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# Truth and Legitimacy (in Courts)

Kenneth S. Klein

*California Western School of Law*, [kklein@cwsl.edu](mailto:kklein@cwsl.edu)

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## TRUTH AND LEGITIMACY (IN COURTS)

*Kenneth S. Klein*\*

*This Article draws upon empirical and theoretical scholarship from philosophy, economics, social science, psychology, political science, ethics, and jurisprudence, in addition to more traditional legal sources such as Supreme Court decisions, to develop an articulation of the meaning, role, and importance of truth in courts. It is frequently articulated that trials are a search for truth. But as insiders to the judicial system know, if this is so then it is a meaning of truth that differs what truth means in any other context. And exposing this definitional dissonance in turn exposes that the legitimacy of the courts rests on an eroding foundation as courts increasingly are not doing what the community believes courts are doing.*

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\* Professor of Law, California Western School of Law. Because this work draws from so many fields of study, the Author could not have written it without knowledgeable “fact checkers” from many disciplines; in this regard the Author thanks Professor Scott Soames, Distinguished Professor and Director of the School of Philosophy at the University of Southern California; Professor Theodore Klastorin, Professor of Operations Management, Burlington Northern/Burlington Resources Professor in Manufacturing Management, Foster School of Business, University of Washington; Professor Jeffrey L. Yates, Professor of Political Science, Binghamton University, State University of New York; Professor Luke Meier, Baylor Law School; my colleagues, Professor Don Smythe; Professor Mario Conte; Professor Daniel Yeager. and Professor Tim Casey. The Author thanks Professor Lisa Black and Professor Greg Reilly for patiently being sounding boards and editors. The Author is grateful for the research support and assistance of Research Assistant, Shauna Guner, the Library staff of California Western School of Law, and Peter Roudik -- Director of the Global Research Center of the Law Library of Congress. This Article was written as the Author’s sabbatical project -- the Author thanks the Board of Trustees of California Western School of Law for approving this Article as the Author’s Sabbatical Project. All errors in this Article are entirely the Author’s.

The Author acknowledges the unintended but undeniable inspiration of this Article from then-University of Texas School of Law student Lisa Black, who as a 1L in 1982 wrote the limerick:

*There once was a fine Texas youth,  
Who sought the world over for truth.  
But that’s not what he saw,  
So he turned to the law,  
Where truth’s just a matter of proof.*

The Author met Lisa Black two years later, has been her spouse since 1985, and has heard this limerick countless times over the past 30+ years.

## INTRODUCTION

This Article seeks to answer what is the meaning of “truth” in American trial courts,<sup>1</sup> and why one should care. As big as this inquiry sounds, it is tied up in equally large subsidiary questions – the meaning in courts of justification, of knowledge, and of belief, which in turn implicate the meaning in courts of fairness, of due process, and of “fact.” And only upon answering these questions can one explore the foundation of the legitimacy of the courts, and how both the meaning of truth in courts – and the public perception of the role of truth in courts – relate to the legitimacy of the courts. No small task, this.

There is scant academic literature studying the truth-finding function of American trial courts. And what has been written largely exists in the ephemeral context of jurisprudence, rather than the concrete world of the truth finding function of trials.

Part I of this Article applies the multi-millennia work of Philosophy in defining truth as a roadmap to isolating the nature of truth in courts. Part I.A of this Article attempts to very, very briefly summarize the philosophical literature on truth to isolate a construction of truth that can advance an understanding of truth in courts. The role of truth in courts is a pragmatic one, in contrast to the more theoretical concepts within jurisprudence. Within epistemology a construction of truth is less ephemeral and more concrete -- is the weak deflationism definition of truth within realism, which sees truth as a binomial property that a proposition has – it either is true or is not. Weak deflationism sees truth as residing in a constellation of truth-related concepts – knowledge, certainty, and belief – each of which leans on the other to derive its meaning and role. Simply put, knowledge requires truth, justification, and belief.

This formulation of the role of truth -- knowledge requires truth, justification, and belief – facilitates isolating the meaning of truth in courts. Part I.B of this Article explores justification in courts. In courts, “justification” is defined by the rules of evidence, which directly delineate what counts as a “fact” in trials. Perhaps surprisingly, the rules of evidence do not consider **all** pertinent information as facts in determining trials, but

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<sup>1</sup> The United States federal district courts created pursuant to Article III of the United States Constitution, and the trial courts of general civil and/or criminal jurisdiction of the various States of the United States. This Article sometimes collectively refers to these courts as the “American courts.”

rather routinely discard facts for either of two reasons: (1) the facts presumptively are considered beyond the evaluative skill set of the decision maker; or (2) consideration of the facts – while advancing a trial decision – undermine an external public goal considered more important than the accuracy of trial outcomes. Part I.B concludes that in justifying a trial judgment, not all facts matter.

Part I.C of this Article explores knowledge in courts. Knowledge is the degree of certainty that must be reached – in light of the goals of the process – to stop gathering information and move to taking action. Knowledge is a compromise or balance between certainty and finality; between perfect and adequate. It is what we might call the necessary and sufficient degree of accuracy. This is a common balancing determination that exists in any information-gathering, decision-making endeavor – how much confidence does one need in gathered information in order to act. In courts this balancing determination is seen in burdens of proof. And what burdens of proof expose is that knowledge in courts means reaching a “correct enough” resolution, biasing toward certainty when the stakes involve liberty and staying near neutral when the stakes are private relationships

Part I.D of this Article explores belief in courts. “Belief” in courts is the “why” of the justice system – what is the role of courts in society and so what do we need from them. Exploration of these questions exposes fracture lines between procedural justice and substantive justice; between individual fairness and communal fairness; and between objective justice and subjective justice. In the end, belief in courts means the courts have procedures for dispute resolution that society generally perceives and accepts as a fair opportunity – or perhaps a fair enough opportunity -- to present one’s position to a neutral decision-maker.

From these preceding sections this Article now can turn to Part I.E, which draws conclusion about the meaning of truth in courts. “Truth” – as used in the justice system – is “accuracy enough,” meaning there has been adequate procedural process to support a general communal sense of systemic fairness without regard to the outcome in a particular case. In other words, truth in courts is the measure of accuracy and process necessary for courts to enjoy legitimacy.

And so Part II of this Article examines the possible tension between the meaning of truth in courts, on the one hand, and on the other hand the basis of the legitimacy of the courts as a societal institution. Because what

emerges from a formulation of the actual meaning of truth in courts is that the public perception of the truth-finding function of the courts is at odds with the inside, systemic meaning of the truth-finding function of the courts.

The social science construct of Legitimacy Theory models why broadly members of American society accept the legitimacy of societal institutions. Legitimacy theory has been brought to bear to understanding why Americans generally accept the legitimacy of the Supreme Court of the United States even in the face of decisions the individual disagrees with. But there is little analytical work focusing on the legitimacy of the trial courts. There is no work at all focusing on whether a misperception of what courts do may undermine the legitimacy of the trial courts.

Thus, the later half of this Article begins the work of filling those gaps. A review of the extant Legitimacy Theory literature on the courts and an application of the lessons from identifying the meaning of truth in courts isolates reasons to be concerned that the misperception of what trial courts do may undermine trial court legitimacy. Finally, a tentative conclusion is drawn about how unawareness by judges of a “legitimacy” concern is driving jurisprudence in potentially problematic directions.

## I. “TRUTH” IN COURTS

The truth-finding function of trial courts almost begs for explication. Judges, lawyers, and academics often say that trials are a search for truth.<sup>2</sup> If so, then it would seem to be a different meaning of “truth” than the meaning of the word in any other context. Yet there is little legal literature directly addressing the nature of the truth in the law generally, or in courts specifically.

That is perhaps understandable. Deconstructing the nature of truth in any context is a daunting challenge. Philosophy literally has dedicated millennia to the task. But by doing so, philosophy provides an analytical base and map to the task. The abstract definition of “truth” resides within a

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<sup>2</sup> See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (“...the very nature of a trial [is] a search for truth.”); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of truth ....”); *United States v. Gray*, 897 F.2d 1428, 1429 (8<sup>th</sup> Cir. 1990) (“A trial is a search for truth ....”); RONALD J. ALLEN & ALEX STEIN, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 567 (2013) (“We begin with a simple, but oft-neglected, observation: The coin of the legal realm is truth.”). But see G. Kristian Miccio, *Giles v. California: Is Justice Scalia Hostile to Battered Women?*, 87 TEX. L. REV. SEE ALSO 93, 95 (2009) (...as currently structured, our adversarial process is many things, but it is not a search for truth.”); accord, Marvin E. Frankel, *The Search For Truth: An Umpireal View*, 123 PENN. L. REV. 1031, 1032 (1975) (“... our adversary system rates truth too low among the values that institutions of justice are meant to serve.”). Notably, even these critics appear to assume that the courts *should* be seeking truth.

constellation of related epistemological concepts – knowledge, justification, and belief. And by unpacking the nature of knowledge in courts, justification in courts, and belief in courts, one can isolate a meaning of truth in courts.

### A. “TRUTH” IN PHILOSOPHY AS A TEMPLATE TO UNDERSTANDING “TRUTH” IN COURTS<sup>3</sup>

Philosophy directly studies the nature of “truth.”<sup>4</sup> For as long as there has been philosophy, philosophers have pondered questions – stated in lay-like terms -- such as: Can we define the truth?<sup>5</sup> What is real?<sup>6</sup> Is there reality external to our ability to perceive it?<sup>7</sup> How can we know and test the truth?<sup>8</sup> Are moral propositions about the world verifiable?<sup>9</sup> Is truth paradoxical and therefore incoherent?<sup>10</sup> The debate over these and many other transcendent philosophical questions about truth is robust, ancient, and ongoing.<sup>11</sup>

The parallel academic debate about “truth” in law occurs within the study of “jurisprudence.”<sup>12</sup> Jurisprudence posits truth inquiries such as what it means to say that a legal proposition – for example, “murder is bad” -- is true (ontology<sup>13</sup>), and how the answer to that inquiry is determined (epistemology<sup>14</sup>). Both are classic philosophical inquiries about truth.<sup>15</sup>

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<sup>3</sup> This section of this Article carries an enormous caveat: The philosophical study of truth has been the focus of countless papers, dissertations, books, careers, and entire fields of study. The terminology and conceptual architecture of that work provides a useful conceptual frame for this Article. But there is no way to delve into the area without gross over-simplification both conceptually and in the way jargon and terminology is deployed. One simply cannot capture the breadth and richness of that work in a few pages. A reader sophisticated in the field will immediately spot the slippage that comes from simplification. It is unavoidable. That is why while I will – within in the confines of simplification – endeavor to be as precise as possible with how I am using particular terminology, I also will attempt to be clear when the terminology I am using is similar in meaning but not identical to how it might be used in the academic literature of philosophy.

<sup>4</sup> See, e.g., BARRY ALLEN, *TRUTH IN PHILOSOPHY* 1 (Harvard Univ. Press 1993).

<sup>5</sup> See generally, Gottlob Frege, “Der Gedanke. Ein logische Untersuchung,” in *Beitrage zur Philosophie des deutschen Idealismus* 1 (1918): 58-77, translated into English as “Thoughts” by P. Geach & R. H. Stoothoff in *Collected Papers on Mathematics, Logic, and Philosophy* ed. B. McGuinness (Oxford: Basil Blackwell, 1984), 351-72, reprinted in *Propositions and Attitudes*, ed. N. Salmon & S. Soames (New York: Oxford Univ. Press, 1988), 33-55.

<sup>6</sup> See D. M. ARMSTRONG, *TRUTH AND TRUTHMAKERS* at 1 (Cambridge Univ. Press 2004).

<sup>7</sup> See generally, CRISPIN WRIGHT, *TRUTH AND OBJECTIVITY* (Harvard Univ. Press 1992).

<sup>8</sup> See generally, D. M. ARMSTRONG, *TRUTH AND TRUTHMAKERS* at 4 (Cambridge Univ. Press 2004).

<sup>9</sup> See SCOTT SOAMES, *UNDERSTANDING TRUTH* 32-39 (Oxford Univ. Press 1999).

<sup>10</sup> See SCOTT SOAMES, *UNDERSTANDING TRUTH* 49-56 (Oxford Univ. Press 1999).

<sup>11</sup> See generally, BARRY ALLEN, *TRUTH IN PHILOSOPHY* 178-79 (Harvard Univ. Press 1993);

<sup>12</sup> See, e.g., DENNIS PATTERSON, *LAW AND TRUTH* (Oxford Univ. Press 1996); *LAW AND LANGUAGE: CURRENT LEGAL ISSUES VOLUME 15* (Michael Freeman & Fiona Smith eds., Oxford Univ. Press 2013); RONALD DWORKIN, *THE PHILOSOPHY OF LAW* (Ronald Dworkin ed.) (Oxford Univ. Press 1977); Jules L. Coleman, *Truth and Objectivity in Law*, 1 *LEGAL THEORY* 33 (1995).

<sup>13</sup> Ontology is the branch of metaphysics concerned with the nature of being or existence. *Merriam-Webster Dictionary*, <http://www.merriam-webster.com/dictionary/ontology> (last visited October 30, 2014).

<sup>14</sup> “Defined narrowly, epistemology is the study of knowledge and justified belief. As the study of knowledge, epistemology is concerned with the following questions: What are the necessary and sufficient

The kind of truth inquiry that occurs in trial courts, however, is different from the truth inquiries of jurisprudence. It is more pragmatic and pedantic. Courts ask questions such as “Did the accused do it?” or “Was the defense proportionate to the attack?” or “Which car had the green light?” or “Did the person act as a reasonably prudent person would act?” Each of these questions is a variant of the question, “What happened?”

There is essentially no academic literature on the nature of those truth inquiries, what we might shorthand as an attempt to understand the meaning of truth in courts. And the inquiry is as elusive as the more abstract jurisprudential inquiry.<sup>16</sup>

Seeking a pragmatic definition of “truth” most closely approximates the epistemological theory of “weak deflationism,” which is a form of “realism.” Philosophical definitions of truth broadly can be divided into realism and anti-realism. One explanation of these two views is:

Realism involves at least the claim that there is reality independent of us and our minds .... The facts may go beyond anything we are capable of ascertaining, but the truth is so by virtue of those facts and that reality. ... The question at issue, therefore, is whether what is to be understood in any proposition lies simply in what sort of fact makes it true -- in other words, its truth-conditions. Anti-realism holds that ... to understand a proposition we need also to know its verification-conditions; we need, that is, a recognition of when its truth conditions apply, and when we are justified in holding that they do.<sup>17</sup>

Put another way -- and admittedly perhaps *too* simplistically -- realism posits that there is objective, external “truth,” while anti-realism asserts that a system -- through its system rules and assumptions -- contributes to create and define truth. Within realism, the most concrete definition of “truth” comes from the “minimalism” version of “deflationism” -- also known as

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conditions of knowledge? What are its sources? What is its structure, and what are its limits? As the study of justified belief, epistemology aims to answer questions such as: How we are to understand the concept of justification? What makes justified beliefs justified? Is justification internal or external to one's own mind?” *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/epistemology/> (last visited October 30, 2014).

<sup>15</sup> See generally, D. M. ARMSTRONG, *TRUTH AND TRUTHMAKERS* 4 (Cambridge Univ. Press 2004).

<sup>16</sup> Accord, Brian Bix, *Linguistic Meaning in Legal Truth*, 15 *CURRENT LEGAL ISSUES: LAW AND LANGUAGE* 34 (Oxford Univ. Press 2013). Bix begins his essay on “Legal Truth” by quipping – paraphrasing Augustine – that truth is something we all know until we are asked to explain it.

<sup>17</sup> D. W. HAMLIN, *METAPHYSICS* 28-29 (Cambridge Univ. Press 1984).

“weak deflationism” -- which defines “truth” as a property that a “proposition” has (or not) -- a proposition either is true or false.<sup>18</sup>

The “truth” formulation of realism -- and within realism, of weak-deflationism -- is a close analog the truth-finding function of trial courts. A system that self-describes itself as a “search for truth” is describing a realism understanding of truth – in other words, that “truth” is external to the system and potentially discernable. A system that bases actual judgments on the evaluation of competing versions of events is describing a weak deflationism understanding of truth – in other words, is concluding that each version of “what happened” is, in the end, either true or false.

The weak deflationism formulation of truth is that truth is a component of knowledge.<sup>19</sup> More precisely, “knowledge” requires “truth,” “belief,” and “justification.”<sup>20</sup> Put more usefully for our purposes, an understanding of knowledge, justification, and belief advances an understanding of truth.<sup>21</sup>

How then are “knowledge,” “justification,” and “belief” defined within philosophy? Professor Keith Lehrer begins the second edition of his book, *A Theory of Knowledge*, by writing, “All agree that knowledge is valuable, but agreement about knowledge tends to end there. Philosophers disagree about what knowledge is, about how you get it, and even about whether there is any to be gotten.”<sup>22</sup> Instinctively we might say that to “know” something – to be “justified” in the “belief” of the “truth” of a proposition – corresponds to what colloquially we might think of as “certainty.”

Perhaps not surprisingly, however, there are robust and complex dialogues amongst gifted philosophers spanning generations over a proper definition of “certainty.”<sup>23</sup> This, in turn, obscures one’s ability to

<sup>18</sup> See Glen Hoffman, *The Minimalist Theory of Truth: Challenges and Concerns*, 5 PHILOSOPHY COMPASS 938-949 (2010); Scott Soames, *Understanding Deflationism*, 17 PHILOSOPHICAL PERSPECTIVES 369, 377-78 (2003).

<sup>19</sup> See, e.g., Donald Davidson, *A Coherence Theory of Truth and Knowledge*, within TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 308-319 (Ernest LePore, Editor) (Basil Blackwell 1986). Stated simply, we may or may not know whether a proposition is true (false) – its truth property is independent of our knowledge of it.

<sup>20</sup> See generally, Jason Stanley, *Knowledge and Certainty*, 18 PHILOSOPHICAL ISSUES 35-57 (2008). *Accord*, KEITH LEHRER, THEORY OF KNOWLEDGE, SECOND EDITION 20-21 (Westview Press 2000).

<sup>21</sup> Whether a proposition *is* true is different from whether we *know* a proposition is true, whether we *can* know it, whether if we can know it then *how* we can know it, whether to know it must we be *certain* of it, whether certainty is *attainable*, how certainty differs from *belief*, and what *justifies* belief short of certainty.

<sup>22</sup> KEITH LEHRER, THEORY OF KNOWLEDGE, SECOND EDITION 1 (Westview Press 2000).

<sup>23</sup> See Baron Reed, *Certainty*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2011 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=certainty>.



confidently define knowledge as “certainty.”<sup>24</sup> But for purposes of this Article, it is unnecessary to try to resolve these perhaps intractably opposing positions. We can define “knowledge” as an “intuitive” form “certainty” – one that avoids the “skeptical” arguments against both “epistemic” and “subjective” definitions of certainty.<sup>25</sup>

An intuitive form of certainty can be described as the level of understanding or explanation that is achieved when all that is possible to be known is known, and which leaves no room for an alternative explanation. In other words, it is not subjective, but rather is based on the highest level of available justification; but it is not epistemic in that it acknowledges there may be unavailable information that would support an alternative conclusion.<sup>26</sup> The weakness of subjective certainty should be apparent – one can be subjectively certain and yet wrong.<sup>27</sup> The weakness of epistemic (or “actual”) certainty is equally patent -- actual certainty may be theoretically impossible, and even if actual certainty is theoretically possible, in any practical sense absolute certainty is unattainable.<sup>28</sup> Put another way, even if time and resources were unlimited, “intuitive” certainty describes the closest one could come to actual certainty and therefore attainable knowledge.

In philosophy, a definition of “justification” also is elusive and contentious.<sup>29</sup> For purposes of this Article, a crude statement of the “foundationalism” theory of justification suffices – a belief in the truth of a proposition is justified when it is derived from predicates external to the proposition and which are experienced through the senses.<sup>30</sup> In other words, justification is an evaluation of the strength of the available information.

“Belief” in philosophical jargon is “the attitude we have, roughly,

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<sup>24</sup> *Id.*; see also, Jason Stanley, *Knowledge and Certainty*, 18 PHILOSOPHICAL ISSUES 35, 35-57 (2008).

<sup>25</sup> See Jason Stanley, *Knowledge and Certainty*, 18 PHILOSOPHICAL ISSUES 35, 35-57 (2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; accord SCOTT SOAMES, UNDERSTANDING TRUTH 29-32 (Oxford Univ. Press 1999); RONALD DWORKIN, THE PHILOSOPHY OF LAW 8-9 (Ronald Dworkin, Editor) (Oxford Univ. Press 1977) (Dworkin describes how a legal positivist -- an anti-realist -- believes that “no sense can be assigned to a proposition unless those who use that proposition are all agreed about how the proposition could, at least in theory, be proved conclusively;” Dworkin criticizes this view because it means that no controversial proposition of law can be true.)

<sup>29</sup> See, e.g., Erik Olsson, *Coherentist Theories of Epistemic Justification*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2014 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justep-coherence>.

<sup>30</sup> See Richard Fumerton & Ali Hasan, *Foundationalist Theories of Epistemic Justification*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justep-foundational>.

whenever we take something to be the case or regard it as true.”<sup>31</sup> It is hard to succinctly describe this meaning of belief in a way that both is accessible to the non-philosopher and fits with a normal meaning of the word. Perhaps “belief” is best thought of as what separates wheat from chaff – it sorts random conclusions from conclusions that advance the purposes of the endeavor one is engaged in.<sup>32</sup> Or put another way, in gathering information one has a context – a system purpose – that identifies what data justifies a conclusion that a proposition is true (false). H. L. A. Hart alluded to the same idea when he wrote that the inquiry “What is law” should be answered by considering what concerns motivated the question.<sup>33</sup> Crudely speaking, the consideration of “concerns motivating the question” describes the role of “belief” in “knowledge.”<sup>34</sup>

In sum, within weak deflationism, knowledge requires truth, justification, and belief. The inquiries of the nature of each of these concepts are the “truth inquiries” of weak deflationists.

These truth inquiries suggest a template for a how to formulate a meaning of truth in courts – isolate the role of truth in courts by first exploring the meaning of knowledge, belief, and justification in courts. But we should not jump into this approach naively. While weak deflationism is an analog for the truth-finding function of trial courts, the truth inquiries of weak deflationism are not identical to the truth inquiries of the courts.

Most obviously, the truth inquiry in courts diverges from philosophy in that courts seek knowledge that is a step down – perhaps *many* steps down – from “intuitive certainty.” Yet this difference is not fatal to the utility of philosophical jargon to analysis of truth inquiries in courts, because what courts do is still within the defined terminology of philosophy. An acceptable epistemological definition of “probability” is the likelihood that a proposition we believe to be true is true.<sup>35</sup> So in the philosophical jargon of “knowledge,” the “knowledge” courts seek is a

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<sup>31</sup> Eric Schwitzgebel, *Belief*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2015 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=belief>.

<sup>32</sup> See generally, KEITH LEHRER, *THEORY OF KNOWLEDGE, SECOND EDITION* 32-41, 72-76, 93, 124-125 (Westview Press 2000).

<sup>33</sup> See H. L. A. HART, *THE CONCEPT OF LAW* 5 (2<sup>nd</sup> ed.) (Clarendon Press 1994). There is some irony to quoting Hart in an Article that uses non-legal disciplines as an analog, as Hart began his own book by contending that law is alone among disciplines in being introspective about what it is and why it is doing what it is doing. H. L. A. HART, *THE CONCEPT OF LAW* at 1 (2<sup>nd</sup> ed.) (Clarendon Press 1994).

<sup>34</sup> See generally KEITH LEHRER, *THEORY OF KNOWLEDGE, SECOND EDITION* 12-14 (Westview Press 2000).

<sup>35</sup> It should be apparent that essentially every single term or word in philosophy is more nuanced and debatable than the discussion of this Article can capture. For example, there are at least three definitions of “probability,” none of which are devoid of objections. See generally KEITH LEHRER, *THEORY OF KNOWLEDGE, SECOND EDITION* 86-94 (Westview Press 2000) (detailing the advantages and objections of three formulations of “probability”). But for purposes of this Article, the above definition fits within all three, and will suffice.

systemically defined “probability” on a spectrum of knowledge less than “intuitive certainty” and more than impossibility.

Put slightly differently, what courts are doing when they seek the “truth” is – and essentially must be -- seeking an adequately justified belief about what happened in a case.<sup>36</sup> Disputes must have an end at some point, and knowledge in the philosophical sense requires the unattainable goal of absolute – or even “intuitive” -- certainty.<sup>37</sup> Coarsely stated, courts settle for “knowledge enough,” based on a “justified enough” “belief enough” that a conclusion is “true enough” -- meaning that for purposes of the courts there is an acceptable likelihood that the court’s judgment of what happened corresponds to what actually happened.<sup>38</sup>

So we must recognize that the meaning of knowledge, justification, belief, and truth likely are analogous but certainly differ between weak deflationists and the courts. It is within this caveat that the weak deflationism formulation of truth can overcome the otherwise apparently over-daunting task of enunciating a comprehensive formulation of “truth” in courts. Just as within weak deflationism knowledge requires truth, justification, and belief, one can posit that “knowledge” in courts (a perhaps highly imperfect form of knowledge that is a degree of probability indeterminately but materially below intuitive certainty) requires:

- (a perhaps imperfect form) of “truth” (“truth” in courts),
- (a perhaps imperfect form) of “justification” (“justification” in courts), and
- (a perhaps imperfect form) of “belief” (“belief” in courts).

We then can infer the insight that to better understand<sup>39</sup> the nature and

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<sup>36</sup> See C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees*, 35 VAND. L. REV. 1293, 1295-97 (1982); accord SCOTT SOAMES, *UNDERSTANDING TRUTH* 31 (Oxford Univ. Press 1999).

<sup>37</sup> See generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994). See also Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 AM. J. JURIS. 43, 47-48 (2004) (“When we need the answer to some question in a hurry, we may be obliged to curtail our search for further evidence.... [W]here some action must be taken now, .... We have no choice but to decide what to do on the basis of whatever evidence we have.”).

<sup>38</sup> In this context, I am comfortable conflating two concepts – probability (an estimate as to the likelihood of a given fact being true) and confidence (how sure one can be about a probability estimate given the information available) – that in other legal, doctrinal contexts should not be conflated. See generally Luke Meier, *Probability, Confidence, and the Constitutionality of Summary Judgment*, 42 HASTINGS CONST. L.Q. 1 (2014). Also, a court judgment of course not only determines “what Happened,” but also what consequences append to that determination. This Article confines itself to the “what happened” function of judgments because the “consequences determination” function of judgments is not part of the truth inquiry of the courts (as this Article defines the truth inquiry aspect of trials).

<sup>39</sup> I use the phrasing “better understand” as I am mindful of Keith Lehrer’s assertion (and explanation) that

import of “truth” in courts we must explore more deeply the meaning of “justification” in courts, the meaning of “knowledge” in courts, and the meaning of “belief” in courts.

## B. Understanding “Justification” in Courts

The philosophical definition of “justification” is “the predicates external to the proposition and which are experienced through the senses.” This readily translates to trials. “Justification” in courts is the set of data that counts as a fact – the admissible evidence. In order to better understand “justification” in courts, we look at what counts as a fact in trials and why.

### 1. The Rules of Evidence Define What Counts as a Fact in Courts

The Federal Rules of Evidence<sup>40</sup> provide a detailed source of the meaning of justification in courts.<sup>41</sup> Professor John Leubsdorf analyzes the Rules of Evidence as a set of *ex ante* incentives for adversaries.<sup>42</sup> But for our purposes, the Rules serve a much more concrete function -- the Rules of Evidence themselves are where the American courts set forth an explicit delineation of what information is admissible evidence – i.e., what counts as a “fact” – in a trial.<sup>43</sup>

In the language of evidence doctrine, what counts as a fact in trials is called “relevant” evidence. Rule 401 defines as “relevant” any information that bears even slightly on anything of consequence in a trial.<sup>44</sup> Rule 402 defines as inadmissible any information that fails to meet the Rule 401 threshold/definition – all relevant evidence is presumed admissible.<sup>45</sup>

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“a complete theory of truth is impossible.” KEITH LEHRER, *THEORY OF KNOWLEDGE*, SECOND EDITION 29 (Westview Press 2000).

<sup>40</sup> This portion of the Article is based on the substantive content of the Federal Rules of Evidence. While each State has its own evidence code, in substance the content of the large majority of those codes is virtually identical to the content of the federal rules. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S FEDERAL EVIDENCE T-1* (Joseph M. McLaughlin, ed.) (Matthew Bender 2d ed. 2014) (noting that 42 states have adopted rules of evidence based on the Federal Rules of Evidence).

<sup>41</sup> *But see* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1212 (2005-2006); *see also* Mark Cammack, *Evidence Rules and the Ritual Functions of Trials: “Saying Something of Something”*, 25 LOY. L.A. L. REV. 783, 783 (1992) (“evidence law does not embrace its own substantive ends, the purposes of evidence law must be determined by reference to the trial which it is designed to regulate.”).

<sup>42</sup> *See* John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621 (2009-2010). *See also*, Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423 (2015) (arguing the rules of evidence are motivated by efficiency decisions).

<sup>43</sup> Because the text of the rules and of the Advisory Committee notes, as well as numerous court opinions, often explicitly describe the underlying rationales of the rules, I will not address in this Article alternative meta-explanations such as Alex Stein’s (Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423 (2015)).

<sup>44</sup> FED. R. EVID. 401.

<sup>45</sup> FED. R. EVID. 402.

The rules then detail when that presumption is overcome.

There are several rules that are purely administrative. But beyond these, the Rules of Evidence set forth ways that superficially relevant evidence nonetheless is *not* admissible at trial – in other words, does not count as a fact and thus cannot act as justification.

## 2. Procedural/Administrative Rules of Evidence

Some rules of evidence are purely procedural or administrative. This entire set of rules -- while they are embedded in the Rules of Evidence -- do not directly bear on what the courts count as a fact. And more to the point, these rules do not describe a mechanism either to advancing or hindering the likelihood that a trial outcome will correspond to what actually happened, which is a description of what courts do that correlates to a justified knowledge of truth:

- Rules 101 (“Scope; Definitions”), 1101 (“Applicability of the Rules”), 1102 (“Amendments”), and 1103 (“Title”) – beyond simply defining terminology (including the title of the rules themselves), set forth the scope of proceedings the Rules apply to and how to amend the rules.<sup>46</sup>
- Rule 102 (“Purpose”) broadly states the goals of the Rules (fairness, efficiency, truth, and justice).<sup>47</sup>
- Rules 103-105 (“Rulings on Evidence;” “Preliminary Questions;” and “Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes”) set forth procedures for making and ruling on objections.<sup>48</sup>
- Rules 106 (“Remainder of or Related Writings or Recorded Statements”), 301 (“Presumptions in Civil Cases Generally” and “Applying State Law to Presumptions in Civil Cases”), 302 (“Applying State Law to Presumptions in Civil Cases”), (“Writing Used to Refresh a Witness’s Memory”), and 613 (“Witness’s Prior Statements”) set forth the timing of

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<sup>46</sup> FED. R. EVID. 101, 1101, 1102, & 1103.

<sup>47</sup> FED. R. EVID. 102.

<sup>48</sup> FED. R. EVID. 103, 104 & 105.

consideration of some evidence, and how the jury is instructed about some evidence.<sup>49</sup>

- Rule 201 (“Judicial Notice of Adjudicative Facts”) provides a method external to presentation of evidence to put facts into the record.<sup>50</sup> Rules 601 (“Competency to Testify in General”) and 603 (“Interpreter”) define the parameters what persons – independent of the content of their testimony – are competent to take the stand.<sup>51</sup>
- Closely related to who can be a witness are the authentication rules<sup>52</sup> and the “Best Evidence Rules,”<sup>53</sup> which independent of the content of documents regulate when a party can (or must) put a document into evidence rather than simply describe what the document says.
- Rules 611 (“Mode and Order of Examining Witnesses and Presenting Evidence”), 614 (“Court’s Calling or Examining Witnesses”), 615 (“Excluding Witnesses”), and 706 (“Court-Appointed Expert Witnesses”) address who may call a witness and when, how witnesses may be questioned, and when a witness can hear another witness testify.<sup>54</sup>

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<sup>49</sup> FED. R. EVID. 106, 301, 302, 612, & 613. Some evidence scholars argue that Rules 106 and 612 also are rules of admissibility. See Andrea N. Kochert, Note, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 IND. L. REV. 499 (2013); Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825 (1995) (endorsing view that most important function of completeness rule is to trump otherwise applicable exclusionary rules); Thomas M. Tomlinson, Note, *Pattern-Based Memory and the Writing Used to Refresh*, 73 TEX. L. REV. 1462, 1481 (1995) (arguing that because a witness may transmit the contents of inadmissible evidence through Rule 612, the rule can lead to the effective admission of inadmissible evidence in powerful testimonial form); but see CHARLES A. WRIGHT & VICTOR JAMES GOLD, 28 FED. PRAC. & PROC. EVID. § 6183 (2d ed. 1993) (“Rule 612 is not an independent source of admissibility, but simply describes a procedure whereby a witness may be assisted in providing admissible testimony.”). Thought of this way, these two rules facilitate revealing to the fact finder evidence that otherwise would have been considered injurious to the accuracy of fact finding – in other words, unwind the premise as to certain kinds of evidence that the evidence will be too confusing to or improperly weighted by the jury.

<sup>50</sup> FED. R. EVID. 201. Within Rule 201 also is an interesting and rare acknowledgement of the fact finding role of the jury. See Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1106-08 (2013).

<sup>51</sup> FED. R. EVID. 601 & 603.

<sup>52</sup> FED. R. EVID. 901, 902, & 903.

<sup>53</sup> FED. R. EVID. 1001, 1002, 1003, 1004, 1005, 1006, 1007, & 1008.

<sup>54</sup> FED. R. EVID. 611, 614, & 615. One might also argue that each of these rules has a paternalistic component – a concern that absent these rules jurors will misapply or improperly weight particular evidence. John Leubsdorf describes how authentication rules can be thought of as rules predicated on a distrust of the cognitive abilities of judges and jurors. See John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1234-41 (2005-2006)

### 3. Evidence Rules Protecting the Jury From Themselves

Most of the rules of evidence *do* seek to advance the likelihood that a trial outcome will correspond to what actually happened, but many do so in a counter-intuitive way. Intuitively, we might think that in a trial for robbing a convenience store, for example, the accused is more likely guilty if they have a past conviction for robbing a convenience store; or that if a trial must decide if the traffic light was red, it is helpful to hear from a witness who can recount that they were told by somebody else the light was red. Neither is an example of conclusive proof, but both are examples of at least *some* evidence. Yet at least in trials where the fact-finder is a jury, the rules of evidence generally treat both of these examples -- and numerous similar examples -- as *not* justifying a correct determination of what happened, and therefore the evidence is excluded.

These are examples of the rules codifying the concern that juries will misunderstand, be confused by, or improperly weigh certain kinds of evidence.<sup>55</sup> The Rules of Evidence simply do not trust -- and come close to being openly derogatory of -- the analytical and emotional abilities of jurors.<sup>56</sup> Therefore, in order to maximize the likelihood that a jury verdict will accurately determine what happened in a case, the rules keep relevant evidence from the jury on the presumption that jurors are easily confused and easily bored.

The “derogatory” view of jurors is most directly seen in Rule 403 (“Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or

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<sup>55</sup> See, e.g., John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1210, 1212, 1248, 1253 (2005-2006) (“The land ... is a realm founded on the untrustworthiness of jurors ...” “...a presupposition that underlies many evidentiary rules. ... distinctions ... between the strengths and weakness of jurors ...” “... the accepted view is that much of the law reflects judicial distrust of jurors. ... The usual manifestation of mistrust is the assertion that jurors ” “...Rules preventing juries from hearing large classes of evidence can best be justified by hypothesizing that their weaknesses will prevent them from appraising that evidence properly.”). For a more charitable view of juries -- arguing essentially that judges are no better than juries -- see Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1494 (1999) (“The point is less that we need rules of evidence because we have juries than that we have no mechanism for enforcing rules of evidence against judges.”).

At least one scholar argues that Rules 403, 408, 608, and 613 also rest on saving litigation time and money. John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1211 (2005-2006) (“Efforts to limit the cost and delay of litigation may exclude relevant evidence”). If so, then this rationale raises constitutional concerns. See generally, Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077 (2013).

<sup>56</sup> As the American Law Institute (“ALI”) reported in promulgating its first Model Code of Evidence, “The low intellectual capacity of the jury is commonly put forward to justify some, if not all, of our exclusionary rules. . . . [J]urors are treated as if they were low grade morons.” EDMOND M. MORGAN, FOREWORD TO MODEL CODE OF EVID., at 8-10 (1942). Accord GLANVILLE WILLIAMS, *THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL JURY TRIAL* 271 (3rd. ed.) (1963) (it is somewhat of an understatement to describe the jury as “twelve people of average ignorance”).

Other Reasons”).<sup>57</sup> This rule does exactly what its title suggests – it excludes relevant evidence that a judge believes the jury cannot properly evaluate. Perhaps a little less directly, that is also the underlying concern of:

- The character evidence rules:
  - Rules 404-406 (“Character Evidence; Crimes or Other Acts;” “Methods of Proving Character;” and “Habit; Routine Practice”);<sup>58</sup>
- The closely-related impeachment rules:
  - Rules 608-610 (“A Witness’s Character for Truthfulness or Untruthfulness;” “Impeachment by Evidence of a Criminal Conviction;” and “Religious Beliefs or Opinions”) and
  - Rule 806 (“Attacking and Supporting the Declarant’s Credibility”);<sup>59</sup>
- And the rules for who can be a witness:
  - Rule 602 (“Need for Personal Knowledge”),
  - Rule 603 (“Oath or Affirmation to Testify Truthfully”),
  - Rule 605 (“Judge’s Competency as a Witness”), and
  - Rule 606 (“Juror’s Competency as a Witness”).<sup>60</sup>

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<sup>57</sup> FED. R. EVID. 403.

<sup>58</sup> FED. R. EVID. 404, 405, & 406. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1526 (1999) (“The principal concern with this class of evidence .... is the danger that a jury will give it too much weight ....”). At common law, the use of character evidence was generally discouraged because of these concerns. See *Michael v. United States*, 335 U.S. 469, 476 (1948). The Advisory Committee noted that character evidence:

... tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man [and] to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

FED. R. EVID. 404 advisory committee’s note. The Advisory Committee recognized that evidence of specific instances of conduct to prove character “possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time,” and consequently, Rule 405 limits the use of this kind of evidence to cases in which character is an essential element of a charge, claim, or defense. FED. R. EVID. 405 advisory committee’s note.

<sup>59</sup> FED. R. EVID. 608, 609, 610 & 806. [The exceptions to the general rule against character evidence for propensity purposes are sharply drawn, both in terms of the type of evidence allowed and the manner in which such evidence may be introduced. For example, Rule 608(a), which allows for impeachment by reputation or opinion evidence, is “strictly limited to character for veracity” to “sharpen relevancy, to reduce surprise, waste of time, and confusion.” FED. R. EVID. 608 advisory committee’s note. Rules 608(b), 609, and 806 have similar safeguards, in addition to the “overriding protection of Rule 403.” *Id.* Rule 610 forecloses impeachment by an inquiry into religious beliefs, because “evidence of atheism is irrelevant to the question of credibility.” 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 46 (Kenneth S. Broun ed., 6th ed. 2006).



Each either is a requirement of a predicate for witness testimony (believing the jury is incapable of seeing the weakness of the evidence in the absence of the predicate), or keeping evidence out due to concerns that the jury will put too much stock in it. Rules 413 (“Similar Crimes in Sexual-Assault Cases”), 414 (“Similar Crimes in Child-Molestation Cases”), and 415 (“Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation”) also fall within this class of rules in that each exists to reverse the function of Rule 404 in particular cases.<sup>61</sup>

And perhaps most surprisingly, the same concern -- that juries will misunderstand, be confused by, or improperly weigh certain kinds of evidence -- animates the rules on hearsay and opinion evidence. Hearsay rules<sup>62</sup> all codify the concern that juries will not properly weigh second-hand (or worse) information.<sup>63</sup> Rules on opinion evidence<sup>64</sup> all codify the concern that juries will either be unable to discern fact from opinion or will over weigh expert opinions.<sup>65</sup>

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<sup>60</sup> FED. R. EVID. 602, 603, 605, & 606. The requirements that a witness have first-hand knowledge of the matter to which he testifies and take an oath or affirmation to testify truthfully are the only express competency requirements provided by the Federal Rules of Evidence. 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 62 (Kenneth S. Broun ed., 6th ed. 2006). Rule 602 reflects the common law’s insistence on the most reliable source of information. FED. R. EVID. 602 advisory committee’s note; 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 10 (Kenneth S. Broun ed., 6th ed. 2006). Rule 603 goes hand-in-hand with the prohibition on inquiry into a witness’s religious beliefs. See FED. R. EVID. 603 advisory committee’s note. The presiding judge is deemed not competent to testify because of the concern that a testifying judge cannot “in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury.” FED. R. EVID. 605 advisory committee’s note. Similar considerations justify precluding a juror from testifying as a witness before the other jurors. FED. R. EVID. 606 advisory committee’s note.

<sup>61</sup> FED. R. EVID. 413, 414 & 415. Rules 413 through 415 were added as part of the Violent Crime Control and Law Enforcement Act of 1994, the largest crime bill in United States history. Pub. L. 103-322, § 320935, 108 Stat. 2135. In the early 1990’s, media attention on perpetrators of sexual crimes escaping convictions on “technicalities” incited public outrage, which prompted Congress to respond by giving prosecutors the power to introduce evidence of past sexual crimes. Jeffrey Waller, Comment, *Federal Rules of Evidence 413–415: “Laws are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil”*, 30 TEX. TECH. L. REV. 1503, 1506–07 (1999). The Rules’ supporters in Congress argued that Rule 404’s presumption against such evidence should be reversed in cases involving rape or child molestation, because the nature of such crimes made such evidence more probative and reliable. See, e.g. 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. McCollum) (arguing that the past conduct of a person with a history of sexual crime provides evidence that he or she has the unique combination of aggressive and sexual impulses that motivates the commission of such crimes, and the lack of inhibitions against acting on these impulses).

<sup>62</sup> FED. R. EVID. 801, 802, 803, 804, 805, & 807.

<sup>63</sup> See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1530 (1999); John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1227-1228, 1249 (2005-2006); LAURENCE TRIBE, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974); JUSTIN SEVIER, *Testing Tribe’s Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 890-893 (2015). The rule against hearsay reflects the concern that the jury, which, historically, transformed from a group of persons with special knowledge of the facts to a group with no private information, should receive facts only from persons with first-hand knowledge of them. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE, § 802.02 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2014). Thus, the rule and its exceptions keep from the jury evidence that lacks reliability. See FED. R. EVID. 803 advisory committee’s note (noting that the exception “proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial”).

<sup>64</sup> FED. R. EVID. 701, 702, 703, 704, & 705.

<sup>65</sup> See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1536

The rules of evidence are not explicitly limited in applicability to jury trials. But we can be comfortable that nonetheless this set of rules is a codified view of the competencies of jurors. Courts allude to the point.<sup>66</sup> Scholars report it.<sup>67</sup> Reference to the point is made in the drafting history of the proposed Model Code of Evidence, the predecessor to the Federal Rules of Evidence.<sup>68</sup>

Further, we can look to whether the same exclusionary rules are present in administrative courts, which are non-jury adjudications. The set of exclusionary rules detailed above are not imposed on the administrative courts. In 1942 the iconic administrative law scholar, Kenneth Culp Davis, published a piece in the *Harvard Law Review* that directly addressed the role of evidence rules in administrative hearings -- he argued such rules largely were unnecessary, primarily because administrative hearings were not jury trials.<sup>69</sup> Professor Davis did not go so far as to argue that rules excluding hearsay and opinion had no place in administrative hearings, but did argue that firsthand testimony should be preferred unless it was “inconvenient,” administrative hearing officers should not place “too much reliance” on opinion evidence, and administrative courts should “prefer”

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(1999). “The basic approach to opinions, law and expert, in these rules is to admit them when helpful to the trier of fact.” FED. R. EVID. 704 advisory committee’s note. Rules 703 and 704 allow experts to testify on matters of which they have no firsthand knowledge, base their testimony on facts or data that are otherwise inadmissible, and, except in criminal cases, opine on ultimate issues. In addition, the jury “may view an expert witness as an ‘objective authority figure more knowledgeable and credible than the typical lay witness,’ and because an expert necessarily testifies about a subject that is beyond the common knowledge of the jury, the jury is not as well equipped to question the reliability of the expert’s opinion.” Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 HOUS. L. REV. 1, 4 (2014) (quoting *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007)); see also FED. R. EVID. 702 advisory committee’s note (1991) (“When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naïve to expect the jury to be capable of assessing the validity of dramatically opposed testimony.”). The Rules reflect these considerations in that they require the judge to play the role of a “gatekeeper” of expert opinion, to ensure that the jury is not presented with unreliable or misleading expert testimony. Brown & Davis, *supra*, at 4. But for purposes of the thesis proposed here – that what counts as a fact in trials is different from what colloquially is a fact – is inescapably exemplified by Rule 703, which allows an expert opinion to rely on facts inadmissible as trial evidence.

<sup>66</sup> *Williams v. Illinois*, 567 U.S. \_\_\_, 132 S.Ct. 2221, 2234-2235 (2012) (“Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge.... Under both the Illinois and the Federal Rules of Evidence, an expert may base an opinion on facts that are ‘made known to the expert at or before the hearing,’ but such reliance does not constitute admissible evidence of this underlying information.... Accordingly, *in jury trials*, both Illinois and federal law generally bar an expert from disclosing such inadmissible evidence. In bench trials, however, both the Illinois and the Federal Rules place no restriction on the revelation of such information to the factfinder. When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose” (citations omitted).).

<sup>67</sup> See, e.g., Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 724 (1964).

<sup>68</sup> The report of the ALI Proceedings considering the final draft of the Model Code of Evidence quoted the Honorable Augustus Hand as saying that he had “taken pride” that he had tried cases for thirteen years without knowing the technicalities of the rules of evidence. E.M. Morgan, *Discussion of Code of Evidence Proposed Final Draft*, 19 A.L.I. PROC. 74, 225 (1942) (remarks of Augustus Hand).

<sup>69</sup> See Kenneth Culp Davis, *An Approach to Problems in the Administrative Process*, 55 HARV. L. REV. 364, 371-374, 416-423 (1942).

sworn to unsworn evidence.<sup>70</sup> Put another way, administrative hearing officers should have the discretion to consider any evidence they wanted to. The Administrative Procedures Act (first codified four years after Professor Davis's article) provides, "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."<sup>71</sup> This is a codification of the position argued by Professor Davis – that in the absence of juries there is no need to exclude weak but relevant evidence from consideration.<sup>72</sup>

Finally, we can softly confirm the "derogatory" premise of the Rules of Evidence by looking at other countries. Countries with no jury trials generally do not exclude hearsay or character evidence.<sup>73</sup> Countries with a cramped scope of right to jury trial only exclude such evidence in jury trials.<sup>74</sup>

So we can have some confidence in the assertion that many of the Rules of Evidence – and most dramatically all of the hearsay rules, character evidence rules, and rules on opinion testimony -- are grounded in a derogatory view of juries.<sup>75</sup> While this set of rules intuitively would seem to impair the accuracy of fact finding at trial, these rules are an attempt to

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<sup>70</sup> *Id.* at 376-77. *Accord*, Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L. J. 1, 5 (1971) ("Since many of the rules governing the admission of proof in judicial trials are designed to protect the jury from unreliable and possibly confusing evidence, the rules need not be applied with the same vigor in proceedings solely before a judge or trial examiner.").

<sup>71</sup> 5 U.S.C. 556(d).

<sup>72</sup> *See* Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L. J. 1, 8 (1971).

<sup>73</sup> The technical treatments of hearsay and character evidence vary. In most countries without a jury system, there are simply no rules addressing hearsay or character evidence at all. *See* Daniel Pulecio-Boek, *The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region*, 13 RICH. J. GLOBAL L. & BUS. 67, 100-01 (2014) (noting that virtually no Latin American evidence code includes rules regarding character or hearsay evidence); *see generally* Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, YALE FAC. SCHOLARSHIP SERIES, Paper 1579 (1995), available at [http://digitalcommons.law.yale.edu/fss\\_papers\\_1579](http://digitalcommons.law.yale.edu/fss_papers_1579). Other codes express a preference for non-hearsay when it is available, but do not exclude hearsay. *E.g.*, STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT 1319, as amended, § 250 (Ger.); Decreto No. 189-84, Código de Procedimientos Penales [Code of Criminal Procedure], art. 199 (Hond.). Several countries have rules barring hearsay and/or character evidence, but the codified exceptions generally give the judge discretion to admit such evidence and thus swallow up the rule. *E.g.*, Law of Evidence Amendment Act 45 of 1988 § 3 (S. Afr.); Evidence Act, 1967, §§ 34-39 (Tanz.). A handful of countries without jury systems limit hearsay and character only in criminal trials. *See* Appendix to this Article. But rules subjecting hearsay and/or character evidence to more scrutiny in criminal cases are probably "rooted as much in due process values as [they are] in the desire to project the adjudicator from unreliable information." MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 15 (1997). *Accord*, Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423, 428 (2015).

<sup>74</sup> England, Scotland, and Jamaica are examples of this. *See* Appendix to this Article. In the case of South Korea, the advent of the criminal jury in 2008 was accompanied by the introduction of rules excluding hearsay and other unfairly prejudicial evidence. Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, AM. J. INT'L L. 525, 554 (2010).

<sup>75</sup> There is growing empirical evidence that the derogatory view of juries is not supportable. *See, e.g.*, JUSTIN SEVIER, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 890-893, 922-924 (2015).

increase the likelihood that a trial outcome will correspond to what actually happened.

#### 4. Evidence Rules Intentionally Compromising the Likelihood of Accurate Results

Having dealt with procedural/administrative rules and juror-capability rules, what remains is a set of rules intentionally excluding relevant evidence on the grounds that it will impair accurate determinations at trial. In other words, these rules are *not* attempting to increase the likelihood that a trial outcome will correspond to what actually happened. Rather, these rules make the exact opposite choice – these rules keep out evidence that *does* bear on determining what happened, and do so on the assumption that while such evidence would be helpful, there nonetheless are valid reasons to ignore it.

The first of these rules is found in Article IV of the Federal Rules of Evidence. Here we find rules constructed to alter the conduct and decisions of persons and/or entities external to the parties in trial.<sup>76</sup> To illustrate: Assume action “X” is considered a preferred choice, but if actor A does X and if B sues A, then A’s trial opponent B might gain advantage at trial by showing that A did X. These Article IV rules, in order to encourage A to do X, prohibit B from at trial introducing evidence that A did X.

For example, consider the rule excluding settlement offers from evidence. We want cases to settle. We do not want people to hesitate to make settlement offers for fear that if the case does not settle, the offer will be seen as a tacit admission of liability. Therefore, to incentivize people to make settlement offers, the rules provide that generally a party cannot argue at trial that their opponent’s offer of settlement is a tacit admission. This rule and its philosophical siblings are:

- Rule 407 (“Subsequent Remedial Measures”),
- Rule 408 (“Compromise Offers and Negotiations”),
- Rule 409 (“Offers to Pay Medical and Similar Expenses”),
- Rule 410 (“Pleas, Plea Discussions, and Related Statements”),
- Rule 411 (“Liability Insurance”), and

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<sup>76</sup> Rules 407 through 411 each promote a socially valuable activity by protecting those who engage in that activity from evidence that might be used against them. DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (3<sup>rd</sup> ed.) 88 (West 2015).

- Rule 412 (“Sex-Offense Cases: The Victim’s Sexual Behavior or Pre-dispositions”).<sup>77</sup>

A related set of doctrines is found in the law of privileges. Privileges recognize certain relationships that society values and that may not fully function except in an environment of trust and confidence.<sup>78</sup> As a result, privileges work to keep out of evidence “extremely probative” and “reliable” information.<sup>79</sup> For reasons unrelated to evidence doctrine,<sup>80</sup> the Federal Rules of Evidence do not codify a comprehensive list of privileges, but nonetheless do recognize the notion of privileges in Rules 501 (“Privilege in General”) and 502 (“Attorney-Client Privilege and Work-Product; Limitations on Waiver”).<sup>81</sup> The privileges currently and

<sup>77</sup> FED. R. EVID. 407, 408, 409, 410, 411 & 412. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1527-1529 (1999). The bar on evidence of subsequent remedial measures to prove negligence or culpable conduct “rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” FED. R. EVID. 407 advisory committee’s note. Similarly, the purpose of Rule 408 “is to encourage settlements which would be discouraged if such evidence were admissible.” S. Rep. No. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7056. The considerations underlying Rule 409, which bars evidence of offers to pay medical expenses, “parallel those underlying Rules 407 and 408.” FED. R. EVID. 409 advisory committee’s notes. Similarly, Rule 411 advances the important social policy of encouraging individuals and organizations to obtain liability insurance. MERRITT & SIMMONS, *supra*, at 150. Rule 410 advances the social interest in plea bargaining and reflects the reality that the criminal judicial system could not function if every case went to trial. *Id.* at 135. Rule 412 “encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.” FED. R. EVID. 412 advisory committee’s note. Accord John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621 (2009-2010).

<sup>78</sup> See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (3<sup>rd</sup> ed.) 826-28 (West 2015).

<sup>79</sup> DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (3<sup>rd</sup> ed.) 826 (West 2015). Accord, Kenneth Culp Davis, *An Approach to Problems in the Administrative Process*, 55 HARV. L. REV. 364, 384 (1942) (privileges “obstruct the search for truth in order to promote certain extrinsic policies . . .”); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 100-01 (4<sup>th</sup> ed. 1992) (“Rather than facilitating the illumination of the truth, [privileges] shut out the light.”).

<sup>80</sup> Congress considered the proposed Federal Rules of Evidence during the “Watergate” scandals, which soured Congress on codification of privileges. See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (3<sup>rd</sup> ed.) 829 (West 2015).

<sup>81</sup> FED. R. EVID. 501 & 502. The original proposal by the Advisory Committee had thirteen privileges, but got caught up in the then broader controversy of Watergate and privilege; Congress did not adopt the original proposal on privileges. See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (THIRD EDITION) at 829 (West Academic 2015). The proposed Article V submitted to Congress contained thirteen rules: one provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts, nine defined specific privileges, and three addressed issues of waiver. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230–61 (1972) (Proposed Rules 501–513). The Judiciary Committee amended Article V, eliminating all of the specific rules on privilege in favor of Rule 501, which provides that privilege is governed by the common law, the United States Constitution, federal law, and rules prescribed by the Supreme Court. The rationale underlying the amendment was that federal law should not supersede state law in substantive areas such as privilege absent a compelling reason. H.R. REP. NO. 93-650, at 8–9 (1974), reprinted in 1974 U.S.C.C.A.N. 7075, 7083. Some scholars suggest that the original proposal by the Advisory Committee got caught up in the then broader controversy of Watergate and privilege. See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (THIRD EDITION) at 829 (West Academic 2015). In 2008 the Advisory Committee proposed and Congress enacted Rule 502, which provides for limitations on waiver of the attorney-client privilege and work product protection, in response to longstanding disputes in the courts about the effect of certain disclosures of protected information and complaints about prohibitively high litigation costs necessary to protect against waiver. FED. R. EVID. 502 advisory committee’s note.

unambiguously recognized in federal courts are the right against self-incrimination, the attorney-client privilege, the attorney work-product privilege, the spousal testimonial and spousal confidences privileges, the psychotherapist-patient privilege, executive privilege, and clergy communicant privilege.<sup>82</sup> There is a recognized but less defined state secrets privilege,<sup>83</sup> and some support for a journalist-source privilege.<sup>84</sup> Some States also recognize physician-patient privilege and intra-family privileges beyond spouses.<sup>85</sup> Each of these privileges conceptually is a choice that evidence in a particular dispute will be excluded in order to effect the choices made by persons external to the dispute (the generic set of future clients, spouses, patients, journalist sources, penitents, etc.).<sup>86</sup>

A third set of exclusions of relevant evidence for non-accuracy reasons are procedural exclusions. In these instances – primarily exclusion of improperly gathered evidence in criminal cases,<sup>87</sup> and exclusion due to discovery abuse in civil cases<sup>88</sup> -- again evidence is excluded not because the admission of the evidence may distort the chances of reaching an accurate result, but despite the fact that the exclusion may do so.<sup>89</sup> The decision is made that because of the way the police (mis)behaved, or because of the way the lawyer (mis)behaved, we must incentivize future better behavior, even if the cost is the distorted outcome of the trial at hand.

Finally, there is exclusion of evidence for reasons of time and money. Here, we return to Federal Rules 403 and 611, both of which allow exclusion of relevant evidence because it is too time consuming or repetitive.<sup>90</sup>

<sup>82</sup> See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (3<sup>rd</sup> ed.) 830-831 (West 2015).

<sup>83</sup> See generally Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931 (2007).

<sup>84</sup> See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (3<sup>rd</sup> ed.) 831-832 (West 2015).

<sup>85</sup> See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (3<sup>rd</sup> ed.) 832 (West 2015).

<sup>86</sup> See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *STAN. L. REV.* 1477, 1530-1532 (1999).

<sup>87</sup> See generally Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 *AM. BAR FNDTN. RESEAERCH J.* 585 (1983); Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 8 *AM. BAR FNDTN. RESEAERCH J.* 611 (1983).

<sup>88</sup> See *FED. R. CIV. PROC.* 37 ("If a party or a party's officer, director, or managing agent ... fails to obey an order to provide or permit discovery ... the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence....").

<sup>89</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("[T]he purpose of the exclusionary rule 'is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.'") (internal citations omitted).

<sup>90</sup> *FED. R. EVID.* 403 ("The court may exclude relevant evidence if its probative value is substantially

As with jury-derogation evidence rules, excluding concededly relevant evidence for extra-trial accuracy reasons is a counter-intuitive definition of what counts as a fact in courts. And so as a check that one is not too precipitously interpreting what American courts are doing, we again can look for at least soft confirmation from the courts of other countries. We can ask: do other countries also recognize privileges and the like, thereby excluding concededly relevant evidence? And when we do so, our definition again is confirmed – countries around the world routinely and intentionally exclude from evidence information that would advance the likelihood that a trial outcome will correspond to what actually happened.<sup>91</sup> In other words, globally courts are comfortable occasionally subjugating trial accuracy to other values. They do not see this as inconsistent with the role of public courts.

## 5. Conclusions About What Courts Count as “Facts”

What now can we conclude about what counts as a “fact” in court? Relevant evidence counts as a fact subject to two limitations. First, a relevant fact must be within the evaluative skill set of our preconceived notions of juror competence. Second, a relevant fact must not promote a defined set of undesirable behaviors external to the trial.

As Judge Richard Posner cautions, “it is important to note that the formal rules only codify a fraction of the law of evidence.”<sup>92</sup> But the other

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outweighed by a danger of one or more of the following: ... undue delay, wasting time, or needlessly presenting cumulative evidence.”); FED. R. EVID. 611 (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: ... avoid wasting time”).

<sup>91</sup> Evidentiary privileges are examples of “[r]ules rejecting probative information for the sake of values unrelated to the pursuit of truth.” MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 12–13 (1997) (noting that testimonial privileges are widespread in continental Europe and often broader than the common law privileges). Some form of the attorney-client privilege exists in nearly every country examined in Appendix A to this Article. See, e.g., Code of Criminal Procedure art. 159(b), *Fletorja zyrtate* Nos. 5–7 (1995) (Alb.); Criminal Procedure Code art. 65(4) (Arm.); *Commonwealth Evidence Act 1995* s 118–119 (Austral.); Código Penal [Criminal Code] §§ 246–247 (Chile); Civil Procedure Act (Law No. 547, 1960, as last amended by Law No. 9171, 2008) art. 315 (R. O. Korea); Code of Judicial Procedure, 36:3 (Swed.); Evidence Act, 1967, §§ 134–137 (Tanz.); CMUK. m. 46 [Code of Criminal Procedure art. 46] (Turk.); Civil Evidence Act § 8 (Zimbabwe). The spousal/familial privileges is just as widespread. E.g., Code of Civil Procedure art. 566, *Fletorja zyrtare* Nos. 9–11 (1996) (Alb.); Code of Criminal Procedure art. 158, *Fletorja zyrtate* Nos. 5–7 (1995) (Alb.); Criminal Procedure Code art. 20(1) (Arm.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BUNDESGESETZBLATT 3202, as amended, § 383(1)–(3) (Ger.); Civil Procedure Act (Law No. 547, 1960, as last amended by Law No. 9171, 2008) art. 314 (R. O. Korea); Code of Judicial Procedure, 36:3 (Swed.); Evidence Act, 1967, §§ 130–131 (Tanz.); CMUK. m 45 [Code of Criminal Procedure art. 45] (Turk.); Civil Evidence Act § 6 (Zimbabwe). In South Africa, judges have “wide discretion to permit [a witness] to refuse to disclose information where disclosure would be a breach of some ethical or social value and nondisclosure would be unlikely to result in serious injustice in the particular case in which it is claimed.” L. H. HOFFMAN & D. T. ZEFFERT, *THE SOUTH AFRICAN LAW OF EVIDENCE* 266–67 (4th ed. 1988). But see Jenia Iontcheva Turner, *The Exclusionary Rule As a Symbol of the Rule of Law*, 67 SMU L. REV. 821, 822–829 (2014) (reporting on the spread of the criminal exclusionary rule internationally in new democracies as a check on government abuse and a symbol of democracy).

<sup>92</sup> Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1517 (1999).

evidence rules Judge Posner has in mind – such as *res ipsa loquitur* – are not matters of defining facts but rather are ways to resolve disputes by approaches other than gathering of facts.<sup>93</sup> For our purposes, these other rules are at most tangential to the ideas of this Article.

So what we learn from better understanding “justification” in courts – or what counts as a fact – is that correct outcomes are *not* the be all and end all of public courts. Or put another way, “justification” in courts means the relevant facts both within the evaluative skills of jurors’ competence and that do not promote defined undesirable behaviors external to the trial

Finally, it bears at least brief acknowledgement and discussion that if we depart from the concrete settings of courtrooms and return to the theoretical context of epistemology, then defining “justification” as dependent on external assumptions is philosophically problematic. Applying nuanced philosophical terminology somewhat crudely, the rules of evidence are an example of an inferential justification that is an epistemic regression – knowledge formed from justified belief inferred from other knowledge formed from justified belief.<sup>94</sup> The rules of evidence avoid the absurdity of an *infinite* epistemic regression by providing a foundation for this otherwise bottomless inquiry – the rules define a set of information that a fact finder by fiat is empowered to believe as true, and thus is justified in inferring knowledge from. But in doing so, the rules of evidence create their own absurdity, because the foundation is defined as incomplete (relevant evidence is excluded) and hence inaccurate – the rules define a path to “truth” that intentionally is *not* the whole truth. This argument in its most abstract form is the basis of skepticism in philosophy of “foundationalism” explanations of “justification.”<sup>95</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> See Richard Fumerton & Ali Hasan, *Foundationalist Theories of Epistemic Justification*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justep-foundational> (“the vast majority of the propositions we know or justifiably believe have that status only because we know or justifiably believe other different propositions”).

<sup>95</sup> See generally, KEITH LEHRER, *THEORY OF KNOWLEDGE*, SECOND EDITION 15-18 (Westview Press 2000). Accord Richard Fumerton & Ali Hasan, *Foundationalist Theories of Epistemic Justification*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justep-foundational> (“If all justification were inferential then for someone *S* to be justified in believing some proposition *P*, *S* must be in a position to legitimately infer it from some other proposition *E1*. But *E1* could justify *S* in believing *P* only if *S* were justified in believing *E1*, and if all justification were inferential the only way for *S* to do that would be to infer it from some other proposition justifiably believed, *E2*, a proposition which in turn would have to be inferred from some other proposition *E3* which is justifiably believed, and so on, *ad infinitum*. But finite beings cannot complete an infinitely long chain of reasoning and so if all justification were inferential no-one would be justified in believing anything at all to any extent whatsoever. This most radical of all skepticisms is absurd (it entails that one couldn't even be justified in believing it) and so there must be a kind of justification which is not inferential, i.e., there must be noninferentially justified beliefs which terminate regresses of justification.”). This is the coherentist attack on foundationalist theories of justification.



That is a mouthful. But for purposes of understanding “justification” in courts – the “problem” can be stated more accessibly: the rules of evidence have to make assumptions about what could be true in order to evaluate what is true. That is epistemologically problematic. But it is less problematic for the more concrete context of “justification” in courts, in part due to the insight that correct trial judgments are not the *only* concern of the courts.

### C. Understanding “Knowledge” in Courts

Recall that when we began this discussion, we defined “knowledge” as an intuitive form of certainty. Put another way, it is when one has collected a sufficient quantum and quality of information that one feels comfortable ending the information gathering function and is willing to act.

Courts are information-gathering, decision-making endeavors. Any information-gathering, decision-making endeavor has rules for what quality of information it is willing to consider, and for when it has enough quantum of information collected such that collection can end and action can begin.

Consider, for example, the different approaches of a research physician and a treating physician. A research physician – or for that matter, any bench scientist in any hard science discipline – primarily is trying to advance pure knowledge, and so paramount is that an experiment is sufficiently rigorously designed that its results are reliable.<sup>96</sup> Thus, a research scientist considers data that can be derived from a properly structured, double blind experiment. A research scientist acts – is willing to move on to the next task -- if the result can be replicated. On the other hand, a treating physician – in response to the necessity of addressing patient health – has very different notions of what to consider as a basis to act, and when to act. Data worthy of consideration is any symptom, regardless of its vagueness or source or likelihood. The decision-making metric is the “differential diagnosis,”<sup>97</sup> under which the physician may treat a more dangerous albeit less probable explanation first.<sup>98</sup>

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<sup>96</sup> *Accord* John Thibaut & Laurens Walker, *A Theory of Justice*, 66 CAL. L. REV. 541, 541-542 (1978) (arguing objective truth is best suited to scientific inquiries, while courts are better suited to distributive justice).

<sup>97</sup> *See generally*, “differential diagnosis,” GALE ENCYCLOPEDIA OF MEDICINE (2008).

<sup>98</sup> Louis Kaplow uses the example of a treating doctor to rhetorically demonstrate why legal systems pay too little attention to decisional rules – he argues that in important medical decisions we would never use a preponderance of evidence standard. Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738, 745 (2012). The inference is that in medical decisions – where the stakes often can be higher than in civil litigation -- the decisional rule would have to be more stringent. Under the differential diagnosis approach, however, the initial treatment may be addressing something even less likely than 50/50. And that is the point – different systems have different decision rules in response to different system needs.

Thought of this way, “knowledge” in courts – or the acceptable degree of “probability” – is a determination about the primacy of “accuracy.”

### 1. Knowledge as Accuracy

At the 2015 Annual Meeting of the American Association of Law Schools, the Criminal Justice Section presented a distinguished panel addressing the ways in which the criminal justice system fell short of being “just” or “fair” because of the system’s apparently insufficient devotion to discerning the “truth” with “accuracy.”<sup>99</sup> An underlying assumption of the entire panel was that guilt or innocence, at least in a serious criminal case, could – and should – be determined accurately no matter the procedural burden or the stage of the litigation.<sup>100</sup>

The panelists all conceded that whatever they thought should be the primacy of accuracy, the United States Supreme Court unambiguously has promoted finality over accuracy.<sup>101</sup> In other words, the jurisprudence of the Court plainly holds that if a trial has been procedurally sufficient, the fact that the verdict could be more accurate is not a reason to reopen the matter. Or put yet another way, even those who believe accuracy is attainable concede that the courts do not adopt it as a primary value.

The moderator of the AALS Panel – Professor Dan Simon – has written in detail on the value of “accuracy” in the American courts.<sup>102</sup> In his book, Simon puzzles over the jurisprudence of the United States Supreme Court -- “One of the most bewildering and underappreciated features of the criminal justice process is the low value it assigns to the accuracy of its factual determinations or, in the legal parlance, to the discovery of truth.”<sup>103</sup> As Simon details, the system regularly allows process to trump accuracy.

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<sup>99</sup> *Criminal Justice – Reprioritizing Accuracy As The Primary Goal Of The Criminal Justice System*, AALS 2015 Annual Meeting (January 5, 2015), available with Login password at <https://soundcloud.com/aals-2/criminal-justice-reprioritizing-accuracy-as-the-primary-goal-of-the-criminal-justice-system/s-YH7ve>.

<sup>100</sup> *Criminal Justice – Reprioritizing Accuracy As The Primary Goal Of The Criminal Justice System*, AALS 2015 Annual Meeting (January 5, 2015), available with Login password at <https://soundcloud.com/aals-2/criminal-justice-reprioritizing-accuracy-as-the-primary-goal-of-the-criminal-justice-system/s-YH7ve>.

<sup>101</sup> *Criminal Justice – Reprioritizing Accuracy As The Primary Goal Of The Criminal Justice System*, AALS 2015 Annual Meeting (January 5, 2015), available with Login password at <https://soundcloud.com/aals-2/criminal-justice-reprioritizing-accuracy-as-the-primary-goal-of-the-criminal-justice-system/s-YH7ve>.

<sup>102</sup> See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (Harvard Univ. Press 2012).

<sup>103</sup> DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 209 (Harvard Univ. Press 2012).

It is one thing to disagree with the Court. It is quite another to find it “bewildering.” If the Court’s opinions on accuracy are “bewildering,” then it bears revisiting whether the Court and Professor Simon mean the same thing by “accuracy.”

A quantum of information rule is the balancing point a system sets between its competing values of finality and certainty. As discussed *supra*, any information-gathering, decision-making endeavor has a set of rules for the quantum of information necessary to act. This is the meaning of “accuracy” within an information-gathering, decision-making endeavor. It is what Professor Luke Meier describes as a “confidence principle” – the confidence one has in the probability of an event having occurred being predictive of whether the event actually occurred.<sup>104</sup> Because absolute certainty is not attainable, in order to act the endeavor must at some point conclude it is – using a colloquial meaning of accuracy -- “accurate enough.”<sup>105</sup> A complaint about the “accuracy” of an information-seeking endeavor is a complaint that the system has not set the threshold for “accurate enough” – the juncture for ending information gathering and turning to action -- at a correct balancing point. Thus, the decisional rule – the rule for when gathering data can end and action can begin – defines a system’s value of “accuracy.”

## 2. Accuracy as Burdens of Proof

Thought of this way, we can understand more clearly what the American courts mean by “accuracy.” In the American courts the rules for quantum of information – the meaning of “accuracy” -- are the burden of production rules within the familiar rules for burdens of proof used as decisional rules: generally “preponderance of the evidence” in a civil case and “beyond a reasonable doubt” in a criminal case.<sup>106</sup> Burdens set a metric both for acceptable probability that a decision will be correct, and how to make that decision (avoid a “tie”).

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<sup>104</sup> See Luke Meier, *Probability, Confidence, and the “Reasonable Jury” Standard*, 84 MISS. L. J. 747, 778-813 (2015).

<sup>105</sup> *Accord*, C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees*, 35 VAND. L. REV. 1293, 1295-1296 (1982)

<sup>106</sup> See, e.g., C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees*, 35 VAND. L. REV. 1293, 1293-1294 (1982). If one probes more deeply than the general contexts of most civil cases and most criminal cases, there are other burdens of proof. See Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 558-559 (2013). For purposes of this Paper, these nuances do not matter. Further, the argument that some burdens of proof are constitutionally required – see Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 79-82 (2008) -- does not matter to this Paper.

The American courts are a binomial decision system.<sup>107</sup> In a civil case within each claim between each pair of parties a verdict can only be liable or not liable. In a criminal case as to each charge against each defendant a verdict can only be guilty or not guilty. American courts reach decisions almost every time.<sup>108</sup>

But even in a binomial decision system it is possible that a decision is *not* reached; rather, there is a “tie.” Thus we must examine tiebreaking rules in binomial decision systems.

While a true tie might be so unlikely as to essentially be impossible, if we define a “tie” simply as a close question – one where the right decision is not yet sufficiently determinable -- then how a system deals with ties is important. Defining ties this way is not a matter of convenience, but rather of reality. Trials have never been, and never will be “Bayesian”<sup>109</sup> -- judges and juries do not seek to quantify experiential data and risk of error to mathematically determine a verdict. The rules of courts structure a system that allows judges and juries to decide what probably happened in a case, and to be confident enough with that conclusion that a dispute can come to an end.<sup>110</sup> Until that point is reached, the trial is in stasis – it is a tie.

Now we can comfortably see how the American courts act like any other information-gathering endeavor. Ties so defined create a decision point – the point at which reaching the *right* decision is less important than reaching *some* decision. In information-gathering endeavors, as information is gathered there will be junctures where a decision is not yet considered readily determinable. Some of these junctures are simply

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<sup>107</sup> Not all court systems are binomial decision systems. For example, a verdict in a criminal trial in Scotland gives three options: guilty, not guilty, and not proven. See Samuel Bray, *Not Proven: Introducing a Third Verdict*, 72 CHI. L. REV. 1299 (2005); Lorraine Hope, Edith Greene, Amina Memon, Melanie Gavisk, & Kate Houston, *A third verdict option: Exploring the option of the not proven verdict on mock juror decision making*, 32 LAW & HUM. BEHAV. 241, 242 (2008).

<sup>108</sup> Hung jury rates in the United States are approximately 5% - 7%. See HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 56 (Little, Brown 1966); G. Thomas Munsterman, *Hung Juries: Are They a Problem* (NCSC), <http://www.ncsc-jurystudies.org/what-we-do/~media/microsites/files/cjs/jury%20news/hung%20juries%20are%20they%20a%20problem.ashx>; George C. Thomas, III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893, 918 (2007); see also, Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 MICH. J. L. REFORM 569, 582-83 (2007) (roughly two percent of federal trials and four-to-six percent of state trials end in hung juries).

<sup>109</sup> Bayes Theorem is “a theorem expressing the probability of one of a number of mutually exclusive events  $H_i$ , given some other event  $E$ , in terms of the probabilities of all the  $H_i$  independently of  $E$  and the probabilities of  $E$  given each  $H_i$ .” OXFORD ENGLISH DICTIONARY (Oxford Univ. Press 2015).

<sup>110</sup> See Luke Meier, *Probability, Confidence, and the Constitutionality of Summary Judgment*, 42 HASTINGS CONST. L.Q. 1, 2 (2014) (“Stated simply, the probability inquiry requires an estimate as to the likelihood of a given fact being true; the confidence inquiry asks how sure one can be about a probability estimate given the information available.”). See also, Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985).

moments where information gathering is early and incomplete. Others are junctures where the system has gathered enough information that a decision could be made. In these later instances, the system rules either will impose a decisional rule – a tie-breaking rule governing how to make a decision -- or continue with the information-gathering process.<sup>111</sup>

In this way, decisions in trials (verdicts and judgments) are different from decisions described in economic decision theories. In trials the decision maker (judge or jury) is different from the system participants controlling the quantum of information the decision will be based upon (attorneys and litigants). Classic decision theory assumes decision-making where these roles reside in the same person/entity.<sup>112</sup>

Subject to this distinction, burdens of proof as decisional rules not only are probability rules, but also are tiebreaking rules.<sup>113</sup> In trials, the attorneys – subject to the gatekeeping rulings of the judge – control the quantum of information.<sup>114</sup> Burdens of proof then regulate the way the decision maker – judge or jury – manipulates this information. The decision maker does not usually – indeed, rarely can -- send the case back to the lawyers and say, essentially, “I need to know more.” So the function in trials of burdens of proof is to force a decision – i.e., to take the possibility of a true tie off of the table. It is a message to the parties – “Put into evidence whatever information you wish, but this is it – this dispute ends today.” So in trials the mere *fact* of imposing a tiebreaking rule tells us imprecisely that in the instance of close questions, at some point the system values finality more than the system fears error.<sup>115</sup> But the rules do not quantify when information gathering will end, because it is in the control of the parties, not the decision maker. Rather, the rules provide that when information gathering has ended, the decision-maker must decide.

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<sup>111</sup> See Michael Block & Jeffrey S. Parker, *Decision Making in the Absence of Successful Fact Finding: Theory and Experimental Evidence on Adversarial Versus Inquisitorial Systems of Adjudication*, 24 INT’L REV. L. & ECON. 89, 91 (2004) (“...burdens of proof ... operate as default rules of decision for cases where revelation has failed.”). A variant of this later version of a tie is when there is no further information to be gathered.

<sup>112</sup> See generally, Hillel J. Einhorn & Robert M. Hogarth, *Behavioral Decision Theory: Processes of Judgment and Choice*, 32 ANN. REV. PSYCHOL. 53 (1981); For a detailed economic analysis of this phenomena and its implications, see generally Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738 (2012). Timothy Williamson argues that in the strictest construction, one “cannot use decision theory as a guide to evidential probability.” TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* 210 (Oxford Univ. Press 2000).

<sup>113</sup> See Jerome A. Hoffman & William A. Schroeder, *Burdens of Proof*, 38 ALA. L. REV. 31, 31 (1986-1987)

<sup>114</sup> See Justin Sevier, *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, 20 PSYCHOL. PUB. POL’Y & L. 212, 212-213 and sources cited therein (2014) (because an adversarial system – in contrast to an inquisitorial system – places control of information outside the control of the decision maker, adversarial systems may be more poorly equipped to achieve objective accuracy).

<sup>115</sup> A compelling criticism of the balance the American courts have struck between finality and accuracy can be found at Laurie L. Levinson, *Searching for Injustice: The Challenge of Post-Conviction Discovery, Investigation, and Litigation*, 87. S. CAL. L. REV. 101 (2015).

But burdens of proof also teach us something about the views of the courts toward *particular kinds of error*. Errors can be of two types. Type I error is a false positive. Type II error is a false negative. Binomial decision systems – in setting their decisional rules – are expressing a choice between: (1) neutrality between Type I error and Type II error; and (2) preferring one type of error to the other.<sup>116</sup>

An example of near-neutrality between Type I error and Type II error comes from baseball. The baseball rule for when a ball is caught by the first baseman at the apparent same moment that the runner's foot touches the base is the tie goes to the runner.<sup>117</sup> The likelihood is essentially zero that measured even in micro-seconds there was an actual tie. If we assume that instances of the runner beating the catch and instances of the catch beating the runner are essentially equally distributed along a spectrum of which came first and by how much, then to impose a tiebreaking rule at exactly the point of the apparently true tie, baseball approaches the two types of error almost neutrally.<sup>118</sup> Baseball is as close as is possible – while still making a decision -- to being indifferent between a mistaken “safe” call and mistaken “out” call.

An example of a system that does not view both types of error neutrally is a pregnancy test. No over-the-counter pregnancy test is perfect. It is capable of giving a false positive or a false negative. But “False-positive results are not thought to be as significant a public health concern as false-negative results, as they should lead to a prenatal appointment and follow-up laboratory testing.”<sup>119</sup> For these reasons, a pregnancy test is intentionally biased to produce more false positives than false negatives.

As these examples illustrate, the nature of the tie-breaking rule of a system teaches us the view of a system towards particular types of error.<sup>120</sup> And with this in mind we see something important about the American courts. The civil trial decisional rule – preponderance of the evidence – is

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<sup>116</sup> See generally, Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 740, 756 (2012).

<sup>117</sup> I am aware that as video technology has advanced and as Major League Baseball has adopted video review, the likelihood and frequency of a true tie has almost been eliminated entirely. But the utility of baseball as an example serves the purposes of this Paper, and it bears noting that there are vastly more baseball games played outside of Major League Baseball than within it.

<sup>118</sup> Baseball does not approach the two types of error *exactly* neutrally, as that would require either randomizing the beneficiary of a true tie or doing something like NCAA basketball does when two opposing team players simultaneously possess the ball – in the run of the game the two teams alternate the right to possession in the wake of a tie. But for our purposes, baseball remains sufficiently illustrative.

<sup>119</sup> Lori A. Bastian, Kavita Nanda, Vic Hasselblad & David L. Simel, *Diagnostic Efficiency of Home Pregnancy Test Kits*, 7 ARCHIVES OF FAMILY MEDICINE 465-469 (1998).

<sup>120</sup> See generally, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 844-49 (Wolters Kluwer 9<sup>th</sup> ed. 2014).

like the baseball example, a near neutral rule.<sup>121</sup> In civil cases the system essentially is indifferent to who wins.<sup>122</sup> The criminal trial decisional rule – beyond a reasonable doubt – is like the pregnancy tests, a strong preference rule, although in contrast to a pregnancy test, the preference here is for Type II error (a “not guilty” verdict setting a guilty person free) rather than Type I error (a “guilty” verdict convicting an innocent accused).<sup>123</sup>

One more observation can tentatively be made about burdens of proof. The intention of burdens may not be matched by the reality. As noted, the civil burden of proof is neutral between types of error. The criminal burden of proof is a strong preference rule. So if the criminal burden of proof functions as intended, then in the set of “Not Guilty” verdicts we would expect that a high percentage of acquittals are actually juries who conclude “not proven” rather than conclude “exoneration.” But there is some weak data suggesting this is not actually what is occurring. In Scotland the criminal verdict form has had three options – “Guilty,” “Not Guilty,” and “Not Proven” -- for over 300 years.<sup>124</sup> The verdict choice of “Not Proven” accounts for between 1/5 and 1/3 of all Scottish acquittals.<sup>125</sup>

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<sup>121</sup> While he does so in the course of developing a different point, in L. Jonathan Cohen’s work addressing burdens of proof he posits an example of a case where the only evidence of who was a gatecrasher is that of 1000 attendees to a rodeo, only 499 paid to get in; his example illustrates the neutrality of the civil system between the two types of error – as to any particular person accused of being a gatecrasher, the likelihood of Type I error is .501 and the likelihood of Type II error is .499, yet the system is comfortable reaching a decision. L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 74-78 (Clarendon Press 1977).

The civil justice system is not uniformly neutral between Type I and Type II error. *See generally*, Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996). Recent Supreme Court jurisprudence arguably broadly changes the balance point in civil cases between Type I and Type II error, by empowering a civil trial judge to dismiss a case pre-discovery as a means of reducing the incidence of frivolous litigation. *See generally*, Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL’Y 1 (2010); Kenneth S. Klein, *Removing the Blindfold and Tipping the Scales: The Unintended Lesson of Ashcroft v. Iqbal is that Frivolous Lawsuits May be Important to Our Nation*, 41 RUTGERS L. J. 593 (2010); Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437 (2013); Mark Hermann, James M. Beck, & Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal*, 158 U. PA. L. REV. PENUMBRA 141, 146-147, 151-153 (2009). Because the Supreme Court did not discuss its rationale in the jargon of Type I and Type II error, however, the Court’s holdings are susceptible of at least two interpretations: the Court may be determining that the civil system no longer should be strictly neutral, but the Court also simply may be trying to correct for a system that should be neutral but that the Court believes has become out of balance.

<sup>122</sup> *See* Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738, 742-44 n. 7-9 (2012).

<sup>123</sup> *See* Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 308 (2007). *See generally*, Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738, 744 n. 10 (2012). In other words, the criminal justice system is premised on a decision that as a society we are willing to live with more criminals on the street in order to minimize the instances of incarceration of the innocent. *See, e.g.*, *In re Winship*, 397 U.S. 358, 361-364 (1970) (the reasonable doubt standard is “a prime instrument for reducing the risk of convictions resting on factual error”). The “beyond a reasonable doubt” standard is one place we can concretely see this decision in action. *Cf.* Matteo Rizzoli & Luca Stanca, *Judicial Error and Crime Deterrence: Theory and Experimental Evidence*, 55 J. L. & ECON. 311 (2012) (arguing that in criminal justice Type I error and Type II error may have equal deterrence effect).

<sup>124</sup> *See* Lorraine Hope, Edith Greene, Amina Memon, Melanie Gavisk, & Kate Houston, *A third verdict option: Exploring the option of the not proven verdict on mock juror decision making*, 32 LAW & HUM. BEHAV. 241, 242 (2008).

<sup>125</sup> *See* Lorraine Hope, Edith Greene, Amina Memon, Melanie Gavisk, & Kate Houston, *A third verdict*

While a variety of factors could explain this experience, one explanation is that between 66% and 80% of acquittals in Scotland are actual exonerations.<sup>126</sup> And while Scotland is not the United States, and the differences systemically and culturally may well matter for comparative purposes, Scotland's experience is at least tentative evidence raising a question of how well the American burdens are achieving their architectural purpose.

This tentative conclusion reinforces an earlier point, which is that trial judgments do not mirror precisely, either in structure or behavior, the kinds of decisions modeled in decision theory. It turns out that decision theory is a useful *analog to* what happens in trials, but is not a *description of* what happens in trials. And for this reason, we can draw broad but not mathematically precise conclusions about the role of burdens of proof in trials. Those conclusions are: The rules of the American courts express a preference for finality over accuracy, express a near neutral view of error in civil cases, and express a strong preference for Type II error in criminal cases.<sup>127</sup>

It bears noting that some scholars expert in economic analysis of the law reject the notion that we cannot have mathematically precise conclusions about the role of burdens of proof in trials. There is a lot of contemporary discussion in the legal literature – largely taking a Bayesian approach<sup>128</sup> – about refining burdens of proof either in order to function optimally or in order to serve system goals beyond simply being a

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*option: Exploring the option of the not proven verdict on mock juror decision making*, 32 LAW & HUM. BEHAV. 241, 242 (2008).

<sup>126</sup> I believe the true exoneration rate in Scotland is actually between somewhat and far lower. Here is why: Envision a spectrum of confidence of guilt ranging from 0% certainty of guilt (100% certainty of innocence) to 100% certainty of guilt. We will somewhat arbitrarily, for these purposes, assign a value of 90% of certainty guilt to “guilt beyond a reasonable doubt” – the standard for conviction in a criminal trial. “Probably guilty” versus “probably innocent” would break right at 50%. So on this spectrum, “Guilty” would be the cases would from 90%-100%. “Probably Not Guilty” would be the cases from 0%-50%. “Probably Guilty but Not Proven” would be the cases from 50%-90%. This model would predict then that 4/9ths of acquittals – 44.44% -- would be where the jury is actually concluding “probably guilty but not proven.” But Scotland's experience is that the percentage of acquittals through a verdict of “Not Proven” is 20%-33.33%. There are a variety of factors that could explain why juries in Scotland opt for a finding of “Not Proven.” See Lorraine Hope, Edith Greene, Amina Memon, Melanie Gavisk, & Kate Houston, *A third verdict option: Exploring the option of the not proven verdict on mock juror decision making*, 32 LAW & HUM. BEHAV. 241 (2008). But all of these factors would vector toward the “Not Proven” rate being higher – not lower -- than the incidence of a true conclusion of “not proven.” So I conclude that the true rate of acquittals because guilt was “not proven” “beyond a reasonable doubt” is higher than 20%-33.33, and conversely the true exoneration rate is lower than 66.67%-80% of all acquittals.

<sup>127</sup> I will not attempt to be any more precise in my description of the role of burdens of proof in fact finding. I agree with Ronald Allen and Alex Stein that it is impossible to assign anything like mathematical precision to the nature of fact finding. See Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 600-602 (2013). But see, Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423 (2015) (arguably presenting the opposite conclusion – that fact finding can be precisely economically modeled).

<sup>128</sup> See, e.g., Anne W. Martin & David A. Schum, *Quantifying Burdens of Proof: A Likelihood Ration Approach*, 27 JURIMETRICS J. 383, 384-385 (1986-1987).



decisional rule. Professors Bruce Hay and Kathryn Spier argue for burdens of proof as a means of limiting the costs of resolving a dispute.<sup>129</sup> Professor Louis Kaplow proposes modifying burdens of proof to better reflect statistical distributions of harms and benefits related to kinds of behavior.<sup>130</sup> Professor Edward Cheng calls for a pure (or at least more) numerical approach to burdens of proof as decisional rules.<sup>131</sup> Professors Ronald Allen and Alex Stein take on the economic analysis of Professor Kaplow and Professor Cheng, and use an economic analysis to conclude burdens of proof need no great revision.<sup>132</sup> Judge Richard Posner argues for reforms to burdens of proof to simultaneously maximize efficiency and protect noneconomic interests.<sup>133</sup>

The underlying assumption of all of this work is that it is possible to define burdens of proof with some mathematical precision. Perhaps so. But even if burdens of proof can – within academic literature -- be defined with mathematical precision, it is doubtful that it is within the capabilities of most judges and juries to apply them in that manner.<sup>134</sup>

### 3. Conclusions About Knowledge in Courts

So then what do courts mean by “accuracy?” “Accuracy” is an application of a confidence principle – it means that a quantum of evidence has been gathered sufficient to conclude that a probably correct determination of what happened can be reached.

And this then gives us a better understanding of “knowledge” in courts. “Knowledge” in courts is reaching a “correct enough” resolution, biasing toward certainty when the stakes involve liberty and staying near neutral when the stakes are private relationships.

#### D. Understanding “Belief” in Courts

We have defined “belief” in an information-gathering, decision-making system as the point when the system has concluded that it has made

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<sup>129</sup> Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997).

<sup>130</sup> Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738 (2012).

<sup>131</sup> Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L. J. 1254 (2013).

<sup>132</sup> Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557 (2013).

<sup>133</sup> Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1502-1507, 1543 (1999).

<sup>134</sup> Because of constitutional concerns, the majority of all trials carry a right to trial by jury. Without regard to one’s evaluation of the capabilities of the “average” judge, surely no one would argue that the “average” juror would or could satisfactorily apply a statistical/mathematical construct of burdens of proof.

not just any determination, but rather a determination that advanced the goals of the system. So to better understand “belief” in courts, we must understand why we have a publicly funded justice system.<sup>135</sup>

### 1. Substantive Fairness and Procedural Sufficiency

Why *do* we have public courts? Why are we willing to devote enormous amounts of our public time and money to resolving who started a fight, or who caused an automobile accident?

It might seem tautological that the goal of a justice system is – as the name of the system states – justice. An inscription on the walls of the Department of Justice states, “The United States wins its point whenever justice is done its citizens in the courts.”<sup>136</sup> But in the context of law, the word “justice” is imprecise. “Justice” can refer to either of at least two ideas -- substantive fairness and procedural sufficiency.

Substantive fairness is an independently equitable result – one that meets a community sense of right and wrong.<sup>137</sup> It is – like the weak deflationism understanding of truth – a singular matter (property) external to any particular dispute and which a trial either results has or not.<sup>138</sup>

Procedural sufficiency is the fair opportunity to present one’s position to a neutral decision maker.<sup>139</sup> It is what the United States

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<sup>135</sup> Cf., Louis Kaplow, *Burden of Proof*, 121 YALE L. J. 738 (2012) (Professor Kaplow applies a similar sort of analytical approach – considering the “why” -- by proposing that how to set a burden of proof and evidence threshold should account for a variety of societal and system interests, including considering the cost of error in fact finding); see also H. L. A. HART, *THE CONCEPT OF LAW* 1-17 (2<sup>nd</sup> ed.) (Clarendon Press 1994) (the inquiry “What is law” should be answered by considering what concerns motivated the inquiry).

<sup>136</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>137</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (REVISED EDITION) (Harvard Univ. Press 1971). Rawlsian justice is, of course, but one formulation in a long philosophical dialogue – paralleling that of “what is truth?” – about “what is justice?” For our purposes, it suffices to say that Rawls’s view is one seeking to define, and thus an example of, a construct of what is an objectively fair outcome. The jurist Roscoe Pound saw this idea of justice – substantive fairness – as precisely what was the goal of the American courts. See Roscoe Pound, *Justice According to Law*, THE MID-WEST QUARTERLY (1913-1918) 223, Paper 6 (1914). Cf. Allen Buchanan & Deborah Mathieu, *Philosophy and Justice*, JUSTICE at 11 (Ronald L. Cohen, editor) (Plenum Press 1986) (“Justice is usually said to exist when a person receives that to which he or she is entitled....”)

<sup>138</sup> But see John Thibaut & Laurens Walker, *A Theory of Justice*, 66 CAL. L. REV. 541, 541-542 (1978) (arguing objective truth is best suited to scientific inquiries, while courts are better suited to distributive justice).

<sup>139</sup> A detailed discussion of the nature of procedural sufficiency as an articulation of justice can be found in the work of Professor Tom Tyler. See, e.g., Tom R. Tyler, *What is Procedural Justice? Criteria Used By Citizens To Assess The Fairness Of Legal Procedures*, 22 LAW & SOC. REV. 103 (1988); Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, 29 PERS. SOC. PSYCHOL. BULL. 747 (2003); E. Allan Lind, Tom R. Tyler & Yuen J. Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767 (1997). Accord, Lita Furby, *Psychology and Justice*, JUSTICE at 163-164 and sources cited therein (Ronald L. Cohen, Editor) (Plenum Press 1986). (“...perceived fairness of procedures affects satisfaction with those procedures, independent of outcomes.”)

Supreme Court has held is procedurally guaranteed by the “Due Process” clauses of the Constitution.<sup>140</sup>

Substantive fairness and procedural sufficiency – both broadly notions of “justice” that comfortably fit within a definition of the word – describe different ideas of justice.<sup>141</sup>

While the nature of justice is an ongoing and intractable philosophical and jurisprudential debate, it is not a matter of doctrinal ambiguity in the American courts. The architecture of the justice system reinforces at innumerable junctures that the goal is procedural sufficiency, by which we mean something akin to “fair enough.”<sup>142</sup> Civil trials do not require unanimous verdicts.<sup>143</sup> Criminal trials can have as few as six jurors.<sup>144</sup> As we saw in our discussion of “justification in courts,” relevant evidence can be excluded for reasons of time consumption.<sup>145</sup> Judges can put absolute time limits – literally using chess clocks -- on civil trials.<sup>146</sup> If after the presentation of evidence at trial the fact finder is completely uncertain of which narrative is correct, rules of decision are imposed for that uncertainty to define a verdict, rather than extend the inquiry.<sup>147</sup> Standards of review can tie the hands of a judge to reverse a jury verdict that is contrary to scientific evidence.<sup>148</sup> Appellate judges cannot overturn fact finding on the basis that the appellate judge believes the jury got it wrong.<sup>149</sup> Professor Simon summarizes the Supreme Court’s jurisprudence as consistently affirming that “[d]efendants are [only] promised procedural

<sup>140</sup> See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332-335 (1976).

<sup>141</sup> In August of 2014, one of the dominant news stories in the United States was the civil unrest in Ferguson, Missouri after a white police officer shot and killed an apparently unarmed African-American, Michael Brown, who witnesses claimed had his hands up at the moment of the shooting. On CNN, the mother of Michael Brown was asked, “What is justice to you?” She answered, “Being fair. Arresting this man and making him accountable for his actions.” *CNN Newsroom with Carol Costello* (August 18, 2014). That seems to be in a single answer an allusion to the two different concepts of judicial justice.

<sup>142</sup> Cf. Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 AM. J. JURIS. 43, 50-51 (2004) (discussing how courts seek an answer that is “tolerably good.”)

<sup>143</sup> See *Apodaca v. Oregon*, 406 U.S. 404, 410-411 (1972).

<sup>144</sup> See *Williams v. Florida*, 399 U.S. 78, 90-102 (1970).

<sup>145</sup> See FED. R. EVID. 403.

<sup>146</sup> See FED. R. CIV. PROC. 16(c)(2)(O).

<sup>147</sup> See generally, Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 558-559 (2013).

<sup>148</sup> See Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. REV. 1643, 1679-1684 (2013); Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139 (2012) (suggesting need to reconsider the trial as the center of gravity for innocence protection given the rapid escalation in the quality and quantity of scientific evidence which makes some forms of evidence more reliable with time).

<sup>149</sup> See, e.g., *Stow v. Murashige*, 389 F.3d 880, 890-891 (9<sup>th</sup> Cir. 2004) (“Allowing an appellate court to look behind a jury’s verdict conflicts with the rule that appellate courts should not scrutinize jury verdicts.... Even ‘egregiously erroneous’ jury verdicts are entitled to double jeopardy effect . . .”); accord *Holland v. United States*, 348 U.S. 121, 140 (1954) (once a jury is convinced of guilt beyond a reasonable doubt, there is no further role for the appellate courts in determining guilt).

rights, not reliable evidence or accurate verdicts.”<sup>150</sup> The system repeatedly and intentionally is set simply to be “fair enough.”<sup>151</sup>

This instinctively may seem wrong – or put another way, out of sync with intuitive notions of what is “justice” and what we as individuals in society want from our courts. After all, if we asked almost anyone to envision himself or herself in court and to ask -- What if *I* were the criminal accused? What if *I* were the crime victim? What if someone had not honored a contract they had with *me*? What if someone got hurt while in *my* house? – we generally expect the instinctive answer to be: “we want the court to do the right thing.”

Some might assert the “real” answer is, “I want to win,”<sup>152</sup> but even phrased this way the wish to win is not the craven answer it might at first appear to be. We want to win because we want the courts “to be fair” – by which we mean “to reach the right answer.” It is natural that usually we see the “fair” or “right” position as our own position.<sup>153</sup> So under this construct, the “why” of American courts is substantive fairness.<sup>154</sup>

But that answer fails under even nominal introspection. Seeking a correct answer cannot be the goal of the courts, because as discussed Section I *supra*, actually knowing what happened is not attainable. And individually even our most craven selves quickly understand this when we think about it.

What we want is the most justice we can afford. There would be a price we found to be too much. Other than a major criminal case, it would be the rare if ever trial where a party would take the position of “whatever I have is what I am willing to pay in order to win.” So what we actually want

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<sup>150</sup> DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 209 (Harvard Univ. Press 2012).

<sup>151</sup> Another aspect of systemic architecture supporting the same conclusion is the system-wide view on jury nullification, which usually is hidden from the jury’s ken. See, e.g., Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 257 (1996) (“Current practice--with few exceptions--is not to instruct juries that they may nullify”). A system that pursues subjective fairness either allows the jury to determine the law, or empowers a jury to nullify the law. A system that pursues procedural sufficiency either forbids or deeply discourages either approach.

<sup>152</sup> See generally, THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT’S RIGHT* 3-4 (HarperCollins 2004).

<sup>153</sup> See Tom R. Tyler, *What is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 117 (1988) (“...as past studies have found, those receiving favorable outcomes think that those outcomes and the procedures used to arrive at them are fairer.”).

<sup>154</sup> Accord, Justin Sevier, *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, 20 PSYCHOL. PUB. POL’Y & L. 212, 214-216 (2014) (the United States adversarial system is better than the inquisitorial system at generating perceptions of fairness, while the inquisitorial system is better at generating perceptions of truth.).

is not “fair” but rather “fair enough.”<sup>155</sup> And as soon as one moves from “fair” to “fair enough” one has moved to a notion of procedural sufficiency.

The scholarly work of those who study “fairness” can help in understanding what “fair enough” looks like – in other words, what generically counts as procedural sufficiency. The work can be summarized (perhaps crudely) as requiring a reasonable opportunity to tell one’s story to a neutral decision-maker.<sup>156</sup>

To elaborate, procedural sufficiency requires first that all sides of a dispute perceive that they have the opportunity to prevail – it cannot be perceived as a rigged enterprise. Any other conclusion would be antithetical to any definition of fairness.<sup>157</sup>

This opportunity to prevail is a necessary but not sufficient aspect of any system that seeks to be fair enough. After all, flipping a coin is “fair” in the sense of an opportunity to prevail, yet inadequate in achieving the goal that the parties had a non-rigged chance to win *because they deserved to win*.<sup>158</sup> What is also necessary to get to this more fundamental sense of fairness is an opportunity to present one’s side of the merits – to tell one’s story -- coupled with a belief that the decision was intended in good faith to be merits-based.<sup>159</sup> And of course a system that gives each side the

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<sup>155</sup> See generally, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 308, 373-378 (1994) (“The regulation of lawyers in litigation ... is appropriately viewed ... as an aspect of procedural rules concerned with achieving accurate outcomes while not incurring excessive costs.”); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors; First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirement would entail.”).

<sup>156</sup> See E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCH. 952, 957-958 (1990); Tom R. Tyler, *What is Procedural Justice? Criteria Used By Citizens To Assess The Fairness Of Legal Procedures*, 22 LAW & SOC’Y. REV. 103, 121-123, 128-131 (1988).

<sup>157</sup> See generally, Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, 29 PERS. SOC. PSYCHOL. BULL. 747 (2003).

<sup>158</sup> Conversation with Scott Soames (October 10, 2014).

<sup>159</sup> See Tom R. Tyler, *What is Procedural Justice? Criteria Used By Citizens To Assess The Fairness Of Legal Procedures*, 22 LAW & SOC’Y. REV. 103, 125-131 (1988). See also, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”). The Court has applied the *Mathews* framework to a wide variety of due process challenges. See, e.g., *Wilkinson v. Austin*, 554 U.S. 209, 224-28 (2005) (considering what due process protections Ohio must afford inmates before assigning them to a maximum-security prison with highly restrictive conditions); *City of Los Angeles v. David* 538 U.S. 715, 716-19 (2003) (holding city may tow illegally parked automobile without a “prompt hearing”); *FDIC v. Mallen*, 486 U.S. 230, 242-46 (1988) (upholding statute authorizing the FDIC to suspend an indicted bank official without a hearing); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 17-19 (1978) (holding public utility termination of services for nonpayment without affording customers an opportunity to dispute bills deprived customers of due process).

opportunity to tell their story -- and leaves each side with the belief that they were heard and that the decision maker at least tried to do the right thing -- *a priori* meets the first requirement of one where each side perceives it has had the opportunity to prevail.

A dispute resolution system that has these aspects – what we might call a fair shot in a non-rigged game<sup>160</sup> – is one which seeks an acceptable approximation of a fair result, and so can be said to be “fair enough,” or procedurally sufficient, from the perspective of a participant in a trial.<sup>161</sup> That would seem to be what a litigant will accept as “enough” when seeking “fairness.”

## 2. Individual Fairness and Collective Fairness

But now perhaps we need to briefly check ourselves. Because a further challenge is that “fair enough” may look and feel very different when we are talking about *my* trial as opposed to talking about *your* trial. Consider the question: “How much of *my* money am I willing to invest to be confident the court got to the right answer in *my* case?” Now consider the question: “How much of *my* money am I willing to pay (in taxes, typically) to be confident the court got to the right answer in *your* case?” One would expect that the answer to these two questions differs.<sup>162</sup>

Put another way, it is the nature of public courts that such courts are -- by definition -- forums where the money of many (*our* money) funds a court used by a few (*your* dispute). So can we have confidence that a fair shot in a non-rigged game is in harmony with a societal norm of “fair enough” across the cultural heterogeneity of the United States?<sup>163</sup> Or put

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<sup>160</sup> In this context, “game” is not a diminutive term. Rather, “Game theory concerns the behaviour [sic] of decision makers whose decisions affect each other. Its analysis is from a rational rather than a psychological or sociological viewpoint. It is indeed a sort of umbrella theory for the rational side of social science, where ‘social’ is interpreted broadly, to include human as well as non-human players (computers, animals, plants). Its methodologies apply in principle to all interactive situations, especially in economics, political science, evolutionary biology, and computer science.” R.J. Aumann, *Game Theory*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2<sup>ND</sup> ED.) (Steven N. Durlauf & Lawrence E. Blume eds.) (Palgrave Macmillan, 2008), [http://www.dictionarofeconomics.com/article?id=pde2008\\_G000007](http://www.dictionarofeconomics.com/article?id=pde2008_G000007)> doi:10.1057/9780230226203.0615.

<sup>161</sup> See Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHICAGO-KENT L. REV. 1033, 1040-1041 (2003).

<sup>162</sup> See generally, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 328-330, 382-398, 399 (1994) (accuracy is very expensive and inefficient; there are differences between an individual’s interests and societal interests).

<sup>163</sup> Professor Tom Tyler – Professor of Law and Professor of Psychology at Yale University -- interviewed 652 Chicagoans who had experience with the police, and found, “Seven aspects of procedural justice make an independent contribution to assessments of process fairness: the effort of the authorities to be fair; their honesty; whether their behavior is consistent with ethical standards; whether opportunities for representation are given; the quality of the decisions made; whether opportunities to appeal decisions exist; and whether the behavior of the authorities shows bias.” Tom R. Tyler, *What is Procedural Justice? Criteria Used By Citizens To Assess The Fairness Of Legal Procedures*, 22 LAW & SOC’Y. REV. 103, 121 (1988). It is difficult to use these factors more

yet another way, what is the precise role of *publicly*-funded justice in American communal life?

The court system seeks sufficient closure to insure societal stability – peace in the streets.<sup>164</sup> Simply put, societies without just courts are more likely to be unstable and violent. One need look no further than the public responses to the verdict of acquittal in the O.J. Simpson multiple homicide trial, or the grand jury decision of whether to indict the police officers who shot Michael Brown or choked to death Eric Garner, to understand the potency of the slogan, “No Justice, No Peace.”<sup>165</sup>

Communities that do not believe the justice system provides just resolution of righteous grievances take to the streets. This will be discussed *infra* in detail – it is the heart of what we mean when we say an institution such as the justice system is “legitimate.” But for the current juncture of this Article, it suffices simply to recognize that the relevant perspective of whether the courts are just is not only that of the litigant, but also – and perhaps primarily -- that of the broader community in which the courts reside. So we then must ask, what aspects of the courts support a *community* belief that the courts are “just?”

### 3. Perceptions of Justice and Actual Justice

Asking about community perspective exposes another nuance of the explication of “justice” -- that “belief” by the community in the courts is a metalevel<sup>166</sup> belief: belief that the courts are doing their jobs sufficiently. Two examples – one large and one small – help illustrate this point.

First consider South Africa’s Truth and Reconciliation Commission.<sup>167</sup> The theoretical predicate for the TRC was that for “[a]

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specifically, as the factors in detail appear to be fluid from one culture to another. See Rebecca A. Anderson & Amy L. Otto, *Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison*, 31 SOC. BEHAV. & PERSONALITY 557, 562-63 (2003).

<sup>164</sup> See generally, Tom R. Tyler & Heather J. Smith, *Social Justice and Social Movements*, INSTITUTE OF INDUSTRIAL RELATIONS WORKING PAPER NO. 61 at 1 (1995) (“People’s actual behavior is ... strongly linked to views about justice and injustice. A wide variety of studies link justice judgments to positive behaviors ... Conversely, other studies link the lack of justice to sabotage, theft, and on a collective level, to the willingness to rebel or protest.”).

<sup>165</sup> See PBS Frontline, *O.J. Simpson Verdict Ten Years Later*, [www.pbs.org/wgbh/pages/frontline/oj/view](http://www.pbs.org/wgbh/pages/frontline/oj/view); New York Times, *Latest Updates: Protests Nationwide as More Troops Are Called to Ferguson*, [news.blogs.nytimes.com/2014/11/25/live-updates-grand-jury-decision-ferguson](http://news.blogs.nytimes.com/2014/11/25/live-updates-grand-jury-decision-ferguson); New York Times, *Reaction to Eric Garner Grand Jury Decision*, [cityroom.blogs.nytimes.com/2014/live-updates-eric-garner-the-grand-jury-decision](http://cityroom.blogs.nytimes.com/2014/live-updates-eric-garner-the-grand-jury-decision).

<sup>166</sup> “A level or degree (of understanding, existence, etc.) which is higher and often more abstract than those levels at which a subject, etc., is normally understood or treated; a level which is above, beyond, or outside other levels, or which is inclusive of a series of lower levels.” “Metalevel,” OXFORD ENGLISH DICTIONARY (2015).

<sup>167</sup> See generally Justice Albie Sachs, *South Africa’s Truth and Reconciliation Commission*, 34 CONN. L.

country transitioning from authoritarian rule to democracy . . . conventional institutions such as courts . . . are not viewed as being neutral enough . . .”<sup>168</sup> The TRC “set an international standard,” successfully bringing stability in an environment where that was a more important societal need than criminal punishment.<sup>169</sup> The lesson of the TRC is that the greatest value of expending public resources on determining what happened is not to achieve some morally acceptable outcome – appropriate retribution in a criminal matter or allocation of responsibility in a civil matter – but rather is to increase the likelihood of communal tranquility.<sup>170</sup>

Now consider the story of a cab driver in Washington D.C. whom I encountered as I was writing this Article.<sup>171</sup> The driver – an immigrant from Eritrea – discussed with me his experience with the local courts when he challenged traffic tickets. He was frustrated that the courts promised him a presumption of innocence, but then informed him that he would have to pay the tickets unless he could produce proof that he had *not* committed a violation. He explained (complained) that the system did not give him a presumption of innocence, but rather gave a pass to the City in proving his guilt when what was at issue was only a \$50 ticket. He said \$50 was a lot of money to him, and so I asked if he appealed. He said he did not because it was too much time and paperwork to fight a \$50 ticket – it cost him more than \$50 in lost time in his cab, and the fine doubled if he lost the appeal.

From these two examples we can see that individual and community meanings of “justice” may differ in specific trials, but broadly are the same. South Africa realized that the importance of a process sacrificing “fair” individual retribution to the “greater good” of gaining closure through a

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REV. 1037 (2002); Albert L. Sachs, *Honoring the Truth in Post-Apartheid South Africa*, 26 N.C. J. INT’L L. & COM. REG. 799 (2001).

<sup>168</sup> Daryl Balia, *Truth and Reconciliation Commission* 295, 296, ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY, FIRST UPDATE SUPPLEMENT (Jack Rabin, editor) (Taylor & Francis 2005); accord Paul Van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 J. INT’L AFFAIRS 647 (1999).

<sup>169</sup> Daryl Balia, *Truth and Reconciliation Commission* 295, 297, ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY, FIRST UPDATE SUPPLEMENT (Jack Rabin, editor) (Taylor & Francis 2005). South Africa raises reconciliation to such a high value that on January 30, 2015 the government granted parole to Eugene De Kock, described as “Prime Evil” for his role as an apartheid era assassin, “in the interests of nation building and reconciliation.” Peter Church, *Apartheid’s Prime Evil, Eugene De Kock, to go free*, SA Promo Magazine (January 30, 2015), <https://www.sapromo.com/apartheids-prime-evil-eugene-de-kock-to-go-free/7258>.

<sup>170</sup> Trials as a search for truth and trials as a mechanism for tranquility are the two predominant explanations of the role of courts, but Mark Cammack offers a third explanation – trials as an attempt to “say something,” by which he means “. . . trials depict and thereby validate assumptions about the nature of fact and the authority of law on which the legitimacy of the practice depends. The process, in effect, proves its own premises” Mark Cammack, *Evidence Rules and the Ritual Functions of Trials: “Saying Something of Something”*, 25 LOY. L.A. L. REV. 783, 783-784, 789 (1992). A fourth interpretation is offered by Charles Nesson, who explains how trials can be understood as a statement to the community about how certain behavior will be judged. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

<sup>171</sup> Interview of Yonas Teseay (January 5, 2015).



collective, societal airing of what had happened. The cab driver – arguably for good reason – does not believe his trials were even a fair process, much less a fair outcome. But his trials were fair enough that he was not motivated to social unrest, and to the broader community he had enough of a “fair shake.” In order to insure domestic tranquility and stability we must have a system that, if not always then at least almost always will give a fair enough process that the loser, however grudgingly, will accept the result.

This formulation of “justice” – a concept that is to some significant but un-measurable degree rooted in public perception and public confidence – is explicitly and repeatedly recognized by the United States Supreme Court. Thus, for example, in *Taylor v. Louisiana*, the Court wrote that “[c]ommunity participation in the administration of the criminal law ... is ... critical to public confidence in the criminal justice system.”<sup>172</sup> In his dissent in *Bush v. Gore*, Justice Stevens famously wrote that the Opinion undermined the “public treasure” of “the public’s confidence in the Court itself” and thus “was a wound that may harm ... the Nation.”<sup>173</sup> In *Press-Enterprise Co. v. Superior Court*, the Court wrote,

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>174</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice O’Connor wrote:

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each

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<sup>172</sup> 419 U.S. 522, 530 (1975). See also *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (prohibiting race-based peremptory strikes of jurors will strengthen “public respect for our criminal justice system”); *U.S. v. Nixon*, 418 U.S. 683, 709 (1974) (“The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”)

<sup>173</sup> 531 U.S. 98, 157-58 (2000).

<sup>174</sup> 464 U.S. 501, 508 (1984).

succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.<sup>175</sup>

Similar conclusions are reached by scholars.<sup>176</sup> For example, Leslie Ellis and Shari Siedman Diamond -- summarizing the work of several social scientists -- wrote,

[T]he level of satisfaction people feel with the decision of a trier of fact is strongly influenced by their perceptions of fairness of the procedures used by the trier to reach that decision. That is, even when actual outcomes were held constant and even when those outcomes were negative, the perceived fairness of the procedures strongly influenced the party's satisfaction with the verdict and willingness to accept the legitimacy of the decision. These and more recent studies of procedural justice show that people are more willing to accept decisions and to adhere to agreements over time when they perceive those decisions as having been produced by fair procedures. Moreover, the authority and perceived legitimacy of the institutions that produce the decisions are enhanced when the procedures used to produce the decisions are viewed as fair, even when those decisions involved unfavorable outcomes. The comfort and positive reactions of litigants are of course important in and of themselves. But building perceptions of procedural justice has an additional important payoff: enhanced authority and legitimacy increase the likelihood that the parties will accept the jury's finding. The more legitimate the process is perceived to be, the more likely participants are to accept the outcome, positive or negative.<sup>177</sup>

Professor James Gibson has done extensive contemporary work studying the prevalence of, reasons for, and stability of acceptance of the

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<sup>175</sup> 505 U.S. 833, 865 (1992).

<sup>176</sup> See, e.g., Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1367-1368 (1985).

<sup>177</sup> Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHICAGO-KENT L. REV. 1033, 1039-1040 (2003).

legitimacy of a court decision or other governmental action without regard to whether one agrees or disagrees with it.<sup>178</sup> That work can be summarized as concluding that public confidence not only is critical to the system, but that public confidence in the courts verifiably exists and is robust.

#### 4. Conclusions About “Belief” in Courts

So what insights can we draw from this discussion of the meaning of “justice” in the American courts, and in turn better understand “belief” in courts? “Justice” in the American courts is a procedural notion more than a substantive notion – the idea is to have courts that are “fair enough.” Justice is based on procedural access to courts and neutrality of decisions. Justice may depend as much upon perception as reality. And while the community at large may have a different notion of “fair enough” than the notions of individual participants in a trial, the two ideas are closely related. Because a system that is not usually perceived as fair enough can lead to mass unrest, the avoidance of which is a material (arguably predominating) goal of the system.

What is “belief” in courts? It means the courts have procedures for dispute resolution that society generally perceives and accepts as a fair opportunity – or perhaps a fair enough opportunity -- to present one’s position to a neutral decision-maker.

#### E. Understanding “Truth” in Courts

Let us now return to our original formulation of “knowledge requires truth, justification, and belief.” In the context of “truth” in courts, we can now restate this formulation as:

Reaching a “correct enough” resolution, biasing toward certainty when the stakes involve liberty and staying near neutral when the stakes are private relationships,

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<sup>178</sup> See, e.g., James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POLITICAL SCIENCE REV. 59 (2008); James L. Gibson, Gregory A. Caldeira, & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POLITICAL SCIENCE REV. 343 (1998); James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POLITICAL RESEARCH Q. 187 (2005); James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POLITICAL SCIENCE 354 (2003); James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 LAW & CONTEMP. PROBLEMS 123 (2009); James L. Gibson & Michael J Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 ANNUAL REV. OF LAW & SOC. SCIENCE (2014).

## REQUIRES

Relevant facts both within the evaluative skills of jurors' competence and that do not promote defined undesirable behaviors external to the trial;

Procedures for dispute resolution that society generally perceives and accepts as a fair opportunity – or perhaps a fair enough opportunity -- to present one's position to a neutral decision-maker; and,

“Truth.”

From this we can isolate and formulate an understanding of “truth” in courts. “Truth” in courts is a sufficient – albeit intentionally incomplete -- correspondence of judgments of what happened to what actually happened. Put somewhat differently, “truth” in courts refers to the relative role a colloquial meaning of “accuracy” has in the family of other values courts seek to advance; meaning there has been adequate procedural process to support a general communal sense of systemic fairness without regard to the outcome in a particular case.. This is because courts unquestionably compromise the likelihood of achieving colloquial accuracy in order to serve other concerns.

As we saw in our exploration of justification, this balancing of colloquial accuracy against other values sometimes emerges quite dramatically. In response to the pattern of societally unacceptable treatment of rape victims in the courts, evidence codes were revised to provide rape shield laws.<sup>179</sup> These laws exclude evidence unquestionably relevant to the defense, for reasons external to achieving a correct trial verdict.<sup>180</sup>

In response to police misconduct, the Supreme Court has ruled to exclude evidence gathered without *Miranda* warnings.<sup>181</sup> This is a controversial rule precisely because it keeps relevant evidence out.<sup>182</sup>

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<sup>179</sup> See generally J. Alexander Tanford & Anthony J. Bocchino, *Rape Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980); Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245 (1989).

<sup>180</sup> *Id.*

<sup>181</sup> See generally Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 AM. BAR FNDTN. RESEAERCH J. 585 (1983); Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 8 AM. BAR FNDTN. RESEAERCH J. 611 (1983).

<sup>182</sup> *Id.* See also Jenia Iontcheva Turner, *The Exclusionary Rule As a Symbol of the Rule of Law*, 67 SMU L. REV. 821, 829 (2014)

In espionage and terrorism cases obtaining a verdict is compromised by the security classification keeping some facts out of evidence.<sup>183</sup> National security trumps accuracy.<sup>184</sup>

While this Article has separately explored “justification” in courts, “belief” in courts, and “knowledge” in courts, in many instances these phrases have overlapping themes that now emerge in “truth” in courts. So while the Federal Rules of Evidence essentially define “justification” in courts, we see that in doing so some rules serve as animating the related concept of “truth” in courts. Thus, Rule 403 explicitly states, “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: ... undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>185</sup> In other words, colloquial accuracy can be subservient to some degree to concerns of time and efficiency.

We similarly see overlaps between “truth” in courts in our exploration of “knowledge” in courts. The explication of knowledge in courts relied heavily on burdens of proof as decisional rules. Burdens also function as evidence regulation rules – who presents evidence first and how much they must present. In this way, burdens of proof also are integral to seeing examples of and thus understanding “truth” in courts. Presumptions of discriminatory intent in employment actions shift the burden to the defendant to present evidence of nondiscriminatory intent,<sup>186</sup> and the *res ipsa loquitur* doctrine shifts the burden to the defendant to disprove negligence in settings of highly suspicious accidents.<sup>187</sup> Both are instances of setting balance points between accuracy and finality in evidence regulation, and thus to what is meant by truth in courts.

And then there are the “truth” in courts threads in our exploration of “belief” in courts. Is there too much frivolous litigation, or too many runaway juries, or both, or neither? Are there too few paths to recovery, or too strict evidentiary rules, or too little supervision of police practices? Concerns about these and other, similar “belief” questions spawn calls for reform in recurring patterns.<sup>188</sup>

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<sup>183</sup> See, e.g., Robert Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1263-1266 (2007).

<sup>184</sup> *Id.*

<sup>185</sup> FED. R. EVID. 403.

<sup>186</sup> See R. Alexander Acosta & Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. L. & POLITICS 207, 210-214 (1997-1998).

<sup>187</sup> See William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183 (1949).

<sup>188</sup> See generally Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem*,

The meaning of “truth” in courts perhaps is best illustrated by two United States Supreme Court Opinions – one civil and one criminal – each an unambiguous elevation of external concerns over colloquial accuracy. In *Ashcroft v. Iqbal*<sup>189</sup> the Supreme Court considered the case of Javid Iqbal, a Muslim Pakistani who had overstayed his student visa and gotten caught up in the post-9/11 security sweeps – Iqbal asserted that both the decision to detain him and the conditions of his confinement were based on his religion and/or national origin.<sup>190</sup> But his allegations became enmeshed in an earlier narrative about frivolous litigation, and so the Court held, in order to reduce the frequency of frivolous litigation, that a trial judge could dismiss Iqbal’s complaint at the pleading stage.<sup>191</sup> Simply put, the Court held that reducing the incidence of frivolous litigation was worth the price of some erroneous dismissals of meritorious cases.<sup>192</sup>

The Court even more dramatically rejected the primacy of colloquial accuracy in *Herrera v. Collins*.<sup>193</sup> Herrera was convicted of murder and sentenced to death. He filed a habeas petition, supported by affidavits showing his actual innocence.<sup>194</sup> The Court’s Opinion framed the issue not as whether the State could execute an innocent man, but as whether a man who had been convicted of murder in accordance with due process is entitled to habeas relief based on new exculpatory evidence.<sup>195</sup> The Court held that he was not: “*Petitioner is not innocent, in any sense of the word. . . . He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion of that trial, the jury found petitioner guilty beyond a reasonable doubt.*” (Italics added.)<sup>196</sup>

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Recasting the Solution, 54 DUKE L. J. 447 (2004); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003)..

<sup>189</sup> 556 U.S. 662 (2008).

<sup>190</sup> See 556 U.S. at 667-670.

<sup>191</sup> Kenneth S. Klein, *Removing the Blindfold and Tipping the Scales: The Unintended Lesson of Ashcroft v. Iqbal Is That Frivolous Lawsuits May Be Important to Our Nation*, 41 RUTGERS L.J. 593, 593-594, 599-605 (2010).

<sup>192</sup> *Id.*

<sup>193</sup> 506 U.S. 390 (1993).

<sup>194</sup> *Id.* at 393.

<sup>195</sup> *Id.* at 399–400

<sup>196</sup> *Id.* at 419. Justice Blackmun dissented, framing the issue as “whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence.” *Id.* at 430. Herrera’s last words before he was executed four months later were, “I am innocent . . . something very wrong is taking place tonight. . . .” *Offender Information*, Texas Dep’t of Criminal Justice, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/hererraleonellast.html](http://www.tdcj.state.tx.us/death_row/dr_info/hererraleonellast.html) (last accessed 11-18-14). *Accord*, *In re Davis*, 557 U.S. 952, 130 S.Ct.1, 3 (“This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged “actual innocence” is constitutionally cognizable.”) (italics in original; citations omitted) (Scalia dissenting) (2009).

“Truth” in courts is “accuracy-enough” as balanced against other system values, such as the likelihood of truly new and controlling evidence, the reasons the evidence is so late forthcoming, and the adequacy and exhaustiveness of the process already afforded. None of these would suffice to reject consideration of new evidence if colloquial accuracy was what was meant by “truth in courts.”<sup>197</sup>

So by “truth” in courts we mean the balancing point the justice system draws as the boundary between the complete accuracy, on the one hand, and competing societal values both internal and external the courts, on the other hand, to have a sufficient correspondence of judgments of what happened to what actually happened.

## II. “LEGITIMACY,” OR WHY THE MEANING OF “TRUTH” IN COURTS MIGHT MATTER

While it is intellectually interesting to explore the meaning of truth in courts, the exploration leaves open the inquiry of whether the answer matters in any meaningful way. It does, and the starting point of understanding that importance is to recognize a key conclusion from the explication of truth in courts. “Truth” in courts is (“accuracy enough”) is different from what the general public would suppose courts do – seeking actual accuracy. The reason that the meaning of truth in courts matters is because this dissonance can undermine the legitimacy of the courts as a social institution.

In David Easton’s third work in his project on empirically-oriented political theory, Easton describes “the inculcation of a sense of legitimacy” as “probably the most effective device for regulating the flow of diffuse support in favor both of the authorities and of the regime.”<sup>198</sup> Easton posits the question whether a political system could “survive without” “feelings of legitimacy,” and answers that “such convictions” are “helpful and perhaps even necessary.”<sup>199</sup> “If the constant threat of living on a precipice of disorder is to be avoided, at a minimum the authorities require some assurance ... they can expect regularly to obtain compliance .... The belief in the legitimacy of the authorities and regimes provides such a stable

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<sup>197</sup> When Dan Simon and Laurie Levinson write about accuracy concerns – they advocate for changing the priority of accuracy in the system, not for making it the only value on the list. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (Harvard Univ. Press 2012); Laurie L. Levinson, *Searching for Injustice: The Challenge of Post-Conviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545 (2015).

<sup>198</sup> DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 278 (John Wiley & Sons 1965).

<sup>199</sup> *Id.* at 278-79.

connection.”<sup>200</sup> “Regardless of what the members may feel about the wisdom of the action of authorities, obedience may flow from some rudimentary convictions” that “the authorities ... are legitimate.”<sup>201</sup>

Easton’s work introduced the concept of “Legitimacy Theory,” which Easton defined as that which “gives explicit consideration to the expectations of society..., and whether an organization appears to be complying with the expectations of the societies within which it operates.”<sup>202</sup> Institutions with diffuse (as opposed to specific) support are said to be legitimate, meaning the institution enjoys support even when society disagrees with the institution’s specific acts.<sup>203</sup>

As Easton’s definition highlights, it is potentially problematic when an institution is not acting within societal expectations of an institution. And so it bears understanding how legitimacy theory applies to the justice system and whether it predicts a concern from a dissonance between societal understandings of what courts do and what courts actually do.

### A. Legitimacy of the Justice System

“Legitimacy” of legal institutions is a concept familiar to international law.<sup>204</sup> For our purposes, we are exploring “judicial” legitimacy in a domestic context – the question of what gives courts legitimacy and what role “truth” plays in that legitimacy. That is a notion that has received far less attention.

#### 1. Legitimacy of the Supreme Court of the United States

Almost all of the scholarly work applying Legitimacy Theory to the justice system does so with focus on decisions of the Supreme Court of the United States, and concluding the Court has a deep reservoir of legitimacy.<sup>205</sup> Despite Justice Stevens’s poignantly expressed concerns in

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<sup>200</sup> *Id.* at 279.

<sup>201</sup> *Id.* at 279-80.

<sup>202</sup> *Id.* at 279-80.

<sup>203</sup> Craig Deegan, *Legitimacy Theory*, *METHODOLOGICAL ISSUES IN ACCOUNTING RESEARCH: THEORIES, METHODS AND ISSUES* 161 (Zahirui Hoque, ed.) (Spiramus Press 2006). *See also*, DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (John Wiley & Sons 1965).

<sup>204</sup> *See, e.g.*, THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (Oxford Univ. Press 1990) (explaining why international law has compliance pull).

<sup>205</sup> *See* Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 *AM. POLITICS RESEARCH* 297, 297-300 (2008) (“A wealth of scholarship exists on the topic of public support of and views toward the United States Supreme Court.”).



his dissent in *Bush v. Gore*,<sup>206</sup> “in the long run, public perceptions of the Court’s legitimacy were not adversely affected” by that decision, nor any decision -- “public support for the Supreme Court does not appear to turn on citizens’ ideological agreement with its specific policy decisions.”<sup>207</sup> The Court enjoys broad legitimacy.

## 2. Legitimacy of the Trial Courts

“Despite the policy import of state courts, only a small number of studies have examined citizen support for state courts . . . , and nearly all of these have analyzed only a single city or state’s citizens’ views towards its courts.”<sup>208</sup> For this reason, in 2008 Professors Damon Cann and Jeff Yates identified and applied to state trial judges the metrics on which trial court legitimacy – diffuse support allowing an institution to persist and retain its authority without regard to agreement with specific decisions – rests.<sup>209</sup> They identified four -- belief that judges are trustworthy and honest; belief that judges are fair; belief that courts provide equal justice; and belief that decisions are based on fact and law.<sup>210</sup>

Cann and Yates confined their focus to judges. But the institutional insiders positioned to influence the honesty, fairness, neutrality, and justification of trial court decisions are not just judges, but also lawyers and juries. So to understand the nature -- and the fragility or resilience -- of the legitimacy of the trial courts, we need to look at all three.

### a. Judges and Legitimacy

To the extent that empirical work on the legitimacy of trial courts has been done, it has looked at legitimacy and judges. There is reason to

<sup>206</sup> See fn. 173 & accompanying text, *supra*.

<sup>207</sup> Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM. POLITICS RESEARCH 297, 297. See also, James L. Gibson, Milton Lodge, & Benjamin Woodson, *Losing, But Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC’Y REV. 837, 837-838 (2014), citing Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANNUAL REV. OF PSYCHOLOGY 375 (2006); James L. & Michael J Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 ANNUAL REV. OF LAW & SOC. SCIENCE (2014), and James L. Gibson, *Legitimacy is for Losers: The Role of Institutional Legitimacy and the Symbols of Judicial Authority in Inducing Acquiescence to Disagreeable Court Rulings*, Presented at the 62nd Nebraska Symposium on Motivation -- Motivating Cooperation and Compliance with Authority: The Role(s) of Institutional Trust and Confidence. (Keynote Speaker). April 24--25, 2014.

<sup>208</sup> Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM. POLITICS RESEARCH 297, 300 (2008) (citations omitted). For our purposes, we can equate Cann’s and Yates’s study of “state courts” to our focus on “American courts” or “trial courts.”

<sup>209</sup> See Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM. POLITICS RESEARCH 297, 303-305 (2008).

<sup>210</sup> See Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM. POLITICS RESEARCH 297, 303-305 (2008).

have done so. One 2013 poll found 87% of voters said they believed that in states where judges were elected, direct campaign donations and independent spending either had “some” or “a great deal” of influence on judges’ decisions.<sup>211</sup> Studying the state of Georgia, Damon Cann “empirically established” that attorney “campaign contributions influence judicial decisionmaking [sic]” in the attorney’s cases before that judge.<sup>212</sup>

Partisan elections do undermine confidence in court legitimacy. “Citizens’ concerns over costly, intense, partisan judicial election campaigns are eroding society’s goodwill toward their state courts.”<sup>213</sup> Yet while undermined to some degree, “state courts enjoy the diffuse support of citizens, and thus citizens believe in the legitimacy of their state courts even when they do not agree with their policy outputs.”<sup>214</sup> When focusing on judges, Cann and Yates -- summarizing and extending the work of others -- found, “on balance, Americans generally hold favorable attitudes toward their state courts.”<sup>215</sup> Concern about neutrality of judges does undermine but does not overcome a belief in trial court legitimacy.

#### b. Lawyers and Legitimacy

It is not hard to document the public disregard for lawyers.<sup>216</sup> And it is not hard to isolate what underlies this disregard. The public believes the behavior of lawyers distorts the ability of courts to discern the truth.<sup>217</sup>

There is broad concern that the system advantages the litigant with lawyer best skilled at manipulating the rules.<sup>218</sup> As Justice Scalia wrote in

<sup>211</sup> See [http://www.justiceatstake.org/newsroom/press-releases-16824/?new\\_poll\\_vast\\_majority\\_of\\_voters\\_fear\\_campaign\\_cash\\_skews\\_judges\\_decisions&show=news&newsID=17594](http://www.justiceatstake.org/newsroom/press-releases-16824/?new_poll_vast_majority_of_voters_fear_campaign_cash_skews_judges_decisions&show=news&newsID=17594).

<sup>212</sup> Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 3 STATE POLITICS & POLICY Q. 281, 292 (2007).

<sup>213</sup> Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM. POLITICS RESEARCH 297, 313 (2008).

<sup>214</sup> *Id.* at 316.

<sup>215</sup> *Id.* at 304-305.

<sup>216</sup> See, e.g., Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 533-549 (1999-2000); E. Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEORGETOWN J. LEGAL ETHICS 777, 779-781 (2002); Bruce A. Green, “The Whole Truth?”: *How Rules of Evidence Make Lawyers Deceitful*, 25 LOYOLA L.A. L. REV. 699, 700-704 (1992); Marc Galanter, *Robert S. Marx Lecture: The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 807-835 (1998); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care*, 29 SETON HALL L. REV. 1405 1405-1420 (1999).

<sup>217</sup> See, e.g., Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEORGETOWN J. LEGAL ETHICS 777, 779-781 (2002); Bruce A. Green, “The Whole Truth?”: *How Rules of Evidence Make Lawyers Deceitful*, 25 LOYOLA L.A. L. REV. 699, 700-704 (1992).

<sup>218</sup> See, e.g., Marvin E. Frankel, *The Search For Truth: An Umpireal View*, 123 PENN. L. REV. 1031, 1034,

dissent in *Caperton v. A.T. Massey Coal Co.*, “What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win ....”<sup>219</sup>

But in the context of legitimacy, Justice Scalia’s concern with “resourceful lawyers” could describe either of two circumstances, and the two circumstances are not of equal import to the legitimacy of the courts. “Resourceful lawyers” could be “cheaters” – players violating rules and thereby undermining an otherwise legitimate system architecture. Alternatively, “resourceful lawyers” could be lawyers who have seen that the rules of the system leave room to influence the likely outcome of trials – this would suggest some illegitimacy in the system architecture itself. It seems to be the perception of the latter of these two descriptions that Ninth Circuit Justice Alec Kozinski lamented in a recent dissenting Opinion,

When we take the judicial oath of office, we swear to “administer justice without respect to persons, and do equal right to the poor and to the rich ....” 28 U.S.C. § 453. I understand this to mean that we must not merely *be* impartial, but must *appear* to be impartial to a disinterested observer. ... [Petitioner here would] have had a fairer shake in a tribunal run by marsupials. ... How can a court committed to justice, as our court surely is, reach a result in which the litigant who can afford a lawyer is forgiven its multiple defaults while the poor, uneducated, un-counseled petitioner has his feet held to the fire?<sup>220</sup>

So in the absence of research on the impacts of lawyer (mis)behavior on legitimacy – in other words, when the best we can do is formulate a reasonable, as yet untested hypothesis of the relationship of lawyers to legitimacy -- it is important to better understand what resourceful lawyers do and how the system responds to it.

The justice system is defined by a set of rules that purport to be designed to promote certain outcomes. In the justice system, we have defined the generic, target outcome as a fair shot in a non-rigged game. If we are thinking of this target in more economics-laden language, then we

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1035 (1975) (“It becomes evident the search for truth fails too much of the time. The rules and devices accounting for the failures come to seem less agreeable and less clearly worthy than they once did. The skills of the advocate seem less noble .... The advocate’s prime loyalty is to his client, not to truth as such.”).

<sup>219</sup> 556 U.S. 868, 903 (2009).

<sup>220</sup> *Alvarez v. Tracy*, 773 F.3d 1011, 1024-25 (9<sup>th</sup> Cir. 2014) (Kozinski dissent).

might call this target a degree of probability – or acceptable approximation or likelihood – of objective substantive fairness (a correct result). But paradoxically, the same rules designed to promote this approximately objective, substantive fairness, provide opportunities for participants in the system – typically anyone with disproportionate wealth -- to distort the likely outcome of the case.

Put simply, as Justice Kozinski alluded, without regard to the merits, money seems to increase one's chances of winning (and poverty makes it hard to win), even for a party staying within the rules. From the perspective of the system, the distortive power of a wealthy party is an actor playing within the letter but not the spirit of the rules. The system designs rules to promote one sort of behavior. The way the rules are written give opportunities to engage in an inapposite – and from the system perspective, counter-productive -- set of behavior.

A colorful way of capturing the concept of a player using the rules of the game in a way that is counter-productive to the goals of the game is to call the player a “manipulator.”<sup>221</sup> Because tactical manipulation arguably is both within and without the rules, it is paradoxical behavior.

A concrete example of a paradoxical “manipulator” in action is a recurring settlement strategy in a civil case between parties who have vastly different wealth. In order to promote the resolution of disputes without resort to the courts, all United States jurisdictions have a variant of the so-called “American Rule” that each side bear their own attorney's fees and costs without regard to who wins a case.<sup>222</sup> Because of the American Rule,

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<sup>221</sup> In the culture of some sports – golf is a prime example — the spirit of the rules is paramount and so a player is expected to self report a rules violation. But the more usual approach in sports – for example, international soccer – is that the spirit of the game is not paramount, and so breaking the rules to gain advantage – if not caught – not only is acceptable but is expected. As the saying goes in NASCAR, “If you ain't cheating you ain't tryin'.” The discordant tension common in sports between the rules and spirit of play is part of trial practice. The legal profession long has struggled with the tension between zealous advocacy within the rules and promoting the ultimate ends of justice. See, e.g., Marvin E. Frankel, *The Search for the Truth: An Umpireal View*, 122 U. PA. L. REV. 1031 (1975); Monroe H. Freedman, *Judge Frankel's Search For Truth*, 123 U. PA. L. REV. 1060 (1975); Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996); see generally, Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, ‘...In the Spirit of Public Service:’ *A Blueprint For the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1987). Comment 1 to Rule 1.3 (Diligence) of the ABA Model Rules seems of two minds, noting both that a lawyer must “take whatever lawful and ethical measures are required to vindicate a client's cause” and that a “lawyer is not bound ... to press for every advantage that might be realized for a client.” Yet Federal Rule of Civil Procedure 11 empowers a court to punish and rectify lawyer behavior that while potentially advancing a client's likelihood of success has no possible grounding in the substantive legal or factual merits of the case. In light of the inconsistency of law on the question, I am comfortable -- albeit intentionally provocative and arguably overly pejorative -- calling a wealthy tactician a “manipulator” for the purposes of this Article.

<sup>222</sup> See *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010); see generally, John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBLEMS 9,

a well-heeled party can leverage their wealth to force a distorted result on a poorer party.<sup>223</sup> Essentially, the threat of “I am willing to spend disproportionately to the stakes of the matter” – often expressed as “I will take this all the way to the Supreme Court!” or “I’ll paper you under” – is a bluff the poorer party can not afford to call.<sup>224</sup> It is the threat by a party with wealth to act apparently economically irrationally, thus imposing an unbearable transaction cost on an opponent. If the opponent believes the threat, then the opponent should abandon the transaction or settle.<sup>225</sup>

I characterize the behavior of the wealthy actor as “*apparently economically irrational*” because there are at least two ways to describe the behavior as rational. One is the instance where the wealthy actor’s decision is irrational if contrasting the particular transaction costs with the size of the transaction, but rational when considered within a broader context.<sup>226</sup> So, for example, the Mattel Toy Company – whose flagship product is the Barbie doll – might decide that in order to discourage all potential infringers of its protected intellectual property in Barbie, it is willing to spend disproportionately to shut down a single infringer.<sup>227</sup> This is loosely conceptually related to the antitrust-prohibited behavior described as “tying,” which is using one’s larger economic footprint to obtain competitive advantage in a sub-market against niche competitors.<sup>228</sup>

A second theory of rationality might be that the wealthy actor understands that its opponent cannot sustain the transaction costs, and so the bluff will never be called; in this instance the rational choice is to make the threat.<sup>229</sup> This is loosely conceptually related to the antitrust-prohibited

27-36 (1984).

<sup>223</sup> Accord Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Models for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 69-73 (1982) (adopting the English Rule rather than the American Rule may increase likelihood of settlement).

<sup>224</sup> The settlement strategy of a “litigate or capitulate” offer is an ultimatum in a bi-lateral negotiation involving asymmetrical information. For an economic analysis of such strategies, see Lucian Arye Bebchuk, *Litigation and settlement under imperfect information*, 15 RAND J. ECON. 404, 404-15 (1984).

<sup>225</sup> This is a variant of the problem economist Richard Selten labeled, “the chain-store paradox.” See Reinhard Selten, *The Chain-Store Paradox*, 9 THEORY AND DECISION 127, 127-159 (1978); see also generally, David M. Kreps & Robert Wilson, *On the chain-store paradox and predation: Reputation for toughness*, GSB Research Paper No. 551 (Stanford University Graduate School of Business, June 1980) <http://www.gsb.stanford.edu/faculty-research/working-papers/chain-store-paradox-predation-reputation-toughness>; David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253, 254-55 (1982).

<sup>226</sup> See David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253, 256-66 (1982).

<sup>227</sup> In the opening line of the Opinion in *Mattel, Inc. v. MCA Records, Inc.* 296 F.3d 894, 898 (9<sup>th</sup> Cir. 2002), Justice Kozinski refers to Mattel as “Trademark Kong.”

<sup>228</sup> See, e.g., *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1411 (9<sup>th</sup> Cir. 1991) (“Tying exists when a seller refuses to sell one product unless the buyer also purchases another. To prove an illegal tie, a party must show 1) a tying of two distinct products or services, 2) sufficient economic power in the tying product market to affect the tied market, and 3) an effect on a substantial amount of commerce in the tied market.”), cert. denied 502 U.S. 994.

<sup>229</sup> See David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253,

behavior described as creating unlawful “barriers to entry,” one variant which is using economic power to create unacceptable transaction costs to potential competitors thereby dissuading the competitors from ever entering a market.<sup>230</sup>

But for our purposes, whether the well-heeled actor is rational or irrational does not matter, because under either scenario, the other party should settle for an under-valued amount or otherwise abandon the litigation.<sup>231</sup> In other words, a rational party acting apparently irrationally can force a rational opponent to accept an irrational outcome.<sup>232</sup> Or as my wife puts it, “you can’t negotiate with a three-year old.”<sup>233</sup>

This is but one concrete example of the manipulator’s paradox. Others abound. To name a few, the liberal rules of civil discovery routinely offer the opportunity to impose huge litigation costs on an opponent.<sup>234</sup> The multitude of possible pre-trial motions presents a similar opportunity,<sup>235</sup> as does SLAPP litigation.<sup>236</sup>

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256-66 (1982).

<sup>230</sup> See, e.g., *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5<sup>th</sup> Cir. 1975) (“...the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.”), cert. denied 424 U.S. 943 (1976).

<sup>231</sup> Accord, Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264, 267 (1979) (“... litigants taking advantage of superior financial resources to bury their opponents in an unending barrage of motions that make capitulation to unfair settlements the only sensible alternative to continued litigation.”).

<sup>232</sup> In the language of game theory by forcing one litigant into a position with no good choices the game is an “iterated elimination of strictly dominated strategy” solution of a two-player “cheap-talk” version of a “dynamic game of incomplete information.” See ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 2-7, 173-253 (Princeton Univ. Press 1972). That solution is incongruous for a game theorist because an “iterated elimination of strictly dominated strategy” solution of a game-theoretic problem assumes that it is common knowledge that all players are acting rationally. *Id.* at 7. A key insight of the chain-store paradox is the incentive of an actor to make a series of short-term irrational decisions in order to realize a long-term gain. See David M. Kreps & Robert Wilson, *On the chain-store paradox and predation: Reputation for toughness* at 1-2, GSB Research Paper No. 551 (Stanford University Graduate School of Business, June 1980) <http://www.gsb.stanford.edu/faculty-research/working-papers/chain-store-paradox-predation-reputation-toughness>.

<sup>233</sup> My spouse, Professor Lisa M. Black (too many times to count).

<sup>234</sup> See generally, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989), quoted and cited with approval in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007); but see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences For Unfounded Rulemaking*, 46 STANFORD L. REV. 1393 (1994).

<sup>235</sup> See, e.g., Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, ‘...In the Spirit of Public Service:’ *A Blueprint For the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 290 (1987) (“The filing of frivolous motions and complaints, asserting unfounded defenses, pursuing abusive discovery, and taking unwarranted appeals glut our system of justice.”); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264, 267 (1979) (“The enormous reluctance in the American court system to evaluate the merits of a case prior to trial ... make [discovery] abuse particularly costly. These problems are compounded by litigants taking advantage of superior financial resources to bury their opponents in an unending barrage of motions that make capitulation to unfair settlements the only sensible alternative to continued litigation.”).

<sup>236</sup> See, e.g., *Rusheen v. Cohen*, 37 Cal. 4<sup>th</sup> 1048, 1055-56 (2006) (“A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances. ... The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are

And this is in no way unique to the civil dispute side of the aisle. The Supreme Court decisions of *Brady*<sup>237</sup> and *Kyles*<sup>238</sup> require a prosecutor to turn over all information favorable to a defendant. The articulation of the rule creates an opportunity for the prosecutor – within the rules – to “cheat.” As the Supreme Court recognized in *Kyles*, “...the prosecution ... alone can know what is undisclosed....”<sup>239</sup> Because the doctrine is not phrased as “turn over all information,” but rather is phrased in reference to evidence “material either to guilt or punishment,”<sup>240</sup> the prosecutor has an incentive to characterize information as neutral, and thus never turn it over – a decision that will be known only to the prosecutor.<sup>241</sup>

So lawyers may act within the rules in a way that distorts accuracy. But before turning to the system response to these manipulations, there is one other observation that bears mention. In their work focusing on judges, Cann and Yates found legitimacy conclusions persisted even though -- among other factors -- there was a deep perception that justice favored wealthy and powerful individuals.<sup>242</sup> If the perception that judges favor the wealthy and powerful does not undermine legitimacy, then perhaps the perception that the wealthy and powerful can hire a lawyer more skilled at manipulating the rules also does not undermine legitimacy; indeed, these may be the *same* perception (that the wealthy and powerful hire skilled lawyers who influence judges to dispense unequal justice).

Nonetheless, we can see in court rules a slow, but nonetheless steady, system response: while the justice system is rife with examples of the manipulator’s paradox, many examples can be matched with a system attempt to eliminate or ameliorate the “bad” conduct.

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brought to chill the valid exercise of constitutional rights.”); *accord*, Cal. Code Civ. P. §425.16(a) (“The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”). “SLAPP” is the acronym for Strategic Litigation Against Public Policy – meaning a lawsuit that is used to bully or embarrass an opponent and furthers no goal on the merits of substantive law.

<sup>237</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>238</sup> *Kyles v. Whitley*, 514 U.S. 419 (1995).

<sup>239</sup> *Kyles*, 514 U.S. at 437.

<sup>240</sup> *Brady*, 373 U.S. at 86 (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”)

<sup>241</sup> See, e.g., Bennett L. Gersham, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RESERVE L. REV. 531, 531 and sources cited therein (2007) (“*Brady* actually invites prosecutors to bend, if not break, the rules,’ and many prosecutors have become adept at *Brady* gamesmanship to avoid compliance.”); *Connick v. Thompson*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1350, 1358-1366 (2011)(holding a district attorney’s office may not be held liable under §1983 for failure to train its prosecutors based on a single *Brady* violation).

<sup>242</sup> Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM.POLITICS RESEARCH 297, 304-305 (2008).

Let's start with the example of leveraging the "American Rule" to extort a settlement. In response to this dynamic, civil procedure rules around the country have added devices such as California Code of Civil Procedure section 998,<sup>243</sup> or Federal Rule of Civil Procedure 68,<sup>244</sup> which enable any litigant party to make a settlement offer that if rejected -- and then bettered at trial -- will result in "loser pays" -- the litigant who rejected the settlement offer now will pay in whole or in part their opponent's fees and costs. In other words, the rule makers recognized the manipulator's paradox promoted by the American Rule, and sought to ameliorate the distortive effect of the rule.<sup>245</sup>

Similarly, Federal Rule of Civil Procedure 11<sup>246</sup> was first inserted into the Code and then repeatedly revised to make it increasingly hard for a party to get away with tactics motivated by improper motives, which are defined as any motive other than merits-based motives.<sup>247</sup> A variety of state codes mimic Rule 11.<sup>248</sup> Similar rules revisions crimp down on the opportunity for discovery abuse.<sup>249</sup> California has adopted an Anti-SLAPP statute.<sup>250</sup> Even revisions in criminal procedure often are justified as deterring misbehavior or sharp practices by inside players to the criminal justice system.<sup>251</sup>

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<sup>243</sup> CAL. C. CIV. PROC. 998.

<sup>244</sup> FED. R. CIV. PROC. 68.

<sup>245</sup> Kathryn Spier argues that the American rule facilitates settlement instances of asymmetrical damage evaluations, and hinders settlement in instances of asymmetrical liability assessments; she argues for a modified FRCP 68 rule of fee-shifting against a judge-set metric. Kathryn Spier, *Pretrial bargaining and the design of fee-shifting rules*, 25 RAND J. ECON. 197, 200-210 (1994); accord, Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L. REV. L. & ECON. 3-27 (1990) (arguing that requiring a losing litigant to pay the opponent's expenses does not remedy the problem of the "American rule," but that requiring the posting of a refundable deposit does). For our purposes, the point is not whether Rule 68 is the best solution, but rather that as Spier confirms, fee-shifting rules can influence settlement behaviors in profound ways, and that the system can influence litigant choices to promote particular outcomes.

<sup>246</sup> FED. R. CIV. PROC. 11.

<sup>247</sup> See, e.g., Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L. J. 1149, 1165 (1986-1987) ("...the Commission endorses Rule 11.... Everyone hopefully now recognizes that lawyers should not file frivolous motions.").

<sup>248</sup> For a summary of the various approaches of the states, see Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1094-1125 (1993-1994).

<sup>249</sup> See, e.g., FED. R. CIV. PROC. 37.

<sup>250</sup> CAL. CODE CIV. PROC. §425.16.

<sup>251</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("[T]he purpose of the exclusionary rule 'is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.'" (internal citations omitted)); Katherine Sheridan, *Excluding Coerced Witness Testimony to Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct*, 38 FORDHAM URB. L.J. 1221 (2011). Accord, Sabine Gless, *Turth or Due Process? The Use of Illegally Gathered Evidence in Criminal Trials - Germany*, <http://ssrn.com/abstract=1743530> (2010). See generally Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019 (1987). For a fuller discussion by the United States Supreme Court (in majority, concurring, and dissenting opinions) of various views on the balancing of criminal exclusionary rules of probative evidence with fair trial rights, see *Stone v. Powell* 428 U.S. 465, 482-489, 496-502, 508-515, 537-542 (1976).



What then, can we conclude about lawyers and legitimacy? System rules routinely either encourage or passively allow lawyer (mis)behavior which decreases the likelihood that court judgments of what happened will correspond to what happened. While the system does steadily try to identify and crimp down on these opportunities, the prevalence of them is robust. This prevalence plays into a pre-existing narrative of public perceptions of lawyers.<sup>252</sup> And that in turn suggests an as yet unexplored vector of possible fragility in the legitimacy of trial courts.

### c. Juries and Legitimacy

There is a similar dynamic at play with juries. It is not hard to find a robust critique of the American jury.<sup>253</sup> The often unstated but apparent commonality of jury criticism is the underlying suspicion that juries get cases “wrong” a disturbing amount of the time.<sup>254</sup>

Juries do get things “wrong,” albeit not with the frequency one might suppose. As Professor Bruce Spencer notes, “direct assessments of accuracy are not possible on a wide scale because only atypically is the correct verdict known, and it is difficult to generalize from those cases to the more typical cases where the correct verdict is not knowable.”<sup>255</sup> But Spencer nonetheless uses it as a starting point to estimate a statistically

<sup>252</sup> The “public perception” may also be the perception of lawyers themselves. *See generally*, Douglass N. Frenkel, Robert L. Nelson, & Austin Sarat, *Report. Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 *FORDHAM L. REV.* 697 (1998). If internal players actually and routinely are manipulating accuracy either maliciously through passive complicity, that is a further indicator of fragile systemic legitimacy. *Accord*, Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *Vand. L. Rev.* 871 (1999).

<sup>253</sup> *See, e.g.*, 1962-1963 Harvard Law School Dean’s Report at 5-6 (Dean Griswold argues that if the goal is justice, juries should be abolished); Warren E. Burger, *The State of the Federal Judiciary*, 57 *A.B.A. J.* 855, 858 (1971) (Chief Justice Burger expresses a readiness to eliminate civil juries); Edward J. Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 *A.B.A. J.* 570 (1974) (arguing as the title describes). In just one three-month period in 2013, national criticism erupted over acquittal verdicts in two Florida criminal homicide trials. *See generally*, Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 *L. & CONTEMP. PROBS.* 269 (1989). *See also*, Scott Stump, *Casey Anthony judge felt ‘shock, disbelief’ at not guilty verdict*, *TODAY News* (May 6, 2013) <http://www.today.com/news/casey-anthony-judge-felt-shock-disbelief-not-guilty-verdict-6C9791042>; Carol D. Leonnig & Jenna Johnson, *Anger flows at acquittal of George Zimmerman in death of Trayvon Martin*, *The Washington Post* (July 14, 2013) [http://www.washingtonpost.com/national/anger-flows-at-acquittal-of-george-zimmerman-in-death-of-trayvon-martin/2013/07/14/e1a1216a-ec98-11e2-bed3-b9b6fe264871\\_story.html](http://www.washingtonpost.com/national/anger-flows-at-acquittal-of-george-zimmerman-in-death-of-trayvon-martin/2013/07/14/e1a1216a-ec98-11e2-bed3-b9b6fe264871_story.html). On January 27, 2015, I performed the quick search – “Outrageous Jury Verdicts” – in “Bing.” The database reported 1240 results. The search “abolish jury system” – a Bing-suggested search that therefore resulted in relevant results without needing to filter by putting the search terms in quotation marks -- had 637,000 results.

<sup>254</sup> *See* Joe S. Cecil, Valerie P. Hans, & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 *AM. U. L. REV.* 727, 742-743 (1990-1991). This is far from a new criticism. At the time the early Americans were considering juries for inclusion in the proposed Constitution, jurors were described as decision makers “by chance,” “stupid,” “unprincipled,” and potentially imposing injustice by “ignorance or knavery.” *See* Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 *U. RICH. L. REV.* 1077, 1096 (2013), and sources quoted therein.

<sup>255</sup> Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 *J. EMPIRICAL LEGAL STUD.* 305, 306 (2007).

defensible model of jury accuracy, and concludes that jury error rates are roughly 10%.<sup>256</sup> This is in accord with the work of many researchers who conclude that juries on the whole reach reasoned and informed decisions.<sup>257</sup> A broad review of the statistical and other social science research concludes that jurors are competent decision-makers.<sup>258</sup>

Without regard to the accuracy of public perception regarding the frequency of jury error, the presence of public perception of jury error is empirically verifiable. In one study 320 individuals were given descriptions of the same trial and verdict, varying only whether the jury was homogeneous or heterogeneous and whether the verdict was guilty or not guilty; the study found a material increase in the perception of an inaccurate verdict when all-White juries found a defendant guilty.<sup>259</sup> For a social scientist what is of interest here is the reasons for community perceptions of inaccurate jury verdicts; for our purposes this study confirms the prevalence of community perceptions that juries get things wrong.<sup>260</sup>

What is unclear – in the absence of legitimacy research -- is the relationship of the perception of jury error to legitimacy. Americans have long perceived juries as deeply flawed. In the ratification debates of the proposed Constitution of the United States, it was suggested that juries were not “fair.”<sup>261</sup> Juries were characterized as “ignorant.”<sup>262</sup> Jurors were said to be unable to “distinguish between right and wrong.”<sup>263</sup> Jurors were described as decision makers “by chance,”<sup>264</sup> “stupid,”<sup>265</sup> “unprincipled,”<sup>266</sup> and potentially imposing injustice by “ignorance or knavery.”<sup>267</sup> Yet these concerns did not cause the framers to eliminate trial by jury in order to have

<sup>256</sup> Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 310-315, 326-328 (2007).

<sup>257</sup> See Joe S. Cecil, Valerie P. Hans, & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 745-746 (1990-1991), and sources cited and quoted therein.

<sup>258</sup> See Joe S. Cecil, Valerie P. Hans, & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 745-764 (1990-1991).

<sup>259</sup> See Leslie Ellis & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHICAGO-KENT L. REV. 1033, 1043-1050 (2003).

<sup>260</sup> See generally Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 L. & CONTEMP. PROBS. 269 (1989).

<sup>261</sup> REMARKS OF JOHN MARSHALL ON JUNE 20, 1788, DURING THE VIRGINIA STATE CONVENTION CONCERNING RATIFICATION OF THE CONSTITUTION, reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 566, 540, 544 (Neil H. Cogan ed., 1997).

<sup>262</sup> A FARMER, NO. 4, MARCH 21, 1788, reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 579, 581 (Neil H. Cogan ed., 1997).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> ARISTOCROTIS, APRIL 1788, reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 582, 582 (Neil H. Cogan ed., 1997).

<sup>266</sup> A [NEW HAMPSHIRE] FARMER, NO. 3, JUNE 6, 1788, reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 586, 586 (Neil H. Cogan ed., 1997).

<sup>267</sup> *Id.*

a “legitimate” justice system; to the contrary, trial by jury is enshrined in the Constitution *three times*.<sup>268</sup>

The justice system has been intentionally set choosing jurors – warts and all – as preferable to judges.<sup>269</sup> Contemporary reform of the role and scope of jury trials, however, suggest that public trust in juries has turned. Legislative reform such as increasing burdens of proof to recover punitive damages,<sup>270</sup> elimination or capping of the right to recover some forms of damages,<sup>271</sup> or increasing the thresholds to finding some forms of liability,<sup>272</sup> all are examples of dissatisfaction with jury verdicts resulting in what has now been called by some “the vanishing trial.”<sup>273</sup>

So in the absence of empirical research, it is hard to formulate a reasonable hypothesis about the expected relationship of juries to legitimacy. There is ample evidence of dissatisfaction with the accuracy of dispute resolution through trial by jury, but there is ambiguity about whether judges are perceived as any better, and we know from prior research that concern about judges has not seemed to undermine legitimacy.

d. Conclusions About Fragility of Trial Court Legitimacy

As noted above, there is thin extant scholarly study of the resiliency or fragility of trial court legitimacy. That work focuses on judges, and suggests that because of concerns with judge neutrality, there is some fragility to perceptions of legitimacy. We can formulate a tentative hypothesis that perceptions of lawyers may add to that fragility. We should be more hesitant to formulate a similar hypothesis about juries. But one theme that emerges from all of these contexts is that whatever legitimacy the courts have, it rests on a premise that the courts are trying to get to a just, fair, and accurate result – in the colloquial understanding of those terms -- pretty much all of the time.

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<sup>268</sup> U.S. CONST. art. III; amend. VI; amend. VII.

<sup>269</sup> See Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1098 (2013).

<sup>270</sup> See CAL. CIV. C. §3294.

<sup>271</sup> See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L.R. 391, 412-415 (2005).

<sup>272</sup> See, e.g., Brian S. Sommer, *The PSLRA Decade of Decadence: Improving Balance in the Private Securities Litigation Arena with a Screening Panel Approach*, 44 WASHBURN L.J. 413, 420-425 (2004-2005) (describing Congressional attempts to impair securities class actions).

<sup>273</sup> See, e.g., 1 J. EMPIRICAL LEGAL STUD. 459-984 (2004), publishing fifteen articles addressing the vanishing trial phenomena.

## B. “Truth” in Courts and Legitimacy Fragility

It is in this context -- that the legitimacy of the trial courts rests on a foundation of uncertain but possible fragility – that we turn to the import of “truth” in courts to the legitimacy of trial courts. Cann and Yates found that familiarity with the courts breeds contempt – “greater knowledge regarding one’s state courts actually decreases their perceptions of court legitimacy.”<sup>274</sup> If so, then the meaning of truth in courts is problematic, since legitimacy may already be fragile, and it is very likely that a non-reflective, super-majority of the public does not understand the meaning of “truth” in courts.

As the explication of the meaning of “truth” in courts developed, courts temper “fairness” with the need for “finality,” and courts intentionally delimit fact-based decisions in deference to other, external values. Put another way, two of the four “legitimacy” factors identified by Cann and Yates – diffuse support allowing an institution to persist and retain its authority without regard to agreement with specific decisions<sup>275</sup> -- are undermined by the nature of “truth” in courts.

That is particularly troubling because there is reason to be concerned that unfamiliarity is eroding. There are a variety of indicators that the community is increasingly becoming broadly aware of what happens in the trial courts. Most directly, there is surprisingly broad personal experience with the courts across the entire national population. More than one-third of eligible Americans will serve as a juror at least once in their lifetime.<sup>276</sup>

Beyond this direct personal experience, there is at least shallow but widespread public awareness of court cases. Trials with ironic frequency gain sufficient purchase in public perception to become – at least for a time – part of the public lexicon as the “trial of the century.” Just a few of the labeled “trial of the century” cases in the last 100 years (as of the writing of this Article) are the trial of Sacco and Vanzetti,<sup>277</sup> the trial of Leopold and

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<sup>274</sup> Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM.POLITICS RESEARCH 297, 314 (2008) (citations omitted). In more recent work, Cann and Yates have found inopposite results. Email dated May 29, 2015 from Jeff Yates to Ken Klein (on file with Author).

<sup>275</sup> See Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts*, 36 AM.POLITICS RESEARCH 297, 303-305 (2008).

<sup>276</sup> See Gregory E. Mize, Paula Hannaford-Agor, Nicole L. Waters, *The State-of-the States Survey of Jury , Improvement Efforts: A Compendium Report 8* (NCSC 2007) (available at <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>).

<sup>277</sup> See JOHN DAVIS, SACCO AND VANZETTI: REBEL LIVES 1 (Ocean Press 2004) (“Within a year it was going to become the ‘trial of the century.’”).

Loeb,<sup>278</sup> the “Scopes Monkey Trial,”<sup>279</sup> the Lindbergh baby kidnapping trial,<sup>280</sup> the Nuremberg trials,<sup>281</sup> the Sam Sheppard murder trial,<sup>282</sup> the O.J. Simpson murder trial,<sup>283</sup> the impeachment trial of President Clinton,<sup>284</sup> the antitrust trial of Microsoft,<sup>285</sup> and the trial of Michael Jackson.<sup>286</sup> As attorney F. Lee Bailey quipped in 1999, “Every time I turn around, there’s a new trial of the century.”<sup>287</sup>

But the work of the justice system can become part of the public lexicon even short of sensationalist tags. In a forty-six month period, the murder trials of Casey Anthony,<sup>288</sup> Jody Arias,<sup>289</sup> and the so-called “American Sniper” killer<sup>290</sup> all dominated the news cycle in quick succession. Less prurient but nonetheless generally followed civil trials of recent vintage include the IP battles between Apple and Samsung<sup>291</sup> the trial concerning RIM’s patent rights to the Blackberry electronic device,<sup>292</sup> as well as the personal-injury lawsuit known as the “McDonalds coffee case.”<sup>293</sup>

Technology nurtures and grows this general communal awareness of what happens in courts. By 2008 (still relatively early days in the context of ubiquitous access to the Internet), trial strategy consultants observed, “Virtually every trial is newsworthy to someone and can therefore end up on the Internet .....”<sup>294</sup> Indeed, this very concern has led to a host of academic and judicial introspection about a proper procedural response to

<sup>278</sup> See Douglas O. Linder, *The Leopold and Loeb Trial: A Brief Account*, <http://law2.umkc.edu/faculty/projects/ftrials/leoploeb/Accountoftrial.html> (1997) (“...the Leopold and Loeb trial has the elements to justify its billing as the first “trial of the century.”) (last visited February 8, 2014).

<sup>279</sup> See Peter Carlson, *(The Last) Trial of the Century*, THE WASHINGTON POST p. C01 (January 4, 1999).

<sup>280</sup> See Peter Carlson, *(The Last) Trial of the Century*, THE WASHINGTON POST p. C01 (January 4, 1999).

<sup>281</sup> See Joseph Canon, *The Real Trial of the Century*, THE NEW YORK TIMES (June 9, 2002), <http://www.nytimes.com/2002/06/09/books/the-real-trial-of-the-century.html> (last visited February 8, 2014).

<sup>282</sup> See Peter Carlson, *(The Last) Trial of the Century*, THE WASHINGTON POST p. C01 (January 4, 1999).

<sup>283</sup> See Peter Carlson, *(The Last) Trial of the Century*, THE WASHINGTON POST p. C01 (January 4, 1999).

<sup>284</sup> See Peter Carlson, *(The Last) Trial of the Century*, THE WASHINGTON POST p. C01 (January 4, 1999).

<sup>285</sup> See Peter Carlson, *(The Last) Trial of the Century*, THE WASHINGTON POST p. C01 (January 4, 1999).

<sup>286</sup> See Michael Ventre, *O.J. case will pale in comparison to Jackson trial*, TODAY (January 30, 2005) <http://www.today.com/id/6877844/ns/today-entertainment/t/oj-case-will-pale-comparison-jackson-trial/> (last visited February 8, 2014).

<sup>287</sup> Peter Carlson, *(The Last) Trial of the Century*, THE WASHINGTON POST at p. C01 (January 4, 1999).

<sup>288</sup> *Casey Anthony Trial Fast Facts*, CNN LIBRARY (July 1, 2014), <http://www.cnn.com/2013/11/04/us/casey-anthony-trial-fast-facts/index.html>.

<sup>289</sup> *Jodi Arias News*, ABC NEWS, <http://abcnews.go.com/topics/news/jodi-arias.htm>.

<sup>290</sup> Tasha Tsiaperas, *Trial for man accused of killing ‘American Sniper’ Chris Kyle begins in Stephenville*, THE DALLAS MORNING NEWS at A1 (February 11, 2015).

<sup>291</sup> Reuters, *Apple, Samsung Electronics Agree to Drop Patent Lawsuits Outside U.S.*, HUFFPOST TECH (August 5, 2014), [http://www.huffingtonpost.com/2014/08/05/apple-samsung-drop-lawsuit\\_n\\_5653206.html](http://www.huffingtonpost.com/2014/08/05/apple-samsung-drop-lawsuit_n_5653206.html).

<sup>292</sup> Rob Kelley, *BlackBerry maker, NTP ink \$612 million settlement*, CNN MONEY (March 3, 2006), [http://www.huffingtonpost.com/2014/08/05/apple-samsung-drop-lawsuit\\_n\\_5653206.html](http://www.huffingtonpost.com/2014/08/05/apple-samsung-drop-lawsuit_n_5653206.html).

<sup>293</sup> Andrea Gerlin, *McDonlad’s Callousness Was Real Issue, Jurors Say, In Case of Burned Woman*, THE WALL STREET JOURNAL (September 1, 1994).

<sup>294</sup> Ellen Brickman, Julie Blackman, Roy Futterman, & Jed, Dinnerstein, *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 292 (2008).

the impact of the Internet on jurors – both pretrial and during trial.<sup>295</sup> The courts provide a seemingly endless source of public fascination, and as a consequence there is broad – albeit potentially shallow – growing general public awareness of what happens in the courts.

And then, of course, there is the impact of electronic media. Popular television series such as *CSI* have caused enormous angst among lawyers and judges about the impact of popular media on the expectations of trial jurors.<sup>296</sup> This angst is grounded in the understanding that the public has an awareness of and a general set of preconceptions about what it believes – rightly or wrongly -- happens in courts.

There even is research suggesting that this broad awareness of what happens in courts is not entirely shallow. There is some evidence of people fashioning their specific behavior in response to how that behavior *may* be evaluated in a future trial. Professors Gideon Parchomovsky and Alex Stein discuss and analyze instances when potential future litigants have the opportunity – assuming they are aware of what happens in courts -- to create beneficial potential evidence.<sup>297</sup> Parchomovsky and Stein detail examples of persons from a variety of legal contexts – property law, patent law, criminal law, and tort law -- actually doing so; persons with sufficient awareness of the evidentiary treatment of actions modify behavior in order to maximize future trial outcomes.<sup>298</sup> Parchomovsky and Stein conclude that people in the general community make choices – indeed, sometimes economically “sub-optimal” choices -- based on their fear of how those choices might be used in a trial.<sup>299</sup> In other words, at a level far more consequential than amusement with *telenovella*-like courtroom dramas, there is increasing societal awareness of what happens in courts.

Are there presently concrete examples of this awareness eroding legitimacy? Arguably, there is exactly the opposite.

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<sup>295</sup> See, e.g., Amanda McGee, *Juror Misconduct in The Twenty-First Century: The Prevalence of The Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301 (2010); Daniel William Bell, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81 (2010-2011); Marcy Zora, *The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577 (2012); Steven Wallace, *The Internet infects the courtroom*, 93 JUDICATURE 138 (2009-2010).

<sup>296</sup> See, Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STANFORD L. REV. 1335 (2009).

<sup>297</sup> See Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 530-542 (2010).

<sup>298</sup> See Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 532-534 & fns. 47-56 (2010).

<sup>299</sup> See Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518 (2010).

Legitimacy Theory would predict that if the community accepts the courts as legitimate, then when there is a perception that the courts are getting things wrong, the community either will do nothing or will work within normal institutional channels (as opposed to acts of civil disobedience) to recalibrate the system.<sup>300</sup> So what do we see? We see the predicted behavior of legitimacy theory – that a community that accepts courts as legitimate either will do nothing or will work within normal institutional channels (as opposed to acts of civil disobedience) to recalibrate the system. Indeed, we can see this so ubiquitously that it reads like an Old Testament list of who begat whom.

In civil litigation the assertion that the system is out of balance is usually expressed by the pejorative phrasing of a “litigation crisis,” or a concern with rampant “frivolous litigation.” Concerns with an explosion of inmate litigation begat the Prison Litigation Reform Act.<sup>301</sup> Concerns with patent “trolls” begat calls for procedural reform of patent laws.<sup>302</sup> Concerns with the abuse of antitrust litigation begat its own procedural reform.<sup>303</sup> A perceived explosion in asbestos litigation begat calls to take all such claims out of Article III courts.<sup>304</sup> Asserted extortive securities litigation begat the Private Securities Litigation Reform Act.<sup>305</sup> The generic assertion of frivolous litigation<sup>306</sup> begat calls for massive tort reform,<sup>307</sup> procedural reform,<sup>308</sup> increasing burdens of proof to recover punitive damages,<sup>309</sup> elimination or capping of the right to recover some forms of damages,<sup>310</sup> and increasing the thresholds to finding some forms of liability.<sup>311</sup> ...and so

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<sup>300</sup> See, DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 278-280, 285-286 (John Wiley & Sons 1965).

<sup>301</sup> See, e.g., Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558-1559 (2003).

<sup>302</sup> See, e.g., Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 510-511 (2003)

<sup>303</sup> *Id.*

<sup>304</sup> See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819(1991-1992).

<sup>305</sup> See Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing With the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055 (1999).

<sup>306</sup> See generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MARYLAND L. REV. 3 (1986).

<sup>307</sup> See Thomas A. Eaton, *Of Frivolous Litigation and Runaway Juries: A View From the Bench*, 41 GA. L. REV. 431 (2007); Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MARYLAND L. REV. 40 (1986).

<sup>308</sup> See John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433 (1986); Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994).

<sup>309</sup> See CAL. CIV. C. §3294.

<sup>310</sup> See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 412-415 (2005); David M. Studdert, Michelle M. Mello, Atul A. Gawande, Tejal K. Gandhi, Allen Kachaia, Catherine Yoon, Ann Louise Puopolo, & Troyen A. Brennan, *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 N. ENGL. J. MED. 2024 (2006)

<sup>311</sup> See, e.g., Brian S. Sommer, *The PSLRA Decade of Decadence: Improving Balance in the Private Securities Litigation Arena with a Screening Panel Approach*, 44 WASHBURN L.J. 413, 420-425 (2004-2005) (describing Congressional attempts to impair securities class actions).

on and so on and so on.<sup>312</sup>

Persistent recalibration of the courts in response to accuracy concerns is a pattern on the criminal side as well. The perceived erratic sentencing patterns of judges begat mandatory sentencing guidelines.<sup>313</sup> The perceived inability of the traditional legal system to handle terrorism begat Guantanamo and military tribunals.<sup>314</sup> The perceived inability of normal criminal procedure to resolve childhood sexual abuse claims begat revised statutes of limitation.<sup>315</sup> The “insanity” acquittal of John Hinckley begat reform of FRE 704(b).<sup>316</sup>

This is not to say that there are *no* instances of civil disobedience in response to concerns of how the law is implemented or interpreted. The Civil Rights movement of the 1960’s is a stark example.<sup>317</sup> Another example comes from the annual protests against the Supreme Court because of the *Roe v. Wade*<sup>318</sup> decision.<sup>319</sup> Yet the broad sweep of American history all stands for the resilient institutional legitimacy of the trial courts.

So what then can we conclude about the relationship between legitimacy to truth in courts? If – as this Article posits -- truth in courts means something different from colloquial understandings of accuracy, then does the dissonance between what the public believes courts do and what courts actually do expose a weakness in the legitimacy of the courts?<sup>320</sup>

<sup>312</sup> See David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 907-14 (2015).

<sup>313</sup> See, e.g., Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 906 (1991) (“The principal argument for sentencing guidelines is ... they limit the play of judicial personality and inhibit discrimination on racial and other grounds.”); see generally KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (U. Chicago Press 1998). The guidelines worked – under the mandatory minimum guidelines variation in sentencing materially shrunk; when the federal courts returned to advisory sentencing guidelines, variance in judicial sentencing doubled. See Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence From Booker*, 89 N.Y.U. L. REV. 1268, 1271, 1275 (2014).

<sup>314</sup> See generally Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J. L. & PUB. POL’Y 635 (2001-2002); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2001-2002); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INTL. & COMP. L. Q. 1 (2004).

<sup>315</sup> See generally Jorge L. Carro & Joseph V. Hatala, *Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239 (1995-1996).

<sup>316</sup> See, e.g., Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 620 (1987) (“Prompted by public reaction to the jury’s not guilty by reason of insanity verdict of would-be presidential assassin John Hinckley, Jr., Congress amended Federal Rule of Evidence 704 in 1984.”).

<sup>317</sup> See generally Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005).

<sup>318</sup> 410 U.S. 113 (1973).

<sup>319</sup> See marchforlife.org.

<sup>320</sup> See Charles Nesson, *The Evidence or The Events? On Judicial Proof and the Acceptability of Verdicts*, 98



That concern can at least be looked for anecdotally.

Much has been and will be written on the shooting of Michael Brown and the aftermath, but in short form, Michael Brown's death lit a firestorm of public attention on police encounters with persons of color, which led to weeks of protests in Ferguson, Missouri, which led to protests nationwide, which led to attention on other apparently similar police encounters (most notably, the choking death of Eric Garner in New York City) and protests concerning those encounters, which led to focus and protests concerning the grand jury evaluations of the encounters, which led to serious discussion at high institutional levels of reform of grand juries and their processes.<sup>321</sup> The essential allegation was that when the actor was a police officer and the victim was a person of color, the likelihood was remote of criminal charges even being brought – much less there being a conviction and sentence.<sup>322</sup> Or, put another way, there was civil discord in response to the perception that values other than “a search for the truth” distorted the likelihood of reaching a correct outcome.<sup>323</sup>

The Brown/Garner rounds of public protest echo the reaction to the verdict in the murder trial of O.J. Simpson.<sup>324</sup> A common explanation of the verdict – and the reaction to the verdict – is the possibility that a

HARV. L. REV. 1357, 1379 (1985) (arguing the public will not defer to a judge's decision that amounts to a probability based bet on what happened).

<sup>321</sup> See, e.g., on March 17, 2015 the Young Lawyers Division of the American Bar Association presented a CLE Webinar entitled “Grand Jury Reform, Post-Ferguson.” See generally, Ben Kesling, *Missouri Governor Announces Creation of 'Ferguson Commission'*, WALL ST. J. (Oct. 21, 2014), <http://www.wsj.com/articles/missouri-governor-announces-creation-of-ferguson-commission-1413914495>; Lee Van Der Voo, *Grand jury reform propelled by Ferguson*, INVESTIGATEWEST (Dec. 30, 2014), <http://www.invw.org/article/grand-jury-reform-propell-1490>; Robert Gavin, *Grand jury reform call: Top judge asks judicial roel in cases of death or near-death of civilians by cops*, timesunion.com (Feb. 17, 2015), <http://www.timesunion.com/news/article/Top-judge-wants-big-grand-jury-changes-in-police-6085342.php> (“In the wake of polarizing grand jury decisions in the police-related deaths of Michael Brown and Eric Garner, New York's top judge wants judges to oversee the grand jury process in cases involving deadly and near-deadly incidents involving police and civilians.”).

<sup>322</sup> See, e.g., [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=0](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0).

<sup>323</sup> That perception largely was affirmed when on March 4, 2015, the United States Department of Justice Civil Rights Division released its *Investigation of the Ferguson Police Department*, which included among its findings:

Ferguson has allowed its focus on revenue generation to fundamentally compromise the role of Ferguson's municipal court. The municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests. This has led to court practices that violate the Fourteenth Amendment's due process and equal protection requirements. The court's practices also impose unnecessary harm, overwhelmingly on African-American individuals, and run counter to public safety.

[http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf) at 3.

<sup>324</sup> See generally JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED (Jossey-Bass 1996); John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917 (1995-1996). Accord Craig M. Bradley & Joseph L. Hoffman, *Public Perception, Justice, and "The Search for Truth" in Criminal Cases*, 69 S. Cal. L.Rev. 1267 (1996).

murderer was let free not because he was innocent but rather in order to send a message to LAPD about police practices.<sup>325</sup>

The Simpson protests and the Brown/Garner protests were a more muted version of the protests after the state court acquittal of police officers for the beating of Rodney King.<sup>326</sup> Those were a dramatic example of a non-trivial percentage of public disagreement with compromising the likelihood of accurate verdicts in response to non-accuracy values.

So we can identify examples of civil discord in response to the perception of the system factoring in non-accuracy values as part of a decision process. But are there also examples of passive acceptance of the system factoring in non-accuracy values as part of a decision process?

This brings us to the interesting world of criminal exclusionary rules. One feature of the criminal justice system is the set of doctrines excluding evidence improperly gathered, such as failure to give *Miranda* warnings.<sup>327</sup> We could postulate that there is broad, shallow public awareness of these doctrines through the colloquial phrasing, “got off on a technicality.”<sup>328</sup> But the primary reaction to these doctrines outside of legal academics and courts is media-driven grousing, not anything approaching deep legitimacy concerns. Further, even the grousing arguably is a tool of other agendas, rather than an indicator of legitimacy concerns – technicality acquittals only seem troublesome when they drive accuracy outcomes that the complainer disagrees with. Put another way, the same person who complains that an accused arms trafficker “got off on a technicality” may express no concern when Oliver North – charged with being a central figure in the “arms for hostages” “Iran-Contra Affair”<sup>329</sup> – got off on a technicality.<sup>330</sup>

None of these examples supports drawing definitive conclusions. It is a profound logical fallacy to draw conclusions from retrospective anecdotal events. Consider a person who every day buys a lottery ticket from the same local convenience store, and never wins. Then two days in a

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> See generally William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981-1982); Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J. L. & ECON. 157, 157-179 (2003); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 L. & SOC. INQUIRY 585, 585-609 (1983).

<sup>328</sup> See, e.g., <http://tvtropes.org/pmwiki/pmwiki.php/Main/OffOnATechnicality>.

<sup>329</sup> See <http://www.pbs.org/wgbh/americanexperience/features/general-article/reagan-iran/>.

<sup>330</sup> See [http://www.sourcewatch.org/index.php?title=Oliver\\_North](http://www.sourcewatch.org/index.php?title=Oliver_North).

row, the person buys a ticket from a gas station in another town. Both tickets win. This is not evidence that the gas station sells winning tickets and the convenience store does not. At best, it is a suggestion of something that bears exploration through collection of good data in a properly structured study.

But what all of this does expose is a dissonance between the judicial system's self-articulation of the system's commitment to accuracy, and the public perception of the courts. This may best be illustrated by the work of "Innocence Projects." According to the *National Registry of Exonerations*, a project of the University of Michigan, the year 2014 had a record number of exonerations (125), continuing a broad year-to-year upward trend since 1989.<sup>331</sup> Why do "Innocence Projects" chase irrefutable examples of innocent convicts on death row? Surely the primary motivation is saving an innocent life. But secondarily it is to demonstrate to the public in a way that cannot be denied the possible horrors of capital punishment. That secondary goal only resonates because of the premise that the public perception of the role of the courts is one seeking just, fair, and accurate results (in a colloquial sense of those words). It is hard to imagine that the public sentiment would be – faced with post-conviction affidavits showing an accused's actual innocence – that the convict was (in the words of the Supreme Court of the United States) "*not innocent, in any sense of the word.*"<sup>332</sup>

## CONCLUSION

In Chief Justice John Roberts's *2015 Year-End Report on the Federal Judiciary*, he described the recent amendments to the Federal Rules of Civil Procedure as predicated on the idea that cost-efficient, speedy dispute resolution is necessary to justice: "Our Nation's courts are today's guarantors of justice.... [L]awyers ... have an affirmative duty ..., with the court, to achieve prompt and efficient resolutions of disputes .... [W]e must engineer a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice."<sup>333</sup> This notion – equating efficiency, affordability, and finality with justice – underlies the strong affinity of the courts for procedural streamlining. Courts are animating a view that it serves justice to -- within constitutional constraints – deploy

<sup>331</sup> <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx>.

<sup>332</sup> Herrera, *supra*, 506 U.S. at 419. Herrera, and the view of innocence the Court enunciated in Herrera, is not an idiosyncratic instance. See *Bhardia v. State*, 774 S.E. 2d 90 (Ga. 2015) (trial court properly denied extraordinary motion for new trial to introduce DNA evidence of innocence of rape because defendant's inadequate showing of newly discovered evidence which could not have been found with due diligence).

<sup>333</sup> <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>, pp. 3, 6.

every available tool to maximize litigation as an efficient and affordable direct line to finality. Hence, we see, among many other “reforms,” reduction in jury size, pressure to settle or arbitrate, compression of open discovery rights, crimping of habeas corpus justifications, dismissal of factually sufficient claims as “implausible,” strict preservation of error standards to support appellate reversal, heightened thresholds for conviction-reversal based on prosecutorial misconduct, etc..

But each of these incremental steps toward “justice” is an incremental step away from the probability that a judgment of what occurred in a case corresponds to what actually occurred. For example, the amendment to Federal Rule of Civil Procedure 26(b)(1) to “crystalize[.]... the common-sense concept of proportionality .... [will] eliminate unnecessary or wasteful discovery ...[as determined by] a neutral arbiter—the federal judge,”<sup>334</sup> but inevitably *also* will foreclose discovery of an indeterminate body of apparently wasteful but actually insightful discovery that would have advanced the accurate determination of what objectively happened in a dispute.

Is this a step away from or toward discerning, in any individual case, the “truth?” Well, that depends on what is meant by “truth.” And therein lies the point. What this Article proposes is that refinements in procedural justice move cases closer to what courts mean by “truth” but move cases further away from what colloquially is generally meant by “truth.” Or put another way, system insiders equate “truth” with “justice,” but for system outsiders the two terms have different meanings.

The move toward more procedural justice at the expense of some colloquial truth may be sound public policy. But so long as it is not transparent public policy garnering large public support, it can come at an enormous cost. That cost is the erosion of judicial legitimacy. And that is a cost that has yet to be accounted for in the consideration of further procedural streamlining of civil and criminal process.

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<sup>334</sup> <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>, pp. 6, 7.

## APPENDIX A

Country	Jury System <sup>335</sup>	Hearsay Evidence	Character Evidence
Albania	None. <sup>336</sup>	Explicitly admissible, unless the declarant is available to testify. <sup>337</sup>	No ban.
Armenia	None. <sup>338</sup>	No ban.	No ban.
Australia	Only used when the charge is a serious crime. <sup>339</sup>	Ban with exceptions. <sup>340</sup>	Admissible if probative value substantially outweighs prejudicial effect. <sup>341</sup>
Chile	None. <sup>342</sup>	No ban.	No ban.
China	None. <sup>343</sup>	Ban, <sup>344</sup> but judges have discretion to admit. <sup>345</sup>	Ban on propensity evidence, modeled after Federal Rules of Evidence. <sup>346</sup>
Czech Republic	None. <sup>347</sup>	No ban.	No ban.
England	Only used in a small percentage of	Explicitly admissible in civil trials. <sup>349</sup> Ban with exceptions in criminal	No ban in civil trials. Ban with exceptions in criminal trials. <sup>351</sup>

<sup>335</sup> For our purposes, “jury system” means a system where lay jurors act as fact-finders, deliberate, and issue verdicts. This table does not distinguish between “mixed systems” (where lay assessors serve with professional judges) or where laypersons deliberate with professional judges, and systems with no lay participation. For a discussion on variations of lay participation around the world, see Steven J. Colby, Note, *A Jury for Israel?: Determining When a Lay Jury System is Ideal in a Heterogeneous Country*, 47 CORNELL INT’L L.J. 121, 124–25 (2014).

<sup>336</sup> DR. MARIJKE MALSCH, DEMOCRACY IN THE COURTS: LAY PARTICIPATION IN EUROPEAN CRIMINAL JUSTICE SYSTEMS 57 (2009).

<sup>337</sup> Code of Civil Procedure art. 598, *Fletorja zyrtare* Nos. 9, 10, and 11 (1996); Code of Criminal Procedure art. 154, *Fletorja zyrtare*, Nos. 5–7 (1995).

<sup>338</sup> MALSCH, *supra* note 314, at 57 (2009).

<sup>339</sup> Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 635 (2008).

<sup>340</sup> *Commonwealth Evidence Act 1995* ss 63, 65.

<sup>341</sup> *Id.* § 49.

<sup>342</sup> U.S. DEPT. OF STATE, SWEDEN 2013: HUMAN RIGHTS REPORT 7, [www.state.gov/documents/organization/220640.pdf](http://www.state.gov/documents/organization/220640.pdf)

<sup>343</sup> John J. Capowski, *China’s Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT’L L.J. 455, 471 (2012).

<sup>344</sup> Uniform Provisions of Evidence of the People’s Court (promulgated by Inst. of Evidence Law and Forensic Sci., CUPL, Oct. 8, 2007) art. 28.

<sup>345</sup> *Id.* art. 32.

<sup>346</sup> *Id.* arts. 33–34. For a discussion of why China, a civil law country with no jury system, has modeled its first evidentiary code after the United States’ Federal Rules of Evidence, see Capowski, *supra* note 321.

<sup>347</sup> Ivana Borzova, *Scheme for Evaluating Judicial Systems 2013: Czech Republic*, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), [www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp) (find “Czech Republic” in “Replies by country” drop-down menu) (last visited Apr. 26, 2015).

Country	Jury System <sup>355</sup>	Hearsay Evidence	Character Evidence
	criminal trials. <sup>348</sup>	trials. <sup>350</sup>	
Germany	None. <sup>352</sup>	No ban.	No ban.
Honduras	None. <sup>353</sup>	No ban, but in criminal trials there is a preference for non-hearsay evidence. <sup>354</sup>	No ban.
Iran	None. <sup>355</sup>	Explicitly admissible in criminal trials. <sup>356</sup>	No ban. Explicitly admissible in determining punishment in criminal cases. <sup>357</sup>
Jamaica	For serious crimes only. <sup>358</sup>	Explicitly admissible, except in criminal trials, oral hearsay is inadmissible if the declarant is available to testify. <sup>359</sup>	No ban.
Korea	In criminal trials, juries render “advisory opinions” which judges are not bound to follow. <sup>360</sup>	Prior to the advent of the criminal jury, there were no exclusionary rules. Now, there are some per se rules barring hearsay and other types of unfairly prejudicial evidence. <sup>361</sup>	

<sup>349</sup> Civil Evidence Act, 1995, c. 38, § 1.

<sup>351</sup> *Id.* § 101.

<sup>348</sup> Leib, *supra* note 317, at 637.

<sup>350</sup> Criminal Justice Act, 2003, c. 44, § 144.

<sup>352</sup> Colby, *supra* note 313, at 125.

<sup>353</sup> U.S. DEPT. OF STATE, HONDURAS 2013: HUMAN RIGHTS REPORT 9, [www.state.gov/documents/organization/220663.pdf](http://www.state.gov/documents/organization/220663.pdf).

<sup>354</sup> Decreto No. 189-84, Code of Criminal Procedure, art. 199. Most other Latin American evidence codes do not even recognize hearsay or character as evidentiary issues. KENNETH L. KARST, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK 52 (1975); Daniel Pulcino-Boek, *The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region*, 13 RICH. J. GLOBAL L. & BUS. 67, 101 (2014).

<sup>355</sup> U.S. DEPT. OF STATE, IRAN 2013: HUMAN RIGHTS REPORT 12, [www.state.gov/documents/organization/220564.pdf](http://www.state.gov/documents/organization/220564.pdf).

<sup>356</sup> ISLAMIC PENAL CODE 2003, arts. 162, 171, 176, 187, 188.

<sup>357</sup> *Id.* arts. 38(e), 60, 64.

<sup>358</sup> U.S. DEPT. OF STATE, JAMAICA 2013 HUMAN RIGHTS REPORT 10, [www.state.gov/documents/organization/220666.pdf](http://www.state.gov/documents/organization/220666.pdf).

<sup>359</sup> Evidence Act §§ 31C–31E.

<sup>360</sup> Hon. Antoinette Plogstedt, *E-Jurors: A View from the Bench*, 61 CLEV. ST. L. REV. 597, 601 (2013).

<sup>361</sup> See Eric Ilhyung Lee, *Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT’L & COMP. L. REV. 585, 601 (1997) (noting “the absence of provisions on issues such as relevance and hearsay” in the Korean rules of evidence); Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, AM J. INT’L L. 525, 554 (2010) (noting that “the advent of jury trials was accompanied by more stringent per se rules on issues such as hearsay.”).

Country	Jury System <sup>335</sup>	Hearsay Evidence	Character Evidence
New Zealand	Only used in a small percentage of trials. <sup>362</sup>	Ban with exceptions. <sup>363</sup>	Explicitly admissible, except in criminal trials, the prosecution may offer such evidence only where its probative value outweighs the risk of unfair prejudice. <sup>364</sup>
Poland	None. <sup>365</sup>	No ban.	No ban.
Scotland	Only used in a small percentage of criminal trials. <sup>366</sup>	Explicitly admissible in civil trials. <sup>367</sup> Ban with exceptions in criminal trials. <sup>368</sup>	No ban in civil trials. Broadly allowed in criminal trials. <sup>369</sup>
Slovenia	None. <sup>370</sup>	Explicitly admissible in civil trials. <sup>371</sup> No ban in criminal trials.	No ban.
South Africa	None. <sup>372</sup>	Ban with exceptions giving judge discretion. <sup>373</sup>	No ban.
Sweden	None. <sup>374</sup>	No ban.	No ban.
Tanzania	None. <sup>375</sup>	Ban with exceptions. <sup>376</sup>	Ban, except admissible for determining damages in civil trials. <sup>377</sup>
Turkey	None. <sup>378</sup>	No ban.	No ban.

<sup>362</sup> Neil Cameron, Susan Potter, & Warren Young, *The New Zealand Jury*, 62 LAW & CONTEMP. PROBS. 102, 138 (1999).

<sup>363</sup> Evidence Act 2006, § 18.

<sup>364</sup> *Id.* §§ 40(2), 43(1).

<sup>365</sup> Colby, *supra* note 313, at 125.

<sup>366</sup> Leib, *supra* note 317, at 637.

<sup>367</sup> Civil Evidence Act, 1988, c. 32, § 2(1).

<sup>368</sup> Criminal Procedure Act, 1995, c. 46, § 259.

<sup>369</sup> *Id.* § 270.

<sup>370</sup> Jasa Vrabc, *Scheme for Evaluating Judicial Systems 2013: Slovenia*, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), [www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp) (find “Slovenia” in “Replies by country” drop-down menu) (last visited Apr. 26, 2015).

<sup>371</sup> Civil Procedure Act of 2004 art. 4, No. 36/2004.

<sup>372</sup> Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 172 (2006).

<sup>373</sup> Law of Evidence Amendment Act 45 of 1988 § 3.

<sup>374</sup> Malin Kall et al., *Scheme for Evaluating Judicial Systems 2013: Sweden*, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), [www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp) (find “Sweden” in “Replies by country” drop-down menu) (last visited Apr. 26, 2015).

<sup>375</sup> WORLD JURY SYSTEMS 424 (Neil Vidmar, ed., 2000).

<sup>376</sup> Evidence Act, 1967, §§ 34–39. The Evidence Act fails to distinguish relevancy from hearsay; several provisions referring to “relevant” evidence are actually categories of admissible hearsay. Ronald J. Allen et al., *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 BOSTON UNIV. INT’L L.J. 1, 37 (2014).

<sup>377</sup> Evidence Act, 1967, § 54.

<sup>378</sup> Ibrahim Cetin, *Scheme for Evaluating Judicial Systems 2013: Turkey*, EUROPEAN COMMISSION FOR THE

Country	Jury System <sup>335</sup>	Hearsay Evidence	Character Evidence
Zimbabwe	None. <sup>379</sup>	Explicitly admissible in civil cases. <sup>380</sup> Ban with exceptions in criminal cases. <sup>381</sup>	Broadly admissible. <sup>382</sup>

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EFFICIENCY OF JUSTICE (CEPEJ), [www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp) (find “Turkey” in “Replies by country” drop-down menu) (last visited Apr. 26, 2015).

<sup>379</sup> ZIMBABWE: INJUSTICE AND POLITICAL RECONCILIATION 110 (Brian Raftopoulos & Tyrone Savage, eds., 2004).

<sup>380</sup> Civil Evidence Act § 27.

<sup>381</sup> Hearsay evidence is admissible in criminal trials if it would be in England. Criminal Procedure & Evidence Act § 253.

<sup>382</sup> Civil Evidence Act § 33; Criminal Procedure & Evidence Act § 260.