135] It has also been said that both systems are essentially adversarial and that there are more similarities than differences between them.[136] It is said further that anything resembling a truly inquisitorial system is impossible to find.[137] Both the adversarial and inquisitorial systems are also recognised as having inherent structural shortcomings.[138]

In turning to the 'truth' discussion in the context of the courts, there is a pronounced lack of definition, analysis or critique of the term 'the truth' in legal literature in comparison with other discourses, for example, in philosophy, religion and social science. The reason for a lack of legal analysis of the meaning of 'truth' will become clearer in the discussion below, but briefly stated, the reason is that in law truth is 'not an explanatorily useful concept'.[139]

B *A Historical Backdrop*

In respect of truth in the courts, we may begin by considering views expressed by judges over time on the role and place of truth in a court of law. Two starkly contrasting views are evident. On the one hand, there are affirmations of the truth imperative. On the other, there are disavowals of the truth imperative altogether, or at least a view that the truth does not trump other priorities. The latter position, one appeal court justice has noted, 'may come as a considerable surprise to most members of the public who see the legitimacy of our system in its capacity to ascertain the truth whilst according procedural fairness'.[140] The following discussion illustrates this claim by reference to various judicial statements in England and Australia over a long period.

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132 Sanders and Young, above n 128, 8.

133 See, for eg, text accompanying above n 124; See also, Lord Eldon in *Ex Parte Lloyd* (5 November 1822), reported as a note in *Ex Parte Elsee* (1830) Mont. 69, 70n, 72.

134 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Report No 92 (1999) [6.3].

135 Ipp, above n 123, 712.

136 Davies, above n 124, 5.

137 Jenny McEwan, *Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial* cited in A Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial Volume One* (2004) 51, 52.

138 Law Reform Commission of Western Australia, above n 134, [7.2].

139 Patterson, above n 50, 3.

140 Davies, above n 124, 4.

In England, Lord Eldon's classic view expressed in 1822 was that 'truth is best discovered by powerful statements on both sides of the question'.[141] Whether such an approach does in fact foster the emergence of the truth has since been seriously questioned, but the approach nonetheless did not deny truth a place in the justice process. It, however, stipulates what the proposer considers to be the ideal means to achieve it. Four years later, Sir James Knight-Bruce would put even greater distance between truth-seeking and the judicial mission. His Lordship observed: 'Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much'.[142] More than a century later Viscount Simon went even further in expressing reticence towards the truth. His Lordship said a court of law 'is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it'.[143] In 1960, almost 140 years after Lord Eldon's classic truth statement, Viscount Kilmuir reinforced this view in what Ipp J has described as '[p]erhaps the frankest exposition'[144] of the approach that a court of law is not engaged in ascertaining ultimate verities:

> Now the first and most striking feature of the common law is that *it puts justice before truth*. The issue in a criminal prosecution is not, basically "guilty or not guilty?" but "can the prosecution prove its case according to the rules?" These rules are designed to ensure "fair play" *at the expense of truth*. Perhaps the most obvious example of this principle is the rule that a prisoner cannot be made to expose himself to cross-examination if he does not want to. The attitude of the common law to a civil action is essentially the same: the question is "has the plaintiff established his claim by lawful evidence?" Not "has he really got a good claim?" Again, *justice comes before truth*.[145]

Those views stand in contrast with Lord Denning's qualified rejection, a few years earlier, of the view that disputes should be resolved entirely in accordance with the rules of the 'game', without being concerned in any way with discovering the truth.[146] His Lordship, while appearing to accord an over-riding role for truth-seeking simultaneously qualifies this prioritisation, as seen in the following passage from *Jones v National Coal Board*,[147] where his Lordship captures the limitation upon a judge's truth-seeking portfolio:

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141 Lord Eldon in *Ex Parte Lloyd* (5 November 1822), reported as a note in *Ex Parte Elsee* (1830) Mont. 69, 70n, 72.

142 *Pearse v Pearse* (1826) 1 De G & Sm 12; 63 ER 950 957 (Sir James Knight-Bruce).

143 *Hickman v Peacey* [1945] AC 304, 318, (Viscount Simon), cited in Ipp, above n 123, 714.

144 Ipp, above n 123, 714.

145 Viscount Kilmur, (1960) 76 *Law Quarterly Review* 41, 42-43 (emphasis added).

146 Ipp, above n 123, 713.

147 [1957] 2 QB 55.

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, *not to conduct an investigation or examination on behalf of society at large*, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, *above all, is to find out the truth, and to do justice according to the law …* [148]

Justice Davies of the Supreme Court of Queensland Court of Appeal has noted, however, that 'at least by the 1980s, judges had come to recognise that, however good our system might be at ensuring fairness between the parties, it was not effective to ascertain the independent truth'.[149] His Honour illustrated the point with observations by Lord Wilberforce and Lord Denning. The former, in *Air Canada v Secretary of State for Trade*,[150] said: 'It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is not known to be, the whole truth of the matter'[151] and that there was 'no higher or additional duty to ascertain some independent truth'.[152] In the same case, Lord Denning said that 'when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side'.[153]

In Australia the ambivalent judicial attitude towards the truth in the trial process is illustrated in the following blunt observation in *R v Whithorn*:[154]

> *A trial does not involve the pursuit of truth by any means*. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies of the case on either side.[155]

Prominent Australian jurist Sir Owen Dixon in a book in the mid-sixties noted that 'the object of the parties is always victory, not abstract

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148 *Jones v National Coal Board* [1957] 2 QB 55, 63 (Lord Denning) (emphasis added). That view was echoed by Brennan J in *Giannarelli v Wraith* (1988) 165 CLR 543, 578.

149 Davies, above n 124, 4. His Honour goes further to state that the general view that our system is effective at achieving justice between the parties 'is also a misapprehension'.

150 [1983] 2 AC 394.

151 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438 (Lord Wilberforce).

152 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438 (Lord Wilberforce).

153 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 411 (Lord Denning).

154 (1983) 152 CLR 657.

155 *R v Whithorn* (1983) 152 CLR 657, 682 (Dawson J) (emphasis added).

truth'.[156] The point is to win. Truth claims, as noted above, are internal to the community in which these truths are expressed.[157] Another High Court justice expressed a similar view, albeit extracurially, before his Honour's elevation to the High Court:

> [T]he object of the parties is simple, to win the case. If in the course of winning the case, the whole truth is unmistakably ascertained and all relevant facts exposed, then a desirable, but nonetheless *no more than incidental*, result will have been achieved.[158]

It may be noted that in both instances it was the parties' 'object' that was identified. What about the court's object, though? A New South Wales Court of Appeal justice speaking extracurially several years later expressed what might be taken as the response to that question:

> Justice differs from, and *should be placed before the truth, only if* the search for the truth results in unfairness in the proceedings. A legal system that is content for the judge to resolve disputes without attempting, within the bounds of fairness and available resources, to ascertain the truth, is a system that is fettered by a rigid formalistic structure, *inherently inimical* to the consistent achievement of justice.[159]

Justice Ipp has noted the 'inherent dichotomy' in the quest for truth and for justice, and identified the judge's truth-seeking limitation clearly: 'the power of the judge to find the truth is limited by the parties' ability and desire to lay all the relevant facts before her or him'.[160] In the traditional Australian system, the way in which lawyers practised 'was more likely to distort or even suppress relevant facts than to reveal them'.[161] In a similar vein, Justice Kirby of the High Court of Australia observed:

> Adversary trial limits most proceedings to a contest between particular parties who rarely, if ever, have an esoteric interest in purely legal developments. They just want to win the case.[162]

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156 Owen Dixon, *Jesting Pilate, and Other Papers and Addresses* (1st ed, 1965) 16.

157 They reject bivalence and instead assert that truth claims are internal to the community in which these truths are expressed, that is, truth depends on what is agreed within the community and that depends on the rules of the language game, not on dispassionate inquiry: Vardy, above n 1, 14.

158 I D F Callinan, 'Commissions of Inquiry — A Necessary Evil?' (Paper presented at the Tasmanian Bar Association Conference, Hobart, Tasmania, 5 November 1988) (emphasis added), cited in Whitton, above n 155, 38.

159 Ipp, above n 123, 716 (emphasis added).

160 Ipp, above n 123, 714. For an illustration of this point see *Bassett v Host* [1982] 1 NSWLR 206, 207 (Hope JA) (affirmed by the High Court (1983) 57 ALJR 681): 'instead of assisting the finding of the truth the system has prevented the court from having before it the only witness who could have spoken directly as to what the truth was'.

161 Davies, above n 124, 4.

162 M Kirby 'Judicial Activism' (1997) 27(1) *University of Western Australia Law Review* 1, 17.

This point is reinforced by Ligertwood, who states that it 'may be argued that parties, driven by self-interest, suppress hypotheses and evidence which promote neither parties' cause, thereby hindering the search for the true facts'.[163] The restrictions on access to information available to the parties are '*[f]or the most part* inherent in the common law procedural system'.[164] If the parties choose not to call a certain witness, however relevant that person's evidence might have been, there is nothing the court can do about it.[165] The judge must adjudicate questions of fact and questions of law submitted to the court, 'but is not responsible for discovering the truth or for settling the dispute to which those questions relate'[166] and 'comes to a conclusion based upon selected evidence'.[167] One Law Reform Commission report has stated the proposition bluntly: 'Like the civil trial … a criminal trial is not a search for truth'.[168] Justice Davies has echoed this view, noting that 'to invest our system with the virtues of ascertaining the truth or of achieving fairness between the parties does not stand up to close examination. In truth, it achieves neither'.[169]

The above views do not represent a coherent pattern of judicial positions on the question of truth. Rather, they provide fleeting insights into occasional judicial perspectives on the question. These perspectives appear to be ad hoc responses to broad matters of prevailing concern rather than a holistic answer to the role of truth in the justice process. In the administration of justice *per se*, in particular areas of the law, the courts recognise a greater competing public interest – the public interest in a just outcome – rather than the public interest in the discovery of the truth. In defamation law, for instance, it was not until recently in Australia that truth (or justification) was recognised as a complete defence. Until this development which was reflected in the Uniform Defamation Acts, truth alone was not a sufficient

163 A Ligertwood, *Australian Evidence* (4th ed, 2004), 40.

164 Ligertwood, above n 163, 273 (emphasis added).

165 Sanders and Young, above n 128, 8. See Law Reform Commission of Western Australia, above n 134, [7.10].

166 See Australian Law Reform Commission, *Review of The Adversarial System of Litigation* (1997) <http://www.austlii.edu.au/au/other/alrc/publications/intro/inquiry.html> at 22 March 2007.

167 Law Reform Commission of Western Australia, above n 134, [7.4].

168 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) Ch 3, [58].

169 Davies, above n 124, 5.

defence in some jurisdictions.[170] Aside from defamation law, the subservience of truth to some other public interest is seen for instance, in contempt law, confidentiality and copyright law. In *sub judice* contempt cases, truth is not relevant.[171] As Butler and Rodrick note, it is 'clear that at least three factors are *not relevant* to an assessment of whether a particular publication has a tendency to interfere with the administration of justice in a particular case. The *first* is the *truth* of the published statements'.[172] Similarly, truth is also subordinated to the public interest in the protection of confidential information in an action for breach of confidence and in the protection of work protected by copyright. In respect of confidentiality, unless the law permits disclosure the information is protected regardless of whether the information disclosed is true. Examples of when the confidentiality imperative may be trumped include, when the confidence is breached for the purpose of exposing an inequity[173] or when disclosure concerns misconduct that should be disclosed in the public interest.[174] In these circumstances, truth is only tangentially relevant. Similar arguments may apply in respect of copyright.

Notwithstanding the foregoing observations, it is suggested that in Australia over the last few decades there has been 'a gradual, but clearly discernible trend towards accepting that *the ultimate purpose* of our adversarial system is to resolve disputes by pursuing the truth; this goal to be limited only by considerations of fairness and resources'.[175] That observation was made more than a decade ago. It is not clear that major strides have been made in this regard since then. For the purposes at hand this much is clear, the courts do not consider the pursuit of truth in its common sense to be their primary function – desirable, perhaps, but not the ultimate goal. Deeply entrenched processes in the prevailing system render the pursuit of truth an incongruous objective. And we shall see why.

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170 At common law, prior to the uniform legislation, truth was a complete defence in Western Australia, Northern Territory, South Australia and Victoria. In Queensland, Tasmania and the Australian Capital Territory it was also necessary to prove that it was for the public benefit that the imputation was made: *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [810]. In New South Wales, it had to either relate to a matter of public interest or have been published under qualified privilege: see Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 104.

171 See cases cited in Des Butler and Sharon Rodrick, *Australian Media Law* (3rd ed, 2007) 268 footnote 328: *Skipworth's Case* (1873) LR 9 QB 230, 234; *R v Saxon, Hadfield & Western Mail Ltd* [1984] WAR 283, 291; *DPP v Australian Broadcasting Corporation* (1987) 86 FLR 153, 163.

172 Butler and Rodrick, above n 171, 268 (emphasis added).

173 *Gartside v Outram* (1856) 26 LJ Ch 113.

174 *Initial Services v Putterill* [1968] 1 QB 396.

175 Ipp, above n 123, 714 (emphasis added).

C *Some Criticisms of the Notion of Courts as a Truth-Seeking Institution*

Pursuant to the foregoing discussion, and at the risk of repetition, the adversarial system is afflicted by several weaknesses[176] that render truth a casualty.[177] Parties control what gets into court[178] and may suppress evidence.[179] The rules of evidence operate to enable the exclusion of 'the truth',[180] hence the epithet 'exclusionary rules'.[181] On occasion these 'complex web'[182] of rules are referred to as 'inclusionary' rules.[183]

McEwan sums up the malaise well in her observation that 'many of the rules of evidence which owe their existence to the structural demands of the adversarial system are incompatible with the uncovering of the truth'.[184] These rules include: (a) legal professional privilege; (b) the privilege in aid of settlement; (c) the privilege against self-incrimination; (d) the immunity of judges and jurors from testifying on the reasons for decisions; and (e) public policy restrictions upon access to information – parliamentary privilege, restrictions protecting marriage and family relationships, restrictions protecting confidential relationships, and public interest immunity.[185] Adjudicative fact-finding then, is about probabilities, not about certainties, and the uncertainty problem is further exacerbated by time constraints. Stein states:

> Adjudicators have to decide cases within reasonable time limits. Justice delayed is justice denied. This requirement forces adjudicators to curtail their fact-finding inquiries and decide cases based on limited informational resources. Facts contested in adjudication have to be reconstructed on the basis of deficient evidence. Adjudicators have to determine those facts by relying on accounts of fallible and biased witnesses; by not considering all evidence that they possibly could consider; by invoking generalisations and inference that are nothing but rough approximations; and, finally, by subjecting the existing evidence to credibility tests that are never carried through to perfection.[186]

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176 Law Reform Commission of Western Australia, above n 134, [7.10] notes that the adversarial system is 'often criticised – and was subject to strong condemnation in public submissions [the LRCWA received] because it is not sufficiently concerned with finding the truth'.

177 Law Reform Commission of Western Australia, above n 134, [6.1] and [7.10]. See also Jerome Frank, *The Courts on Trial* (1st ed, 1949) 102.

178 Law Reform Commission of Western Australia, above n 134, [7.3].

179 Sanders and Young, above n 128, 9.

180 Law Reform Commission of Western Australia, above n 134, [7.12], [20.8] and [24.1].

181 Hal Wootten, *Conflicting Imperatives: Pursuing Truth in the Courts* in Ian McCalman and Ann McGrath (eds) *Proof and Truth: The Humanist As Expert*, (2003) 22.

182 Sanders and Young, above n 128, 9.

183 See Philip McNamara, 'The Canons of Evidence – Rules of Exclusion or Rules of Use?' in William Twining and Alex Stein, *Evidence and Proof* (1st ed, 1992) 291.

184 McEwan, above n 137, 66.

185 Ligertwood, above n 163, 273-407.

186 Alex Stein, *Foundations of Evidence Law* (1st ed, 2005) 35.

The parties' control of proceedings, the rules of evidence, and judicial and jury passivity, furthermore, 'all combine to make the system open to manipulation by smart, wealthy and determined criminals'.[187] It is said further that 'to treat law as, above all, a fight surely cannot be the best way to discover the facts'[188] and that the view that manipulation of evidentiary material by the parties best enables the court to determine the truth is 'an assumption at best unproven and at worst highly implausible'.[189]

Another area of controversy in respect of the courts concerns the notion of 'objectivity'. In classical democratic theory, both law (and by extension the courts) and the media gain much of their power through their apparently neutral or objective status, and in both cases, objectivity is seen traditionally 'as the guarantee of fairness and fairness is seen as a mediator of justice'.[190] Recent theory in both media and jurisprudential studies, however, would see objectivity as 'a complex and … far more ambiguous phenomenon'.[191] In law, it has been suggested that there are three types of objectivity, and different types of objectivity are manifested in 'common thinking about law', [192] including in courtrooms.

D *Some Responses to Criticisms*

In response to the criticisms above, it is argued that truth is best discovered by powerful statements from the parties,[193] evaluated by a passive and impartial adjudicator.[194] It is said further that the adversarial system does not devalue truth but takes the view that the truth emerges from the presentation by the prosecution and the defence of alternative versions of the facts, based on the evidence each side presents.[195] It is, on this view, a strategy for discovering the truth and this view resembles the *marketplace of ideas* theory advanced in the discussion

187 Law Reform Commission of Western Australia, above n 134, [7.11].

188 Frank, above n 177, 102. Frank notes Professor Morgan's observation that law-suits are not a proceeding for the discovery of truth but a game in which the contestants are not the litigants but the lawyers.

189 Nico Jorg, Stewart Field and Chrisje Brants, 'Are Inquisitorial and Adversarial Systems Converging?' in Phil Fennell, Christopher Harding, Nico Jorg and Bert Swart (eds), *Criminal Justice in Europe: A Comparative Study* (1st ed, 1995), 41, 43.

190 Marcus O'Donnell, 'Preposterous Trickster: Myth, News, the Law and John Marsden' (2003) 8(4) *Media and Arts Law Review* 282, 284. That discussion occurs specifically in O'Donnell's examination of the 'objectivity fallacy' in respect of the law and the media.

191 O'Donnell, above n 190, 284.

192 O'Donnell, above n 190, 284, citing Posner.

193 *Ex Parte Lloyd* (1822) Mont 70, 72n.

194 Sanders and Young, above n 128, 8.

195 Law Reform Commission of Western Australia, above n 134, [7.3].

on free speech.[196] The relegation of the truth pursuit to second place is justified, it is said, by the courts' primary mission – to deliver justice. It is said further: 'It should be remembered, however, that in every case the ultimate aim of the justice system must be to deliver justice, which is not always the same as delivering truth'.[197]

The courts then pursue justice through particular processes, whose main features can be summed up as follows: (a) the court's role is to hand down a decision on the evidence before it; (b) it is for the parties to produce the evidence; and (c) the evidence must observe the limits of the evidentiary rules.[198] It is also argued that having a judge as umpire is 'a far better'[199] way as it is 'more likely that the "real truth" will emerge'.[200] Also, criticism of the adversarial system, it is said, appears to be founded, erroneously, on 'the idea that it is possible to get really true facts about the world but that the adversary system is the wrong way of going about it'.[201] In defence of the rules of evidence, it is said that the search for truth must have 'procedures for discovery'[202] and that rules of evidence ensure integrity in collecting evidence and proving guilt.[203] Inquisitorial systems, on the other hand, lack evidence-gathering rules because they 'may hamper the search for the truth'.[204] Claims that greater judicial pre-trial supervision in inquisitorial systems[205] is good, is disputable[206] as the 'investigator' is prone to bias.[207] And, finally, a sacrosanct principle of the trial acts as a powerful restraint on a court's initiative in pursuing the truth:

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196 The *marketplace of ideas* concept is drawn from American jurisprudence in Holmes J's well-known dictum which advocates the free entry of ideas into the marketplace, and for the truth to emerge through a collision of ideas: *Abrams v United States* 250 US 616 (1919), 630.

197 Law Reform Commission of Western Australia, above n 134, [7.11]. An illustration of the point can be seen in circumstances where juries may sacrifice the truth to avoid a gross injustice because: (a) they reject the law that criminalises the wrong for which the defendant is being tried; (b) they reject not the criminalisation of the act but the level of sanction attached to it; or (c) they accept the law and concomitant sanction but simply have no wish to see them applied to the particular defendant on trial: See M Matravers, 'More Than Just Illogical: Truth and Jury Nullification' in Duff et al, above n 137, 74, citing D Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (2000) 5.

198 See Graham Roberts, *Evidence: Proof and Practice* (1st ed, 1998) 23.

199 Sanders and Young, above n 128, 9.

200 Sanders and Young, above n 128, 9.

201 Bankowski, above n 49, 11.

202 Bankowski, above n 49, 13; also see generally 12-15.

203 Sanders and Young, above n 128, 9.

204 Sanders and Young, above n 128, 9.

205 Law Reform Commission of Western Australia, above n 134, [7.16].

206 Sanders and Young, above n 128, 10.

207 Sanders and Young, above n 128, 8.

> Perhaps the most sacred principle of the modern trial is that the court is forbidden from acting upon its own knowledge of material facts in issue and from carrying out its own investigation of those facts or otherwise relying upon extra-evidentiary curial observations.[208]

E *Summary*

A number of points may now be made in summarising the role of truth in the justice system.

First, two somewhat contrasting positions as to the role of truth have been expressed in recent times in Australia. One is the view that there is 'a clearly discernible trend towards accepting that *the ultimate purpose* of our adversarial system is to resolve disputes by pursuing the truth'.[209] The other is that delivering justice and delivering truth are 'not always the same' thing, and the justice system's ultimate aim is to deliver justice.[210] Furthermore, 'the characteristic mode of reasoning is induction; the pursuit of truth as a *means* to justice under the law commands a high, but not necessarily an overriding, priority as a social value'.[211] On the one hand it may be argued that the two positions are not all that different as they both view the pursuit of truth as a means to an end, and not an end in itself. On the other hand, it is arguable that the justice system, not least of all because of trial methods and inquiry processes, does not always facilitate the emergence of truth.[212]

Second, any profession of allegiance to truth in the justice system is a qualified one, that is, the quest for truth must be limited by the scope of the judicial function.[213] Questions of procedure, fairness and resources inevitably come into play. As Weinstein has usefully summarised:

> Even were it theoretically possible to ascertain truth with a fair degree of certainty, it is doubtful whether the judicial system and rules of evidence would be designed to do so. Trials in our judicial system are intended to do more than merely determine what happened. Adjudication is a practical enterprise serving a variety of functions. Among the goals – in addition to truth finding – which the rules of procedure and evidence … have sought to satisfy are economising of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system and tranquilising disputants.[214]

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208 Ligertwood, above n 163, 437-438 (authorities omitted).

209 Ipp, above n 123, 714.

210 Law Reform Commission of Western Australia, above n 134, [7.11].

211 Wootten, above n 181, 31, citing W Twining, *Rethinking Evidence: Exploratory Essays* (1990).

212 See, for eg, the discussion under above heading III C.

213 See *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR 1, 11.

214 Jack B Weinstein, 'Some difficulties in Devising Rules for Determining Truth in Judicial Trials' (1966) 66 *Columbia Law Review* 223, 241.

The variety of influences upon truth-seeking in the judicial process can be seen further in the observation of Sanders and Young: 'Walking the tightrope separating one value, truth, from the competing value of procedural fairness is clearly difficult. Other values also come into play, such as economy and efficiency'.[215] These characteristics might be seen as features of the practical exigencies of judicial decision-making, to adapt Lord Hoffmann's description in a journalism context.[216] The judicial approach to truth may be contrasted with the pursuit of truth in, say, an esoteric sense or in the sense of the philosophical debates that turn on epistemological, metaphysical and other bases. In short, even if the pursuit of truth is accepted as being the 'ultimate aim' of the trial process that aim comes with many qualifications.

Third, the courts' primary concern is with 'evidence' and 'proof'.[217] The law inclines towards relevant 'information', 'facts', 'evidence' and 'proof' rather than towards 'truth'. As Wootten notes: 'The distinction between the facts and the law or "legal criteria" that are applied to them is fundamental to the judicial task'.[218] He observes further: 'The courts have no explicit theory of truth or knowledge [and] are much more likely to talk about "the facts"'.[219] But does this mean that the justice system is not concerned with the truth? Sanders and Young offer a more charitable view of truth-seeking by courts in the adversarial system of justice, where they note: '[I]t is sometimes said that adversarial systems focus on proof, and inquisitorial systems on truth. But this is too simplistic. Both systems are concerned with establishing the truth, but they differ on the best way of achieving that end'.[220] They may also differ on what 'truth' means given that the term has several meanings, as seen in the discussion above.[221] It would be more accurate to say, however, that the kind of truth that the courts pursue is a qualified one, and the nature of some of those qualifications are noted by Wootten:

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215 Sanders and Young, above n 128, 12.

216 See *Campbell v MGN Limited* [2004] 2 All ER 995, 1012-1013.

217 The meanings of the two terms are somewhat bound up in each other. P K Waight and C R Williams, *Evidence – Commentary and Materials* (4th ed, 1995) 1, describe the law of evidence as consisting of 'the rules and principles which govern the proof of the facts in issue at a trial'. The *Evidence Act 1995* (Cth) s 55(1) refers to 'relevant evidence' which it describes as 'evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.

218 Wootten, above n 181, 18.

219 Wootten, above n 181, 31.

220 Sanders and Young, above n 128, 8.

221 See discussion under above heading II.

> My point is not to glorify the system, but to bring out that the primary claim is not that it gets things right, or discovers the truth, but that it gives parties a "fair go" … The system seeks truth. That it should do so is implicit in the notion of a "fair" hearing, and in our law's concept of acting judicially, which "excludes the right to decide arbitrarily, irrationally or unreasonably". However truth is often very hard, sometimes impossible, to find, and society cannot indefinitely postpone dispute settlement while the quest proceeds. A number of things may deflect, override, or force compromises on, a court's search for truth … our law privileges procedural justice over the search for truth … the quest for truth remains, but is narrowed to what the parties choose to put in issue, and the use of the evidence they choose to present.[222]

Fourth, in Australia there has been a 'quiet but enormously significant revolution'[223] as courts move away from a passive role in civil litigation.[224] The rationale for this, however, is to target delays, and to promote early settlements and cost reductions, and not the quest for truth specifically.[225]

Fifth, a critical question remains – is truth attainable? The view from a legal perspective is that truth is not always there to be found in a trial and furthermore, the law's interest is in a truth that can be proved in keeping with the required standard of proof through a particular procedure.[226] It is suggested that the 'pursuit of truth' justification that is advanced in free speech discussions is attractive but elusive:

> [It] is a very appealing metaphor, but it assumes that there is a "truth" to be attained. At times, however, there is no real objective truth to be found in a trial – particularly where the issue is to do with a person's state of mind or motivation … we often do not know even our own motivations. Therefore it is impossible to know with absolute certainty the motivation of another person … *the law is not interested in an objective truth so much as a truth that can be proved beyond reasonable doubt* (or, depending on the context, on the balance of probabilities) *by a rational and fair procedure*. This, in essence, is the fundamental debate underlying freedom of discussion and contempt law: when, if ever, should people be forced to be satisfied with the *legal truth* and when should they be allowed access to "the" truth?[227]

The reference here to 'legal truth' appears to have been made in passing but it suggests the existence of 'a truth' that is unique to the

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222 Wootten, above n 181, 18-19 (references omitted).

223 Peter A Sallmann, 'Managing the Business of the Australian Higher Courts' (1992) 2 *Journal of Judicial Administration* 80, 80.

224 Ipp, above n 123, 723.

225 Ipp, above n 123, 723.

226 Law Reform Commission of Western Australia, *Review of the Law of Contempt*, Report No 93 (2003) 21. See also text accompanying above n 214 on this point.

227 Law Reform Commission of Western Australia, above n 226, 21 (emphasis added).

justice system.[228] Truth in the legal sense, therefore, is another way of ascertaining what really happened – whether a person did or did not commit a wrong:

> "Guilt" is a word that is used internally to the law. It is an ascription that comes at the end of a specifically legal procedure and must not be confused with lay views of whether "he did it". In other words the ascription "he is guilty" is not the same as "he did it" made by (say) a policeman.[229]

It relies on a particular 'truth certifying' procedure and our knowledge of the facts and the truth is dependent on that procedure:[230]

> The trial then is an institution which gives the ground rules for the alternative verdicts "guilty" or "not guilty" which are internally linked to the propositions "he did it" and "he did not do it" of reality. How does the trial procedure then arrive at the "truth"? What is the point of the process? The aim of the process is, I suggest, to produce a coherent story or picture of the events and reality under dispute … the judicial process is simply a particular method of attempting to get at the truth, a particular truth certifying procedure.[231]

The term 'truth', however, does not appear to have become established as a key component of legal nomenclature and discourse. Indeed, the available evidence tends to point the other way, that is, it suggests that even where an interest in restoring the primacy of truth-seeking is professed, there is keen appreciation of institutionally-imposed impediments.

Sixth, the principles at work in different systems are influenced 'by history, culture and underlying ideology'.[232] Clearly, the Australian approach has been heavily shaped by historical developments and 'owes its form exclusively to history'.[233] Changing to a full-fledged truth seeking process would require change so fundamental that it would be impossible.[234]

Seventh, and finally, we may take note of the constant reminder in the above discussion of the difficulty in seeking truth. Twining refers to 'powerful reminders of the difficulty of the enterprise of seeking after

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228 This is in the sense, as Bankowski suggests, the trial procedure does not constitute legal truth 'as our more radical epistemological position would have it' (see Bankowski, above n 49, 16-17).

229 See Bankowski, above n 49, 8.

230 See Bankowski, above n 49, 17.

231 See Bankowski, above n 49, 15.

232 Sanders and Young, above n 128, 7.

233 Ipp, above n 123, 711.

234 This was the view expressed in respect of any change from an adversarial to an inquisitorial system, by England's Royal Commission on Criminal Procedure *Report* (1981) Cmnd 8092, HMSO, London, [1.8] cited in McEwan, above n 137, 51.

truth'.[235] He adds that 'the pursuit of truth is a difficult enterprise deserves the status of a truism; it is fair to say that within evidence scholarship this has sometimes been part of 'the neglected obvious''.[236] The courts are constituted to serve an important social purpose – the administration of justice. This brief demands something different from the ascertainment of ultimate truths. It denies the courts the luxury enjoyed by philosophers (as seen above) and journalists to defer their decisions until the truth imperative is fully discharged assuming, of course, that such an ideal is attainable. The courts must make decisions and they must make them efficaciously. They are in the business of practical reasoning, as opposed to philosophy's tendency for theoretical reasoning, and they must provide certainty and finality:

> Adjudication can never be halted in indecision. A decision not to decide the case is actually a decision to reaffirm the status quo. Adjudicators have to resolve the disputed issues of fact one way or another and are not authorised to withhold their decision in the presence of uncertainty. This is what practical – as opposed to theoretical – reasoning is about.[237]

IV Conclusion

The justice system's approach to the truth, when viewed against the backdrop of the philosophical truth discussion above is not altogether divorced from the *coherence* and *correspondence* approaches. A co-relation can be established with both these epistemological positions.[238] The construction of reality in the courtroom is '*at base*, a coherence as opposed to a correspondence theory of truth'[239] and its 'aim is the construction of a coherent picture, rather like the construction of a jigsaw puzzle where all the pieces come together'.[240] As Bankowski notes, we can 'be agnostic about the general epistemological positions, regarding 'correspondence' or 'coherence', and note that the main point of the trial is constructing a coherent picture or reality. But it is a bit more than that. It is also a way of testing rival coherent pictures'.[241] As noted earlier, the coherence approach would find guilt or otherwise 'at the end of a specifically legal procedure' and should not be confused with the lay view that 'he did it'.[242] The 'basic core' of the coherence

235 Twining, above n 211, 128.
236 Twining, above n 211, 129.
237 Stein, above n 186, 34.
238 See Bankowski, above n 49, 16.
239 Bankowski, above n 49, 9 (italics added).
240 Bankowski, above n 49, 15.
241 Bankowski, above n 49, 16. For an illustration of this proposition see Bankowski, above n 49, 15-16, and the case of *R v Voisin* [1918] 1 KB 531.
242 Bankowski, above n 49, 8-9, provides a useful discussion in the context of how the courts go about establishing guilt: see quotation accompanying above n 229.

theory of truth is the conception that beliefs or judgments are 'true or false according to whether or not they fit in – *cohere*, with the body of other beliefs (or whatever) that are true'.[243] The *coherence* theory measures truths by their 'fit' within a given system.[244]

In contrast the correspondence theory espouses the view that if the person is guilty 'he did it' – as if there was 'some kind of independent reality by which we can measure the truth or falsity of the matter'.[245] The correspondence approach, simply stated, is that when something happens 'it really is so and the statement concerning it is true'.[246] In a trial then, 'guilt' according to the correspondence theory means 'he really did it'. Or, to put it in another way 'a statement is true if, and only if, it corresponds to reality, and false if it does not do so'.[247]

The paradox that follows from this discussion is that there are at least two kinds of truth. The *coherence/correspondence* dichotomy creates the paradox that legal inquiry is amenable to at least two, potentially, different (or conflicting) truths. This has been referred to as *substantive truth* (or 'actual truth' that permits the conclusion that 'he really did it') and *formal legal truth*[248] (which is created by the fact-finder which could mean, for example, that 'he really did it' or that 'he really did it but is not guilty' because the interests of justice would dictate this). While it is to be hoped that a properly designed legal system will result in the formal legal truth coinciding with the substantive truth, there are many instances in which a properly designed legal system will contain features that result in the formal legal truth and the substantive truth diverging.[249] An important conclusion from this discussion is that the

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243 Johnson, above n 2, 15. See also text accompanying above n 79.

244 Bankowski, above n 49, 9, 16.

245 Bankowski, above n 49, 9.

246 See discussion under above heading II A 1, see especially text accompanying above n 49.

247 Bankowski, above n 49, 8-9.

248 See Matravers, above n 197, 73 (reference omitted).

249 Matravers, above n 197, 73. See above heading III C for a discussion of some of these features. The overturning of the following wrongful conviction cases illustrate the point well: *Button v R* (2002) 25 WAR 382; *Beamish v R* [2005] WASCA 62; *Mallard v R* [2005] HCA 68: *Narkle v The State of WA* [2006] WASCA 113. Similar examples may be found in 'Innocence Project' cases. 'Innocence Project' refers to the groups, often affiliated with tertiary institutions, who are dedicated to exonerating wrongfully convicted persons. Such groups can be found in the United States: see <http://www.innocenceproject.org/about/>; the United Kingdom: see <http://www.innocencenetwork.org.uk/>; and Australia: see <http://www.griffith.edu.au/school/law/innocence/home.html>. A related point arises from s 42 Uniform Defamation Acts which provides that if the question whether a person committed an offence is in question in defamation proceedings "proof that the person was convicted of the offence by an Australian court is *conclusive evidence that the person committed the offence*" (emphasis added). As the examples cited in this footnote show, this proposition is doubtful.

legal inquiry process is not conducive to establishing substantive truth or truth on the correspondence test – that is, it is not conducive to establishing whether 'he really did it'. This, however, as discussed above, is not altogether as diabolical as it may appear.[250]

250 See above heading III D.