

NINE

Law

9.1 *Truth and legal adjudication*

THIS chapter switches the focus of veritistic evaluation to the law. The law features highly codified systems and procedures in which multiple players interact to produce certain judgments, namely, verdicts. Since one of the central aims of these procedures, I shall argue, is to produce true or accurate judgments, it is natural to evaluate existing procedures along the veritistic dimension. This is the appropriate task, at any rate, for social epistemology. Are current systems and procedures optimal from a veritistic standpoint? If not, what changes might yield improvements?

Notice that I am speaking of *judgments* rather than *beliefs*, although belief-producing practices are my standard object of veritistic appraisal. The reason for this deviation is that the palpable outputs of legal deliberations are not private beliefs but public judgments of guilt and innocence, liability or non-liability. It is therefore smoother to conduct the chapter's discussion in terms of judgments. This departure from the book's main framework is minor because legal judgments normally issue from beliefs of the trier of fact. When judgments are mentioned, beliefs are not far from the picture. Like beliefs, moreover, judgments are things that can be true or false, accurate or inaccurate.

The problem of adjudication, at least in the form I shall address it, is the problem of *applying* the law to particular cases under dispute. How should legal systems channel the flow of evidence and information about particular cases so as to produce suitable judgments about those cases? To highlight this problem, the adjudication issue needs to be separated from other issues in the legal sphere, and the status of the judgments in question needs to be carefully examined.

For present purposes I take it as given that the body politic has arrived at certain laws or statutes, that a certain history of case law is in place, and that certain canons of legal interpretation are entrenched. Whether these laws and so forth are good from a moral point of view is not up for present discussion. The question of their goodness falls into the realm of general moral and political philosophy, which transcends the scope of this book. I shall assume that the job of an adjudication system is to apply whatever laws are "on the books"

(and constitutionally legitimate).¹ If those laws are bad, they should doubtless be changed. But it is not the job of the adjudication system as such to effect that change. In endorsing this division of labor, I am not denying the possible appropriateness of juror nullification. It might sometimes be morally right for jurors to undercut an existing statute by refusing to apply it even in a clear case. My point is, first, that adjudication systems should not be designed on the assumption that the laws to be applied will be morally or politically wrong. Second, remedies for bad legislation should primarily be addressed at the legislative level, not at the enforcement level. But this issue will not be pursued here.

When seeking to apply the law to particular cases, either criminal or civil cases, two kinds of factors must be considered by the adjudicator (or adjudicative system): (1) What are the *material* (nonlegal) facts of the case? and (2) What is the *legal basis* for classifying this case under the target category or categories? A prosecutor or plaintiff claims that the case falls under some legal category, for example, a criminal offense of type *O*, or a civil tort of type *T*. The legal basis for such a claim would consist in a variety of legal factors, for example, statutes, common law, judicial precedents, canons of interpretation, and patterns of reasoning that enable people to see analogies or similarities across cases. An adjudicator will seek to decide the case by determining whether the legal basis warrants the alleged classification in virtue of the material facts.

Now in order to defend the veritistic, or truth-oriented, approach to adjudication, I need to show that some relevant truths and falsehoods are in play. To begin, I freely help myself to the assumption that there are certain "material" truths and falsehoods. These truths have their status independent of any knowledge of them by the adjudicative body. Such truths might include, for example, that the defendant started a certain fire, or that the defendant was aware that a certain drug he manufactured had specified side effects. The existence of such facts is relevant to whether the case is *really* an instance of arson or an instance of gross negligence. Of course, whether or not the actions of the defendant realize some category of criminal offense or civil wrong depends not only on the material facts of the case—what acts were committed by the defendant, and what was his state of mind—but on the definitions of the pertinent legal categories. That is why the adjudicator must take into account both the material facts and the legal basis.

Unlike most discussion in the philosophy of law, my attention will be mainly directed to the problem of identifying material facts. In other words, the fact-finding dimension of adjudication will occupy center stage. For purposes of this chapter, then, attention might conceivably be restricted to the question of how various aspects of adjudication procedures affect the fact

¹ By "laws" I here refer to what H. L. A. Hart (1961) calls "primary rules." Rules of adjudication can also be laws, but these would be what Hart calls "secondary rules."

finder's success or failure at identifying the relevant material facts. There is a difficulty, however. Juries never make formal pronouncements concerning the material facts they identify. Their formal verdicts are restricted to "guilty" or "innocent" (on such-and-such counts) and "liable" or "nonliable" (for such-and-such harms). So it is natural to ask about the truth or falsity of their verdicts. A group of twelve jurors might all differ from one another in their detailed beliefs about the material facts. The legal system is mainly concerned, however, about the accuracy of their official, collective verdict. Since the verdicts concern "legal facts" in some sense, not purely material facts, we must inquire into what makes verdicts true or false.

A sporting analogy will be helpful. When a baseball umpire calls a pitch a strike or a ball, or when he calls a runner safe or out, the verdict is based on two sorts of factors. First, there are recognized standards or criteria for what counts as a ball and a strike, and what counts as being tagged out. These standards or criteria are analogous to the legal basis for a verdict. Second, there is a question about the target physical events. Where did the pitch travel in relationship to home plate and the batter's body? Was any part of the runner's body touching a base when the runner was tagged? These physical events or facts are analogues of the material facts in the legal setting. Now let us turn to the verdict and the question of whether there is an associated "fact" that makes it true or false. I want to say—what it seems entirely natural to say—that in most cases there is a determinate fact as to whether a pitch is a strike or a ball, or whether a runner is safe or out. In nonborderline cases, the physical facts are (metaphysically speaking) determinately on one side or other of the relevant zone of demarcation. A pitch well above the batter's head, or three feet wide of the plate, is determinately a ball. In such cases, and closer ones as well, a certain verdict is definitively *merited* or *deserved*. If an umpire calls it differently, he makes a mistake. The pitch was really a ball, even if it is called a strike. The runner was really out, even if he is called safe. In short, there are facts—the runner being out, the pitch being a ball—with which an umpire's verdict is either aligned or misaligned; there are facts that make his verdict either correct or incorrect. I shall call such facts *merit facts*, because they are the sorts of facts that merit a particular judgment, even if that judgment is not the one issued by the authorized judge in the case.² Merit facts are not identical with physical facts; they "arise from" a combination of physical facts and normative criteria.

Merit facts contrast with what I shall call *judgment facts*. If an authorized umpire calls a runner out, then from the point of view of the game, that runner *is* out. It is recorded as an out, and this record is what affects the progress and official outcome of the game. So this sort of judgment fact is terribly

² If the reader prefers "desert" facts to "merit" facts, that substitution can be made throughout. Another possibility is "entitlement" facts; but "entitlement" is appropriate only for positive classifications, not negative ones, and both need to be covered here.

important. But it should not be confused with a merit fact; nor does the undoubted existence and importance of judgment facts subvert the existence of merit facts. Indeed, merit facts and judgment facts can coexist even if, in an obvious sense, they conflict. There might be a fact that the runner is "really" safe (a merit fact) although there is also a fact that he is called out (a judgment fact).

It would be foolish to insist that in every play of a game, there is a determinate merit fact. Baseball observers would probably agree that some pitches are so close to the edge of the strike zone that they could properly be called either strikes or balls, even if there were perfect agreement on the precise path of the pitch. Indeed, different umpires (permissibly) seem to have different zones of interpretation, and there are said to be different (tacit) customs of interpreting the strike zone in the American and National Leagues. Given this amount of vagueness, it is plausible that a certain subset of pitches do not fall clearly into either category (even given the true path of the ball). So the class of merit facts concerning baseball pitches may not enjoy perfect determinacy.

All of the foregoing remarks, I want to say, apply *mutatis mutandis* to the realm of law, although the law has vastly greater complexity than baseball. By analogy with baseball, however, I hold that there are legal "merit facts" concerning guilt or innocence, liability or nonliability. These merit facts are determined, or warranted, by the material facts of the case (what the defendant actually did or failed to do, what circumstances actually obtained, and so forth) and by the legal basis of the case. If an adjudicator issues a judgment that accords with such a merit fact, the judgment is true or correct. If the adjudicator issues a contrary judgment, it is wrong or incorrect.³ I do not claim that *all* legal cases are of this sort. "Hard" cases may well be indeterminate. In hard cases, even the totality of the material facts (as known from a God's-eye view) and the relevant legal considerations may not clearly warrant one unique judgment rather than another. For my purposes, however, total determinacy is not necessary. In fact, even a comparatively modest amount of determinacy will suffice, as will be explained below.

The extent of, and basis for, determinacy or indeterminacy in the law are questions that lie at the center of raging disputes in legal philosophy and jurisprudence. I believe I can stay neutral on many of these disputes.⁴ (A good thing, too, since this territory is well beyond the plausible reach of this book.)

³ There is a view in the law, sometimes associated with Legal Realism, which holds that "the law is what judges say it is." In distinguishing between merit facts and judgment facts I am assuming that this view is mistaken. It should be pointed out, however, that it is probably wrong to attribute this view to Legal Realists, at least to *all* Legal Realists. Perhaps it is attributable to Felix Cohen and Jerome Frank, but not to most of the other Legal Realists (Brian Leiter, personal communication). See Leiter 1996.

⁴ In particular, I want to stay neutral as between different approaches to the philosophy of law that allow for at least partial legal determinacy, such as (1) legal positivism (or conventionalism), (2) the natural law theory, and (3) the Dworkinian theory of law. My approach is consistent, I believe, with any of these approaches.

But some discussion of this terrain is unavoidable, to clarify where my claims fit within a large literature on these subjects.

Following Jules Coleman and Brian Leiter (1995), three possible sources of legal indeterminacy may be identified: (1) global semantic skepticism, (2) gaps in the law, and (3) conflicts or contradictions in the law. Global semantic skepticism claims that language in general is thoroughly indeterminate; there are no objective facts that make sentences mean one thing rather than another. If semantic skepticism were true, legal language would inherit its global indeterminacy. Few philosophers of language, however, hold such a strong global position. There are, to be sure, great unsettled debates over the sources of (determinate) meaningfulness, but only a minority would deny entirely that there is (ever) such meaning.⁵ I shall proceed on the majority view that rejects global semantic skepticism.

The other two arguments for legal indeterminacy are specific to the law. The "gap" argument claims that legally binding sources for dispute resolution may be in short supply. Existing statutes, standards, and interpretive resources may not suffice to cover novel cases. At least they may be too weak to warrant a unique outcome. H. L. A. Hart (1958) argued that in such cases, judges must exercise discretionary authority, but there is no correctness prior to the exercise of such discretion. Gaps can arise when statutes or general legal principles suffer from ambiguity, or are open to nonequivalent verbal formulations. Such ambiguity may resist attempts at resolution by appeal to (for example) legislative intent. But as Kent Greenawalt (1992) points out, although different formulations may imply different outcomes for *some* imaginable and perhaps actual situations, many activities will be either excluded under all plausible formulations or included under all plausible formulations. For example, every plausible formulation of the statutory crime of theft will exclude the ordinary act of scratching one's nose (Greenawalt 1992: 36).

The argument from conflicts or contradictions says that sometimes the law is genuinely contradictory, so that each of two conflicting conclusions about a given case could legitimately be drawn.⁶ Here too there would be no uniquely correct outcome. One response to the conflict worry is that conflicting norms can sometimes be ordered in their importance. It is not clear, however, that there is a common scale of importance against which conflicting legal norms or values can always be compared. Some degree of incommensu-

⁵ W. V. Quine (1960) is a prominent semantic skeptic, but most current theorists would say that his semantic skepticism rests on an untenable form of behaviorism. Saul Kripke (1982) might also seem to be a semantic skeptic. But Kripke is better interpreted as simply denying that meaning can arise from individual behavior or mental states. He seems to admit that it arises from some sort of communal facts. Perhaps a clearer example of a current semantic skeptic is Stephen Schiffer (1987).

⁶ For example, Joseph Singer writes: "legal reasoning is indeterminate and contradictory. By its own criteria, legal reasoning cannot resolve questions in an 'objective manner'" (1984: 6).

rability may reign among legal values (Coleman and Leiter 1995: 227).⁷ So some amount of indeterminacy seems inescapable.

Defenders of *strong* determinacy in the law, such as Ronald Dworkin and Michael Moore, would resist these conclusions. At least in Dworkin's early writings (Dworkin 1967, 1977), he suggested that even in "hard" cases there is a correct answer to be discovered.⁸ Moore, a defender of natural law theory, also seems to espouse this position (Moore 1985, 1989; see also Brink 1985). Strong determinacy is compatible with the project of this chapter, but by no means required. All I require for the tenability of my project is the rejection of total indeterminacy.

The principal current theorists who endorse total indeterminacy belong to a family of three approaches: Critical Legal Studies (CLS), Feminist Jurisprudence, and Critical Race Theory.⁹ But their attacks on legal determinacy, apart from the points already discussed here, involve disputes on topics unrelated to the present focus. Their criticisms of legal determinacy, for example, are frequently intertwined with attacks on legal "liberalism." Unfortunately, it is quite doubtful that there is any unified doctrine that comprises legal liberalism, or that determinacy needs to be associated in any way with liberalism (Coleman and Leiter 1995: 203–11). At any rate, this chapter is not committed to any doctrine called "liberalism." My framework is not opposed to liberalism; it is just neutral vis-à-vis the usual views associated with philosophical liberalism.

Another concern of the so-called "Crits" is the lack of "objectivity" in the law. The term "objectivity" has many meanings. Under one of its meanings, to say that our current system lacks objectivity is to say that it is not very good at producing accurate judgments.¹⁰ This denial of objectivity is perfectly compatible with everything I say in this chapter. The chapter by no means assumes or maintains that the American adjudication system, or any other existing adjudication system, gets a high score on the veritistic dimension. My project of veritistic evaluation assumes that there are some legal truths that an adjudication system should *aim* to reveal, but it does not assume that this or that system is actually effective at revealing these truths. So some contentions advanced by the Crits do not concern determinacy, and some are not at odds with views adopted here.

A few more words are in order about the implausibility of total indeterminacy. Debates in legal philosophy and jurisprudence tend to center on hard

⁷ On the topic of value incommensurability, see Raz 1986 and Anderson 1993.

⁸ For an application of Dworkin's line of reasoning to various indeterminacy arguments, see Kress 1989. A semantic framework that might support strong objectivism is presented in Stavropoulos 1996.

⁹ Representative writings of these movements include the following: Kennedy 1976 and Unger 1975 (Critical Legal Studies), Bell and Bansal 1988 (Critical Race Theory), and Minow 1987 (Feminist Legal Theory).

¹⁰ This would not be a favored way of expressing a CLS position, but it is strongly intimated by various strands of the CLS literature.

cases, perhaps because they pose the most pressing theoretical issues. Hard cases are also the bread-and-butter of lessons in law schools, again because they raise the most interesting issues for understanding of the law. Finally, hard cases are the ones that appellate courts take on their docket, and are widely reported when decided. All this attention to hard cases may create a false impression in people's minds: the impression that most, or even a substantial proportion of, legal cases are difficult to decide (given all the facts). I suspect that this is false. Many if not most cases are dull and obvious, at least if the material facts are known. The threat of indeterminacy simply does not arise. Greenawalt's case of scratching one's nose is a good example. Would anybody maintain that Jennifer's act of nose scratching *equally* warrants being classified as an instance of theft as it warrants being classified as nontheft? I trust not. So it is certainly a determinate case of a legal merit fact: in scratching her nose, Jennifer is innocent of committing theft. Presumably there are innumerable cases of this type, not just a handful.¹¹ This is enough to get my project off the ground.

It is important to distinguish between *metaphysically* easy and *epistemologically* easy cases. If all the material facts of a case are "given," metaphysically speaking, it may be straightforward how it ought to be classified. But this does not mean that it is epistemologically easy to determine what those facts are. In particular it may not be easy for the legal trier of fact to make this determination. Witnesses to the crucial material facts may no longer be alive, or what witnesses there are may be disposed to hide or distort the facts. So metaphysically easy cases may be epistemologically hard to decide. The whole point of this chapter is to consider which systems or procedures of fact finding are epistemologically superior. The metaphysical/epistemological distinction might also be applied to legal facts, in addition to material facts. Although there may be decisive reasons in the law (precedents, lines of legal argumentation, and so forth) for adjudicating a case one way rather than another, these reasons may not be apparent to a random judge. A judge may have an epistemologically difficult judicial task even if, metaphysically speaking, the law is determinate. But this chapter—unlike most philosophy of law—is not directed at these jurisprudential issues. It is directed primarily at selecting systems of material fact finding.

To introduce my project more fully, return again to the baseball realm. In baseball the epistemological task of classifying relevant plays in a game is a task assigned to umpires. But which individuals should be appointed or hired as umpires? What criteria should be used in hiring decisions? First, a candidate should know the rules of baseball in considerable detail. Second, his visual acuity should enable him to discriminate, *inter alia*, subtly different paths of projectiles. Obviously, these desiderata are relevant to the task of ren-

¹¹ Several writers cite the prevalence of easy cases as a reason for rejecting the thesis of total indeterminacy, including Ken Kress (1989), Lawrence Solum (1987), Frederick Schauer (1985), and Kenney Hegland (1985).

dering accurate verdicts about baseball plays. The better his eyesight and knowledge of the rules, the better an umpire he will be, *ceteris paribus*. I add "*ceteris paribus*" because there are other desiderata for an umpire. An umpire should be cool but firm in tight situations, he should work collegially with other umpires, and so forth. So judgmental accuracy is not the only important trait in an umpire; but it is a crucial trait.

Analogously, it is a vital and central desideratum of a legal adjudication system that it promote the rendering of accurate verdicts. No system can be perfect, in part because parties to law suits are commonly prone to deception, and deception is hard to detect. Nonetheless, accuracy is certainly to be sought, as far as is feasible and subject to other constraints. Returning to the case of the umpire, how should we measure a candidate umpire's accuracy? Suppose we have an independent test for balls and strikes (perhaps an optical scanner). But also suppose, as was allowed earlier, that some pitches are genuinely—metaphysically—indeterminate vis-à-vis the ball/strike category. This indeterminacy does not endanger the assessment of a candidate's accuracy. We may simply ignore indeterminate cases and measure the candidate's accuracy by his score on determinate ones. We can do the same, in theory, in the law. Insofar as we concentrate on accuracy, what we seek in an adjudication system is one that promotes correct verdicts in determinate cases. Indeterminate cases may simply be ignored. This is why the application of social epistemology to legal adjudication is conceptually in the clear even if there is (metaphysical) indeterminacy. None of this guarantees, of course, that it is easy to figure out what degrees of accuracy various adjudication systems will promote. But figuring that out is social epistemology's proper task in the legal domain, however difficult a task it may be.

9.2 *Alternative criteria of a good adjudication system*

My emphasis on the veritistic criterion for a good adjudication system is supported by at least one official document of the American legal system: the Federal Rules of Evidence. Rule 102 of the Federal Rules reads:

These rules [of evidence] shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end *that the truth may be ascertained* and proceedings justly determined. (Emphasis added)

Although this passage invokes further desiderata such as time, cost, and justice in addition to truth, it clearly makes truth determination one of the core objectives. Nonetheless, many people might resist the weight I am giving to the truth-finding desideratum. Adjudication systems, they might say, are devices for resolving disputes, and it remains to be shown that accuracy is the most important criterion for a good dispute-settling system. Certainly there

are other candidate criteria that deserve consideration. Three alternative criteria will therefore be examined: (1) *fairness or impartiality*, (2) *acceptability to the parties*, and (3) *evidence responsiveness*.

Before turning to these alternatives, let us draw a distinction between two kinds of disputes: *interest-based* disputes and *merit-based* disputes (Perritt 1984).¹² Interest-based disputes are ones in which people have conflicting interests but no external standard by which to resolve this conflict. For example, two friends may agree to spend the evening together, but one prefers to see a film and the other prefers to play cards. There is no external standard by which to resolve this disagreement. In a merit-based dispute, one party claims to merit certain treatment because of something done by the other party, something allegedly covered by an external standard. For example, the first party might claim to merit a certain award because the second breached a contract, or acted tortiously. All legal disputes are of this second, merit-based, kind. Only for this class of disputes do I favor a truth-oriented approach. But this encompasses all legal disputes.¹³

Does any alternative constitute a satisfactory approach to legal, merit-based disputes? Let us begin with fairness or impartiality, by first asking what fairness or impartiality consists in. Perhaps impartiality means not giving either party *any* advantage or edge over the other in resolving the dispute. Is this really a plausible aim of an adjudication system? Consider a suit in which one side knows of numerous witnesses to a critical event who are all prepared to support its contention concerning that event, whereas the other side has no witnesses to support its account of the matter. This arises because what actually transpired in that event fits the contention of the first side, as every witness to it would be prepared to attest. Now any adjudication system that allows the testimony of witnesses—in contrast with possible adjudication systems that would disallow witnesses altogether—gives an edge or advantage to the first party. A witness-permitting system makes it more likely, in this case, that the first side will win. Is this a count against such a system? Surely not. If a party gains an “advantage” in a dispute-resolution procedure simply as a byproduct of being in the right, that is unobjectionable. If a procedure renders it more likely that one party will win because of its merit, that is no flaw of the procedure.

Another way of clarifying the “no advantage” idea is to say that each party to a dispute must have an equal chance of winning, no matter what features it might have. But this implies that flipping a coin to decide who wins should be an adequate procedure. A moment’s reflection indicates that this is an

¹² Perritt uses the terminology “rights disputes” rather than “merit-based disputes.”

¹³ In cases of genuine indeterminacy, the external standard does not cover the cases unambiguously. This does not mean that they are not legal disputes. Legal disputes are ones that invoke external standards and presume the possibility of a resolution by reference to such standards. That such a presumption fails for certain disputes does not prevent them from being legal disputes.

absurd system for settling legal disputes. Do we want a system that gives a defendant—no matter what he has actually done—a 50–50 chance of being judged guilty, or innocent? Should a totally innocent person have a 50 percent chance of losing a frivolous civil suit that might be brought against him? This would obviously encourage suits for large damages against random parties, even when plaintiffs have suffered no harm at all, much less harm caused by the named defendants. If a plaintiff could win half of her suits, on average, no matter what events have transpired, she would be sitting pretty (as long as she were not named as defendant in an equal number of suits). Such an adjudication system would obviously be a disaster.

A dispute-resolution system, then, should not be impartial in the sense of equalizing chances of winning. Parties who *merit* victory in virtue of the material facts should be favored by the system, and parties who do not should be disfavored. Similar remarks apply to a popular metaphor that conveys the impartiality theme, the metaphor of “a level playing field.” It is unclear what, exactly, this metaphor means. Does a level playing field imply that each player has an approximately equal prospect of winning? If that is the meaning, then a level playing field is not a good feature of an adjudication system, for the reasons given above.

It might be replied that procedural fairness or impartiality does not require giving *no* advantage to any party; it just requires giving no *unfair* advantage to any party. But what does an *unfair* advantage consist in? That is precisely what a fairness approach must explain, and so far we have no viable explanation.

Shall we define an “unfair” advantage as an advantage that accrues to a party in virtue of some features *other* than its merit? The fairness criterion might then be construed as saying that a system should not favor any party *except* in virtue of their merit-determining properties (or indicators thereof). Only merit-determining properties should tilt the system in one’s favor, should influence the outcome of the dispute. But this is just another way of saying that the system should be designed to generate accurate, merit-reflecting judgments, which is precisely what the truth-oriented approach maintains. On this interpretation, fairness or impartiality is not a rival of the veritistic approach to dispute resolution; rather it is a tool for achieving truth determination.

Let me spell this out more fully. A system should treat parties impartially on all dimensions irrelevant to the determination of merit facts, precisely to enable the merit facts to shine through and be decisive. Except where race, gender, ethnicity, and so forth are themselves material facts (for example, in a civil rights action, or in a criminal case where they are necessary for identification purposes),¹⁴ they are irrelevant to, and totally unreliable indicators of, the material facts in legal cases. That is why systems should be impartial with respect to these features, and many others. So the correct appeal of the impar-

¹⁴ Thanks to Brian Leiter for suggesting the relevant qualification here.

tiality idea can be fully explained only within the framework of a veritistic criterion of dispute resolution.

The next alternative to consider is the acceptability of a system to the parties. Like impartiality, mutual acceptability has intuitive appeal. But considered as either a necessary or a sufficient condition of a system's adequacy, the proposal faces serious problems. The problems can best be exposed by carefully considering the *reasons* parties might have for accepting or rejecting a dispute-resolution system.

Suppose parties accept a given adjudication system because they believe it is veritistically effective. Does this suffice to make this system a good one? Imagine that although the parties *believe* in the veritistic virtues of the system, their confidence is misplaced. It is actually a veritistic disaster, and many alternative systems would be better. If we (some group of theorists) know this, and know that the ordinary citizens are deluded on this score, should we still regard the system as good? This scenario is not fantastic. There can be culturally generated myths about the truth-generating properties of systems. (There might be such a myth about the adversarial system in Anglo-American culture.) Does the existence of the myth make the system a good one? I don't think so. If verdicts regularly go astray, as judged by the veritistic criterion, this misfortune is not much ameliorated by misguided public acceptance of the system.

Even if general acceptance is not sufficient for a system's worth, it might be necessary. Is this so? Before answering, consider possible reasons for rejecting a system. Given a choice, a tortfeasor might reject a certain system for settling a suit against him because he knows he is legally in the wrong and fears that the system would reveal this fact. This reason for rejecting a system should not count against its worth. So party acceptability of a system, *tout court*, is not a necessary condition of a system's adequacy.

Instead of deeming a *system's* acceptability as a criterion of its worth, let us consider the acceptability of its *outcomes* as the criterion of worth. A system is good, under this proposal, if it frequently generates outcomes (settlements) that both parties find acceptable. The problem with this proposal is that one might accept an outcome not because she thinks it is merited but because she despairs of doing any better under the system. She might view the system as corrupt and insensitive to her situation, but she lacks the bargaining power to do better outside the system. So she accepts the outcome as the best of a bad situation. For this reason, outcome acceptability is not a compelling criterion of system adequacy.¹⁵

¹⁵ I do not mean to suggest that a system's acceptability has *no* good-making features. Clearly, the acceptability of a dispute-resolution system can help preserve the stability and maintenance of the enterprise that it serves, and that is often a good-making feature. What I am saying is that mere acceptability does not suffice for justice; it is not *all* an adjudication system should aim for. Thanks to David Golove for urging these points on me.

The third alternative to veritism is evidence responsiveness. According to this proposal, a legal adjudication system is good insofar as it induces adjudicators to align their verdicts with the evidence they receive. Although an evidence-responsive verdict will sometimes coincide with the truth, it need not do so. The current proposal points out that our legal system requires fact finders to make decisions based on the evidence. Why isn't this the appropriate criterion of system worthiness?¹⁶

Viewed from within our legal system, there is no question that jurors must base their decisions on the evidence they receive. An evidence-based decision is a proper one, even when it contravenes the merit fact of the case (which the evidence may not reveal). But this viewpoint is an "internal" one, a viewpoint appropriate to a certain role-player in the system (a juror). The question we are presently pursuing is "external" to any given adjudication system. It looks at whole systems and compares them with rivals. When such an external stance is taken, we cannot appeal to an internal component of a system as a criterion. We first need a criterion appropriate to the choice of a system, and a component already built into one system (or even several systems) is inappropriate. We can make sense of evidence responsiveness, however, if verdict accuracy is taken as our external criterion. Verdict accuracy rationalizes the desideratum of evidence responsiveness because evidence responsiveness is the best general means of achieving accuracy, though it sometimes goes astray.¹⁷

In endorsing the accuracy criterion, some might suppose that I am ignoring the true and proper aim of adjudication, namely, justice. What is the relationship between accuracy and justice? Two senses of justice need to be distinguished: *substantive legal justice* and *procedural justice*. Substantive justice in matters of adjudication consists in judgments or decisions about a person

¹⁶ This proposal bears a straightforward similarity to the evidentialist theory of justified belief, as presented, for example, by Richard Feldman and Earl Conee (1985).

¹⁷ At this juncture a distinction must be drawn between different senses of legal "merit." A certain party might merit victory in a given case relative to the "metaphysical" facts of that case. For a variety of reasons, however, she might not have managed to produce sufficient evidence—as judged by the applicable standard—to warrant victory in that case. Indeed, a judge might even dismiss the case for insufficient evidence. Although in one sense this litigant "merited" victory, in another sense she did not. The sense in which she did not merit victory is merit *relative to the existing and applicable standards of evidence*. I would call this second sense of "merit" a *system-internal* sense of "merit." The first sense of "merit"—the one I work with throughout the text—might be called a *system-external* sense of "merit." (Notice that system-external merit, in the intended sense, is external only to the *adjudication system*, not to the system of *substantive laws*. Whether or not a party has system-external merit does depend on what laws are in place.) When one is operating within a given adjudication system and taking its procedures for granted, the system-internal sense of "merit" should be heeded. But when one is designing adjudication systems, considering revisions in existing adjudication systems, or comparing adjudication systems (which is our present mission), the system-external sense of "merit" is crucial. That is why, except for this note, the chapter focuses on the system-external sense of "merit."

that accord with her (legal) merit or desert. Thus, there is no conflict at all between accuracy and substantive legal justice.¹⁸ Essentially, they amount to the same thing. Procedural justice is another matter. A judgment or decision is procedurally just if it results from the application of a proper procedure.

What is a “proper” procedure? We might distinguish between a thin and a thick sense of “proper procedure.” In the thin sense, a token procedure is proper if it comports with the accepted or customary procedure followed in the system. In the thick sense, a customary procedure itself might not be proper, because it violates some external standard for procedural rightness. What is that external standard? As previously argued, an appropriate standard would be the accuracy standard. A procedure is good and proper to the extent that it promotes accurate judgments.¹⁹ In the thick sense of propriety, then, even procedural justice makes some reference to the accuracy desideratum. Notice, however, that whichever sense of propriety is adopted, a distinction remains between substantive and procedural justice. A given decision by a court can be procedurally just but substantively unjust if it results from a customary and generally accurate procedure that errs on that particular occasion.

The criterion of verdict accuracy requires slight refinement if it is to mesh with the Anglo-American tradition in criminal law. The evidence standard of “beyond reasonable doubt” is imposed in the criminal law because certain kinds of verdict errors are regarded as more serious than other kinds: convictions of the innocent are worse errors than acquittals of the guilty. What this shows is not that truth determination is the wrong criterion of system goodness, but that one category of truths—the truths of innocence—is weighted more heavily than another category of truths—the truths of guilt. With this weighting element acknowledged (for the criminal realm), the veritistic criterion is precisely on track.

I have called the veritistic criterion a “central” or “fundamental” criterion for the evaluation of adjudication systems. I do not say, however, that truth is the *only* relevant value. Other values include speed, cost, and the nonviolation of independent legal rights of the role-players (parties, witnesses, jurors, and so forth). By “independent” rights, I mean rights flowing from sources other than the adjudication system itself (or its rationale). If a proposed adjudication system entails or risks the violation of certain rights, it might properly be rejected despite its exemplary truth-conducive properties. The difficult problem is to say how the truth-getting value should be *weighted* as compared with

¹⁸ But does substantive legal justice coincide with moral justice? If not, shouldn't the latter be pursued instead of accuracy? This is a vexed question, which cannot be addressed here at length. My inclination, however, is to say that adjudication systems cannot reasonably be burdened with the task of securing moral justice; legal justice is a hard enough task to fulfill.

¹⁹ Use of an accuracy-promoting procedure might not be *sufficient* for procedural justice, however. It may also be necessary that the procedure in question be customary and predictable as well. To judge a case by an ad hoc, completely unanticipated, method would not qualify as procedurally just even if the method were generally accurate.

these other values. This is not a problem I shall try to settle. It falls outside the scope of social epistemology. It is enough for my purposes to show, as I believe I have shown, that truth is a primary or central value in legal adjudication. Any adjudication system that fails badly on the veritistic dimension has a strong count against it. This suffices to get the program of social epistemology through the door. It shows that social epistemology has important work to do in this territory, even if it does not get the final word on the subject. Any “all-things-considered” choice among adjudication systems or their components must involve more than veritistic considerations. But veritistic considerations do have pride of place, and they are the ones on which I shall concentrate.

9.3 *Truth and the Bill of Rights*

Some people might take exception to the suggestion that truth deserves “pride of place” among the desiderata of adjudication. Other factors are so weighty, they might argue, that painting truth into the foreground distorts the picture. When we read the (American) Bill of Rights, don’t we see a picture in which certain defendant rights and privileges handily trump the search for truth? Doesn’t this indicate that an emphasis on truth is off the mark, even granting that social epistemology does not purport to encompass all dimensions of evaluation?

As a preliminary point, notice that social epistemology is not wedded to the constitutional or legal heritage of any one political entity. Social epistemology is universal. When applied to the law, it is not uniquely concerned with *American* legal institutions, although I cite these disproportionately out of personal familiarity. The United States Constitution has no privileged position in our deliberations, unlike deliberations that transpire in American courts or American law schools. If the U.S. Constitution did not support an adjudicatory emphasis on truth, that would not sink my theoretical ship. In point of fact, though, a strong case can be made that it does support this emphasis. Even the Bill of Rights, properly interpreted, helps justify the view that the truth goal deserves substantial priority or weight.

My defense of this contention will be heavily based on Akhil Reed Amar’s (1997) treatment of the criminal procedure aspects of the Fifth and Sixth Amendments.²⁰ Amar combines Constitutional history with textual interpretation to support the centrality of the truth goal. He also criticizes a number of twentieth-century Supreme Court decisions in this area and makes several new proposals for criminal procedure. Some of Amar’s work in this territory is fairly controversial, especially particular doctrines he advocates for contemporary criminal procedure. But I think we can separate Amar’s claims about

²⁰ Amar also analyzes Fourth Amendment jurisprudence, but it is less directly relevant to my concerns.

the historical role of truth seeking from his claims about the merits of more recent Supreme Court jurisprudence. Only the former are relevant here.

Begin with the Fifth Amendment clause on self-incrimination:

No person . . . shall be compelled in any criminal case to be a witness against himself.

On its face, this privilege compromises the search for truth. Since the law regularly relies on witnesses to obtain the truth, why not use a criminal defendant as such a witness, if truth is the paramount aim? Since the testimony of other witnesses is sometimes compelled, why not that of a criminal defendant? So it seems as if the Fifth Amendment gives higher priority to factors other than truth.

Amar considers several possible rationales for the self-incrimination privilege that he plausibly dismisses. One frequently cited rationale is the psychological cruelty of the so-called cruel trilemma: without the privilege, the defendant would have to choose among self-accusation, perjury, or contempt (see *Murphy v. Waterfront Commission* 1964; *Miranda v. Arizona* 1966). But, observes Amar (1997: 65), our justice system has no such scruples about compelling answers from a civil litigant. Nor does the system object to forcing people, even in criminal cases, to testify against friends and relations (except spouses), despite the potential pain. Finally, there is no trilemma if one is innocent and says so. So under this interpretation, only the guilty would be beneficiaries of the privilege. No other criminal procedure provision of the Bill of Rights, Amar argues, is designed to give *special* protection to the guilty.

Another interpretation of the self-incrimination clause is that it protects a special zone of mental privacy (*Murphy v. Waterfront Commission* 1964: 55). Again Amar argues that this does not fit. Civil litigants and witnesses must often testify concerning highly private, highly embarrassing matters, for example, in divorce cases. If the Bill of Rights were intended to protect a special, private zone, why not extend this to civil as well as criminal cases? Furthermore, under Court interpretations, immunity dissolves the self-incrimination privilege. Once a witness is given immunity, she can be forced to testify about anything in the private zone. This does not fit with the idea that a private sphere must be maintained.

A third possible foundation of the clause is "noninstrumentalization." Government disrespects a person when it uses him as a means of his own destruction (Rubinfeld 1989; Luban 1988).²¹ This explanation does not work, says Amar, because the government "uses" persons as witnesses all the time, whether they are willing or not. It is a general duty of citizenship to serve as a witness when necessary to enforce the laws. Second, if there were a general prohibition against the government using a person against himself, why may it do so in civil prosecutions? Third, the government is allowed to force an

²¹ Luban writes: "making me the active instrument of my own destruction signals the entire subordination of the self to the state" (1988: 194).

arrestee to submit to photographing, fingerprinting, and voice tests whose results may be introduced in a criminal court (*Schmerber v. California* 1966). If these instrumental uses are permissible, why is using testimony so different, asks Amar (1997: 67)?

The answer Amar proposes is a truth-based one: "Truth is a preeminent criminal procedure value in the Bill of rights: most procedures were designed to protect innocent defendants from *erroneous* conviction. Especially when pressured, people may confess—or seem to confess—to crimes they did not commit" (1997: 84). If the prospect of an unreliable (inaccurate) confession on the witness stand today seems improbable, Amar reminds us that from 1789 until well into this century many innocent defendants in noncapital cases could not afford lawyers and were not furnished lawyers by the government. If forced to take the stand, they could be bullied or bamboozled by a prosecutor into agreeing to things that would wrongly seal their fate. This increases the plausibility that avoidance of this scenario was indeed on the minds of the framers.²²

Let us turn to the Sixth Amendment, which reads:

✓ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The deep principles underlying the Sixth Amendment, Amar argues, are the protection of innocence and the pursuit of truth. A speedy trial protects the innocent person from prolonged punishment in pretrial detention. It also helps ensure that the accuracy of the trial itself will not be undermined, as might occur if a delayed trial causes the loss of exculpatory evidence (Amar 1997: 90). The publicness of the trial is also intended to protect an innocent person from an erroneous verdict of guilt. Prosecution witnesses may be less willing to lie or shade the truth with the public looking on. Bystanders can bring missing information to the attention of court and counsel. Counsel, confrontation, and compulsory process are also designed as engines by which an innocent person can make the truth of his innocence visible to the jury and the public (Amar 1997: 90).²³

²² Amar points out that concern with the unreliability of a defendant's in-court testimony was expressed by the Supreme Court a century ago in one of its earliest self-incrimination opinions: "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him" (*Wilson v. United States* 1893: 66).

²³ The public aspect of the trial suggests that a premium is placed not only on the jury producing a true verdict but on the public's believing its truth. This is not a point I shall be stressing, but it is obviously compatible with the veritistic approach.

The relationship between the publicness of a trial and the discovery of truth was highlighted as early as 1685, when Solicitor General John Hawles put the point as follows: “[T]he reason that all trials are public is, that any person may inform in point of fact, though not subpoena’d, *that truth may be discovered* in civil as well as criminal cases. There is an invitation to all persons, who can inform the court concerning the matter to be tried, to come into the court, and they shall be heard” (Hawles 1811: 460; emphasis added). Truth was equally stressed by William Blackstone: “This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than private and secret examination . . . [A] witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal” (1765: 3/373).

The ability to compel witnesses to testify on one’s behalf is also dedicated to the truth goal. In the words of the Supreme Court, “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . to the jury *so it may decide where the truth lies*” (*Washington v. Texas* 1967: 19; emphasis added).

The right to counsel, argues Amar, is again one of the tools that an innocent party needs to convince the jury (truly) of her innocence. Trials are commonly filled with technical lawyer’s law—for example, the rules of evidence. Without expert assistance, the accused may be unable to exercise her rights effectively to cross-examine prosecution witnesses and present her own evidence and witnesses (Amar 1997: 139).

Amar summarizes his view as follows:

Truth and accuracy are vital values. A procedural system that cannot sort the innocent from the guilty will confound any set of substantive laws, however just . . . A Constitution proclaimed in the name of We the People should be rooted in enduring values that Americans can recognize as *our* values. Truth and the protection of innocence are such values. Virtually everything in the Fourth, Fifth, and Sixth Amendments, properly read, promotes, or at least does not betray, these values. (1997: 155)

Amar’s critics contend that he ignores many considerations. Carol Steiker (1994), for example, argues that Amar’s “originalism” fails to bring the Constitution—specifically, the Fourth Amendment—into tune with our times. In the modern context of professional police forces, which did not exist at the time of the framers, the exclusion of evidence from illegal searches assumes an importance it did not have in colonial times. But Steiker does not really dispute Amar’s historical claim that truth was a paramount concern in the framing of the Fourth, Fifth, and Sixth Amendments. At most she says that other pressing values outweigh that of truth determination in the regulation of searches and seizures. Nothing I advocate is incompatible with this conclusion.

Similarly, although Yale Kamisar (1995) criticizes Amar’s views on Fifth

Amendment issues, he does not really dispute the importance of truth or reliability, especially its historical importance:

To be sure, the “voluntariness” test *started out* as a rule protecting against the danger of untrustworthy confessions. It is also true that for a long time thereafter the rule that a confession was admissible so long as it was “voluntary” was more or less an alternative statement of the rule that a confession was admissible so long as it was free of influence that made it unreliable or “probably untrue.” (1995: 937)

Kamisar contends that unreliability is no longer the sole or even principal reason for excluding coerced or involuntary confessions. The main concern is impermissible police interrogation methods. Even if Kamisar is right about this, it just shows, once again, that truth is not the only desideratum, a point I fully acknowledge. I would formulate the point as follows. Avoiding or deterring impermissible police methods is a *side constraint* on our adjudication system. Evidence may be excluded if that side constraint is violated. But the existence of such a side constraint should not belie the fact that the overarching goal of the system is truth determination.

For these reasons, the project of veritistic epistemology seems to accord quite well with the spirit of the American Constitution. The Constitution aside, however, it is questionable whether the specifics of the American adjudication system are optimal means to truth determination. Even ignoring provisions of the system that reflect extraveritistic side constraints, how effective is the Anglo-American system from a veritistic point of view? That question will occupy us for the rest of the chapter.

9.4 *Common-law vs. civil-law traditions*

Modern adjudication systems are elaborate institutional structures. Labor is often divided among agents who uncover the evidence, agents who argue over the implications of the evidence, agents who issue verdicts on the evidence, and agents who oversee the entire process. Since the ultimate outcomes of a system hinge on the types of inter-agent transactions permitted and encouraged by the system, this is prime territory for social epistemology. The variety of possible adjudication systems is obviously legion, and some of these systems can be expected to outstrip others in their propensity to reach the truth. This signals a natural domain for veritistic epistemology.

In Western legal history, there are two broad traditions of adjudication: the common-law (Anglo-American) tradition and the civil-law (Continental) tradition. These are sometimes referred to, respectively, as the “adversary” system and the “inquisitorial” system. The latter designations are rather unfortunate. Though the common-law system is indeed adversarial, its adversarial character is only one of its distinguishing marks. The term “inquisitorial” is unfortunate because of its misleading connotations. So I shall avoid

“inquisitorial” entirely, and I shall use the term “adversarial” only to label one dimension of common-law adjudication, not the tradition as a whole.

One possible project for the epistemology of adjudication is to compare the veritistic merits of the common-law system and the civil-law system as whole systems. This project makes sense, since each system has its own integrity, with some of its features complementing other features of that system. For example, certain exclusionary rules in the common-law system may be rationalized by the role of lay juries in that system. It might make sense, therefore, to make a comparative evaluation of two entire systems. This is *global* evaluation. On the other hand, from the vantage point of possible reform, it may not be in the cards that an entire adjudication system or tradition would be replaced or exchanged for another. Procedural change usually happens piecemeal. So it would be nice to know how well each procedure, or each small group of procedures, functions in the search for truth. My strategy will be to combine the global and the local. I shall engage in global evaluation by making a provisional case for the veritistic superiority of the Continental, or civil-law, system. But some of the discussion will focus on the local level, looking at selected components of the American system that could be improved without wholesale redesign.

Let me begin by reviewing some of the principal differences between the common-law and civil-law traditions. I draw substantially on the work of John Langbein (1985) and Mirjan Damaska (1997). A chief difference between the common-law and civil-law traditions consists in the composition of the trier of fact, or decision maker. In the common law it is a lay jury;²⁴ in the Continental tradition it is a professional judge or board of judges. In recent times, however, Continental systems have added lay judges to supplement the professional ones, at least in criminal cases.

A second major difference between the traditions is that the bench, in the Continental system, doubles as investigator and as trier of fact. In other words, the court rather than partisan lawyers takes the main responsibility for gathering and sifting evidence. In a German civil suit, for example, the suit commences with a complaint filed by the plaintiff’s lawyer. The complaint narrates the key facts, asks for a remedy, and proposes means of proof for its main factual contentions. The defendant’s answer follows the same pattern. But neither plaintiff’s nor defendant’s lawyer will conduct a substantial search for witnesses or other evidence. Digging for facts is primarily the work of the judge. Similarly, the judge serves as the examiner-in-chief, and interrogates each witness. Counsel for either party may pose additional questions, but counsel are not prominent as examiners. After the court takes testimony or other evidence, counsel may comment, making suggestions for further proofs or advancing legal theories. So counsel do play a role in the proceedings, but

²⁴ Of course, even in the common-law system, parties can waive trial by jury.

their role is definitely subsidiary to that of the court. Counsel do not interrogate witnesses, and indeed the very concepts of "plaintiff's case" and "defendant's case," as distinct stages of the proceeding, are unknown. Furthermore, although a German lawyer will discuss the facts with his client, and will nominate witnesses whose testimony might be helpful, the lawyer will stop at nominating. A lawyer will never have out-of-court contact with a witness, which would be regarded as a serious ethical breach. If such contact were revealed to the judge, it would cast that party's case in substantial doubt.

The common-law system, especially the American version, contrasts quite markedly in the role of counsel. Lawyers are responsible for all the main initiatives and conduct of the case. In pretrial they engage in preparation of witnesses and other evidence, and at trial their battle dominates both interrogation and argumentation phases of the proceedings. This is what marks the common-law system as an adversary system. The judge is largely a referee, who enforces conformity with legal requirements by restricting the introduction of evidence, constraining counsel's argumentation, and the like. The main burden of action, however, is shouldered by the lawyers of the parties, and unlike the Continental system, the trier of fact remains essentially passive.

Other differences also attend the central role of the court under the Continental system versus partisan counsel under the common-law system. In the American system, partisan control includes the selection and preparation of expert witnesses. Each side typically has its own expert witnesses, who are often subject to abusive cross-examination. This practice typically amazes European jurists. In the Continental tradition experts are selected and commissioned by the court. Indeed, in the German system, experts are not even called "witnesses." They are regarded as "judges' aides."

One other institutional contrast is worth highlighting. This is the mass and density of evidentiary rules in the common-law system (Damaska 1997).²⁵ This maze of evidentiary rules departs in large measure from the methods of factual investigation employed in general social practice. A large class of "exclusionary" rules bars certain types of evidence from reaching the trier of fact, though these same types of evidence would cheerfully and blithely be regarded as probative in everyday life. The hearsay rule is perhaps the most prominent of this class of rules. This peculiarity of the common-law system is worth examining, although it has no obvious relationship to the adversarial character of that system.

What kind of methodology should be deployed in addressing questions of veritistic quality? Empirical studies of each system's accuracy, or purely theoretical analysis? Obvious problems confront the prospect of empirically

²⁵ Damaska identifies a number of other important contrasts between the two traditions, which I pass over because they have no discernible (to me) veritistic ramifications.

investigating a system's reliability. Some might say that we can never be in a better position to judge the facts of a case than the fact finder who actually worked on the case. But this does not seem right. The public often knows about certain evidence excluded from the jury. It may therefore be in a better position than the jury to judge the facts of the case. Second, new evidence or new technologies can convincingly demonstrate the inaccuracy of earlier verdicts. DNA techniques have recently established the innocence of persons convicted of murder before DNA techniques were available. Furthermore, certain types of experimental studies can make contributions toward estimates of accuracy. For example, as Gordon Tullock points out (1980: ch. 3), information about jury disagreements can be used to infer minimum error rates. An empirical research group in England arranged to have a regular jury impaneled and a second jury drawn from the jury list to listen to the same case (McCabe and Purves 1974). Afterward, both juries deliberated and voted. In 7 of the 28 cases studied in this fashion—a quarter of the total—the two juries disagreed. In these cases, as Tullock points out, one of the juries must have been wrong. Thus, at least one-eighth of the 56 juries were mistaken. This is only a minimum error rate, of course, since whenever two juries agreed, they might both have been wrong.

Although this methodology yields some information about error rates, it does nothing to address the probable sources of error. It offers few clues about which features of the adjudication procedure might be responsible for error. Since that is the prime target of my investigation, the methodology I pursue will be rather different. Most of my discussion will proceed by means of theoretical analysis. A number of issues, however, would definitely benefit from new empirical research, and I shall occasionally sketch how such research might be conducted. At present, however, the range of empirical research that addresses the veritistic questions I am asking is fairly limited.

9.5 *Exclusionary rules*

One feature of the common-law system that invites veritistic scrutiny are its many exclusionary rules. Recall from Chapter 5 our truth-in-evidence principle. The truth-in-evidence principle says that a larger body of evidence—true evidence, at any rate—is generally a better indicator of the truth-value of a hypothesis than a smaller, contained body of evidence, as long as the implications of the evidence for the hypothesis are properly interpreted. In other words, adding true evidence to an already given body of evidence will generally help a cognitive agent assess the truth of a hypothesis, at least if the significance of the evidence is properly interpreted. This principle seems to speak against withholding any true item of evidence from the trier of fact. Exclusionary rules are veritistically suspect.

What are the possible rationales for exclusionary rules? They fall into two

categories: veritistic and extraveritistic rationales. Extraveritistic rationales appeal to considerations other than truth: rights, interests, or values of a different sort. As discussed earlier, the practice of excluding illegally obtained evidence is meant to deter police and other officials from making illegal searches or seizures. Rule makers presumably recognize that judgmental accuracy may be sacrificed by excluding illegally obtained evidence. But this veritistic concern is simply trumped, in their eyes, by other values. Since I fully admit the possible legitimacy of this maneuver, and since I offer no principle for balancing veritistic and extraveritistic values, I shall not pursue this kind of rationale further.

Other cases of exclusionary rules, however, lend themselves to veritistic rationales. Designers of evidentiary rules may think that truth will actually be promoted by excluding certain types of evidence rather than admitting them. To explain the plausibility of this approach, start first with what the U.S. Federal Rules of Evidence say about "relevant" evidence. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Rule 401). As Richard Lempert (1977) points out, this definition lends itself to the following probabilistic interpretation. Evidence is *irrelevant* to a hypothesis when it makes that hypothesis neither more probable nor less probable than it would be without that evidence. This will hold when the evidence was just as likely to occur if the hypothesis were true as if it were false. When these likelihoods are the same ($p(E/H) = p(E/\text{not-}H)$), their ratio is 1.0. That is when evidence is irrelevant. By contrast, an item of evidence is relevant when the likelihood ratio for that item differs from 1.0. In terms of the Bayesian model explained in Chapter 4, when the likelihood ratio is either greater or less than unity, there will be some probative impact of the new evidence on the hypothesis in question (so long as the prior is neither 0 nor 1.0). Suppose, for example, that the fact finder in a criminal trial receives evidence that the perpetrator's blood, shed at the crime scene, was type A. Suppose that the fact finder also knows that the defendant's blood is type A, and 50 per cent of the remaining suspect population has type A blood. This information implies that the likelihood of this evidence (= the perpetrator's blood is type A) if the defendant were the perpetrator is 1.0, and the likelihood of this evidence if someone else committed the crime is .50. Thus, the likelihood ratio in question is (1.0/.50), or 2.0, clearly different from unity. This evidence, then, is relevant evidence, for it should make a difference to the fact finder's probability estimate of the defendant's guilt. In particular, it should raise that estimate above what it was prior to receipt of this evidence.

The general principle of the Federal Rules of Evidence is that relevant evidence should be admitted. A number of exceptions, however, are added. Rule 404, for example, excludes character evidence (to incriminate a defendant) even when it is relevant. Similarly, Rule 410 excludes evidence of withdrawn

guilty pleas, even when such evidence is relevant. And Rule 403 says: "Although 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 . . ."

How could relevant evidence mislead the jury? Lempert suggests a straightforward answer, which comports nicely with our discussion of Chapter 4. Relevant evidence might mislead the jury because the jury might *misestimate* the likelihoods, and hence the likelihood ratio. If the jury's estimate of the likelihoods is substantially different from their true value, this could lead to an inappropriately large or inappropriately small revision in their estimate of guilt. To use the terminology of Chapter 4, the fact finder can be misled if their subjective likelihoods differ markedly from the objective (true) likelihoods. This is precisely why it might be reasonable to exclude certain categories of evidence, for example, withdrawn guilty pleas, from jurors. Jurors might be prone to see certain types of evidence as more weighty or less weighty than they really are, by misestimating the likelihood ratio.

How is all this related to the goal of truth? As Theorem 4.1 established, when Bayesian reasoners correctly estimate likelihoods (when their subjective likelihoods match the objective likelihoods), their reasoning on new evidence tends to push their degree of belief in the hypothesis toward greater knowledge (or truth possession). Its effect is veritistically positive. But when reasoners *misestimate* the objective likelihoods, no such increase in knowledge or truth possession can be assured (even as probable). So in cases where there is a distinct danger of the fact finder misestimating the likelihoods, there is reason to worry. This is how a veritistic rationale for certain exclusions can be constructed.

Several problems, however, face this type of rationale. To warrant exclusion on this ground, rule designers should have information or evidence about two things: (1) the true likelihoods in the relevant class of cases, and (2) the likelihood estimates that fact finders—especially jurors—are prone to make. Without such evidence, it would seem, rule designers would lack grounds for claiming, or suspecting, that fact finders will *misestimate* the true probabilities. Do rule designers really have such evidence? Do they have hard base-rate facts, for example, about the proportion of guilty defendants who entered and then withdrew a guilty plea, or about the proportion of innocent defendants who entered and then withdrew a guilty plea? Do they have hard information about likelihood estimates jurors would be prone to make about such scenarios? In both cases, rule designers clearly lack such hard evidence.

Perhaps they do not need hard base-rate facts, however, to make reasonable surmises that jurors would be prone to misestimate the relevant likelihoods. Maybe judicial experience would suffice to establish, for example, that innocent defendants sometimes get bamboozled into entering guilty pleas, which they subsequently withdraw after ample consultation with counsel. Furthermore, they may have adequate experience with inexperienced jurors

to know that the latter are not equipped with the same background knowledge **to** appreciate how this can happen. Hence, the jurors will underestimate the **relevant** likelihood.

If this difference in knowledge or experience is what separates jurors from **rule** designers, however, why not admit evidence of a withdrawn guilty plea **and** let the defense counsel give the kind of information rule designers have **to** the jury? Perhaps that would rectify their propensity to misestimate the **likelihood**.

Next, we should be careful in applying Theorem 4.1 to the present set of **problems**. That theorem says that new evidence generates an expected **increase** in truth possession (or knowledge) when the reasoner uses accurate **likelihoods**. But failure to have perfectly accurate likelihoods does not guarantee an expected *decrease* in truth possession. We simply do not have precise **mathematical** results to report about what can be expected to happen when **inaccurate** likelihoods are employed. When the subjective likelihood ratio is at least in the same direction (greater than unity or less than unity) as the true likelihood ratio, perhaps there will also be a general tendency for knowledge to increase. In that case, the argument from misestimation in favor of exclusion would be very weak indeed. The relevant choice here, after all, is not between giving evidence to jurors with perfectly accurate likelihoods versus giving evidence to jurors with inaccurate likelihoods. The relevant procedural choice is between giving evidence to jurors with admittedly inaccurate likelihoods versus not giving them evidence (of this sort) at all. The latter choice is what the present exclusionary rule mandates. It is far from clear that this is the veritistically preferable choice. All things considered, then, the veritistic rationale for exclusion—the misestimation rationale—rests on shaky ground.

Finally, we should remind ourselves that part of our mission is to compare the common-law system with the civil-law system, in which there are no purely lay juries that serve as fact finders. If the inability of lay juries to make accurate likelihood estimates vis-à-vis certain types of objectively probative evidence forces a lay jury system to throw out those types of evidence, that is a major count against it. Certainly it is a major count against such a system when evaluated veritistically. If the Continental system uses these types of evidence without incurring gross misestimates of likelihoods, that is an important factor in its favor as compared with the common-law system.

9.6 *Adversary control of proceedings*

The next component of the common-law system to be examined is its much-debated adversarial component. Under the common law, partisan counsel play a crucial role in both pretrial and trial phases. Critics of the adversarial approach, as we shall see, claim to detect basic truth-distorting flaws at both stages.

Before inspecting the alleged flaws, let us ask whether the adversary system has any virtues from a truth-oriented perspective. Veritistic virtues are often claimed on its behalf. The best way for the court to discover the facts, it is said, is to have each side strive as hard as it can in a keenly partisan spirit, to bring to the court's attention the evidence favorable to that side. Then let the neutral trier of fact decide on the basis of all the evidence. It does not matter that each counsel is biased; these biases will cancel each other out. As long as the trier of fact is neutral, the truth goal will be served.

Our own discussion in Chapter 5 might be invoked in support of this view. Engaging in critical argumentation was there shown (or conjectured) to have veritistically desirable consequences, at least when certain conditions are met. What better exemplifies the spirit of critical argumentation than the adversary system in the law?

Unfortunately, not all that attorneys do in a partisan spirit counts as "arguing." In effect, certain lawyerly activities create or change the evidence rather than simply interpret or debate it. These dimensions of their activities may hide or camouflage the truth rather than bring it into clearer focus, and the effects of these activities cannot easily be overturned or rebutted by the arguments of opposing lawyers.

A critical part of the lawyer's pretrial activity is to coach witnesses, and this can shape (or "misshape") the evidence in two ways.

Every sensible lawyer, before a trial, interviews most of the witnesses. No matter how scrupulous the lawyer, a witness, when thus interviewed, often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed. So we have inadvertent but innocent witness-coaching . . . [T]he contentious method of trying cases augments the tendency of witnesses to mold their memories to assist one of the litigants, because the partisan nature of trials tends to make partisans of the witnesses. (Frank 1949: 86)

Thus, coaching by counsel can affect the substantive content of witness testimony. Second, coaching can affect the style of a witness's testimony, thereby making a material difference to how a jury views that testimony.

The lawyer . . . seeks to . . . hide the defects of witnesses who testify favorably to his client. If, when interviewing such a witness before trial, the lawyer notes that the witness has mannerisms, demeanor-traits, which might discredit him, the lawyer teaches him how to cover up those traits when testifying . . . In that way, the trial court is denied the benefit of observing the witness's actual normal demeanor, and thus prevented from sizing up the witness accurately. (Frank 1949: 83)

In these activities, lawyers do not merely argue over a fixed body of evidence;

they are actually engaged in manufacturing evidence, evidence slanted toward **their** client. The evidence is manufactured in the sense that the specifics of **what** and how the witness testifies are different from what they would be without the lawyer's intervention. While an opposing lawyer can, in principle, **rebut** misleading arguments an initial lawyer presents, an opposing lawyer **cannot** undo testimony that is presented to the court. He might try to produce **additional** evidence that runs in a contrary direction, for example, by getting **an** adverse witness to contradict himself. But once we realize that lawyers in **the** adversary system actually (help to) produce certain details of the testimony, rather than merely argue over it, the original justification rooted in **adversarial** debate is revealed as a distorted picture of the actual situation.

Similar remarks apply to the activity of cross-examination.

As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect **on** the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony. If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. (Frank 1949: 82)

In effect, the adversary system permits a lawyer to intentionally *mislead* the jury. Although the lawyer knows or believes that an adverse witness is telling the truth, he can purposefully elicit behavior from the witness that will incline the jury to think, falsely, that the witness is unreliable, untrustworthy, or insincere. On its face, this lawyerly practice conflicts with Rule 403, which recommends the exclusion of evidence that threatens to mislead the jury. Nonetheless, it is a practice that the adversary system readily encourages.

An opposing lawyer, of course, also has opportunities for cross-examination, and opportunities on "re-direct" to rehabilitate his own witness. However, he cannot undo the testimony and manner of testimony that the previous lawyer has elicited. The battle, then, is not simply a contest for argumentative superiority, but a contest for manipulative superiority. Who can make the witness *appear* in a light more favorable to his client? Although argumentative superiority may be disposed to point toward truth, there is little reason to believe that superior manipulative skill is positively correlated with truth.

These questionable features of the common-law system contrast sharply with those of the Continental system. In the latter tradition, lawyers neither coach witnesses outside the trial nor interrogate witnesses at trial. All interrogation is conducted by judges. This averts the veritistically dubious activities by partisan lawyers we have just been discussing. Attorneys for each party may suggest questions to the court to be asked of witnesses, enabling them to

extract important information from witnesses. But it is neutral judges who actually pose the questions.²⁶

The adversary system is sometimes referred to as the “fighting” or “sporting” approach to justice, insofar as it promotes a lively contest between the attorneys for each side. The kinds of features recently identified, moreover, lead many commentators to suspect that trial outcomes depend heavily on the relative skills of the rival lawyers. To the extent that this suspicion is correct, this is a real threat to the search for truth. There is no reliable correlation between a party being in the right and that same party having the superior attorney, or team of attorneys. In fact, the correlation between being right and having the superior attorney may well be close to zero.²⁷ If the correlation is indeed zero, and if superiority of attorneys is a decisive factor in determining trial outcomes, this is probative evidence that the system fares poorly at getting the truth. To dramatize the point, suppose that counsel superiority is the *sole* factor determining the outcome, and there is zero correlation between rightness and counsel superiority. Then the system will reach true verdicts only about half of the time!

Is the suspicion that trial outcomes heavily depend on lawyerly skill correct? How decisive a factor is lawyerly skill? If we supplement skill with other types of relevant resources for hire, such as number of attorney hours expended, and use of private investigators to dig for favorable witnesses and evidence, many people would say that superior legal resources usually do spell victory, at least in complex civil litigation. It is debatable, however, whether this generalization holds across the board. At any rate, we would need more evidence before condemning the adversary system as a veritistic washout.

Is there any way to obtain more evidence on this issue? In principle, experimental manipulations might be designed to shed some light, but details of such possible manipulations are admittedly problematic. Before spelling out an idea, let me present some background on other experiments in the legal sphere. Research on jury behavior has often been conducted with mock juries. For example, to study the effect of such factors as jury size and decision rule, Hastie, Penrod, and Pennington (1983) conducted manipulations with mock

²⁶ Are judges in the Continental system really neutral? One of the frequently alleged flaws of the Continental system is that judges all have a similar background as agents of the state and therefore bring a certain systematic bias to the courtroom. But the Continental system no longer uses exclusively professional judges as triers of fact. At least in criminal cases, lay judges supplement professional ones. This brings decision makers into the system with different backgrounds and presumably different biases.

²⁷ Cynics might contend that there is even a negative correlation, at least in civil suits. Wealthier parties hire more skillful lawyers, and wealthier parties are usually in the wrong; so says the cynic. I am not prepared to go this far—though some types of class action litigation, such as tobacco litigation, certainly tempt one in this direction. An optimist might reply that contingency fees ameliorate the situation to some degree. Even citizens with meager resources can hire an expensive lawyer on a contingency fee basis if they have a clear-cut and lucrative case. (Thanks to Holly Smith for this last observation.)

juries. Working from the transcript of a real trial, they filmed a reenactment of the trial using professional actors, a police officer, a judge, and two attorneys. The trial film was shown to several mock juries, which varied in size and decision rule (unanimity versus less-than-unanimity). Differences between the juries were then analyzed by social scientists who had observed their deliberations and verdicts.²⁸

The manipulation I am contemplating would be harder to arrange. We want the same case to be handled by two different pairs of lawyers (or pairs of attorney teams), in order to compare the two outcomes. It is not only the trial proceedings that would be of interest, but out-of-court activities as well. It would not be easy to run the same initial case materials through different lawyers. For example, a potential plaintiff witness who had previously been interviewed by one lawyer would not be the "same" person if he had to go through it again with a second lawyer. He might have been affected by the first interview. Furthermore, since the only independent variable of interest is the two lawyer-pairs, it would be desirable to "control" the jury. That is, the same jury or an equivalent jury should deliberate after each of the two trials, to make sure that jury differences do not contribute to differences of outcome. If it is the same jury, however, their second run through the trial would be massively influenced by the first. The alternative is to use a different but "equivalent" jury the second time. But how is "equivalence" to be ensured? Jury composition would have to be carefully controlled for, which would be extremely difficult.

These wrinkles are practical experimental difficulties I do not know how to surmount. In *thought*-experimental terms, however, it is reasonably clear what we want to know. If two different lawyers were given the same case to try, and if they worked with an equivalent judge and jury, would the outcome be the same or different? In how many cases would permuting or inverting the relative skills and resources of the lawyers produce different outcomes? If it were a significant percentage of cases, that would be a sobering fact about the veristic properties of the adversary system.

Of course, one would want to run not just a single manipulation of this kind but numerous manipulations, across a spectrum of cases ranging from lopsided to tight. In lopsided cases, the known material facts and legal status may be so overpowering that even the weakest attorney for one side could not lose the case and even the most talented for the other could not win it. The fact that *this* outcome would not reverse under attorney changes is not particularly reassuring, however, because there may be plenty of nonextreme cases in which outcomes would reverse. So we should not choose only this sort of case to study. Nor should we choose only tight cases, in which attorney switches could easily spell the difference. This too might be an unrepresentative

²⁸ One reason for the choice of mock juries was that observers would not have been permitted in real jury deliberations.

scenario, which might magnify our worries beyond reason. We would need to experiment with a range of cases to see how many such cases would permit attorney switches to change the outcome.²⁹ Though obviously expensive, this would be an eminently worthy series of experiments to run.

Absent experiments of this kind, one must appeal to judgments of well-placed observers of the system. Such judgments provide little comfort to defenders of the adversary system. It is widely remarked, for example, that defenses mounted by public defenders commonly fall short of the quality of defense that better-paid attorneys would provide, either because of the former's relative inexperience or because their heavy case loads restrict the amount of time they devote to each case. Affluent clients, moreover, evidently believe that more time spent by more expert attorneys makes a nonnegligible contribution toward the probability of victory, because well-heeled corporations are prepared to spend seemingly limitless amounts of money on the most expensive lawyers. If these items of common lore are correct, they suggest that lawyerly resources make a substantial difference to legal outcomes. Given our previous reasoning, it follows that the adversary system, in which outcomes often hinge on superior legal resources, is relatively poor for veritistic purposes. The much-diminished role of counsel under the Continental system looks better in this regard.

9.7 *Discovery and secrecy*

This section continues an assessment of the adversary system, at least indirectly, but it focuses on a special problem of getting relevant evidence before the trier of fact. We have already emphasized the importance to truth determination of getting relevant evidence before the fact finder. If critical evidence somehow gets hidden from the fact finder, that may seriously if not conclusively impair the truth-getting project. The task of uncovering evidence in criminal cases belongs largely to government investigators (police), which falls outside our purview. But sometimes the adjudication system itself assumes the task—as it should—of getting evidence before the fact finder. Often the extraction of evidence is problematic, and a system's success in addressing this problem speaks significantly to its truth-getting powers.

This section concentrates on how to get parties to disclose evidence relevant to their case. Attention will be confined to civil litigation, where disclosure and discovery issues comprise an increasingly large and time-consuming chunk of pretrial activity. Before 1938, in American law, each party to a lawsuit could keep the other side in the dark concerning what evidence it planned

²⁹ There is also the problem of *which* attorney switches to make. Should we only make switches between the most and the least talented attorneys? Or should intermediate examples be chosen to participate?

to introduce at trial, or what experts it planned to utilize. The discovery rules that were incorporated into the Federal Rules of Civil Procedure in 1938 were intended to end the practice of "trial by ambush," by providing parties with procedures for obtaining pretrial disclosure of evidence that was in the possession of their opponents. Revisions were subsequently made in 1980, 1983, and 1993. However, there continue to be complaints of discovery abuse by attorneys and their clients. Lawyers routinely "make specious objections, withhold documents, reinterpret questions asked of their clients, ignore those parts of questions they would rather not answer, and twist the common meaning of language to avoid disclosing documents" (Nader and Smith 1996: 102). Stonewalling can help big corporations win a war of attrition, because their opponents often lack the financial resources to continue the litigation.

The analysis of the problem that follows is based on Talbott and Goldman 1998, of which William Talbott is the principal author. Two types of problems about evidence disclosure can be usefully separated. Let us first distinguish *positive* versus *negative* evidence that a party may possess. Positive evidence is evidence that can assist a party's cause if presented to the trier of fact. Negative evidence is evidence that would hurt its cause. The first problem of evidence disclosure is that each party, if allowed to do so, would prefer to keep (at least some of) its positive evidence secret until the time of trial. That would keep the opposing side from developing an effective rebuttal. Since 1938, parties have been required to disclose beforehand the documentary evidence, expert witnesses, and so forth that they plan to introduce at trial. Attorneys may also make discovery requests of their opponents to extract documents or other evidence that they suspect are relevant, and the rules require compliance with applicable requests. The problem of positive evidence disclosure is tolerably well solved by the discovery rules, because positive evidence is evidence that a party will introduce at trial. If it did not disclose that evidence earlier, the omission will be apparent when it introduces that evidence at trial.³⁰ The problem of negative evidence, however, is far more intractable.

Given two opposing parties, *A* and *B*, *B* would like to have any evidence in *A*'s possession that is negative for *A*. Evidence negative for *A* is positive for *B*, and hence in *B*'s interest to know about. At the same time, *A* will be strongly motivated not to disclose negative evidence in its possession, especially highly probative evidence. Since negative evidence is precisely what party *A* will not itself present at trial, it has a better chance of keeping that evidence secret, even when this violates the disclosure rules.³¹ If company *A*'s internal memos

³⁰ Of course, the party can allege that it did not possess or know of the evidence at the earlier time. But that claim will often be hard to support.

³¹ The 1993 amendment to the Federal Rules of Civil Procedure requires a party to provide to other parties "a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings" (Rule 26(a)(1)(B)).

would damage its case, it will not present these memos at trial, and there is no straightforward way such evidence will get into *B*'s hands, and hence before the fact finder, unless *A* discloses them. It serves *A*'s interests, then, to "duck" or "dodge" *B*'s discovery requests that would cover such documents.³²

A good illustration of the problem, discussed by Talbott and Goldman, was a product liability suit in the State of Washington.³³ A suit against Fisons Corporation claimed that an asthma medication manufactured by the defendant had caused severe brain damage in a young child to whom the medication was administered while she was suffering from a viral infection. One month before trial an anonymous "Good Samaritan" leaked to the attorneys for the child a "smoking gun" document, an earlier letter from the defendant manufacturer that had been sent to only a small number of physicians. The letter referred to "life-threatening toxicity" of the key ingredient of the medication in children with viral infections. The document proved that Fisons knew its medication had a potentially lethal defect and yet continued to market the drug without warning most doctors. Moreover, this document had not been disclosed by the defendant during the formal discovery process, despite the fact that there were discovery requests that appeared to ask for just such a record. After this disclosure by the Good Samaritan, the defendant settled the child's product liability claim for \$6.9 million, and paid an award of approximately \$1 million to the child's doctor. A Good Samaritan leak, of course, cannot be expected in the ordinary course of events. It is clear from the monetary damages that Fisons ultimately paid that it stood to lose a great deal by disclosing the "smoking gun" document, and therefore decided against disclosure. This kind of nondisclosure seems to be quite common where large damages are at stake. A lot of "discovery games" take place surrounding such evidence, in which attorneys for defendants who don't want to disclose certain evidence try to dodge the necessity of production through various stratagems, or try to "hide" a disclosed document by burying it amid thousands or even millions of pages of other documents.

Given the financial incentive some parties have to hide negative evidence, even rules that imply an obligation of disclosure may fail to ensure compliance. Talbott therefore proposes two types of changes in the existing discovery rules that could alleviate the situation.³⁴ First, he proposes constraints on legitimate responses that lawyers may make to discovery requests, constraints

³² Of course, there is a danger of getting caught red-handed concealing something where there is a lot of paper floating around that could provide clues to suppressed documents. So parties do have some incentive to release damaging memos. But this does not undercut the basic point that lawyers can and do conceal negative evidence.

³³ *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation* (1993). This case is also discussed, along with similar ones, by Nader and Smith (1996: 121–8).

³⁴ These proposals should be credited to Talbott (rather than Talbott and Goldman) because they originate with him. For details, see Talbott and Goldman 1998.

that would limit the legitimate ducking and dodging that now abounds. Second, he proposes changes that would severely sanction attorneys who assist or counsel their clients to avoid disclosure. Only serious sanctions aimed at lawyers, he argues, can create appropriate incentives to counteract built-in incentives against disclosure. The goal of accurate verdicts calls for such a system of penalties.

Talbott and Goldman acknowledge that such a system would undermine to some degree the unalloyed adversarial ethos in which every attorney zealously pursues the interests of his client, and is expected to refrain from aiding the opposition in any fashion. Disclosing negative evidence does, clearly, assist the opposition. But this compromise of the extreme adversarial ethos seems necessary to maximize truth determination, and is already implied by the discovery rules currently in place.³⁵ Recognition that the adversarial ethos is working badly in this important area of litigation seems to be slow in coming, but it can be found among some commentators. Stuart Taylor, Jr. (1994) writes: "I fear [that] the discovery process has been clogged by a culture of evasion and deceit that accounts for much of its grotesque wastefulness, and the adversary system has been perverted from an engine of truth into a license for lawyerly lies."

The next set of legal practices I wish to discuss falls somewhat outside the main thrust of this chapter. Although these practices can affect the accuracy of verdicts, their immediate effect is to prevent information arising during litigation from being revealed to the public. This sort of concealment can impair truth determination in other trials, or prevent meritorious cases from being brought to trial. But it also has an impact on public ignorance, which is of veritistic concern.

Two kinds of practices that produce such concealment or secrecy are *confidential settlements* and *vacatures*.³⁶ In a confidential settlement, the sued party pays damages on condition that the facts of the case and the amount of the settlement be kept a secret. A vacature is an agreement, approved by the presiding judge after trial, to "vacate" the result, which has the legal effect of voiding it as if it never occurred. Vacatures are usually accompanied by a confidential settlement, in which the parties agree to a court order sealing the records of the trial. Such practices are popular among corporations settling product liability suits, because they are worried that other people injured by

³⁵ At least it is implied when the civil discovery rules are combined with the American Bar Association's *Model Rules of Professional Conduct* (1995). Rule 3.4(d) of the *Model Rules* says: "[A lawyer shall not] in pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." So the *Model Rules* already require attorneys to do certain things that "assist" an opposing party. The only remaining question is how far the system should go in requiring such "assistance."

³⁶ My discussion follows that of Nader and Smith 1996: ch. 2. Also see Hare, Gilbert, and ReMine 1988.

their products (or their lawyers) will be more inclined to sue if they learn of the current settlement and the evidence produced in the context of that suit. They may also want to conceal from the public the dangerous characteristics of their product. Plaintiffs are often prepared to agree to these confidentiality provisions because they need the money being offered in the settlement.

Ralph Nader and Wesley Smith (1996: 73) recount the story of the Ford Pinto and its notorious fuel tank design that caused minor collisions to result in fuel tank ruptures and fires. General Motors also had fuel tank troubles. General Motors' lawyers managed to keep this damaging information secret, however. When they were sued by victims of fuel tank fires, GM disclosed documents and agreed to settlements only under confidentiality agreements. In a 1983 trial in Kansas, the judge agreed to seal the court transcript and exhibits even though the proceedings had taken place in a public courtroom.

The obvious solution is for courts to refuse to accept most confidential settlements, or for legislatures to prohibit or curtail such settlements. Judges must review and approve proposed settlements, and the law must be prepared to enforce them. One measure of the envisaged type was adopted by the Texas Supreme Court in 1990, which amended the state's court rules to create a presumption that all court records are to remain open (Nader and Smith 1996: 95). Several other states have enacted similar court rules. Also in 1990, Florida adopted an antisecrecy law, the Sunshine in Litigation Act. This law prohibits courts from entering orders that conceal a public hazard or information about a public hazard. It also makes any agreement to conceal a public hazard unenforceable. Washington State passed a similar law in 1993. Here are examples, then, in which one facet of the adjudication system is reformed with an eye to increasing public knowledge. Though not primarily aimed at improving verdict accuracy, these examples are clear illustrations of applying veritistic social epistemology to the legal realm. However, these are examples of "local" changes, within the common-law tradition, rather than of global changes.

9.8 *Expert testimony*

The role of experts in science was broached in Chapter 8. In the law too the proper handling of testimony from scientific experts is a pressing and sensitive issue. Whose expert testimony should be admitted at trial, and how should such admission or exclusion decisions be made? These are crucial questions in contemporary American legal theory, and they fall quite naturally into social epistemology. Two factors have recently contributed to the centrality of these questions: first, the rapid growth of product liability litigation, with its frequent appeal to scientific evidence, and second, a recent and controversial Supreme Court decision on scientific testimony.

As far back as 1858, the Supreme Court foresaw the problems now before us. It also worried about the court and the jury's ability to assimilate and evalu-

ate expert testimony: “[E]xperience has shown that opposite opinions of persons professing to be experts may be obtained to any amount,” and cross-examination of all these experts is virtually useless, “wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved.”³⁷ In 1897 the Supreme Court decided to limit cross-examination of experts. It said that once an expert gives his opinion, the court should take it or leave it. It would be “opening the door to too wide an inquiry to interrogate him as to what other scientific men have said upon such matters, or in respect to the general teachings of science thereon, or to permit books of science to be offered in evidence.”³⁸ In other words, whatever a qualified witness said was okay.

This highly permissive stance was turned on its head in *Frye v. United States*, decided in 1923 by a Federal Court of Appeals. The issue in contention in *Frye* was whether a lie detector test would be admitted as evidence. The trial court refused to admit it, on the grounds that there was not yet a scientific consensus about the validity of this new method. In other words, the standard set by *Frye* for scientific testimony was that such testimony should incorporate principles and methods generally accepted by the relevant scientific community. The Court of Appeals agreed, and the general acceptance standard became the dominant approach for seventy years. The standard had the effect of excluding a lot of “junk science”—patently absurd testimony by witnesses of dubious authority.

In 1975, however, the Federal Rules of Evidence were signed into law. Rule 702 governed testimony by experts: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” A question arose whether the more liberal Rule 702, which says nothing about “general acceptance,” superseded *Frye*. Some courts went with *Frye*, others with the Rules.

Against this background we find the stunning 1983 decision concerning *Barefoot v. Estelle* (see Gianelli 1993). This began as a capital murder case in Texas. In the penalty phase, the prosecution offered psychiatric testimony concerning Thomas Barefoot’s future dangerousness. One psychiatrist, Dr. James Grigson, without ever examining Barefoot, testified that there was a “one hundred percent and absolute chance that Barefoot would commit future acts of criminal violence.” Barefoot challenged the admission of this evidence on constitutional grounds due to its unreliability. In an amicus brief to the Court, the American Psychiatric Association stated that the “large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least

³⁷ Quoted in Angell 1996: 125; Angell also cites Loevinger 1995.

³⁸ Quoted in Angell 1996: 125.

two out of every three cases.” The brief also noted that the “unreliability of these predictions is by now an established fact within the profession” (Gianelli 1993: 113; also see Gianelli 1994: 2020). Nonetheless, the Supreme Court rejected Barefoot’s argument, saying:

The rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party . . . We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings. (*Barefoot v. Estelle* 1983: 898–9)

Thomas Barefoot was executed in 1984 (partly) on the basis of junk science.

In 1993 the Supreme Court settled the issue of whether the Federal Rules of Evidence supersede *Frye* by saying that they do. In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the Court viewed the Federal Rules as “relaxing” the traditional barriers to testimony, and as rejecting the “austere” standard of *Frye*. On the other hand, the *Daubert* opinion said:

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The Court went on to mention four illustrative factors that trial judges might use in reviewing the admissibility of purportedly scientific testimony: (1) whether the theory or technique in question can be or has been tested, (2) peer review and publication of the theory or technique, (3) the known or potential rate of error, and (4) general acceptance of the methodology or technique. In short, the Court suggested some flexible criteria for guiding trial judges in their role as “gatekeeper” of scientific testimony.

Daubert is often described as being a compromise. On the one hand, it clearly intended to liberalize the admission of scientific testimony as compared with *Frye*. On the other hand, it does instruct judges to exercise supervision of proffered testimony, appealing in part to reliability. The message of *Daubert*, however, seems confusing and ambiguous, and subsequent decisions have reinforced the impression of ambiguity. When the Supreme Court itself acted, after *Daubert*, in a landmark case concerning silicone breast-implant litigation, it ostensibly approved the loosest and least scrupulous of gatekeeping functions. But an important recent decision of a Circuit Court concerning breast-implant litigation, also under the aegis of *Daubert*, observed quite tight criteria for testimonial admissibility. These wide fluctuations are worth examining in some detail.

In 1991 a federal jury in San Francisco awarded the plaintiff Mariann Hopkins \$7.34 million in a breast-implant case against Dow Corning. (A sub-

sequent case won a verdict of \$25 million.) At the trial, much was made of secret documents discovered earlier at Dow Corning, which cast the company in a bad light. Neither these documents, however, nor any other evidence offered at trial, went reliably to the question of whether there is a causal link between breast implants and the rare disorder from which Hopkins allegedly suffered, namely, mixed connective tissue disease.³⁹ At that time, no epidemiological study showed any increased risk of connective tissue disease (or related diseases) from breast implants. Epidemiological studies conducted since then have also failed to find any such increase of risk. Partly under the influence of the much-publicized Hopkins award, the Food and Drug Administration banned silicone breast implants in 1992.⁴⁰ The FDA ban was followed by a tidal wave of litigation. In the next two years, more than 16,000 breast-implant lawsuits, brought by over a thousand lawyers, were filed in federal and state courts. The Hopkins decision reached the Supreme Court in 1995, after its *Daubert* opinion had been issued. In *Hopkins* the respondent (Dow Corning) claimed that the Appeals Court, acting after *Daubert*, had failed to abide by the *Daubert* criteria of admissibility. Yet the Supreme Court let stand the Hopkins decision in 1995. How this squares with *Daubert* itself is puzzling. *Daubert* had concerned the question of whether the antinausea drug Bendectin had caused birth defects. After the Supreme Court opinion, the Appeals Court decided that the testimony by plaintiffs was inadmissible, because expert opinion indicated that no epidemiological studies had found Bendectin to be a risk factor for human birth defects. So extremely similar scientific issues were handled dramatically differently.

A new breast-implant decision in 1996 complicates the picture still further (Kolata 1996b). A Federal District judge in Oregon, applying *Daubert* criteria, dismissed seventy breast-implant claims very similar to that of Hopkins. Expert testimony that plaintiffs wished to introduce was challenged by the defense on the grounds that it was not based in science. Exercising his gate-keeping function under *Daubert*, Judge Robert Jones asked a panel of four disinterested scientists to advise him on the plaintiffs' evidence. After four days of hearings in which the independent panel questioned the experts offered by plaintiffs and defense, Judge Jones decided that none of the proffered plaintiff testimony was of sufficient quality to be presented in court. The testimony was criticized on the grounds that it failed to establish a probability that implants cause disease. Here the impact of *Daubert* was to screen out allegedly scientific testimony quite meticulously. If upheld, this decision would run in

³⁹ For an excellent history and analysis of breast-implant litigation and its scientific context, see Angell 1996.

⁴⁰ It was relevant that neither Dow Corning nor other manufacturers had conducted tests establishing the safety of silicone breast implants. But they were not required to do so originally because the product was already on the market when the FDA received authority to require tests for new products. Breast implants had originally been approved under a "grandfathering" clause.

the opposite direction from the “liberalization” policy of evidence admission that seemed to be heralded by *Daubert*.

Let us tarry no further over the delicate issue of *Daubert* interpretation. *Daubert* aside, what practice(s) for admitting or excluding proffered scientific testimony would be veritistically best? We can approach the question from the local or the global perspective. The local perspective would confine the possible answers to ones that fit the common-law adversarial tradition. The global perspective would entertain the possibility that the best solution lies within the Continental tradition.

In the adversarial tradition, faith is placed in the idea that competing partisan testimony presented to the fact finder will optimize the search for truth. This idea was endorsed in the *Daubert* (1993) opinion itself:

Respondent expresses apprehension that abandonment of “general acceptance” as the exclusive requirement for admission will result in a “free-for-all” in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally. Vigorous 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.

Our own discussion in Chapter 5 would seem to support this perspective. Wasn't it demonstrated in Chapter 5 that critical argumentation promotes the search for truth? So if one party's expert witnesses offer pseudoscience, or simply poor-quality science, the opposing party's witnesses can rebut the former's contentions.

Unfortunately, as we have noted previously, Chapter 5 did not demonstrate the simple principle that critical argumentation always promotes truth. The veritistic value of critical argumentation was only defended subject to two important qualifications, both of which are probably violated in the instance under discussion. First, it was assumed that the *premises* used by the arguers are all true. This is a very stringent condition to meet in general, and it is obviously doubtful for the case of scientific testimony. For example, an expert witness might assert (or presuppose) as a premise that effects found in studies of experimental animals, for example, rats, apply to humans as well. But that statement may well be false. Second, the veritistic power of critical argumentation was advanced only subject to the condition that the audience for the argumentation correctly interprets the evidential support relations between the premises and conclusions asserted by the speakers. This condition is almost surely not met when a lay jury is confronted with technical scientific testimony. Perhaps *some* jurors, *some* of the time, draw correct probabilistic conclusions from the mass of scientific statements produced by both sides. But it is unlikely that lay jurors can generally be expected to make suitable inferences on arcane and sophisticated topics, where even substantial education and training do not always suffice to produce understanding. So we have **no**

general guarantee, from considerations of the adversary process or critical argumentation, that truth will tend to emerge.

In fact, a very different scenario seems all too likely. Presented with conflicting arguments from highly credentialed "experts," it is easy for the confused juror to perceive the intellectual merits of the two sides as a deadlock.⁴¹ To the naive juror, the ostensible credentials of opposing experts may seem equally impressive, and the subtleties of their arguments are too impenetrable to dictate a preference. Since the jury must render a decision, the apparent "parity" of argumentative strength may incline jurors to choose on the basis of nonintellectual factors, for example, the personal appeal of the opposing experts, or the party that elicits more sympathy. These types of factors, however, have no reliable correlation with the merit facts of the case, so their impact tilts away from accuracy rather than toward it.

To assess the genuine probative force of proffered testimony, it is natural to turn to someone of relatively greater knowledge or expertise. This is what *Daubert* does in enjoining judges to serve as gatekeepers. But do judges have the requisite metaexpertise, that is, the expertise to judge scientific expertise? In receiving the *Daubert* case on remand from the Supreme Court, Judge Kozinski of the Ninth Circuit Court spoke of a "complex and daunting task" facing judges in a post-*Daubert* world (quoted in Kesan 1996: 2001). Judges, after all, are not typically well educated in science. Judge Jones pursued an exemplary strategy in identifying four independent scientists of exceptional qualifications to serve as proxy gatekeepers. But can all judges be relied upon to do their jobs so well? Will judges in all jurisdictions obtain high-quality specialists?

The legal system could plausibly enlist the help of established scientific organizations, as several commentators have suggested, for example, Marcia Angell (1996: 205). Reputable experts could be recommended to courts by organizations like the National Academy of Sciences, the American Association for the Advancement of Science, or more specialized scientific societies. These could be used to assist judges in exercising their gatekeeping function.

More radical reforms might also be proposed. One is to replace juries with judges as triers of fact in tort cases. Other countries do not use juries in civil cases. We should consider eliminating them at least for tort cases, where issues commonly become technical and arcane.

Another radical reform would be to retain juries but adopt the Continental practice—mentioned in Section 9.4—of having neutral, court-selected experts testify at trial. In other words, partisan expert witnesses might be largely replaced by neutral expert witnesses. Partisan specialists could not be replaced entirely, since parties should be allowed to introduce results of tests that they

⁴¹ In a nationwide survey of 800 people who served on civil and criminal juries, 89 percent reported that paid experts were believable (see Kesan 1996: 1988).

themselves conducted. In a criminal case, the prosecution's criminologist could testify concerning what blood samples were taken, what analyses were done, and what the results of these analyses were. Similar testimony could be introduced in civil cases. The scientific *interpretation* of these results, however, should be confined to neutral expert witnesses. Party specialists would not be permitted to testify about the import of the test results for the facts under dispute, or on the scientific reliability of those types of tests. That would be the province of neutral experts. Actually, the current Federal Rules of Evidence (Rule 706a) already allow judges to appoint expert witnesses of their own, but this is rarely done. The present proposal is to make this standard practice, and have it replace party-selected scientific experts (except those who have conducted case-pertinent tests).

Those habituated to the adversarial tradition might find court-appointed expert witnesses discomfiting, since they would introduce an element of chance or randomness into the picture. If your side has conducted a test, which your specialists view as probative, you may have no way of telling beforehand (or before pretrial depositions) how a court-appointed expert will testify concerning that test. Wouldn't this threaten the ability of counsel to prepare its case?

Granted, court-appointed experts would emerge as an unpredictable element from each party's perspective. But is this objectionable or unparalleled? Isn't this precisely the situation parties face in the selection of *judges*, who decide matters of *law*? Judges are assigned to cases by lot. Parties have no inkling, before a judge is selected, what legal judgments this "expert" will render in their case. The proposal for scientific witnesses is a perfect parallel. Before knowing the identity of court-appointed scientists, parties may be unable to predict what scientific judgments they will have to contend with. But why is this objectionable? On the contrary, assuming that court-selected experts are at least as knowledgeable and definitely less biased than party-selected experts, this practice seems well designed to improve the accuracy of verdicts. How different the early outcomes of tobacco litigation might have been if jurors never received testimony from tobacco-hired "experts"!

Why favor the extreme step of replacing party experts with court-selected experts? Why won't the screening practice of judges like Judge Jones have a comparable effect? A judge can use independent experts as advisors to screen the admissibility of party-selected testimony, without overturning or revamping the adversarial tradition of party-selected witnesses. The trouble I find with this advisory use of independent experts is that their only function is to assist the judge in deciding between admission or exclusion of partisan-prepared testimony. Exclusion of testimony, however, is a fairly drastic step, which should not be undertaken lightly. It calls for clear and precise criteria of exclusion, which are extremely difficult to formulate, as the *Daubert* opinion itself illustrates. The necessity for such criteria can be happily circumvented if courts do not make decisions about which testimony is "sufficiently" scien-

tific. If neutral experts are chosen from a professionally approved list of candidates, scientific soundness will be guaranteed as far as the current state of science allows, and the threat of partisanship will be greatly diminished.⁴²

9.9 *Juries*

The lay jury is a prominent distinguishing mark of the common-law as opposed to the Continental system, so one might expect it to figure prominently in my discussion. In fact, however, my treatment of it will be fairly brief. One reason for brevity is that the core rationale for the lay jury may be extraveritistic. Jury service may be seen as an important facet of self-government, as a bulwark against central authority, and as a means to educating the citizenry. Since these kinds of considerations fall outside the veritistic dimension of adjudication, they are not prime targets for my comparatively narrow agenda. However, if lay juries were abysmal on the accuracy dimension, maybe these extraveritistic considerations would be trumped. So the veritistic properties of juries must not be ignored. Furthermore, the institutional options are not exhausted by either lay juries, on the one hand, or professional judges, on the other. In many Continental systems, the trier of fact, especially in criminal cases, is a panel composed partly of professional judges and partly of ordinary citizens. This option might honor the extraveritistic values but with less cost in veritistic value (assuming for the sake of argument that lay juries are somewhat less accurate). Second, as mentioned in Section 9.8, we might drop lay juries for certain categories of litigation, like torts, without abandoning lay juries entirely. This choice might be grounded partly on veritistic grounds: specialized knowledge may be required more in tort cases than in criminal cases.

How can the accuracy of lay juries be investigated? An approach cited in Section 9.4 is to compare two juries' verdicts on one and the same case. Where there is disagreement, one of the juries must be wrong. Another approach is to compare the jury's verdict with the one the presiding judge would have rendered if she had been the trier of fact. This approach was adopted by Harry Kalven, Jr. and Hans Zeisel (1966), in their much-admired study of the American jury. When judge and jury disagree, we cannot, of course, conclude that the jury was wrong. But this kind of study indicates the magnitude of difference to be expected between lay and professional triers.

⁴² Won't a list of professionally approved scientists still include some with a partisan stance? If the judge chooses from this list, might not her own biases determine her choice of experts? Can partisanship really be avoided, then, by court-selected experts? To avoid these threats to neutrality, one could adopt the practice of selecting an expert witness (or panel of such witnesses) by *lot*. As the canonical method for selecting judges to try cases, why not extend it to expert selection as well?

Kalven and Zeisel surveyed judges' opinions in 3,576 criminal cases. Ignoring a complication, the outcomes are presented in the following table (from Kalven and Zeisel 1966: 58, table 12).⁴³

		JURY		
		Acquits	Convicts	Total Judge
JUDGE	Acquits	14%	3%	17%
	Convicts	19%	64%	83%
	Total Jury	33%	67%	100%

Focusing on the four cells excluding the totals, the agreement cells are the upper left and lower right cells, and the disagreement cells are the upper right and lower left cells. As there indicated, judge and jury agreed in 78 percent of the cases and disagreed in 22 percent of the cases.⁴⁴ Is 22 percent a serious percentage of cases? I am inclined to think so, at least if the errors are heavily weighted in one direction; but others might disagree. Furthermore, as Kalven and Zeisel explain, the class of cases studied are the tighter or more difficult cases, since they are the cases in which the defendant chose to go to trial rather than offer a plea. Presumably, pleas are offered in more one-sided cases, on which judge and jury would have agreed. So the total percentage of prospective disagreement that can be inferred is lower than 22 percent.

The implications of this study are limited by at least two factors. First, no immediate inference can be drawn as to how the errors were distributed. The data are compatible with judges erring as often as, or more often than, juries, so the veritistic inferiority of juries cannot be inferred. Second, this study covered only criminal cases, and was conducted in an era when sophisticated modes of evidence, such as DNA analysis, were less frequent. It is possible that the intricacy of contemporary tort litigation, and even that of contemporary criminal trials, might yield greater discrepancies between judges and juries than Kalven and Zeisel found. New studies should be executed in the contemporary setting before firm conclusions are drawn.

Other approaches to studying juries may shed light on their probable veritistic qualities. In Hastie, Penrod, and Pennington's (1983) detailed analysis of jury behavior, for example, jurors were given memory tests for information from the trial. Jurors seemed to perform remarkably poorly, the authors report.

Memory on the eight fact items tested appeared to run at a rate of about 60 percent accuracy for information directly stated in testimony . . . Performance on the

⁴³ The complication is that juries "hung" in some of these cases, whereas judges always rendered "guilty" or "not guilty" judgments. So there were some noncomparabilities. By consolidating the "hangings" in a natural way, however, Kalven and Zeisel obtain the figures shown in the table.

⁴⁴ Disagreement is massively in one direction, with juries less inclined to convict than judges. But I shall not explore this issue.

judge's instruction memory questions were even lower, less than 30 percent accurate on questions about material stated directly in the judge's final charge, such as the elements of the legal definition of second degree murder. (1983: 80)

This kind of finding does not inspire confidence about verdict accuracy.⁴⁵

Other aspects of the jury system can also be approached from the veritistic perspective. The whole manner of jury selection—including voir dire and peremptory challenges—poses many interesting questions. Is a prospective juror's voting behavior predictable in virtue of socioeconomic status, past experiences, political persuasion, and so on, as jury consultants like to claim? If some such characteristics are good predictors of post-trial voting, this may suggest that the facts of the case are less weighty than they ought to be in determining verdict outcomes. This might bear on possible reforms of current procedures. For example, some legal analysts recommend eliminating peremptories altogether. But if certain types of jurors would be inclined to vote a certain way independent of the merit facts of the case, that "biased" kind of juror is a threat to verdict accuracy, and a peremptory dismissal might make good veritistic sense. Peremptory challenges can also be used, however, to dismiss jurors who would be all too good at tracking the merit facts. This speaks against the desirability of peremptories, from a veritistic perspective. So possible jury-selection reforms and other "local" reforms of the jury system deserve far more attention than they can be given here.

Finally, I return to the "global" dimension of our analysis: the comparison of the common-law and civil-law traditions. There are many salient respects, we have seen, in which the common-law system seems to be veritistically inferior to the Continental one. Although better empirical research needs to be done, this inferiority thesis is the tentative conclusion that emerges from our reflections. I have not, of course, given much attention to the alleged weaknesses of the Continental system. One of these commonly attributed weaknesses (mentioned in n. 26) is that judges, being a particular class of bureaucrats, have a particular perspective on society that might bias some of their judgments.⁴⁶ Another criticism is that Continental judges—unlike attorneys in the Anglo-American system—have insufficient incentives to investigate the evidence on each side of a case with the right amount of depth and energy. Obviously, these factors must be assessed before coming to any firm conclusion about the relative veritistic merits of the common-law and civil-law systems. Finally, one has to consider how the veritistic dimension should be weighted in comparison with the extravertistic dimensions. But given the

⁴⁵ However, the memory performance of all jurors taken together leaves more room for optimism (Hastie, Penrod, and Pennington 1983: 81). A forgetful juror can be reminded of certain items by other jurors.

⁴⁶ Inclusion of lay judges on the panels of criminal cases might dilute this worry about the Continental system, because the professional judges would be exposed to lay opinions.

importance of the veritistic criterion, as defended in Section 9.2 especially, it would be very significant to find, as my preliminary explorations here suggest, that the common-law system is veritistically inferior to the Continental one.