Baosheng Zhang
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A Dialogue Between Law and History

Proceedings of the Second International Conference on Facts and Evidence

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Preface

The articles in this volume grew out of the papers presented at the *Second International Conference on Facts and Evidence: A Dialogue Between Law and History* held at the Peking University School of Transnational Law (STL) in Shenzhen, China, between September and November 2019. From September 14 to 15, eight Chinese-speaking scholars held a workshop at STL to exchange views on their draft papers. On November 16 and 17, these scholars joined with more than a dozen legal scholars and historians from various universities and research institutions in Europe and the USA to expand the discussion into an international dialogue between historians and legal scholars. The *Second International Conference on Facts and Evidence: A Dialogue Between Law and History* was the second installment of a cross-disciplinary research project on facts and evidence under the auspices of the Collaborative Innovation Center of Judicial Civilization (*CICJC*), a multi-institutional research platform with its primary anchor at the Institute of Evidence Law and Forensic Science (*ELFS*) of China University of Political Science and Law (*CUPL*). The inaugural conference of this project, the *First International Conference on Facts and Evidence: A Dialogue Between Law and Philosophy*, was co-hosted by CICJC and East China Normal University and successfully convened in Shanghai, China, in May 2016.

Like their fellow researchers in other disciplines in the humanities and social sciences, historians and legal scholars and practitioners share the same interest in ascertaining "truth" in facts in their respective professional endeavors. It is generally recognized that any historical study without truthful reconstruction of historical events is fiction, and any judicial trial without accurate fact-finding is a miscarriage of justice. In both historical research and judicial process, practitioners are invariably called upon, before making any arguments or judgments, to prove the underlying facts through evidence; however, these concepts are defined or employed in different academic or practical contexts. Thus, historians and legal professionals have, respectively, developed theories and methodological tools to inform and explain the process of evidentiary proof and the core concepts of evidence, inference, interpretation and, above all, rational reasoning. Compared with other disciplines, history and law have uniquely close relationship with each other, and have developed, as demonstrated by several authors in this volume, mutually dependent and yet uneasy reliance. When lawyers and judges try to resolve a legal dispute, they first endeavor to ascertain

what happened that gave rise to the dispute in recent or distant past in order to answer the "questions of fact," thus undertaking a historian's mission of fact-finding. Considering that "questions of law," the second task of resolving a legal dispute, are actually a subset of "questions of fact," it is apparent that the law determination process involves primarily questions of "historical fact." In addition, the dialogue between law and history is not just a theoretical exercise but one of enormous practical significances. For instance, because of the rise of "originalism" in interpreting the US Constitution, as explicated in at least one of the articles in this volume, getting the facts right determines the outcome in constitutional decisions by the U.S. Supreme Court.

The *Second International Conference on Facts and Evidence: A Dialogue Between Law and History* intended to bring together scholars in the legal and history disciplines from different intellectual, cultural and jurisdictional backgrounds to explore some issues of common interest in the role of fact and evidence in both disciplines. Historians and legal scholars have engaged in exchange of views on these matters for many years, especially since the second half of the twentieth century, but rarely have concerted efforts been organized to consider these issues in face-to-face dialogue or produce collection of scholarly writings in a single volume. Two prominent efforts stand out. One is *Evidence and Inference in History and Law: Interdisciplinary Dialogues* (2003), which focuses exclusively on comparison of history and law borne out of an international seminar at the Netherlands Institute for Advanced Studies, 1994–1995.[1] An older and with a broader comparative perspective beyond law and history, *Evidence and Inference: The Hayden Colloquium on Scientific Concept and Methods* also contains half a dozen articles on fact-finding in history and law.[2] In some sense, this volume follows the intellectual footprints of this tradition and expands the related efforts to include Chinese scholars in this hereto exclusively Western academic and cultural undertaking.

We are grateful to the participants of the conference and contributors to this volume for devoting time and intellectual prowess to this historic interdisciplinary and cross-cultural dialogue. We acknowledge the financial and institutional support from CICJC, EIFS, CUPL and STL that made the conference and publication of this book possible. Special appreciation is due to Profs. Ronald J. Allen and Q. Edward Wang, academic advisors to this project, who not only, respectively, helped identify leading scholars in law and history from all over the world but also provided valuable advice in developing the thematic topics of the conference. We thank all colleagues and students from CUPL and STL who have contributed in different but all helpful ways to the organization of the conference, particularly Dean Philip McConaughey

[1] *Evidence and Inference in History and Law: Interdisciplinary Dialogues*, eds., William Twining and Iain Hampsher-Monk (Chicago: Northwestern University Press, 2003).

[2] *Evidence and Inference: The Hayden Colloquium on Scientific Concept and Methods*, ed., Daniel Lerner (London: Cambridge University Press, 1962).

of STL, Professor Lin Jing of CUPL and Professor Patrick Jiang and Ms. Wang Wei of STL. We would also like to thank Springer and in particular Ms. Leana Li, Ms. Lydia Wang, Ms. Fiona Wu, Mr. Umamagesh Perumal, and Mr. Augustus Vinoth, for their hard and efficient work to ensure the publication of this book.

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History, Science, Law … and Truth: Reflections on Fact Finding in History, Science and Law

Ronald J. Allen

Virtually all intellectual disciplines, excepting only the most introspective, pursue knowledge of an external world, employing naive concepts of both truth and knowledge, and even the purely introspective disciplines (if there are any) do the same regarding the internal states of mind and emotion of the person engaging in the intellectual effort. Truth in the naive sense is captured by propositions that accurately describe whatever their referents are, and knowledge is having beliefs whose contents are in fact true propositions in that they accurately correspond to an external reality. All disciplines do so because any other form of inquiry is pointless. If there is no accessible external world, and even if there is, if one cannot explore it systematically, we are all figuratively (and maybe literally) brains in a vat, and so we may as well go have a beer and be done with it. No sane person believes any of this of course, even those who promulgate some of the more inane philosophical ramblings about skepticism, the inaccessibility of direct knowledge of the external world, and puzzle over the deep meaning of Gettier examples. In a remarkable irony that often goes unnoticed, the most radical subjectivist, the most diehard skeptic, the person most convinced that knowledge of the world is unobtainable is constantly trying to convince the rest of us that his or her arguments are correct—are actually true in the real world—that one cannot know the real world exists nor know anything about it.

Peculiar beyond belief, I say. And thus I go naively about my business in a small corner of what might be called naturalized epistemology of exploring how juridical proof actually works in western legal systems, untroubled by the philosophical meaninglessness of it all. But exploring the nature of juridical proof soon brings one into contact with the methodologies of other disciplines, and this happened in the law when in the middle of the twentieth century that stalwart of science—mathematics in general and probability theory specifically—was viewed as perhaps the solution

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to many of the problems bedeviling an adequate understanding of juridical proof. It turned out this was a false turn for many reasons, which I will not go into, but I want to mention the conceptual issue that causes the deep incompatibility between probabilistic explanations of juridical proof and the reality on the ground (and for that matter behind any formal theory of evidence). For probability theory to be explanatory of trials, people would need know the necessary probabilistic data to appraise evidence, such as accurate base rates and likelihoods (or belief functions, credences, etc., if one is operating within unconventional probabilistic models). But to do that, they must already know the outcome of the case being tried. Evidence at trial is obviously contingent in the sense that the implications of any particular piece of evidence is a function of all the other data relevant to the case. Litigated cases are not like pari-mutuel betting in which fully specified statistical rules determine precisely the effect of each new bet. Evidence of the existence of a dead body does not mean that a murder occurred, for example, because subsequently admitted evidence may show the death to have been accidental or in self-defense. If evidence is not contingent in this sense from a fact finder's perspective, then the fact finder already must know that there was no accident or self-defensive act, but that is exactly my point. To implement a probabilistic theory of evidence requires that the outcome already be known, which of course makes the trial itself superfluous. The hope to systematize proof is much like the futile hope that we will eventually know enough about scientific theories to make Bayesian judgments about them. That will happen in science, as in the law, only when we already know all there is to know, and thus only when scientific and legal inquiry no longer serve a purpose.

Perhaps these speculations about the nature of evidence and probabilistic approaches to fact finding do not apply to historical work.[1] But maybe they do. As Carl Hempel has noted, some historians have believed that history is concerned with the description of the particular events of the past, much like the grist of the legal mill, whereas others see the historian's task as proposing interpretations of those particular events or finding underlying "scientific laws" that explain the data. Apparently no one since the demise of the German school of history that Hempel is criticizing seems to think that the historians' task is to just chronicle the historical facts, but whether that task is to find scientific laws or provide interpretative glosses is more contested. Hempel argues that the actual historical events are mere evidence of general laws that historical work seeks to discover and not just justifications for subjective interpretations of scattered pieces of evidence from the past. One sees the implications of Hempel's approach in historiography today and its fascination with Big Data that to all intents and purposes looks like empirical science.[2] In any event, positions on historiography seem located somewhere in the range from the search for scientific laws to the proffering of interpretations.

The law has a different concern that markedly distinguishes it from both the scientific conception of historical research and the interpretive version, as well as setting it apart from scientific inquiry. At trial, the effort virtually always is to reconstruct

[1] The next few paragraphs are influenced by Allen (1994).

[2] See e.g., van Nederveen Meerkerk (2017).

a particular event, to tell things as they were in a fashion quite consistent with the Germanic conception of historiography that has been thoroughly rejected by historians. The purpose is neither to uncover general causal laws nor to articulate historical interpretations of an event. To be sure, general causal laws may be invoked intermediately as evidence that some event occurred, and themselves may be the subject of evidence. Historical interpretations, or any other kind for that matter, are the handmaidens of reconstruction rather than its result. An obvious example is that motive is always admissible but virtually never an element in a cause of action.

Interestingly, most sciences are radically unlike either law or history in that the data are virtually never problematic. What actually happened is typically the uncontroversial starting point for attempting to explain why it happened. If the data are ambiguous, experiments generally will be repeated until replication is satisfactorily achieved, thus ruling out observational insufficiencies and leaving only theoretical insufficiencies as the problem. In a sense like the interpretive approach to history, scientific theories are then advanced to explain the observations of the data but the only ones that matter are those that point to methods of confirmation—to further empirical tests of predictions made by the theory. The critical difference between science and history on this score is that the historical interpretations (like much of the debates over American constitutional law, for example) do not appear to be empirically resolvable (which may be true of Hempel's conceptions of historical laws as well; brave talk does not substitute for rigorous empirical methods). To be sure, in scientific endeavors securing the data can be difficult, as in the arduous task of searching for the Higgs Boson, but at the end of the day that data either are or are not there. In the law, and often in history, exactly the opposite obtains. Inconsistent primary data ("the light was red"—"no, it was green") are the norm, and replication is generally impossible. In legal decision making, controversy virtually always settles on what happened. Why something happened (whatever did happen) may be evidentially controversial, by which I mean parties may advance varying and conflicting generalizations for the benefit of the fact finder (consider again motive), but they will be advanced in an inferential structure leading to a conclusion about a fact or series of facts rather than about a universal, a principle, or a theory.

At least one other significant difference between science and law—and I diffidently suggest history as well—obtains. Regardless of the process of discovery, scientific knowledge is organized in a hypothetico-deductive fashion. General principles are taken as assumptions under which are organized principles of increasing specificity. This organizes not only the knowledge but also the efforts of researchers. Work focuses on either systematizing further the deductive structure of preexisting knowledge through the elimination of anomalies (empirically or theoretically) or on the modification or replacement of the conceptual structure of the field. While some philosophers of science see these activities as quite distinct, their respective practitioners have much in common. Both share a well-organized body of substantive and methodological knowledge, although they may disagree about the explanatory power of that knowledge. Still, the disagreement typically exists over well-defined issues and is swamped by the scope of agreement. Even those assaulting the conceptual

foundations of a field typically share with those doing work within a field methodological and mathematical principles, agree on what counts as evidence, and are able to express their scope of disagreement comprehensibly. And it is precisely the scope of agreement and disagreement that generates highly specific research efforts that occur at multiple sites simultaneously that actually bring about, in Harman's phrase, a change of view (and which also puts a lie to a considerable extent to the Kuhnian tall tales of incommensurability).

This description of the activity of scientific research does not describe factual inquiry in the legal process, although for a counterintuitive reason. The difference is not that scientific inquiry is highly complicated and lay judgments about ordinary life quite simple, but the exact opposite. Scientific progress in large measure proceeds through the simplification of phenomena, in particular through controlling as many variables as possible, which the hierarchical structure of scientific knowledge facilitates. Judgments about ordinary events, by contrast, virtually never are and cannot be recast as the results of controlled experiments. Too many variables are constantly and necessarily in play. And factual judgments at trial are even more resistant to domestication because the complicating features of the trial process are draped over the bubbling cauldron of real life.

Consider a simple example. Suppose a witness begins testifying, and thus a fact finder must decide what to make of the testimony. What are some of the relevant variables? First, there are all the normal credibility issues, but consider how complicated they are. Demeanor is not just demeanor; it is instead a complex set of variables. Is the witness sweating or twitching, and if so is it through innocent nerves, the pressure of prevarication, a medical problem, or simply a distasteful habit picked up during a regrettable childhood? Does body language suggest truthfulness or evasion; is slouching evidence of lying or comfort in telling a straight forward story? Does the witness look the examiner straight in the eye, and if so is it evidence of commendable character or the confidence of an accomplished snake oil salesman? Does the voice inflection suggest the rectitude of the righteous or is it strained, and does a strained voice indicate fabrication or concern over the outcome of the case? And so on.

The list of relevant variables goes far beyond credibility issues, of which demeanor is only one. When a witness articulates a proposition, the fact finder must determine what the proposition is designed to assert. That task, too, involves an immense number of variables. In addition, the fact finder will possess some knowledge based on its observations leading up to the first articulated proposition by a witness, acquired from the lawyers for example. And there are many more examples. For the law to proceed as a science would require that many of these variables be in a deductive structure with their necessary and sufficient conditions spelled out. No such structure could be created; it would be too complex. Moreover, the "thing" being theorized is adaptive, and thus would immediately begin to change, making the deductive structure outdated before it could even begin to do its work.[3]

Although we see that the structures of scientific and lay knowledge differ both in organization and acquisition, implicit in them both is the inability to state a priori

[3] See, e.g., Allen (2011, 2013).

the necessary and sufficient conditions for knowledge. Lay knowledge is, somewhat counterintuitively, an a fortiori case because of its complexity and the resultant lack of organized attempts to eliminate agreed-upon ambiguity. In the lay world, hordes of laymen do not descend in an organized fashion on well-articulated problems to resolve them in a fashion analogous to the work of scientists. This is not primarily because the problems are trivial but instead because the scope of ambiguity is far too wide. I think it fair to say, at any rate, that we lack consensus over the extent of our knowledge of conventional affairs (some people know, or believe they know, matters that elude others) or in what order aspects of it should be studied (some people regret ambiguity about wine more than ambiguity about truthfulness at trial; others do not). And of course, it is not obvious, outside of legal disputes, what the payoff might be for investing greater resources than we presently do in an organized effort to eliminate conventional ambiguity.

How does historical work fit into this? I am not sure. I suspect that it exploits the complexity of the human condition with which the law struggles. There is always more evidence of the past to be considered, and thus to be reordered. I look forward to comments on this matter.

There is also a critical difference between history (and science for that matter) and law, and that is the explicit adversarial nature of the American legal process. The adversarial process does much more than structure the trial process; it also structures the investigatory process. It delegates to the individuals with knowledge of the underlying events and the proper incentives to invest the socially optimal amount in further investigation the responsibility to collect and adduce the evidence. In American civil trials, this is facilitated by open and complete discovery, which mandates that the parties share all the pertinent information with each other. In criminal trials, even more starkly the parties are obligated to search out the pertinent evidence, and have the right incentives to do so, to not over or under invest in the production of evidence. Obviously, there are slips between the cup and the lip, and parties can behave strategically, which diminishes the beneficial effects of the adversarial process. But those effects remain large. Investing anyone else with investigatory responsibility means some third party (usually a government official) must duplicate the costs of learning the facts that the parties have simply by virtue of being involved in the relevant transaction, and of course the third party will be a government bureaucrat whose incentives will rarely include the socially efficient production on information. The bureaucrat will not be spending his or her own money, and may be more concerned about their own interests than those of the parties.

The superior knowledge of the parties not only guides evidence collection but presentation. The parties' obligations extend to constructing the best explanations for the evidence and presenting judge or juror with plausible inferential links and chains. In the condition of access to all the evidence, a priori this structure has the greatest chance of generating the socially optimal decisions over time. However, without access to the evidence, the system becomes less efficient, which is seen in some civil cases where parties attempt to exploit the transaction costs of discovery for personal gain and in criminal cases generally in which in the U.S. open discovery is not the norm.

There is one other critical distinction between law on the one hand and history and science on the other. Not deciding a case is not an option for a civilized legal system, because not deciding a case is to decide it. The status quo favors someone, and not deciding a case leaves the status quo intact. Notwithstanding the wide-ranging and intractable ambiguity of the human condition, domesticated however much by the adversarial process, decision must be made. But, there is not and could not be (otherwise trials would be superfluous) a formalized theory of evidence that generates accurate outcomes, and thus legal systems can only locate the decision over what is true somewhere and more or less live with the results. This locus is the fact finder, judge or juror. Virtually all proffered material is admissible at trial; trial judges affect admissibility very little, and the formalities of the rules of evidence even less. The proffered data become evidence if they influence a fact finder. Whether they do is determined by the sum total of that person's experiences at the moment of decision, experiences which will by that time include the advocates' efforts to enlighten the fact finder about the implications of the material produced at trial and all the other observations generated by the trial.

In the law, then, evidence is not a set of things; it is instead the process by which fact finders come to conclusions about the past. This concept is banal in the sense that it reduces to the proposition that a disinterested fact finder reconstructs the past based on all the observational inputs available at the moment of judging but the banality contains genius in the twin recognition that there is no alternative except official orthodoxy on conventional matters and that the probability of gathering the necessary information for an accurate reconstruction of the past increases astronomically with the size of the fact finding body and not just with the size of the evidentiary proffer at trial. Each fact finder is in essence a solitary scientist constantly reducing conventional ambiguity. This type of ambiguity is treated differently from the scientific variant because resources would be wasted by attempting to reach explicit agreement on its contours prior to the existence of a dispute, and so we do not organize assaults on it. It differs from the historical variant because again motive (historical laws and interpretations) may be relevant but is never a material fact. When a dispute arises involving factual ambiguity, a small set of individuals is gathered, from one (a judge) to twelve (an historical jury), to pool its members' knowledge in order to make sense of the evidence adduced. Given the lack of a social justification for organizing conventional knowledge on a scientific model, the law achieves an analogous result by holding a convention of lay scientists and requiring that they deliberate long enough to reach agreement.

Notwithstanding the differences in fact finding among science, law, and history, one commonality stands out: without accurate fact finding, the rest of the process is useless. Scientific theorizing to explain the cosmos with the earth at its center was just a colossal waste of time, as would be the construction of historical interpretations or laws based on mythologies rather than reality. In the law, every single conception of a right depends on accurate fact finding. Rights are meaningless without accurate fact finding. In the West, much is made of the political side of the Enlightenment that inverted what was thought to be the natural order of things that the people were subservient to their rulers to make the rulers subservient to the people. But

the epistemological side of the Enlightenment that replaced dogmatic knowledge with empirical knowledge was the necessary foundation for that political revolution. Facts matter, and facts can only be found in free and open inquiry where no a priori limits on investigation are imposed. No topic is taboo. The stain of slavery on the western world is one example, as is the abuse of young people in particular by the clergy. Or the inquiry into corruption, political or personal, the long struggle for minorities and women for equality. Without free inquiry, one does not do science; one does witchcraft. Without free inquiry, legal systems do not dispense justice but injustice. And without free inquiry, historians create children's stories rather than accurate chronicles of the past, which are unlikely candidates for any intellectually compelling interpretation or theorizing. Thus, even if the ancient conception of history as chronicling the past has fallen from favor, it remains the necessary first step in any systematic historical thinking.

At least that is the view in the West. What is it in China? How do you conduct historical research aimed at the truth in a society that is apparently forbidden to discuss publicly such things as universal values, freedom of speech, civil society, civil rights, the historical errors, crony capitalism, and judicial independence? Hopefully, the next few days will generate some answers to these and other important questions.

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A Comparison of Fact-Finding Methodology in Evidence Law and History

Baosheng Zhang and Guoyang Ma

1 Evidence Is a Common Problem Faced by History and Law

Evidence is a common phenomenon in the process of human knowledge exploration. "All disciplines, from archeology to zoology, from history to astronomy, from statistics to decision theory, have largely shared problems of evidence and inference" (Anderson et al. 2005, 46). According to Twining's article *Evidence as a Multi disciplinary Subject* (Twining 2003), some recent developments have greatly strengthened the case for making evidence a multi disciplinary field in its own right. "In this context, 'Evidence' is preferable to 'Evidence Science'." In 2005, Schum (2005) published *Thoughts about a Science of Evidence,* emphasizing that evidence is a common problem faced by many disciplines. But "there is no single discipline known to [Schum] that provides all answers regarding the properties, uses and discovery of evidence" (Schum 2005). Therefore, it is necessary to carry out interdisciplinary research on "evidence science" to solve the common problems of evidential reasoning and knowledge acquisition faced by various disciplines. In this sense, knowledge acquisition in history and law belongs to the same exploration of evidence science.

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1.1 Historical Facts Are the Common Research Objects of History and the Evidence Law

Fact is one kind of actual existence, which we can grasp by means of perception and mind (Zhang 2018, 1). All facts occur in a certain time and space. In the time dimension, facts can be in the past and present tense, but not future tense. Wigmore pointed out that "a fact is any act or condition of things, assumed as happening or existing" (Garner 2004, 628). In the past tense, facts are existing things or things that have already happened, which we could call historical facts. What is happening or facts in the present tense are not the object of study in history or law.

Once a historical fact has occurred, it has a feature that cannot be changed, which is called "accomplishment" (Peng 1996, 74–78). "Facts cannot be changed. When we talk about changing some facts, we just mean that we wish the facts in the future to be different from the facts before us or in the past. Facts are always accomplished or happening" (Jin 2011, 817). The accomplishment of fact is the same as its historicity. That means, once some fact has happened, whether you like it or not, it is an irrevocable historical fact or historical event. The common sayings "water under the bridge", "the die is cast", "it is no use crying over spilt milk" are all wonderful notes on accomplishment. In litigation, the facts that triers of fact should find are irrevocable historical facts. In the study of history, all the facts that need to be studied by historians are fait accompli.

1.2 The "Mirror of Evidence" Doctrine of Historical Fact-Finding

For historical facts, because of the lack of direct knowledge, the fact-finder can only rely on the "mirror of evidence" to infer the facts indirectly. This means that in the process of evidential reasoning, the cognitive means of fact-finders have some natural limitations. This is shown in the following aspects:

First, evidence is prerequisite for historical fact-finding; it is the sole "bridge" connecting the subject with the object. Evidence is just like a mirror that reflects the facts of past cases. Without this "mirror of evidence", it is impossible to ascertain what happened in the past. Yet the images shown by this "mirror" may be illusory, like "flowers in the mirror" or "moon in the water". Therefore, whether historical facts can be found accurately depends not only on how many pieces of evidence can be obtained but also on the ability to identify the authenticity of the evidence. Generally speaking, the more relevant evidence, the higher the accuracy of fact-finding. However, if there are problems in the authenticity or credibility of the relevant evidence, it will seriously affect the accuracy of fact-finding. Therefore, Simon (1973) said that "in a world of this kind, the scarce resource is not information; it is processing capacity to attend to information." Regarding the relationship between historical facts and historical materials, the former is a real event, while

the latter is the documentary record left behind when real events occur. However, it is doubtful to many historians how much documentary evidence describes the "real past". For example, in the male-centered social culture, historical records are often about men's activities, and how these records differ from the facts becomes a problem. Therefore, in the academic awakening of "postmodernism", documentary historical materials are regarded as "texts" or "narratives". Scholars begin to pay attention to pluralistic, marginal and unusual sources, such as conflicting narratives in social memory and social identity, and exploring the significance of social situations and personal feelings in these evidentiary analyses. Wang (2001) has held that the study of historical memory is not to deconstruct our existing historical knowledge but to treat historical materials with a new attitude, regard them as a relic of social memory, and reconstruct the understanding of "historical facts" in the analysis of historical materials. The "historical materials" preserved in records are only a small part of these "past facts". They are selected, organized, even altered and fictitious "past". Therefore, documentary historical materials cannot be regarded simply as the carrier of "historical facts". They are the products of social memory under various subjective emotions, prejudices and social power relations. Obviously, it is the basic function of the cognitive subject to find the facts accurately, distinguish the authenticity of the evidence and make evidential reasoning.

Second, the logic of historical fact-finding is induction and abduction. The finding of historical facts is an inductive reasoning process from evidence to inferred fact, to fact of consequence and essential elements (Allen et al. 2011, 143). In the chain of reasoning according to Twining and others, the nature of inductive reasoning of fact-finding is reflected in different levels, from evidence to interim probanda, penultimate probanda and ultimate probandum (Anderson et al. 2005, 60–63). Among them, "generalizations" such as experience or common sense knowledge are associated with each link in the chain of reasoning, and they supply justifications for each reasoning link, allowing the inference from evidence to the penultimate probandum. Whether the evidence is relevant to the proof of the fact of consequence, or how much it has probative force, is generally not governed by a set of rules set by the legislator in advance, but only by the "logic and general experience" of the fact-finder (judge or jury). This determines that fact-finding is a process of inductive reasoning (Allen 2011). Likewise, Hu (2013, 197) believed that traditional Chinese textology methods are only applicable to the study of known materials; they seem powerless in unknown fields, because "evidence in historical science cannot be reproduced". He summarized three basic views about textology methods in the Qing Dynasty: (1) It is not forbidden for people to have independent opinions in the study of ancient books, but for each new opinion, there must be evidence of materialism. (2) Sinologists' "evidence" are nothing more than "anecdote". (3) Proof by example is an inductive method. If there are not many examples, it is merely proof by analogy. If there are many examples, then it is a proper induction.

Different from the reasoning process in which induction leads to general knowledge from specific evidence, abduction works in the other direction. As another typical method of evidential reasoning, abductive reasoning can be used not only in investigative activities but also in historical studies. For example, Hu Shi applied

the method of "inferring the cause from the result and producing evidence to infer the result" to classical academic textology and the study of China's modernization (Xi 2016). "Inferring the cause from the result" is Huxley's method of inferring unknown facts from known facts. This method of doubt, or "strictly distrusting everything without sufficient evidence", is also known as the "method of history". "Producing evidence to infer the result" comes from Dewey's "experimental method" or the method of producing evidence. Hu Shi holds that the commonality between historical science and experimental science is "to do evidence-based discussion", but the difference between them is that "'evidence' in historical science cannot be duplicated. Historical scientists have to look for evidence, and they cannot create or reconstruct evidence (by experimental methods)." But we can use the experimental method of "producing evidence to infer the result" to prove the hypothesis about the unknown field and expand our knowledge. Therefore, "experimentation is to create appropriate 'causes' to pursue the imaginary 'results'". Hu (2005, 187) used these evidential reasoning methods to study the history of Chinese literature and found the law of dual evolution and dual development.

Third, as the "ideological product" of evidential reasoning, truth is probabilistic. The nature of inductive reasoning determines the probabilistic nature of fact-finding. Because the historical fact-finder cannot take past facts as the research object directly, evidential reasoning becomes the basic method of historical fact-finding. There will always be problems in the fact-finding, such as the quantity, authenticity and other problems of evidence, so the truth derived from evidential reasoning is just a cognitive achievement or "ideological product" formed in the mind of the fact-finder. According to the correspondence theory of truth, "when the object and subject, during the course of integration, could match up to a degree of more than 50%, such cognition is featured as having found the truth" (Shu 1993, 206). Of course, reconciling historical truth with the correspondence theory of truth will produce a dilemma: that is, because the fact-finder cannot observe the cognitive object (historical facts) in the sense of "objectivity", he can only reconstruct the historical facts in his mind through the processing of evidence information, which will make it impossible to judge the "subjective and objective agreement" (degree of correspondence between truth and historical fact). Twining (1985, 15) said that "the application of the principles of induction to present evidence makes it possible to assign a probable truth value to a present proposition about a past event". Because the historical fact-finding must go through a process of induction from evidence to probandum, the finding of truth is a judgment of the probability of the factual propositions. In fact, the judgment of factual propositions can never reach absolute certainty. The probability of fact-finding is mainly reflected in five fundamental reasons illustrated by Twining, along with others (Anderson et al. 2005, 246). First, the evidence is always incomplete. Second, evidence is commonly inconclusive. Third, the evidence is often ambiguous. Fourth, Bodies of evidence are commonly dissonant. Fifth, evidence comes to us from sources whose credibility, to some degree, is less than perfect. These five reasons are not only the reasons for the probabilistic nature of historical truth but also the causes of the "mirror of evidence" principle.

1.3 Both History and Evidence Law Are Facing Scientific and Technological Challenges

The development of contemporary science and technology not only provides a powerful means for exploring historical facts but also brings serious challenges to it. An editorial in *Nature* (2016) described how scientists were using genetic evidence to theorize about patterns of ancient human migration, although some historians were still skeptical about this methodology. However, the editorial cited Patrick Geary as saying that historians will be left behind unless they learn to accept the scientific tools of genetics. "If historians do not get involved and engage with this technology seriously, we're going to see more and more studies that are done by geneticists with very little input from historians", he said.

Compared with the application of DNA evidence in historical research, scientific evidence invaded the legal field earlier. In the second half of the nineteenth century, open consideration of evidence replaced formalistic evidence theory in civil law countries, opening the door for the use of scientific evidence. Radbruch (2012, 145) says that the status quo of scientific evidence theory is that: On the one hand, psychological analysis is applied to witnesses to assess their credulity and misunderstandings in order to minimize their probative value. On the other hand, improved techniques are employed in the analysis of fingerprints, bloodstains and many other observed targets so that the probative value of physical evidence can be enhanced. The extensive use of scientific evidence in trials have solved many hard cases, helped many innocent people to eliminate the injustice of wrongful conviction, and brought the hope of "scientization of factual inquiry" (Damaška 1997, 143) to mankind. However, just like the "double-edged sword" of science, scientific evidence not only helps the courts reduce the number of wrongful convictions but also creates a lot of wrongful convictions. In March 2016, *Science* published a series of articles on forensic science research, one of which said that a report published in 2009 by the U.S. National Research Council found that forensic analysts had long overstated the strength of many types of evidence, including footprints and fingerprints, tire tracks, bullet marks, blood splatters, fire, and handwriting (Enserink 2016). The title of another article, *When DNA is Lying*, is even more sensational. The article said that DNA evidence has helped exonerate hundreds of wrongly convicted people, but it has also landed innocent people in jail (Starr 2016). According to updated data from the American Innocence Project (2019), the misapplication of forensic science contributed to 45% of wrongful convictions in the United States proven through DNA evidence. The so-called "misapplication of forensic science" or "misuse or misleading use of scientific evidence" includes: (1) unreliable scientific principles or lack of factual basis; (2) scientific methods whose validity have not been fully proven; (3) misleading testimony of expert witnesses; (4) errors in the process of testing and (5) misconduct by forensic scientists. Obviously, in the face of the "invasion" of scientific evidence into the legal field, judges, as "laymen" of science, have not been fully prepared. They tend to have a superstition of scientific evidence, which will inevitably lead to a kind of blind obedience (Chen 2010), thus compromising their

ability to examine and judge scientific evidence. However, since there is no presupposed probative force in any evidence, scientific evidence does not necessarily have reliability or credibility. In addition to the "general acceptance" of scientific principles and methods, the use of scientific knowledge in courts depends on experts. Experts may help fact-finders to correctly understand evidence or adjudicate disputed factual issues. They may also misuse scientific principles and technical methods to make inferences, thus misleading judges and juries to make wrong decisions. In this regard, historians and judges are in the same situation. Historians can use the lessons learned from evidence law to keep an appropriate vigilance against the possible drawbacks of the application of scientific evidence.

2 Differences Between Fact-Finding in History and Law

History and evidence law are two similar subjects. Both of them aim to find out the truth of history to the greatest extent. But they have the following differences.

2.1 The Difference of Subject Responsibility: Judicial Finality and the Endless Exploration of History

As the final means of dispute resolution in human society, judicial results have finality. Firstly, it manifests in the principle of judicial final settlement; that is, the judiciary holds an authoritative position in a variety of dispute resolution systems, and it is the final procedure for dispute resolution and the last line of defense for justice. In a country under the rule of law, it is necessary to ensure that every organization and individual respects the final judgment of the court, and that the validity of a court's legal judgment cannot be overridden by any means. Secondly, in litigation procedure, the finality of the court's ruling is reflected in two legal principles: "ne bis in idem" in civil law systems and "the rule against double jeopardy" in common law systems. Article 14(7) of the United Nations International Covenant on Civil and Political Rights expresses the basic requirements of these two principles: No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. These principles have not been clearly stipulated in the current procedural law of China, and many practices in judicial practice violate these principles. The finality of adjudication is of great significance to ensure the authority and public credibility of justice.

The purpose of history is to discover the truth of history through the exploration of historical facts. In historical research, any acquired historical knowledge has a certain

degree of fallacy and therefore needs to be continuously subjected to new tests or falsifications (such as archeological discoveries). In other words, any historical knowledge belongs to the "temporary" proposition, which needs to be revised according to newly found evidence. In the study of history, it is a normal phenomenon to argue about historical knowledge, which shows the relativity of historical knowledge. This kind of academic debate can promote the progress of historical science. From another point of view, a reasonable academic debate can be solved through further research (including the improvement of methods). By contrast, Twining (2003, 92) believes that the duty of the judge is to come to a firm decision in adjudication. "This pressure for decision has led the law to develop important ideas about presumptions, burdens of proof and standards of proof as aids to decision". Martin (1998) has quoted some scholars' viewpoint that in terms of social timeliness, there is no time limit for historical study, but the administration of justice has to solve urgent issues. Historians are surprised to find that judges only consider a small amount of "facts" in their convictions so that the trial can be continued. Lagarde believed that judicial evidence is formed in the procedure provided by law and leads to irrevocable conclusions. These are two reasons why they are different from historical evidence (Martin 1998).

2.2 *Different Attitudes Towards Hearsay Are Determined by the Differences in Probandum*

The main research objects of evidence law are the facts of court cases. Although trial facts are also historical facts, they are very recent in comparison with historical research objects. Usually, the parties (especially the defendant) and witnesses are still alive, and the real evidence has not been corrupted. However, the probandum in history is generally more remote, and historians have to rely on hearsay evidence.

Thayer (1898, 264) wrote in *A Preliminary Treatise on Evidence at the Common Law* that when we talk about "evidence" in evidence law, it does not have the main meaning given to it by ordinary discourse. This is a forensic procedure term. It imports something put forward in a court of justice. When people talk about historical evidence, scientific evidence and the evidences of Christianity, they are talking about different things. The evidence law is concerned with the furnishing to a court of matter of fact for judicial investigation. In the law of evidence, only testimony from witnesses and exhibits are evidence (Allen et al. 2011, 7–8). According to the hearsay rule, "hearsay" means a statement that the declarant makes outside of the current trial of hearing, and a party offers it in evidence to prove the truth of the matter asserted in the statement.[1] The law of evidence excludes hearsay mainly on the basis of the "testimonial triangle" theory.[2] Considerations include: the hearsay declarant does not make an oath, the fact-finder does not observe what is being

[1] See FRE 801.

[2] The testimonial triangle concept was first popularized for the academic legal community by Professor Laurence Tribe in his article Triangulating Hearsay, 87 Harv. L. Rev. 957 (1974). For

declared, and the other party does not have the opportunity to cross-examine the hearsay declarant. Therefore, there are some problems associated with hearsay, such as dangers of sincerity, narrative ambiguity, perception and memory. These are the main implications of the definition of hearsay in the U.S. Federal Rules of Evidence 801 and the rule against hearsay in 802.

By contrast, historical studies are based primarily on hearsay, because the witnesses (including the parties and witnesses) of historical events have already died. Historians can only reconstruct historical facts based on hearsay, and they cannot cross-examine historical figures. This situation has led to a change in the methodology of archaeology from "documents" to "cultural relics". In Foucault's view, in the past, history relied on documents and thus claimed to be the proof of the collective memory of the ages, and regarded itself as an anthropology. Therefore, traditional historical studies mainly record the relics and articles of the past. They turn the relics and articles into "documents", and use and question the documents. Scholars not only discuss the narratives in documents but also want to know whether the facts in documents are true and under what conditions can they be believed. Are the documents correct, or have they been tampered with? Therefore, documents have always been regarded as a language with expressive function, or as a faithful record of the truth that the document recorder wished to reflect. Foucault's Archaeology of Knowledge advocates that documents should be turned into "cultural relics". Their primary task is no longer to explain the meaning of documents, or to judge the authenticity and value of documents, but to organize and arrange documents, to distinguish and arrange the relevant and irrelevant, to discover their internal elements, and to describe their various relationships. At the same time, people should inspect the interior of the document and find its significance. That is to say that Foucault's archaeology regards literature as "relics". Archaeology only considers the object's own value, not its instrumental value. It only reveals its complex internal relationships, regardless of time and the past. Archaeology freezes time, and it deals with the internal layers of a particular knowledge system (any of the various humanities systems) (Huang 2006). In this sense, documents are only evidentiary material through which historians reconstruct human past behavior. New Historiography or Archaeology of Knowledge tries to explore some relations in the composition of documentary evidence itself through evidential reasoning.

Since historical studies are mainly based on hearsay, or even hearsay of hearsay, in order to distinguish the truth of hearsay and avoid false hearsay, a Multi-Evidence Method has been developed. Ye (2009) discussed the connection between anthropology and traditional Chinese textology, which developed from the two-way evidence of the early twentieth century to three-way evidence in the 1990s, and then to four-way evidence in the twenty-first century. He laid out the four stages of evolution, i.e., trust in, suspicion of, interpretation of and multi-dimensional interpretation of ancient scholarship.

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a much earlier version of the triangle, see Charles Kay Ogden and Ivor Armstrong Richards, The Meaning of Meaning 10–12 (1927).

1. One-way evidence: documentary evidence. In the view of modern scholars, the so-called saints' books, such as *The Book of Songs, The Book of History, The Book of Rites, The Book of Changes*, which were elevated to "classics", are actually based on oral hearsay, rather than texts that directly record historical facts. Modern scholars have developed an all-round movement of suspicion and discrimination against the early history of documentary evidence. This is an unprecedented challenge to the one-way evidence theory of traditional Chinese academic study, and also a great subversion of the 3000-year-old belief in sacred writing.
2. Two-way evidence: archaeological materials. Wang Guowei put forward the idea of "two-way evidence" in *New Evidence for Ancient History*, calling on scholars to verify "material on paper" with "underground material" (oracle bone inscriptions). He said that "we are fortunate to have access not only to textual materials but also to new materials underground. It is through underground materials that we can correct texts or check the contents of ancient books. Even suspected sources may be facts. The two-way evidence can only begin now". Wang Guowei's "evidence" here refers to "historical data from different observations", while "two-way evidence" refers to "mutual verification of two bodies of historical data from different observations" (Zhang 2003).
3. Triple evidence—ethnological materials. Yang Xiangkui put forward the idea of three-way evidence. He believed that if there is insufficient evidence from documents, more should be obtained from archaeological materials. If it is still insufficient, more can be obtained from ethnological research. In view of the unbalanced social development of ethnic groups in China, ethnological materials, including oral narrative and ritual narrative testimony or extrinsic evidence, can make up for the deficiencies of documentary evidence. Therefore, in the study of ancient history, three-way evidence has replaced the old two-way evidence.
4. Four-way evidence—real evidence or image evidence. On the basis of summarizing the "seven materials" theory of Li Ji's ancient history research, Ye Shuxian simplified the "five ways" theory advocated by Zhang Guangzhi into the "four-way evidence". Finally, he used the division of testimony and real evidence in the law of evidence and five types of narrations of cultural text in anthropology or semiotics to reorganize the respective roles of the four-way evidence. He also interpreted the respective functions of the four-way evidence (see Tables 1, 2).

2.3 Fact-Finding in History Lacks the Concept of Materiality

Materiality is the main component of the relevance of judicial evidence. Relevance is the attribute of evidence that helps to prove or disprove the consequential probandum. The consequential fact mentioned here is the requirement of materiality, that is, the issues to be proved by using the evidence belong to the consequential facts that need to be proved according to law. Suppose, in the case of Zhang San's murder of Li Si, the prosecution asked Zhang San's mother to testify about the beriberi of Zhang

Table 1 Functional comparison between textology and the law of evidence

Classification of textology methods	Classification of evidence law	Five types of cultural text narration in anthropology or semiotics
One-way evidence	Documentary evidence (indirect)	Text narrative
Two-way evidence	Documentary evidence (indirect)	Text narrative
Three-way evidence	Testimony or extrinsic evidence	Oral narrative and ritual narrative
Four-way evidence	Real evidence or image evidence	Object narrative and image narrative

Table 2 Comparison between five types of cultural text narration in anthropology or semiotics and the four-way evidence

Five types of cultural text narration in anthropology or semiotics	Classification of textology methods	Classification of evidence law
Text narrative	One-way evidence and two-way evidence	Documentary evidence from testimony
Oral narrative	Three-way evidence	Documentary evidence from testimony
Image narrative	Four-way evidence	Real evidence
Object narrative	Four-way evidence	Real evidence
Ritual (rites and music) narrative	Three-way evidence and four-way evidence	Testimony and real evidence

San. This testimony is relevant to the fact that Zhang San has beriberi. However, although this factual claim is also a probandum, it is not a consequential fact. It is not material for the trial (whether Zhang San murdered Li Si or not). But if a witness provides an invoice to prove the factual pleading that Zhang San bought the murder weapon, the factual pleading has a "material" relationship with the consequential fact of the litigation. Therefore, relevance refers to the relationship between evidence and factual pleading, while materiality refers to the relationship between factual pleading and trial elements, and the definition of relevance includes these two relationships (Zhang 2018, 14–15). Therefore, when judges judge whether a piece of evidence is relevant, they must consider two questions: First, whether the evidence is related to the consequential facts in proving a case—this issue is called "materiality". Second, whether the evidence presented has the function of proving the material issue, that is, whether the evidence is helpful to establish the material issue. When the evidence makes a consequential fact "more or not more" probable, it is relevant (Allen 2010).

Twining (Anderson et al. 2005, 104) believes that historians share with lawyers a concern with particular past events, but historians lack the concept of materiality.

Trials are typically past-directed and hypothesis testing; they are concerned with inquiries into particular past events in which the hypotheses are defined in advance by law. This concept identifies in advance the hypotheses to be proved or negated and helps to formulate and anchor disputed issues of fact in advance with precision and specificity. Through a specific case, we will analyze the differences between the focus of law practitioners and historians in fact-finding. In the famous Sacco-Vanzetti case, Nicola Sacco and Bartolomeo Vanzetti emigrated from Italy to America in the early 1900s. Their work was respected, but at the same time they were also implacable anarchists. In 1920, they were charged with felony murder in a commonplace but ruthless crime. But there are still some arguments about whether they were convicted for being murderers or for being anarchists. One major element of the argument is that they were wrongly convicted because of a problem in the authenticity of certain firearms evidence against Sacco. At the time of their arrest, Sacco was carrying a 32-caliber Colt automatic pistol. At the trial, a police officer testified: "Sacco attempted on several occasions to put his hand under his overcoat in spite of being warned [by Connolly] not to do so." In the later trial, the prosecutors spent a long time proving that a bullet had been fired through the 32-caliber Colt automatic that was alleged to belong to Sacco. The court allowed prosecutors and defenders to test-fire bullets through Sacco's 32-caliber Colt automatic, but ballistic experts on both sides disagreed. Obviously, in the above-mentioned case, the testimony of the police that "Sacco attempted on several occasions to put his hand under his overcoat in spite of being warned [by Connolly] not to do so" did not make it more possible that Sacco shot at the police, so the testimony lacked relevance. Similarly, the prosecution and defense ballistics experts disagreed about whether the bullet had been fired through Sacco's 32-caliber Colt automatic, so the scientific evidence lacked relevance.

By comparison, historians study this case from a different perspective. They are often involved not only in establishing what happened but also explaining why it happened. This is often a more difficult and more interesting problem. Furthermore, historians are typically interested in questions that go beyond establishing and explaining a particular event. For example, a lot of historical research literature about the Sacco-Vanzetti case treats as straightforward or assumes the question of their innocence in order to explore many issues related to the political, social and legal background at that time (Twining 2003). Martin (1998) quoted many scholars' opinions to compare the fact-finding of historians with the fact-finding of judges. Two points aroused the greatest interest of the author: Firstly, to the degree of detail of fact-finding, history aims at memory and identity construction, while justice aims at social peace to settle disputes. For example, historical facts about the number of victims of Nazi concentration camps in World War II, human experimentation sites and the attribution of responsibility involve the most detailed historical techniques. In order to prevent people from forgetting this human experience, it is necessary to emphasize that the memory of Auschwitz is "indispensable". In contrast, the prosecutor declared that they are not historians, and these detailed searches should be completed by historians. For them, it is enough to collect one or two pieces of evidence that prove the facts and that cannot be refuted by contrary evidence. Secondly, in the

case of urgent collective memory and society, only the judiciary can confirm a very important fact by judgment.

Because the consequential fact in judicial fact-finding is regulated by substantive law, the process of judges or juries using evidence to find the truth of the case is not arbitrary, but strictly limited by law. In this sense, in a judicial case, what is the consequential probandum and what is the relevant evidence are determined by law, which is the role of consequential materiality. However, historians cannot be limited by any rules and regulations in the study of a historical case, so they can study historical facts from multiple perspectives and draw many different conclusions.

2.4 Historical Evidence Analysis Lacks the Concept of Admissibility and the Definite Goal of "Justice-Seeking"

The principle of admissibility highlights the legal characteristics of evidence. In the field of litigation, admissibility refers to "the quality or state of being allowed to be entered into evidence in a hearing, trial, or other proceeding" (Garner 2004). "Admissible evidence is relevant and is of such a character (e.g., not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it" (Garner 2004). Admissibility first involves relevance, i.e., the exclusion of irrelevant evidence. "Irrelevant evidence is not admissible."[3] Therefore, relevance is a necessary condition for admissibility. But Thayer (1898, 264–266) said that "it is obvious that, in reality, there are tests of admissibility other than logical relevancy." These other tests include value considerations such as fairness, harmony and efficiency. Twining et al. (Anderson et al. 2005, 87) held that, in addition to the rules of relevance, most of the remaining rules of evidence can be viewed as falling into three categories—rules for justifying the exclusion of evidence on the ground that it has improper prejudicial effect that exceeds the probative value, rules that direct or reflect cost-benefit analysis in order to prevent excessive delay or time consumption, and rules that reflect external policies that are considered to go beyond the purpose of ascertaining the truth. Assuming that there should also be some exclusionary rules of evidence in historical studies, it is obvious that only irrelevant evidence should be excluded in order to achieve the goal of truth-seeking. However, in addition to the goal of seeking truth, the law of evidence also has the goal of seeking justice, including guaranteeing procedural justice and human rights. Examples include rules that exclude illegal evidence and rules that protect specific social relations and values, such as privilege rules, etc.

In the law of evidence, the pursuit of truth (truth-seeking) and values (justice-seeking) are two sides of a coin, which co-constitute the justification of an evidence rule. Cohen (1986, 54) held that truth is the main object of intellectual inquiry. Therefore, the truth of a proposition, if it is relevant to our concerns, is the best reason for us to accept it into our stock of stored information. In other words, in

[3] See FRE 402.

this respect, truth is a kind of reason, just as justice is a kind of reason. The unity of value and truth determines the dual functions of evidence law: one is to promote the discovery of truth, that is, truth-seeking; the other is to maintain universal social value, that is, justice-seeking. These two functions are competitive. "The goal of truth is in competition with other goals, such as economy, preserving certain confidences, fostering certain activities, and protecting constitutional norms" (Posner 1993, 206). Truth-seeking is only one of the basic values of the law of evidence, not all of them. Evidence rules should pursue the unity of various objectives.

Compared with judicial pursuit of justice, due to the lack of adversarial proof procedure in historical research, the analysis of historical evidence lacks the concept of admissibility and usually has no clear rule for excluding evidence. Hu (2000, 14–26) pointed out when comparing the differences between historical textology and the law of evidence, the development of "the law of evidence" in modern countries is largely due to the fact that both litigants are allowed to have the right to refute the evidence put forward by the other party. Because of the refutation of the other party, it is not easy to use false evidence and irrelevant evidence. In contrast, no opposing party stands in front of a textology scholar to refute his evidence, so he often refuses to examine strictly whether his evidence is reliable and relevant. The main reason why the method of textology is far less rigorous than the judge's judgment is the lack of a conscious refutation of its own standards.

However, historians, being cognitive subjects under specific historical conditions, cannot get rid of the restrictions of social and cultural background when determining the truth or falsehood of evidence, evaluating evidence or applying evidential reasoning. They can only, as Sima Qian said, "form their own unique theory" in the process of "exploring the relationship between natural phenomena and human society and being familiar with the process of historical development" (Ban 1962, 2735). The so-called "forming their own unique theory" is undoubtedly the product of value judgment. Yu (2008) analyzed this problem from two aspects: (1) No historians have personally experienced the historical facts that have long disappeared, they can only reconstruct the historical facts conceptually through the media of historical materials. As Becker (1967, 47) said, there is a most important distinction to be made: the distinction between the ephemeral event which disappears, and the affirmation about the event which persists. (2) The historical facts regarded by any historian as the object of study are only a part of the sum of historical facts, or even a negligible part. As Toynbee and Urban (1974, 10) said, any study of human affairs is bound to be selective. Supposing someone had all the newspapers published in the world, and supposing he had a guarantee that every word reported was true, he would still have to select, and, even if he reproduced all the facts, he would have to highlight some and devalue others.

Therefore, although historical research lacks the concept of admissibility and the clear goal of justice-seeking in the process of using evidential reasoning, historians all live in a specific social and historical environment, which inevitably makes their historical research have certain value selectivity. Historians use the specific value standards given to them by their specific society to reorganize historical facts. This will naturally lead to a serious tension between the pursuit of truth and the choice of