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Susan Haack

University of Miami School of Law, shaack@law.miami.edu

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EPISTEMOLOGY LEGALIZED: OR, TRUTH, JUSTICE, AND THE AMERICAN WAY

SUSAN HAACK*

... the man of mere theory is in the practical sphere an useless
and dangerous pedant.

– F. H. Bradley¹

It's a little unexpected; but perhaps I shouldn't be too surprised to find myself called upon to play the role of jurispude. I did, after all, once publish an essay entitled "Confessions of an Old-Fashioned Prig"²—an essay in which I tried to articulate why it matters whether you care about the truth, and what has gone wrong in the thinking of those, like Richard Rorty, who profess to believe that truth is "entirely a matter of solidarity,"³ that the supposed ideal of concern for truth is a kind of superstition, and that standards of better and worse evidence are nothing but local, parochial conventions. And all this had a quite direct bearing on my present topic; for if Rorty & Co. were right, we would surely stand in need of the most urgent and radical revision not only of our legal thinking, but of our legal system itself.

Jeremy Bentham's powerful metaphor of "Injustice, and her handmaid Falsehood" reminds us,⁴ if we need reminding, that justice requires not only just laws, and just administration of those laws, but also factual truth—objective factual truth; and that in consequence the very possibility of a just legal system requires that there be objective indications of truth, i.e., objective standards of better or worse evidence. Any case would illustrate the point, but the case of Kerry Kotler is especially vivid: in 1992, after serving eleven years of a twenty-five-to-fifty year sentence for rape, Kotler was released from prison when DNA evidence established that he was not the perpetrator; less than three years later, he was charged with another rape, and again convicted

* The author thanks Giovanni Tuzet for helpful correspondence, and Mark Migotti for very helpful comments on a draft—and for thinking up the title (however, she notes that the subtitle is *All Her Own Work*).

1. F. H. Bradley, *Ethical Studies* (London: Henry S. King and Co., 1876), 204.

2. Susan Haack, "Confessions of an Old-Fashioned Prig," in Haack, *Manifesto of a Passionate Moderate: Unfashionable Essays* (Chicago: University of Chicago Press, 1998), 7-30.

3. Richard Rorty, *Objectivity, Relativism, and Truth* (Cambridge: Cambridge University Press, 1991), 32.

4. Jeremy Bentham, *Rationale of Judicial Evidence* (London: Hunt and Clarke, 1827; New York: Garland, 1978), vol. I, 22.

—this time on DNA evidence.⁵ But unless there were an objective fact of the matter about which rape, or rapes, Kotler committed, and unless DNA evidence were objectively more truth-indicative than eyewitness testimony, etc., this would be, not justice, but a ghastly farce. Not to labor the point: the law is up to its neck in epistemology.

When Bentham published his *Rationale of Judicial Evidence* in 1827 the theory of evidence was, as he observed, largely unexplored and uncharted. By now, the territory is much traveled by legal scholars, and even visited by the occasional venturesome philosophical tourist. I can't hope to offer anything to rival the map Bentham himself drew, either in scope or in detail; nor can I aspire to a scholarly treatment of his remarkable treatise, let alone of the subsequent literature. My plan is, rather, to sketch some epistemological themes of mine, and explore their bearing on two familiar, radical epistemological criticisms of our legal system: (i) that an adversarial system is an epistemologically poor way of determining the truth; and (ii) that exclusionary rules of evidence are epistemologically undesirable. Neither criticism, I shall argue, is decisive; both, however, throw harsh light on disturbing aspects of the way our adversarial system functions in practice.

The task I have set myself requires coming to terms with the inevitable tensions between philosophical and legal thinking—epistemology being the part of philosophy to which it falls to articulate what evidence is and what makes it better or worse, the law of evidence being, rather, a mesh of practices, procedures, and rules regulating the legal handling of evidence. Epistemology, like philosophy generally, is essentially universal; the law of evidence, like the law generally, varies from place to place and from time to time. Moreover, my task requires thinking about “the law(s) of evidence” in the broadest sense: i.e., not only about legal rules of admissibility and exclusion of evidence, burdens and standards of proof, and so forth, but also about the procedures and practices that structure legal efforts to determine the truth.⁶ Additionally, the task requires discriminating those questions about the law of evidence that epistemology can reasonably be expected to illuminate, and those which, because they involve value judgments of other kinds, are beyond the reach of purely epistemological argument. On top of which, it requires an epistemology that is—well, *true*; for mistaken epistemology can only obscure, and not illuminate, legal issues. I will do what I can.

5. Edward Connors, Thomas Lundgren, Neal Miller, and Tom McEwen, *Convicted by Juries, Exonerated by Science* (Department of Justice: NIJ Research Report, June 1996), 61-64. The victim in the earlier crime had identified Kotler both in a photo array and in a line-up. *Ibid.*

6. On broader and narrower conceptions of the law of evidence, see William Twining, “What Is the Law of Evidence?” in Twining, *Rethinking Evidence* (Oxford: Blackwell, 1990), 178-218.

I. EPISTEMOLOGY: EVIDENCE, INQUIRY, ADVOCACY

Inquiry is something just about everyone engages in just about every day, when they want to know the source of a bad smell, the cause of a delayed flight, or whatever; and it is the professional occupation of scientists, historians, detectives, investigative journalists, of legal and literary scholars, and of philosophers, among others. Unlike such other human activities as cooking dinner, composing a symphony, dancing, debating, or pleading a case before the Supreme Court, inquiry is an attempt to discover the truth of some question or questions. To understand this, no elaborately articulated theory of truth is needed; it is sufficient that the concept of truth satisfy the Aristotelian Insight, that “to say of what is not that it is not, or of what is that it is, is true”—that a proposition be true just in case things are as it says. Someone who is trying to find out whether the butler did it, for example, wants to end up believing that the butler did it if the butler did it; that the butler didn’t do it if the butler didn’t do it; and that it’s more complicated than that if it’s more complicated than that.

Inquiry involves, first, being struck by a question. If the answer is to be found by means of some familiar routine, you just do what is needed (look up the number in the phone book, or whatever). If the answer is not so easily found, however, the next step is to make a conjecture which, if true, would answer the question at issue; figure out its consequences; check out how well those consequences stand up to any evidence you already have and any further evidence you can lay your hands on; and then use your judgment whether to stick with your conjecture, modify it, abandon it and start again—or suspend judgment until more evidence comes along. Inquiry is better conducted the more insightful, imaginative, and informed the conjectures, the more rigorous the reasoning, the more thorough the search for evidence, and the more scrupulously honest and (as we say) judicious the weighing of evidence. Strictly speaking, in fact, if you are trying to find evidence to support a foregone conclusion rather than following the evidence where it leads, you aren’t really inquiring; which is why, when the government or our university institutes an Official Inquiry into this or that, some of us reach for our scare quotes.

An inquirer’s business is to discover the true answer to his question; so his obligation is to seek out what evidence he can and assess it as fairly as possible. An advocate’s business is to make the strongest possible case that this—his side’s—answer is the true one; so he will be most effective if he selects and emphasizes whatever evidence favors the proposition in question, and ignores or plays down the rest. So, again strictly speaking, “disinterested inquirer” is a kind of pleonasm, and “biased inquirer” an oxymoron. But in real life, obviously, it’s a lot messier. Probably nobody is of rock-solid, across-the-board

intellectual integrity, and even the most honest inquirers have their prejudices and blind spots; so the distinction between inquiry and advocacy can get blurry.

The concepts of inquiry and of evidence are intimately intertwined. The evidence with respect to factual, empirical claims is a complex mesh in which experiential evidence, i.e., the evidence of the senses, and reasons, i.e., background beliefs, work together like the clues and ramifying intersecting entries in a crossword puzzle. How reasonable a crossword entry is depends on how well it is supported by the clue and any completed intersecting entries; on how reasonable those other entries are, independent of the entry in question; and on how much of the crossword has been completed. Similarly, how well a factual claim is warranted by evidence depends on how well it is supported by experiential evidence and background beliefs; on how secure those background beliefs are, independent of the claim in question; and on how much of the relevant evidence the evidence includes. Relevance is not a matter of logic, but depends on matters of fact. For example: though someone who believes that character can be determined by handwriting may *think* that this job applicant's looping her g's is relevant to whether she is trustworthy, whether it *is* relevant depends on whether handwriting actually does indicate character.

How supportive evidence is of a claim depends on how well it anchors the claim in experience, and how well it integrates it into an explanatory account; i.e., on how good the circumstances of any relevant observations were, and how well the claim in question fits into an explanatory story with the other relevant facts presumed known. But supportiveness alone is not enough; the warrant of a claim also depends on how warranted the reasons that support it are, independent of the claim itself. This involves no vicious circle, for eventually we arrive at sensory evidence, which neither has nor stands in need of warrant; and nor does it leave the whole mesh of evidence dangling in mid-air, for sensory evidence anchors it in the world. Even supportiveness and independent security together are not enough; the warrant of a claim also depends on how much of the relevant evidence the evidence includes—for however supportive and secure the evidence is, it won't give strong warrant to the claim in question if it omits some essential facts. It is because comprehensiveness is one determinant of quality of evidence that thorough inquiry requires not only sifting and weighing the available evidence, but also, when necessary, seeking out additional evidence (which reminds me to remind you of the two meanings of "partial": "biased" and "incomplete").

Even working on some question alone, without benefit of collaborators or rivals, involves a kind of dialogue with yourself: trying out a conjecture, imagining possible objections, working out possible responses—or simply

looking over what you typed yesterday and wondering “what *was* I thinking?” But life is short; and rather than seeking out evidence for ourselves, firsthand, most of the time we depend on what others tell us. I rely on an airline representative’s answer to a question about plane schedules; a historian relies on a colleague’s authentication of a document; astronomers rely on observations made by another team in another hemisphere, or on observations made in China a millennium ago. Often enough we interpret what others say, and take their competence and honesty for granted, without giving the matter serious thought; but sometimes we have to struggle to understand what others say or write, and sometimes we suspect they may be confused or misinformed, or have reason to deceive us. And even when evidence-sharing seems effortless, it depends implicitly on the grounds each inquirer has for justified confidence in others’ competence and honesty.

Both cooperation and competition can advance inquiry. Cooperation can enable productive division of labor and the pooling of evidential resources; competition can be a powerful incentive to intellectual effort, and to honesty. And of course the engagement of many people, whether cooperatively or competitively, extends the time available for seeking out and scrutinizing evidence. Indeed, one strength of natural-scientific inquiry is precisely that (even though research projects are doubtless sometimes hurried or cut short because a grant is running out, a publication deadline must be met, etc.) a question can be pursued by generation after generation of scientific workers until a solution is finally reached. Unfortunately, however, both cooperation and competition can turn sour and counterproductive. Cooperation may be real mutual help; but it can turn into mere mutual support and boosterism. Competition may be honest mutual criticism or honest rivalry for priority; but it can breed mere rhetoric and counter-rhetoric, posturing and counter-posturing. And at its worst, competition gone sour can even lead to the misrepresentation, distortion, or concealment of evidence.

We describe disagreements among proponents of rival scientific theories or historical claims as “debates”; and participants in such controversies sometimes engage in something that looks a lot like advocacy. Moreover, eloquence and appeals to authority sometimes produce an artificial consensus, at least temporarily. But disagreements among inquirers, unlike debates between rival advocates, cannot be decided by a vote on the basis of rival presentations; they will settle on a conclusion only if and when the evidence brings the community of inquirers to a genuine, unforced consensus.

When we need the answer to some question in a hurry, we may be obliged to curtail our search for further evidence, as well as our scrutiny of the evidence already in hand—as we may choose to do when the question doesn’t seem important enough to warrant the time and trouble a thorough search or

scrutiny would take, or when an answer already seems well-enough warranted that additional effort is a waste of time. And we are often faced with urgent practical problems—a medical emergency, say, when a decision about treatment must be made at once, and can't wait for new evidence to settle disagreement in the field; or an intelligence emergency, where some action must be taken now, on information known to be incomplete. In such circumstances, we have no choice but to decide what to do on the basis of whatever evidence we have—if we're wise, taking what backup precautions we can against the possibility that the evidence in hand is misleading. All this has a quite direct bearing on legal determinations of truth.⁷

II. LEGALIZING IT ALL

But as we leave the epistemological high ground for the legal bramble-patch, we encounter a dense tangle of questions.

For example: To what extent do legal and epistemological conceptions of evidence coincide, and how, where, and why do they diverge? They coincide only partially, for the law focuses on evidence that can be produced in court: i.e., on testimony, and sometimes on physical things—photographs, weapons, etc.—which would more likely be classified by an epistemologist as the objects of sensory evidence. What could epistemology tell us about such legal notions as proof beyond a reasonable doubt, the weight of evidence, the preponderance of evidence? My epistemology, at any rate, has a good deal to say about what makes evidence better or worse and a claim more or less warranted, but relatively little about the grades of proof that are of peculiar legal concern; which—if Richard Posner's report that judges' estimates of what degree of probability represents "beyond a reasonable doubt" range from 75% to 95% is anything to go by⁸—seem to be disturbingly vague. What could epistemology contribute to the debate between "fact-based" and "story-based" approaches in the "New Evidence Scholarship"?⁹ I call my approach "foundherentist" because it combines the plausible elements of foundationalism (in

7. I have drawn in this section on the following earlier work of mine: Susan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology* (Oxford: Blackwell, 1993), especially chapter 4; "Confessions of an Old-Fashioned Prig," *supra*, note 2; "The Same, Only Different," *Internationale Zeitschrift für Philosophie*, 2002.1 (2002) 18-22; *Defending Science—Within Reason: Between Scientism and Cynicism* (Buffalo, N.Y.: Prometheus Books, 2003), especially chapter 3.

8. Richard Posner, *Frontiers in Legal Theory* (Cambridge, Mass.: Harvard University Press, 2001), 367.

9. See Richard Lempert, "The New Evidence Scholarship," in *Probability and the Law of Evidence: The Uses and Limits of Bayesianism*, eds. Peter Tillers and Eric D. Green (Dordrecht, the Netherlands: Kluwer, 1988), 61-102.

virtue of giving an appropriate role to experience) and of coherentism (in virtue of also giving an appropriate role to mutual support among beliefs). Though the vocabulary is different, the ideas are essentially similar: the “fact-based” approach is foundationalist in structure and spirit, the “story-based” approach coherentist; and foundherentism shows that we can combine the strengths, and avoid the weaknesses, of both theories.

But these questions are relatively small potatoes compared to the radical epistemological criticisms of adversarialism, and of exclusionary rules of evidence, mentioned earlier. Wisely or not, I am going to see if I can handle these not-so-small—and probably uncomfortably hot—epistemologico-legal potatoes.

III. THE EPISTEMOLOGICAL CRITIQUE OF ADVERSARIALISM

“Some persons fancy that bias and counter-bias are favorable to the extraction of truth—that hot and partisan debate is the way to investigate. This is the theory of our atrocious legal procedure. But Logic puts its heel upon this suggestion”; thus C. S. Peirce, the greatest of American philosophers, in a discussion of the methods of inquiry.¹⁰ Almost a century later, Judge Marvin Frankel writes: “We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth.... [But d]espite our untested statements of self-congratulation, we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversarial system.”¹¹

As I have stressed, inquiry is a very different enterprise from advocacy. Moreover, Peirce was right to warn that when “it is no longer the reasoning which determines what the conclusion shall be, but the conclusion which determines what the reasoning shall be,” the inevitable result will be “a rapid deterioration of intellectual vigor”: “man loses his conception of truth and of reason,” and comes to think of reasoning as “merely decorative,” until “the truth for him is that for which he fights.”¹² To allow a clash of “bias and counter-bias” to replace a search for and scrutiny of evidence in the sciences, history, etc., really would be, as Peirce insisted, a recipe for disaster (a disaster that presently constitutes a real threat to our academic, indeed our intellectual, culture). However, Peirce’s assumption that the theory of our legal procedure

10. Charles Sanders Peirce, *Collected Papers*, eds. Charles Hartshorne, Paul Weiss, and Arthur Burks (Cambridge, Mass.: Harvard University Press, 1931-58), 2.635. References are by volume and paragraph number; the passage is dated 1878.

11. Marvin F. Frankel, “The Search for Truth: An Umpireal View,” *University of Pennsylvania Law Review* 123.5 (May 1975) 1031-59, 1036.

12. Peirce, *Collected Papers*, supra, note 10, 1.57-.58 (c. 1896).

is that allowing rival advocates to have at it is a good way to inquire is, to say the least, a considerable over-simplification.

First, a legal system isn't exactly, as science is, a kind of inquiry; it is better described as a set of rules and machinery for resolving disputes and making it possible for people to live together in some kind of order. Not that inquiry is irrelevant to the law; but the reason it is relevant is that we want, not simply resolutions, but *just* resolutions. And legal inquiry operates under a kind of time constraint not relevant to physics, history, etc.; for, with good reason, the law seeks, in the words of Justice Blackmun, "quick, final and binding ... judgments"¹³—the desideratum of promptness imposing time constraints at one end of the process, and the desideratum of finality-and-bindingness at the other.

Second, our adversarial system isn't advocacy all the way down; a trial is only one stage of the process, after the investigations of the police, the FBI, the attorneys for each side and their investigators, after an indictment, and so on. Although in a sense (as the Supreme Court averred in a 1966 ruling) "[t]he basic purpose of a trial is the determination of truth,"¹⁴ a trial is quite unlike a scientific or historical investigation. Rather, it is a late stage¹⁵ of a whole process in which a decision is made as to a defendant's guilt or liability, the stage at which the finder of fact sifts through the evidence presented by the advocates for each side and assesses whether it establishes guilt or liability to the required degree of proof. Moreover, legal determinations are constrained not only by the desire to arrive at factually correct verdicts, but also by other, non-truth-related desiderata: that citizens' constitutional rights must be respected; that it is much worse to convict an innocent man than to acquit a guilty one; and so on.

So the question is *not*, as Peirce apparently took for granted, whether "hot and partisan debate is the way to investigate"; rather, it is whether an adversarial trial conducted in accordance with the rules of evidence, in combination with pre-trial investigation itself undertaken in the knowledge that the trial will be conducted in this way and subject to these rules, and given the concern for promptness and finality as well as constitutional constraints and other non-epistemological desiderata, is a tolerably good way of arriving at verdicts that often enough find guilty defendants guilty and innocent defendants not guilty, and find for the plaintiff if and only if the defendant is liable.

Obviously it is not within the competence of epistemology alone to tell us what weight to give considerations about efficiency in arriving at the truth and

13. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

14. *Tehan v. United States*, 383 U.S. 406, 416 (1966).

15. I write of "a late stage," rather than "the final stage," because a full account would include the appeals process.

what to such other desiderata as promptness and finality; nor, therefore, to tell us how good an approximation to invariably true verdicts is “tolerably good,” since this requires just such weighing of epistemological values against values of other kinds. As I see it, while justice delayed *is* justice denied, nonetheless late *is* better than never; so that, e.g., we certainly should be willing to consider revision of rules about the introduction of new evidence, etc., now that DNA analysis can show decisively whether someone convicted of a long-ago crime was actually the perpetrator. But I want to concentrate on the epistemological core of our question.

The best case that could be made for the epistemological efficacy of an adversarial system, given the special circumstances under which the legal search for truth is conducted, would run somewhat as follows. Since for good reason the legal process, unlike the process of scientific inquiry, has to be concluded within a relatively short time frame, we need a way of ensuring that the search for and scrutiny of evidence is as thorough as that time frame allows. An adversarial system is one way to do this. If everyone involved knows that eventually, at the trial stage, the determination will be made by an impartial jury weighing the evidence developed and presented by the parties, each subject to cross-examination by the other, this should encourage precisely the kind of thoroughness we are aiming to achieve. For an advocate’s goal is to win; so counsel for each party is motivated to seek out evidence favoring his side of the case, and to bring out the flaws in evidence pointing the other way. To be sure, the process isn’t perfect; but it is a reasonable substitute for the ideal, as something not dissimilar might be in the case of an urgent medical or intelligence decision.¹⁶

This optimistic argument is right, up to a point: the adversarial process *can* enable thorough evidential search and scrutiny. However, the optimistic argument is right *only* up to a point: the adversarial process *will* enable thorough evidential search and scrutiny only if, for example, the resources available to each side for search and scrutiny of evidence are adequate and comparable, if juries are willing and able to decide cases on the basis of the evidence, etc. And this obliges us to ask how well the adversarial process we presently have really works.

16. Compare the Devil’s Advocate in sainthood proceedings, asked to play his adversarial role to guard against the possibility that other noses will be so deadened by the odor of sanctity that they won’t smell a rat if there is one.

Our present trial system, with its very specific, formalized division of labor, is of course an artefact of history. English courts once relied less on juries than on in-court tests by oath and ordeal, tests based on the assumption that God would punish those who swore falsely, would ensure that an innocent man's arm was not scalded as he plunged it into boiling water, and so on: on "proof," that is, in the old sense of the word, as in "the proof of the pudding is in the eating." After 1215, when the 4th Lateran Council prohibited priests from taking part in such tests, jury trials became commoner, but these early jury trials differed significantly from jury trials today; e.g., jurors might be specially chosen for their special expertise (such as a jury of vintners if the defendant was accused of selling bad wine), or they might be allowed to go around the town investigating the alleged offense for themselves.¹⁷ Certainly our present system is a better way of arriving at factually correct verdicts than trials by oath or ordeal; probably it is better than those early jury trials (though the specialized jury may have had its merits—after all, a panel of physicians would likely be better than a random selection of lay persons at assessing the evidence relevant to an emergency medical decision). But it certainly isn't perfect—as, if we could ask him, Thomas Barefoot might tell us.

After Mr. Barefoot was convicted of murder in the state of Texas, two psychiatrists testified at his sentencing hearing (as required by the Texas death-penalty statute) as to the likelihood that he would be dangerous in future. Neither had ever met him; and one, Dr. Grigson—who testified that there was a "*one hundred percent and absolute*" chance that Barefoot would commit future acts of violence¹⁸—was so notorious for his pro-prosecution testimony at such hearings that he had earned the nickname "Dr. Death." (Between 1973 and 1994 he testified in over 140 capital cases, in more than 90% of which the jury sentenced the defendant to death).¹⁹ Questioned by Barefoot's attorney about studies showing that psychiatric predictions of future dangerousness are wildly unreliable, Dr. Holbrook said he disagreed with their conclusion, and Dr. Grigson that he was not familiar with most of them, and that in any case they were accepted by only a "small minority group" of psychiatrists. Barefoot was duly sentenced to death.

17. See Frederic William Maitland, *The Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1909), lecture II; Stephan Landsman, "Of Witches, Madmen, and Product Liability: An Historical Survey of the Use of Expert Testimony," 13 *Behavioral Science and Law* (1995) 131-57.

18. *Barefoot v. Estelle*, 463 U.S. 880, 909 (1983) (Justice Blackmun, dissenting).

19. Amnesty International, Urgent Action notice, "United States of America (Texas): Death penalty/legal concern, Bobby Glen Cook," available at <http://web.amnesty.org/library/index/EGAMR510282003>; and cited in Thomas Regnier, "Barefoot in Quicksand: The Future of 'Future Dangerousness' Predictions in Death Penalty Sentencing in the World of *Daubert* and *Kumho*," *University of Akron Law Review* 37.3 (2004) 467-507, 481, n. 80.

When the case found its way to the Supreme Court, the American Psychiatric Association submitted an amicus brief acknowledging that two out of three psychiatric predictions of future dangerousness are mistaken. However, in his ruling for the majority, observing that the APA didn't say that such predictions were wrong *all* the time, only *most* of the time, Justice White dismissed the argument that the jury should not have been allowed to hear this evidence; relevant federal and state law anticipates, he pointed out, that cross-examination and the presentation of contrary evidence are the appropriate means of unmasking dubious testimony.²⁰ This probably wasn't a lot of comfort to Barefoot, who was executed in 1984.

To be sure, we don't have a definitive list of who is really guilty and who is not, who is really liable and who is not, against which to check whether our adversarial process results in jury verdicts that are usually, often, or rarely factually correct. Nevertheless, we have ample reason to think that the process fails dismayingly often: those DNA exonerations, for one thing—which are likely only the tip of the iceberg, since every innocent man exonerated by DNA was convicted on some evidence, probably evidence of a kind on which other innocent people were also convicted who *can't* be exonerated by DNA because there is no material to test; and the wildly inconsistent verdicts in tort cases involving the same chemicals, drugs, or devices and the same alleged damage, for another. On this point, I fear, Peirce only exaggerates: “We employ twelve good men and true to decide a question, we lay the facts before them with the greatest care, the ‘perfection of human reason’ presides over the presentment, they hear, they go out and deliberate, they come to a unanimous opinion, and it is generally admitted that the parties to the suit might almost as well have tossed up a penny to decide! Such is man’s glory!”²¹

A hoary old joke defines a jury as “twelve people whose job it is to decide which side has the better lawyer.” We laugh; but uneasily, for we know that the resources available to many criminal defendants are pitifully small, and that the contingency-fee system can't always redress the inequality of resources of an individual plaintiff and a mammoth corporate defendant. There are grounds for doubting even that the system ensures that evidential search and scrutiny is most thorough when there is most at stake.²²

Again, we read that better-educated jurors are likelier to find ways to avoid jury duty, and likelier to be challenged if they are empaneled. Besides the

20. *Barefoot v. Estelle*, *supra*, note 18, 898.

21. Peirce, *Collected Papers*, *supra*, note 10, 1.626 (1898).

22. At the time of Barefoot's conviction and sentencing, the sum available for an indigent Texas defendant in a death-penalty case for “investigation and experts” was \$500; one wonders how much might have been spent at that time by the defense team for, say, a celebrity accused of shoplifting, or a sports star accused of sexual assault.

expensive jury consultants employed in high-profile cases, now there is demographically based computer software to help attorneys identify which members of a jury pool may be expected to be sympathetic to their side, which to be sympathetic to the other, and which neutral.²³ We may even begin to lose our grip on what it means for a jury to be "impartial," and to wonder whether it isn't too much to ask that each juror be willing to go with the evidence; isn't it enough that a jury be fairly divided between those prejudiced in one direction and those prejudiced in the other? And now, with the opportunity to watch real jury deliberations on television,²⁴ we will wonder how thoroughly jurors understand judges' instructions, how often one juror succumbs to pressure from the others to conform, and how often jurors compromise on a verdict which, rather than representing anyone's real opinion, simply gets things over with in a way all of them can more or less live with.

Moreover, in our overburdened system, the proportion of cases decided by a jury is quite small.²⁵ And even if, as it may be said, attorneys negotiating a plea bargain or a settlement agreement are relying on their assessment of the chances of success at a trial, the optimistic argument now requires a further assumption: that attorneys often enough can and do predict correctly what the result would be if a case were to go to a jury—i.e., it relies not only on the approximation of jury verdicts to the truth, but also on the approximation of attorneys' predictions to jury verdicts.

On top of which, just as competition in inquiry sometimes does, the culture of adversarialism can turn sour and counter-productive. In fact, a central theme of Judge Frankel's now-classic paper was that exactly this was happening: while counsel "must not knowingly break the law or countenance fraud . . . [w]ithin these unconfining limits, advocates freely employ time-honored tricks and stratagems to block or distort the truth." Attorneys manage strategically "to avoid too much knowledge"; they use the very devices which can test dishonest witnesses and help ferret out falsehoods to make honest witnesses look shiftily and competent witnesses look confused; they shop for complaisant experts.²⁶ As a result, rather than engaging in the thorough search for and scrutiny of evidence that the optimistic argument assumes, they may actually

23. Consolidated Technology Solutions, SMARTJury, <http://www.cts-america.com/smartjury.asp> (last accessed November 30, 2004); Charles Nesson, "Peremptory Challenges: Technology Should Kill Them?" *Law, Probability and Risk* 3 (2003) 1-12.

24. ABC/ABC News, *In the Jury Room*, a seven-episode television series that premiered on August 10, 2004.

25. It was reported in 2001 that 4.3% of federal criminal cases and 1.4% of federal civil cases ended in a jury verdict. See William Glaberson, "Juries, Their Power Under Siege, Find Their Role is Being Eroded," *New York Times*, March 2, 2001, A-1.

26. Frankel, "The Search for Truth," *supra*, note 11, 1038ff.

impede it. It is hard to believe that Judge Frankel's reservations apply with any less force now than they did a quarter of a century ago.

In short: an adversarial system of justice is not an inherently hopeless way to determine the truth under the inevitable time-pressures; but there is good reason to fear that our present adversarial system is very far from optimal. It's a bit like the peer-review system. Asking others in the field to read and comment on work submitted is not an inherently hopeless way to determine what work is worthy of publication. But in philosophy at least, the peer-review system is now grossly overburdened as more and more people must publish to get tenure, or even to get on tenure-track; corrupted by the many willing to use their position to get friends' work published or rivals' work suppressed; and well-known to be the coach-class of professional publishing, shunned by those with enough frequent-flyer miles to be allowed into the first-class cabin of prestigious publication-by-invitation. It is so far from optimal, in fact, that no one really believes (whatever some administrators profess) that peer review is either a necessary or a sufficient condition of good work.

IV. THE EPISTEMOLOGICAL CRITIQUE OF EXCLUSIONARY RULES

In *Barefoot*, Justice Blackmun had written an angry dissent focused on the issues about evidence: "The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three ... because, it is said, the testimony is subject to cross-examination and impeachment. ... [T]his is too much for me. ... when a person's life is at stake, ... a requirement of greater reliability should prevail."²⁷ Cross-examination and impeachment may not be enough, he argued, when flimsy evidence is presented to jurors in the guise of science.

At the time, scholars were still debating whether the old *Frye* rule, according to which novel scientific testimony is admissible only if it is generally accepted in the field to which it belongs,²⁸ had or hadn't been superseded with the passage of the Federal Rules of Evidence in 1975; for FRE 702 provided simply that the testimony of a qualified expert, including a scientific expert, is admissible if it is relevant and not otherwise excluded by law, and didn't mention acceptance in the relevant community. The issue was resolved a decade later, in *Daubert*; and this time it was Justice Blackmun who wrote the ruling.

Describing *Frye* as "an austere standard, absent from, and incompatible with, the Federal Rules of Evidence," and acknowledging that "[v]igorous

27. *Barefoot v. Estelle*, supra, note 18, 915 (Justice Blackmun, dissenting).

28. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,"²⁹ the Court ruled unanimously that the Federal Rules *had* superseded *Frye*. However, in a part of the ruling from which Justices Rehnquist and Stevens dissented, Justice Blackmun added that FRE 702 requires that courts screen proffered expert testimony not only for relevance *but also for reliability*. Though both sides could declare victory—the plaintiffs because *Frye* was set aside, the defendants because expert testimony must now be screened for reliability—the new standard was in some ways more stringent than the old. One suspects that Justice Blackmun may have been remembering Thomas Barefoot, and hoping that tightened standards of admissibility would keep out flimsy evidence.

This, however, brings us directly up against the second radical epistemological criticism of the Anglo-American legal system: that exclusionary rules are inherently at odds with the epistemological desideratum of completeness. This is the main theme of Bentham's treatise on evidence: "[t]he theorem to be proved" is that "merely with a view to rectitude of decision, ... no species of evidence whatsoever ... ought to be excluded."³⁰ For evidence to have probative force, it must be not only correct, but also complete; evidence which is true so far as it goes but which omits some essential point can be thoroughly misleading. So, Bentham argues, exclusionary rules are to be avoided; the right way to deal with misleading evidence is to put it in the context of further evidence, either by bringing out more details by interrogation, or by introducing other witnesses. By these standards, the English jurisprudence on the subject of evidence, with its thicket of exclusionary rules, is "incompetent ... to the discovery of truth, ... incompetent, therefore, ... to the purposes of justice"—as, Bentham continues, is almost every rule that has ever been laid down on the subject.³¹

But does Bentham's critique of English evidence law in 1827 have any relevance to evidence law here and now? I shall set aside complications posed by the different rules in different states, the different rules for administrative courts, different arrangements for grand juries, etc., etc., and focus on the Federal Rules of Evidence. Rule 102 sounds like something of which Bentham

29. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*, note 13, 596.

30. Bentham, *Rationale of Judicial Evidence*, *supra*, note 4, vol. 1, 1.

31. *Ibid.*, 4. My knowledge of civil-law systems is limited to say the least; but I note for the record that the Swedish Code of Judicial Procedure adopted in 1948 abolished rules disqualifying witnesses because of partiality and rules excluding hearsay (CJP, ch. 35, sec. 1). The "principle of free evaluation of evidence" now allows every kind of evidence. Hugo Tiberg, Pär Cronhult, and Fredrik Sterzel, eds., *Swedish Law: A Survey*, trans. James Hurst (Stockholm: Juristförlaget, 1994), 494.

would have approved: the Rules are to be construed so as “to secure fairness in administration, elimination of unjustifiable expense and delay, and ... growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”³² And so does rule 402, providing that “all relevant evidence is admissible, except as otherwise provided [by law]. ... Evidence which is not relevant is not admissible.”³³ Rule 106 even specifically requires completeness: when a written or recorded statement, or part of such a statement, is introduced by one party, the other may require the introduction of any other part or any other recorded statement which ought in fairness to be considered along with it.

Rule 403, however, provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”³⁴ In fact, the mesh of rules intended to keep out confusing or misleading evidence is not so different, probably, from the English evidence law that Bentham had condemned so severely. True, Bentham allows that rules excluding evidence on grounds of “delay, vexation or expense” are justifiable, provided the non-truth-related evil they prevent outweighs the truth-related evil they cause.³⁵ But while he might have approved of some of our policy-related exclusionary rules, he specifically argued against a rule allowing spousal privilege; and I doubt he would have approved of, e.g., rule 407, excluding evidence of subsequent measures which, had they been taken sooner, might have prevented the damage for which the defendant is being sued—presumably so as not to discourage landlords from fixing wonky steps and such.

More to the epistemological point, however, is Bentham’s discussion of hearsay. Bentham classifies this as a species of “inferior evidence,” because it is liable to “a characteristic fraud”: the fact that the person whose words are reported cannot be cross-examined constitutes an incentive to lying. Nevertheless, he argues, “[w]hen standing by itself, this evidence, if false, is not at all dangerous; it would have nothing to support it, and would probably be falsified by ascertained circumstances.” At the same time, “[i]n connection with other proofs, it may be necessary for explaining and completing a series of facts.” As with “casual written evidence,” “[i]ts exclusion may occasion the loss of

32. Rule 102, Federal Rules of Evidence, *United States Code* (U.S. Government Printing Office, 2000), 854.

33. *Ibid.*, 864.

34. *Ibid.*, 865.

35. Bentham, *Rationale of Judicial Evidence*, *supra*, note 4, vol. 1, 3.

information which cannot be obtained in any other way.”³⁶ So he would *admit* such evidence unless the secondary witness is available to testify in person. This, of course, runs almost exactly contrary to the Federal Rules, which *exclude* hearsay evidence unless otherwise provided, but allow numerous exceptions—many of them applicable even if the out-of-court declarant is available as a witness. These exceptions—testimony as to secondary witnesses’ statements of their sense impressions at the time they spoke, excited utterances, dying declarations, then-existing mental, emotional or physical conditions, as well as recorded recollections, etc., etc. —are allowed on the grounds that such hearsay supposedly satisfies adequate “indicia of reliability.”

Bentham is right to see completeness of evidence as a desideratum—though I would prefer to put the point gradually: comprehensiveness of evidence is one determinant of degree of warrant. However, it follows *neither*, as Bentham believes, that the best strategy is to let in all evidence *nor*, as the FRE assume, that the best strategy is to try to exclude unreliable evidence. It doesn’t follow that more evidence is always better than less, so that the policy should be to let it all in; for additional-but-still-incomplete evidence *may* lead us in the wrong direction, while the previously available even-more-incomplete evidence would have led us in the right direction. This is why Bentham reaches for those modal qualifiers as he argues that if hearsay evidence is false, other evidence will “probably” show it to be so, and that hearsay evidence “may be” necessary to fill in the gaps in other testimony. But it doesn’t follow, either, that since we don’t have all the evidence, the policy should be to exclude potentially unreliable stuff. This is why, when Posner argues in favor of exclusionary rules, he too reaches for words like “may,” and “probably.”³⁷ Both strategies have benefits; both have drawbacks.

As even a brief exploration of the exclusionary strategy with respect to expert testimony as it plays out in *Daubert* and its progeny suggests, crafting effective rules specifying indicia of reliability is harder than it sounds. For one thing, while reliability is a matter of degree, an expert’s testimony must either be admitted, or not. For another, courts must decide *with respect to each expert* whether his testimony should be admitted, in whole or in part; but the testimony of several experts might, in some instances, fit together in an explanatory story to give more credibility to a fact in issue than the testimony of any one would do. This is in effect an application of Bentham’s point that additional evidence may change the complexion of the evidence we already have;

36. Jeremy Bentham, *A Treatise on Judicial Evidence*, ed. M. Dumont (1825; repr. Littleton, Colo.: Fred B. Rothman and Co., 1981), 201, 202, 200.

37. Posner, *Frontiers in Legal Theory*, *supra*, note 8, chaps. 11 and 12, *passim*; see e.g., p. 350 (trial by jury “may” produce in Darwinian fashion a higher quality of lawyer than bench trials, in which a judge “may” seek to compensate for the inadequacies of the weaker lawyer).

and also a kind of corollary of my theory: as the way a crossword entry interlocks with others may reasonably raise our confidence that it is correct, the way that, e.g., an epidemiological study suggesting a weak correlation of substance S with disorder D interlocks with toxicological results suggesting a possible mechanism by which S might sometimes cause this or that physiological damage, may reasonably increase our confidence that the statistical results are not misleading.³⁸

Moreover, as the Supreme Court has gradually modified and amplified what it said in *Daubert* about how to determine reliability, it has left more and more to courts' discretion. According to *Daubert*, courts are look to a potential witness's methodology, not his conclusions, and may refer to such factors as falsifiability, the known or potential error rate, peer-review and publication, and general acceptance in the scientific community. In *Joiner*,³⁹ however—ruling that, even though excluding expert testimony may well be outcome-determinative, the standard of review for such evidentiary decisions is abuse of discretion, not some more stringent standard—the Supreme Court quietly abandoned the distinction between methodology and conclusions on which it had relied in *Daubert*. And in *Kumho*—ruling that *Daubert* applies to *all* expert testimony, not only the scientific—the Supreme Court noted that the factors on *Daubert*'s “flexible” list may or may not be apropos, depending on the kind of expertise involved; courts may use any, all, or none of them, or, where appropriate, others of their own devising.⁴⁰

In a way, *Kumho*'s advice—in effect, that courts should use whatever indicators of reliability are appropriate in a particular case and with respect to a particular witness⁴¹—seems supremely sensible. (Think of the expert on police training techniques in *Berry*,⁴² excluded for lack of peer-reviewed publications; of the forensic document examiner in *Starzecpyzel*,⁴³ admitted after a *Daubert* hearing the conclusion of which was that *Daubert* didn't apply; or of Dennis Carlson, the tire expert in *Kumho*, solemnly explaining his “visual-inspection methodology”—he eye-balled the tires.) On the one hand, readily applicable, specific criteria, such as whether the evidence has been

38. See Susan Haack, “An Epistemologist Among the Epidemiologists,” *Epidemiology* 15.5 (September 2004) 51-2.

39. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

40. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (“*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case”).

41. “[W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*. . . . Too much depends on the particular circumstances of the particular case at issue.” *Kumho Tire*, supra note 40, 150.

42. *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994).

43. *United States v. Starzecpyzel*, 880 F. Supp. 1027 (S.D.N.Y. 1995).

published in a peer-reviewed journal, don't identify the reliable-enough reliably enough; but on the other hand, as the *Kumho* court acknowledges, its much less specific advice relies heavily on courts' discretion—it's rather like advising someone to "do the right thing." In practice, it seems, while since *Daubert* federal courts have been tougher in excluding dubious expert testimony proffered by plaintiffs in tort cases, they have been less so with dubious forensic testimony in criminal cases.

And in Texas, apparently, *plus ça change, plus c'est la même chose*. After repeated reprimands for his irresponsible testimony in Texas capital cases, Dr. Grigson was expelled from the American Psychiatric Association in 1995; but even after his expulsion he continued to testify for the state of Texas. The Texas rules of evidence are modeled on the Federal Rules; and in 1995 the Texas Supreme Court adopted *Daubert*.⁴⁴ In *Nenno v. State*, a 1998 capital-murder case, the Texas Court of Criminal Appeals ruled that the testimony of a supervisor from the FBI Behavioral Science Unit that a person matching the description established by evidence in the case "would be an extreme threat to society," was admissible; arguing that the *Daubert* factors need not apply outside the context of "hard science"—and thus using the fact that predictions of future dangerousness are not "hard science" to justify a *lower* standard of admissibility.⁴⁵ This decision preceded *Kumho*: but so far as I can see, there is nothing in *Kumho*—which was cited approvingly in Texas evidentiary case law just a month after it was decided⁴⁶—that would have precluded it.

Because *Daubert* shifted some of the responsibility for determining the quality of evidence away from the jury, the traditional decider of fact, to the courts, it has prompted debate over whether judges or juries are likely to be better at assessing the worth of complex and perhaps arcane expert evidence. I think there is probably no good answer to this question, beyond "it depends on the judge, the jury, and the evidence in question." The more important point is that our rules of evidence are not designed to compensate for failures of the adversarial system; for as the author of a text on the FRE observes, noting that except in egregious cases ("plain error") a potentially reversible exclusion will not be considered on appeal unless it was first brought to the attention of the trial court, "[t]he adversary system, based on party responsibility, is deeply engrained in our jurisprudence, *particularly in the field of evidence*."⁴⁷

44. *El du Pont de Nemours v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995); the ruling introduced two additional *Daubert* factors of its own: whether the technique depends on subjective judgments, and whether it has non-judicial uses.

45. *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998).

46. *Godsey v. State*, 989 S.W.2d 482, 490 (Tex. App. 1999).

47. Michael Graham, *Federal Rules of Evidence in a Nutshell*, 6th ed. (St. Paul, Minn.: West Publishing, 2003), 19 (emphasis added).

And now we see that, just as the inclusive strategy that Bentham urges would work poorly unless the advocates for the parties do a decent job of seeking out relevant evidence and of revealing the flaws in the dubious stuff admitted along with everything else, so too the exclusionary strategy built into our rules of evidence will also work poorly unless the parties do a decent job of challenging dubious stuff to get it excluded. And thinking, for example, of how much more feasible it is likely to be for a mammoth corporation than for an indigent criminal defendant to make a *Daubert* challenge to proffered expert testimony, we see that tweaking the rules of evidence is not the way to compensate for large discrepancies in the parties' resources.

Hence my conclusion: "The American Way"—the way of adversarialism and of exclusionary rules—is not an inherently bad way to determine the truth in legal disputes; but as it presently works it isn't nearly as good a way as we would ideally like it to be. In general, of course, what legal way of determining the truth will work best at a given place or time is likely to depend in complicated ways on matters of history, culture, economics, and social mores; and for our legal system to work significantly better would probably take changes not only within the system itself, but also in the larger social context in which it operates. But I will end here; for it really is beyond the competence of a "person of mere theory" like myself to offer detailed proposals about how such improvements, so desirable from the point of view of justice, might be achieved.