Truth, Error, and Criminal Law

An Essay in Legal Epistemology

Larry Laudan
Universidad Nacional Autónoma de México

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This book treats problems in the epistemology of the law. Beginning with the premise that the principal function of a criminal trial is to find out the truth about a crime, Larry Laudan examines the rules of evidence and procedure that would be appropriate if the discovery of the truth were, as higher courts routinely claim, the overriding aim of the criminal justice system. Laudan mounts a systematic critique of existing rules and procedures that are obstacles to that quest. He also examines issues of error distribution by offering the first integrated analysis of the various mechanisms – the standard of proof, the benefit of the doubt, the presumption of innocence, and the burden of proof – for implementing society's view about the relative importance of the errors that can occur in a trial.

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Acquitting the guilty and condemning the innocent – the Lord detests them both.

– Proverbs 17:15

As there is the possibility of a mistake, and as it is even probable, nay, morally certain that sooner or later the mistake will be made, and an innocent person made to suffer, and as that mistake may happen at the very next trial, therefore no more trials should be had and courts of justice must be condemned.

W. May, Some Rules of Evidence, 10 AMER. L. REV. 642, at 654–5 (1876)

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Preface

Every author owes debts more numerous than he can mention. Of some, he is barely aware, though they are no less real for that. More troubling are those that run so deeply that they cannot easily if ever be repaid, and certainly not by the bare acknowledgment of their existence. Still, it remains important to mention them, even if the gesture is brief and fleeting.

I first became interested in epistemological issues surrounding the law about five years ago, having previously devoted myself to the philosophy of science and applied epistemology. More by accident than by design, my earliest encounters with academic law occurred at the University of Texas, where I often go to consult books unavailable in Mexico, where I work. On one of my annual trips north of the border, I decided to stop into the office of Brian Leiter in the University of Texas Law School. I had, by chance, been reading a classic legal case, *In re Winship*, a few days before. Leiter and I did not know one another, but something was bothering me and I knew his reputation as one of the few philosophers of law with an interest in questions of proof. After introducing myself, I asked him (more or less): "I can't make sense of what the court is saying about proof beyond a reasonable doubt. Can you straighten me out?" After puzzling over the relevant passages, he replied candidly: "No."

This book dates from that conversation. Probably as much to get me out of his hair as anything else, Brian put me onto LexisNexis, that wonderful repository of all things legal on the Internet. I started reading other Supreme Court cases discussing reasonable doubt, hoping that would set me straight. It did not. This book is the end product of my quest for an answer to that initial and seemingly innocuous question. As these things always do, my puzzle about reasonable doubt mushroomed into worries about a plethora of epistemic notions (the benefit of the doubt, the presumption of innocence, the burden of proof, relevance, and reliability) widely used by the judiciary and academic lawyers alike. The nagging worry was that key parts of *all* these notions (especially proof, relevance, and reliability) were being used in ways that were not only nonstandard (at least among philosophers) but also, apparently, deeply confused. The more I

read, the more uneasy I became. Senior jurists, including those on the Supreme Court, often wrote about knowledge and truth seeking in ways that I found foreign and unfamiliar. Sometimes, they seemed plainly wrong.

At about this point, I came to know Ron Allen, the Wigmore Professor of Evidence Law at Northwestern, whose work I had read and from which I have learned much. Even when we disagreed, which was not often, I felt that we were in the same conceptual universe, committed to the idea of analyzing a trial as the search for the truth about a crime. Besides, we shared a knee-jerk aversion to the Bayesian project in the law and elsewhere, so I knew he had to be on the side of the angels.

A year later, I finally stumbled upon the article that I had been looking for in Leiter's office that day almost two years earlier: a cogent and sophisticated treatment of the standard of proof beyond a reasonable doubt. It was written by a young legal scholar, Erik Lillquist from Seton Hall Law School, from whom I have also learned much.

Fortuitously, some funds from the Institute for Philosophical Investigation at my university made it possible for my colleague Juan Cruz Parcero and me to invite several scholars to the campus for three days of intensive conversations about law and epistemology in December 2003. Apart from Allen and Lillquist, two other scholars attending that meeting made a deep impression on me. They were Michele Taruffo from Pavía and Jordi Ferrer from the University of Gerona. Politely overlooking the fact that I was neither a lawyer nor a philosopher of law, both of them heightened my awareness of a number of problems that I had barely stumbled on in my own halting efforts with LexisNexis. Above all, they persuaded me that – where the law of evidence is concerned – the traditional gulf postulated between Roman and Anglo-Saxon law was ill-founded. Both civilian and common law courts face similar problems of proof and evidence, and it had been simply parochial of me to imagine that an appropriate dialogue about evidence could be conducted within the terms of reference of a single legal system. Living and working in Mexico, as I do, reinforced that impression, since I spend much of my time explaining the mysteries and idiosyncrasies of Anglo-Saxon procedure to Mexicans and likewise learning about those of the Mexican system. As I subsequently discovered, Taruffo has written a splendid volume in Italian, *The Proof of Judicial Facts*, that is, in my judgment, the best current book on the theory of legal proof. (It is a scandal, but symptomatic of the problem I just mentioned, that there is no English translation of it.) My examination of the parallels between Mexican and U.S. law has been enormously aided by my friend Enrique Cáceres of the Institute for Jurisprudence at the National Autonomous University of Mexico (UNAM), whose knowledge of Mexican jurisprudence is more than merely impressive.

Two years ago, the Law School at the University of Texas invited me to put together an advanced seminar in legal epistemology. Along with the patient students who suffered through my first shot at writing this book, a very bright

philosopher of law, Les Greene, regularly participated. His sagacious questions saved me from some of the serious errors into which I was falling. Outside the law itself, I must mention my continuing debt to Deborah Mayo's penetrating analyses of the nature of error and the logic of the design of statistical tests.

Closer to home, I am grateful to my colleagues at UNAM, who batted nary an eyelash when I announced to them that I was taking time off for a couple of years from my duties as philosopher of science to learn something about the law. But for their generous provision of time for study-leave, it would have been impossible to write this book. Finally, I want to acknowledge a deep indebtedness to my wife, Rachel, who (among many other things) worked very hard – but with limited success – to make this book intelligible to nonspecialists.

Two chapters of this book (2 and 4) are much-altered versions of articles that have appeared or will soon appear in *Legal Theory*. I remain humbled that the editors of that distinguished journal (Larry Alexander, Jules Coleman, and Brian Leiter) were willing to take a total outsider under their collective wing.

Guanajuato, México
1 August 2005

Abbreviations and Acronyms Used

BARD: beyond a reasonable doubt
BoD: benefit of the doubt
BoP: burden of proof
CACE: clear and convincing evidence
$guilt_m$: material guilt
$guilt_p$: probatory guilt
$innocence_m$: material innocence
$innocence_p$: probatory innocence
m: ratio of true acquittals to false convictions
n: ratio of false acquittals to false convictions
PI: presumption of innocence
PoE: preponderance of the evidence
SoP: standard of proof

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Thinking about Error in the Law

> We need hardly say that we have no wish to lessen the fairness of criminal trials. But it must be clear what fairness means in this connection. It means, or ought to mean, that the law should be such as will secure as far as possible that the result of the trial is the right one.
>
> – Criminal Law Revision Committee[1]

> Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover the truth according to law.
>
> – Justice Lewis Powell[2]

A Road Map

If we look closely at the criminal justice system in the United States (or almost anywhere else for that matter), it soon becomes evident that there are three distinct families of basic aims or values driving such systems. One of these core aims is to find out the truth about a crime and thus avoid false verdicts, what I will call the goal of *error reduction*. A second is premised on the recognition that, however much one tries to avoid them, errors will occur from time to time. This goal addresses the question of which sort of error, a false acquittal or a false conviction, is more serious, and thus more earnestly to be avoided. In short, the worry here is with how the errors distribute themselves. Since virtually everyone agrees that convicting an innocent person is a more costly mistake than acquitting a guilty one, a whole body of doctrine and practices has grown up in the common law about how to conduct trials so as to make it more likely that, when

[1] Criminal Law Revision Committee, Eleventh Report, Evidence (General) 1972, Cmnd. 4991, at §§62–4.

[2] From Powell's dissent in *Bullington v. Missouri*, 451 U.S. 430 (1981).

an error does occur, it will be a false acquittal rather than a false conviction. For obvious reasons, I will say that this set of issues directs itself to the question of *error distribution*. The third set of values driving any legal system is a more miscellaneous grab bag of concerns that do not explicitly address trial error but focus instead on other issues important to the criminal justice system. At stake here are questions about the efficient use of resources, the protection of the rights of those accused of a crime, and various other social goods, such as the sanctity of marriage (spouses cannot be made to testify against one another) or preserving good relations with other nations (diplomats cannot generally be convicted of crimes, however inculpatory the evidence). I will call these *nonepistemic policy values*. Such concerns will figure here because, although not grounded in the truth-seeking project, their implementation frequently conflicts with the search for the truth.

Judges and legal scholars have insisted repeatedly and emphatically that the most fundamental of these values is the first: that of finding out whether an alleged crime actually occurred and, if so, who committed it. The U.S. Supreme Court put the point concisely in 1966: "The basic purpose of a trial is the determination of the truth."[3] Without ascertaining the facts about a crime, it is impossible to achieve justice, since a just resolution crucially depends on correctly figuring out who did what to whom. Truth, while no guarantee of justice, is an essential precondition for it. Public legitimacy, as much as justice, demands accuracy in verdicts. A criminal justice system that was frequently seen to convict the innocent and to acquit the guilty would fail to win the respect of, and obedience from, those it governed. It thus seems fair to say that, whatever else it is, a criminal trial is first and foremost an *epistemic* engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators. To say that we are committed to error reduction in trials is just another way of saying that we are earnest about seeking the truth. If that is so, then it is entirely fitting to ask whether the procedures and rules that govern a trial are genuinely truth-conducive.

The effort to answer that question constitutes what, in the subtitle of this book, I have called "legal epistemology." Applied epistemology in general is the study of whether systems of investigation that purport to be seeking the truth are well engineered to lead to true beliefs about the world. Theorists of knowledge, as epistemologists are sometimes known, routinely examine truth-seeking practices like science and mathematics to find out whether they are capable of delivering the goods they seek.

Legal epistemology, by contrast, scarcely exists as a recognized area of inquiry. Despite the nearly universal acceptance of the premise that a criminal

[3] *Tehan v. U.S.*, 383 U.S. 406, at 416 (1966).

trial is a search for the truth about a crime, considerable uncertainty and confusion reign about whether the multiple rules of proof, evidence, and legal procedure that encumber a trial enhance or thwart the discovery of the truth. Worse, there has been precious little systematic study into the question of whether existing rules could be changed to enhance the likelihood that true verdicts would ensue. Legal epistemology, properly conceived, involves both a) the *descriptive* project of determining which existing rules promote and which thwart truth seeking and b) the *normative* one of proposing changes in existing rules to eliminate or modify those rules that turn out to be serious obstacles to finding the truth.

The realization of a legal epistemology is made vastly more difficult because, as just noted, nonepistemic values are prominently in play as well as epistemic ones. In many but not all cases, these nonepistemic values clash with epistemic ones. Consider a vivid example. If we were serious about error reduction, and if we likewise recognized that juries sometimes reach wrong verdicts, then the obvious remedy would be to put in place a system of judicial review permitting appeals of both acquittals and convictions. We have the latter, of course, but not the former. *Every* erroneous acquittal eludes detection because it escapes review. The absence of a mechanism for appealing acquittals is patently not driven by a concern to find the truth; on the contrary, such an asymmetry guarantees far more errors than are necessary. The justification for disallowing appeal of acquittals hinges on a policy value. Double jeopardy, as it is known, guarantees that no citizen can be tried twice for the same crime. Permitting the appeal of an acquittal, with the possibility that the appeal would be reversed and a new trial ordered, runs afoul of the right not to be tried more than once. So, we reach a crossroads, seemingly faced with having to choose between reducing errors and respecting traditional rights of defendants. How might we think through the resolution of conflicts between values as basic as these two are? Need we assume that rights always trump the search for the truth, or vice versa? Or, is there some mechanism for accommodating both sorts of concerns? Such questions, too, must form a core part of the agenda of legal epistemology.

This book is a first stab at laying out such an agenda. In this chapter, I formulate as clearly as I can what it means to speak of legal errors. Absent a grasp of what those errors are, we obviously cannot begin to think about strategies for their reduction. In Chapters 2 through 4, we examine in detail a host of important questions about error distribution. Chapters 5 through 8 focus on existing rules of evidence and procedure that appear to pose serious obstacles to truth seeking. Those chapters include both critiques of existing rules and numerous suggestions for fixing such flaws as I can identify. The final chapter assays some possible solutions to the vexatious problems generated by the tensions between epistemic values and nonepistemic ones.

A Book as Thought Experiment

The two passages in the epigraph to this chapter from Supreme Court Justice Lewis Powell and England's Criminal Law Revision Committee articulate a fine and noble aspiration: finding out the truth about the guilt or innocence of those suspected of committing crimes. Yet, if read as a *description* of the current state of American justice, they remain more an aspiration than a reality. In saying this, I do not mean simply that injustices, false verdicts, occur from time to time. Occasional mistakes are inevitable, and thus tolerable, in any form of human inquiry. I mean, rather, that many of the rules and procedures regulating criminal trials in the United States – rules for the most part purportedly designed to aid the truth-finding process – are themselves the *cause* of many incorrect verdicts. I mean, too, that the standard of proof relevant to criminal cases, beyond reasonable doubt, is abysmally unclear to all those – jurors, judges, and attorneys – whose task is to see that those standards are honored. In the chapters that follow, I will show that the criminal justice system now in place in the United States is not a system that anyone concerned principally with finding the truth would have deliberately designed.[4]

A natural way to test that hypothesis would be to examine these rules, one by one, to single out those that thwart truth seeking. And, in the chapters to follow, I will be doing a fair share of precisely that. But, as we will discover, it is often harder than it might seem to figure out whether a given evidential practice or procedure is truth promoting or truth thwarting. In short, we need some guidelines or rules of thumb for deciding whether any given legal procedure furthers or hinders epistemic ends. Moreover, for purposes of analysis, we need to be able to leave temporarily to one side questions about the role of nonepistemic values in the administration of justice. We will have to act as if truth finding were the predominant concern in any criminal proceeding. In real life, of course, that is doubtful.

As I noted at the outset, criminal trials are driven by a host of extra-epistemic values, ranging from concerns about the rights of the defendant to questions of efficiency and timeliness. (Not for nothing do we insist that justice delayed is justice denied.) The prevailing tendency among legal writers is to consider all these values – epistemic and nonepistemic – as bundled together. This, I think,

[4] Lest you take my remarks about the lack of a coherent design in the rules of trials as casting aspersions on the founding fathers, I hasten to add that the system now in place is one that *they* would scarcely recognize, if they recognized it at all. Many of the features of American criminal justice that work against the interests of finding truth and avoiding error–features that we will discuss in detail later on – were additions, supplements, or sometimes patent transformations of American criminal practice as it existed at the beginning of the nineteenth century. Congress or state legislatures imposed some of these changes; judges themselves created the vast majority as remedies for serious problems posed by the common law or abusive police practices. A few date from the late-nineteenth century; most, from the twentieth.

can produce nothing but confusion. Instead of the familiar form of analysis, which juggles all these values in midair at the same time, I am going to propose a thought experiment. I will suggest that we focus initially entirely on questions of truth seeking and error avoidance. I will try to figure out what sorts of rules of evidence and procedure we might put in place to meet those ends and will identify when existing rules fail to promote epistemic ends. Then, with that analysis in hand, we can turn to compare the current system of evidence rules and procedures with a system that is, as it were, epistemically optimal. When we note, as we will repeatedly, discrepancies between the kind of rules we would have if truth seeking were really the basic value and those rules we find actually in place, we will be able then to ask ourselves whether these epistemically shaky rules conduce to values other than truthseeking and, if they do, when and whether those other values should prevail over more epistemically robust ones. Although I ignore such values in the first stage of the analysis, I do not mean for a moment to suggest that they are unimportant or that they can be ignored in the *final* analysis. But if we are to get a handle on the core epistemic issues that are at stake in a criminal trial, it is best – at the outset – to set them to one side temporarily.

If it seems madcap to try to understand the legal system by ignoring what everyone concedes to be some of its key values, I remind you that this method of conceptual abstraction and oversimplification has proved its value in other areas of intellectual activity, despite the fact that every oversimplification is a falsification of the complexities of the real world. Consider what is perhaps the best-known example of the power of this way of proceeding: During the early days of what came to be known as the scientific revolution, Galileo set out to solve a conundrum that had troubled natural philosophers for almost two millennia, to wit, how heavy bodies fall. Everyone vaguely understood that the velocity of fall was the result of several factors. The shape of a body makes a difference: A flat piece of paper falls more slowly than one wadded into a ball. The medium through which a body is falling likewise makes a crucial difference: Heavy bodies fall much faster through air than they do through water or oil. Earlier theories of free fall had identified this resistance of the medium as the key causal factor in determining the velocity of fall. Galileo's strategy was to turn that natural assumption on its head. Let us, he reasoned, ignore the shapes of bodies *and* their weights *and* the properties of the media through which they fall – obvious facts all. Assume, he suggested, that the only relevant thing to know is how powerfully bodies are drawn to the earth by virtue of what we would now call the gravitational field in which they find themselves. By making this stark simplification of the situation, Galileo was able to develop the first coherent account of fall, still known to high school students as Galileo's Law. Having formulated a model of how bodies would fall if the resistance of the medium were negligible (which it is not) and the shape of the body were irrelevant (which it likewise is not), and the weight of a body were irrelevant

(which it is), Galileo proceeded to reinsert these factors back into the story in order to explain real-world phenomena – something that would have been impossible had he not initially ignored these real-world constraints. The power of a model of this sort is not that it gets things right the first time around, but that, having established how things would go under limited and well-defined conditions, we can then introduce further complexities as necessary, without abandoning the core insights offered by the initial abstraction.

I have a similar thought experiment in mind for the law. Taking the Supreme Court at its word when it says that the principal function of a criminal trial is to find out the truth, I want to figure out how we might conduct criminal trials supposing that their *predominant* aim were to find out the truth about a crime. Where we find discrepancies between real-world criminal procedures and epistemically ideal ones (and they will be legion), we will need to ask ourselves whether the epistemic costs exacted by current real-world procedures are sufficiently outweighed by benefits of efficiency or the protection of defendant rights to justify the continuation of current practices.

Those will not be easy issues to resolve, involving as they do a weighing of values often considered incommensurable. But such questions cannot even be properly posed, let alone resolved, until we have become much clearer than we now are about which features of the current legal regime pose obstacles to truth seeking and which do not. Because current American jurisprudence tends to the view that rights almost invariably trump questions of finding out the truth (when those two concerns are in conflict), there has been far less discussion than is healthy about whether certain common legal practices – whether mandated by common law traditions or by the U.S. Constitution or devised as court-designed remedies for police abuses – are intrinsically truth thwarting.

My object in designing this thought experiment is to open up conceptual space for candidly discussing such questions without immediately butting up against the purported argument stopper: "but *X* is a right" or "*X* is required (or prohibited) by the Constitution." Just as Galileo insisted that he wouldn't talk about the resistance of the air until he had understood how bodies would fall absent resistance, I will try – until we have on the table a model of what a disinterested pursuit of the truth in criminal affairs would look like – to adhere to the view that the less said about rights, legal traditions, and constitutional law, the better.

I said that this thought experiment will involve figuring out how criminal trials could be conducted, supposing that true verdicts were the principal aim of such proceedings. This might suggest to the wary reader that I intend to lay out a full set of rules and procedures for conducting trials, starting from epistemic scratch, as it were. That is not quite the project I have in mind here, since it is clear that there is a multiplicity of different and divergent ways of searching for the truth, which (I hasten to add) is not the same thing as saying that there are multiple, divergent truths to be found. Consider one among many questions

that might face us: If our aim is to maximize the likelihood of finding the truth, should we have trial by judge or trial by jury? I do not believe that there is a correct answer to that question since it is perfectly conceivable that we could design sets of procedures that would enable either a judge *or* a jury to reach verdicts that were true most of the time. English speakers have a fondness for trial by jury, whereas Roman law countries prefer trial by judge or by a mixed panel of judges and jurors. For my part, I can see no overwhelming epistemic rationale for a preference for one model over the other. If we Anglo-Saxons have any rational basis, besides familiarity, for preferring trial by jury, it has more to do with the political and social virtues of a trial by one's peers rather than with any hard evidence that juries' verdicts are more likely to be correct than judges' verdicts are.

To begin with, I intend to propose a series of guidelines that will tell us what we should look for in deciding whether any particular arrangement of rules of evidence and procedure is epistemically desirable. This way of proceeding does not directly generate a structure of rules and procedures for conducting trials. What it will do is tell us how to evaluate bits and pieces of any proposed structure with respect to their epistemic bona fides. It will set hurdles or standards for judging any acceptable rule of evidence or procedure. If you want an analogy, think of how the rules of proof in mathematics work. Those rules do not generally *generate* proofs by some sort of formal algorithm; bright mathematicians must do that for themselves. What the rules of proof do (except in very special circumstances) is enable mathematicians to figure out whether a purported proof is a real proof. In effect, what I will be suggesting is a set of *meta-rules* or meta-principles that will function as yardsticks for figuring out whether any given procedure or evidence-admitting or evidence-excluding practice does, in fact, further epistemic ends or whether it thwarts them.

What I am proposing, then, is, in part, a *meta-epistemology* of the criminal law, that is, a body of principles that will enable us to decide whether any given legal procedure or rule is likely to be truth-conducive and error reducing. The thought experiment I have been describing will involve submitting both real and hypothetical procedures to the scrutiny that these meta-principles can provide. When we discover rules currently in place that fail to serve epistemic ends, we will want to ask ourselves whether they cannot be replaced by rules more conducive to finding the truth and minimizing error. If we can find a more truth-conducive counterpart for truth-thwarting rules, we will then need to decide whether the values that the original rules serve (for instance, protecting certain rights of the accused) are sufficiently fundamental that they should be allowed to prevail over truth seeking.

If, as Justice Powell says in the epigraph, the system "is designed" to discover the truth, you might reasonably have expected that we already know a great deal about the relation of each of its component parts to that grand ambition. The harsh reality is that we know much less than we sometimes think we do. Many

legal experts and appellate judges, as we will see on numerous occasions in later chapters, continue to act and write as if certain portions of the justice system that actually thwart truth seeking have an epistemic rationale. Still worse, some jurists and legal scholars attribute error-reducing power to rules and doctrines that, viewed dispassionately, produce abundant false verdicts in their own right. Like Powell, they pay lip service to the mantra that the central goal of the system is to get at the truth, all the while endorsing old rules, or putting in place new ones, that hobble the capacity of that system to generate correct verdicts. So long as jurists believe, as many now do, that certain judicial rules (for instance, the suppression of "coerced" confessions[5]) promote truth finding – when in fact they do the opposite – there can be nothing but confusion concerning when and if truth seeking is being furthered.

One important reason that we know so much less than we should is that the courts in particular, but also the justice system in general, tend to discourage the sort of empirical research that would enable us to settle such questions definitively. In philosophy, my biases lean in the direction of naturalism. That means that I believe that most philosophical issues ultimately hinge on finding out what the facts are. I believe, further, that our methods of inquiry must be constantly reviewed empirically to see whether they are achieving what we expect of them. In writing this book, I have been constantly frustrated by the paucity of empirical information that would allow us to reach clear conclusions about how well or badly our legal methods are working. Where there are reliable empirical studies with a bearing on the issues addressed here, I will make use of them. Unfortunately, given the dearth of hard evidence, the analysis in this book will fall back on armchair hunches about the likely effects of various rules and procedures far more often than I would have liked. My defense for doing so is simply that one must fight one's battles with the weapons that one has at hand.

I should stress, as well, that I approach these questions as a philosopher, looking at the law from the outside, rather than as an attorney, working within the system. Although I have thought seriously about these issues over several years, I cannot possibly bring to them the competences and sensibilities of a working trial lawyer.[6] What interests me about the law is the way in which it functions, or malfunctions, theoretically, as a system for finding truth and avoiding error. In this role, I am less concerned than a civil libertarian or defense attorney might be with the rights of the accused and more concerned with how effectively the criminal justice system produces true verdicts. The analysis offered in this book

[5] To see the point of the scare quotes, consult Chapter 7, where we will observe that the majority of "coerced" confessions are not coerced in the lay sense of that term.

[6] Accordingly, I ask those readers who know the fine points of the practice of the law far better than I do to overlook the occasional acts of ignorance on my part, of which there are doubtless several, unless they actually impinge upon the cogency of the argument that I am making.

does not purport to tell juries and judges how to decide a case; such dreadful decisions must depend on the case's special circumstances and its nuances. Its aim, rather, is the more prophylactic one of pointing out some errors that these fact finders should avoid in the always difficult quest for a true and just verdict.

There will be readers who expect any avowedly philosophical treatment of the law to center on issues of morality and rights or on questions about the authority and essence of the law. Such are the themes that have dominated the philosophy of law in the last half-century. The most influential philosopher of law in the English-speaking world in the twentieth century, H. L. A. Hart, managed to write a lengthy, splendid book on the philosophy of law (*The Concept of Law*, 1961) that says virtually nothing about what I am calling legal epistemology. His eminent continental counterpart, Hans Kelsen, did virtually the same thing a generation earlier in his *Pure Theory of Law* (1934). Readers expecting a similar agenda from me will be sorely disappointed. To them in particular, I say this: If it is legitimate and fruitful for *moral* philosophers, such as Gerald Dworkin or John Rawls, to focus on the law principally as an exercise in ethics and morality, while largely ignoring the importance of truth seeking in the law (which they famously do), it is surely just as appropriate to look at the law through the lenses of epistemology and the theory of knowledge. Although one is not apt to learn so by looking at the existing philosophical literature on the subject, it is indisputable that the aims of the law, particularly the criminal law, are tied to epistemic concerns at least as profoundly as they are to moral and political ones. This book is a deliberate shot across the bow of the juggernaut that supposes that all or most of the interesting philosophical puzzles about the law concern its moral foundations or the sources of its authority.

Principal Types of Error

In this initial chapter, I will to begin to lay out some of the analytic tools that we will need in order to grapple with some thorny problems in the theory and practice of the criminal law. As its title already makes clear, this book is largely about legal errors. Since treating the law as an exercise in epistemology inevitably means that we will be involved in diagnosing the causes of error, we need to be clear from the outset about what kinds of errors can occur in a criminal proceeding.

Since our concern will be with purely epistemic errors, I should say straightaway that I am *not* using the term "error" as appellate courts are apt to use it. For them, an "error" occurs in a trial just in case some rule of evidence or procedure has been violated, misinterpreted, or misapplied. Thus, a higher court may determine that an error occurred when a trial judge permitted the introduction of evidence that the prevailing rules should have excluded or when some constitutional right of the defendant was violated. Courts will find that

an error occurred if a judge, in his instructions to the jury about the law, made some serious mistake or other, in the sense of characterizing the relevant law in a way that higher courts find misleading or incorrect. Very occasionally, they will decide that an error occurred if the jury convicted someone when the case against the defendant failed to meet the standard of proof beyond a reasonable doubt.[7]

By contrast, I will be using the term "error" in a more strictly logical and epistemic sense. When I say that an error has occurred, I will mean either a) that, in a case that has reached the trial stage and gone to a verdict, the verdict is false, or b) that, in a case that does not progress that far, a guilty party has escaped trial or an innocent person has pleaded guilty and the courts have accepted that plea. In short, for the purposes of our discussion, *an error occurs when an innocent person is deemed guilty or when a guilty person fails to be found guilty.* For obvious reasons, I will call the first sort of error a *false inculpatory finding* and the second a *false exculpatory finding.*

There are two important points to note about the way in which I am defining legal errors:

First, errors, in my sense, have nothing to do with whether the system followed the rules (the sense of "error" relevant for appellate courts) and everything to do with whether judicial outcomes convict the guilty and free the innocent. Even if no errors of the procedural sort that worries appellate courts have occurred, an outcome may be erroneous if it ends up freeing the guilty or convicting the innocent. The fact that a trial has scrupulously followed the letter of the current rules governing the admissibility of evidence and procedures – and thus avoids being slapped down by appellate courts for breaking the rules – is no guarantee of a correct outcome. To the contrary, given that many of the current rules (as we will see in detail in later chapters) are actually *conducive* to mistaken verdicts, it may well happen that trials that follow the rules are more apt to produce erroneous verdicts than trials that break some of them. Accordingly, our judgment that an error has occurred in a criminal case will have nothing to do with whether the judicial system followed its own rules and everything to do with whether the truly guilty and the truly innocent were correctly identified.

Second, standard discussions of error in the law – even from those authors who, like me, emphasize truth and falsity rather than rule following or rule breaking – tend to define errors only for those cases that reach trial and issue in a verdict. Such authors, naturally enough, distinguish between true and false verdicts. That is surely a legitimate, and an important, distinction, but it is

[7] Courts typically distinguish between errors that, while acknowledged as errors, did not decisively affect the outcome of a trial (called "harmless errors") and more serious errors, which call for retrial or reversal of a conviction.

neither the most general nor the most useful way of distinguishing errors. As my definition of "error" has already indicated, I claim that errors occur whenever the innocent are condemned by the system and whenever the guilty fail to be condemned. Obviously, one way in which these mistakes can happen is with a false conviction or a false acquittal. But what are we to say of the guilty person who has been arrested and charged with a crime that he truly committed but against whom charges were subsequently dropped by the prosecutor or dismissed by the judge? These are mistakes just as surely as a false acquittal is. Likewise, if an innocent person – faced with a powerfully inculpatory case – decides to accept a plea bargain and plead guilty, this is an error of the system just as much as a false conviction is, even though the case against the accused is never heard and a jury never renders a verdict.

Clearly, this analysis rests on being able to speak about the truly guilty and the truly innocent. Much nonsense has been creeping of late into several discussions, both popular and academic, of the law. For instance, one often hears it said (in a gross misconstrual of the famous principle of the presumption of innocence) that the accused "*is* innocent until proven guilty," as if the pronouncing of the verdict somehow created the facts of the crime. If it were correct that only a guilty verdict or guilty plea could render someone guilty, then there could be no false acquittals, for it would make no sense to say, as the phrase "false acquittal" implies, that a jury acquitted someone who is actually guilty. Since such locutions make perfect sense, we must reject the notion that a verdict somehow *creates* guilt and innocence.

A second obstacle to talking clearheadedly about guilt and innocence arises from the novel but fashionable tendency to suppose that whether someone is guilty or innocent of a crime simply depends on whether the evidence offered at trial is sufficient to persuade a rational person that the defendant is guilty. The confusion here is more subtle than the former one. It is rooted in the obvious fact that the decision about guilt or innocence made by a reasonable trier of fact will necessarily depend on what he or she comes to learn about the alleged crime. On this view, a verdict is correct so long as it squares with the evidence presented at trial, without making reference to anything that happened in the real world outside the courtroom. One legal scholar, Henry Chambers, has claimed that "what is true is what the [trial] evidence indicates is true."[8] Contrary to Chambers, I claim that nothing that a judge or jury later determines to be the case changes any facts about the crime. Likewise, I claim that, while what is presented in evidence surely shapes the jury's verdict, that evidence does not define what is true and false about the crime. Unless this were so, it would again make no sense to talk of a true or a false verdict, so long as that verdict

[8] Henry Chambers, Reasonable Certainty and Reasonable Doubt, 81 MARQ. L. REV. 655, at 668 (1998).

represented a reasonable inference from the evidence. Yet, sometimes we come to the conclusion that the evidence presented at trial was deeply unrepresentative of the true facts of the crime. Sometimes, truly innocent people are wrongly convicted and truly guilty people are wrongly acquitted, even though the jury drew the conclusions that were appropriate from the evidence available to them. (Basically, Chambers confuses what I will be calling the *validity* of a verdict with its truth.)

I will be adamant in insisting that the presumption of innocence, properly understood, does not make a guilty person innocent nor an acquittal of such a person into a nonerror. Likewise, I will argue that verdicts don't make the facts and neither does the evidence presented at trial; they only give official sanction to a particular hypothesis about those facts. Strictly speaking, the only people innocent are those who did not commit the crime, whatever a jury may conclude about their guilt and regardless of what the available evidence seems to show. Likewise, the truly guilty (those who committed the crime) are guilty even if a jury rationally acquits them. "Being found guilty" and "being guilty" are manifestly not the same thing; neither are "being presumed innocent" and "being innocent." The naive argument to the effect that what we *mean* when we say that Jones committed the crime is that a jury would find him guilty utterly confuses questions about what is really the case with questions about judgments issued in the idiosyncratic circumstances that we call criminal trials. There are false acquittals and false convictions, and the existence of each entails that verdicts are not analytically true or self-authenticating. Because they are not, we can speak of verdicts as being erroneous, even when they result from trials that were scrupulously fair, in the sense of being in strict compliance with the rules governing such proceedings. By the same token, we can speak of outcomes or verdicts being true, even when they resulted from trials that made a mockery of the existing rules.

For future reference, it will prove useful to make explicit the moral of this discussion. In brief, it is legitimate, and in some contexts essential, to distinguish between the assertion that "Jones is guilty," in the sense that he committed the crime, and the assertion that "Jones is guilty," in the sense that the legal system has condemned him. I propose to call the first sense *material guilt* (hereinafter, guilt_m) and the second *probatory guilt* (guilt_p). Clearly, guilt_m does not imply guilt_p, nor vice versa.

Similarly, we can distinguish between Jones's *material innocence* (innocence_m), meaning he did not commit the crime, and his *probatory innocence* (innocence_p), meaning he was acquitted or otherwise released from judicial scrutiny. Again, neither judgment implies the other. With these four simple distinctions in hand, we can combine them in various useful ways. For instance, Jones can be guilty_m but innocent_p; again, he can be innocent_m but guilty_p. Either of these situations would represent an error by the system.

Other Relevant Distinctions among Error Types

The most basic distinction we need has already been mentioned: that between false inculpatory and false exculpatory findings. These two types of findings are just what one would expect: A false exculpatory finding occurs when the legal system fails to convict a truly guilty felon. A false inculpatory finding is a conviction of an innocent person.

Still, we need to add a couple of other important distinctions to the tool kit of error types. One involves separating valid from invalid verdicts. A verdict of guilty will be valid, as I propose to use that term, provided that the evidence presented at trial establishes, to the relevant standard of proof, that the accused person committed the crime in question. Otherwise, a guilty verdict is invalid. Naturally enough, an acquittal will be valid as long as the conditions for a valid conviction are not satisfied and invalid otherwise. The notion of validity aims to capture something important about the quality of the inferences made by the trier of fact, whether judge or jury. Invalid verdicts can occur in one or both of two ways: a) The trier of fact may give more or less weight to an item of evidence than it genuinely merits, or b) she may misconceive the height of the standard of proof. In either case, the verdict is inferentially flawed.

It is crucial to see that the valid/invalid distinction does *not* map neatly onto the true/false verdict dichotomy. We settle the truth of a verdict (or what I am calling a finding) by comparing it with the facts. That is, Jones's conviction is true just in case Jones committed the crime. By contrast, we settle the validity of a verdict by comparing it with the evidence presented at trial, asking whether that evidence meets the applicable standard of proof. Just as a deductive inference can be valid even when its conclusion is false (all horses can fly; all stallions are horses; therefore, all stallions can fly), so a verdict can be simultaneously valid and false. Using the terminology of the previous section, it can be a valid verdict that Jones is guilty_p, even while it is true that Jones is innocent_m. By the same token, a verdict of not guilty may be valid even if Jones is guilty_m.

Happily, it sometimes turns out that true verdicts are likewise valid ones and that false verdicts are invalid. But neither of these connections is solid. Sometimes, perhaps often, a jury will produce a valid verdict that is false, that is to say, a verdict that reflects an appropriate inference from the evidence presented at trial but that is factually false. This can occur when the evidence admitted at trial, skewed for whatever reasons, invites a conclusion at odds with what actually happened. But even when the evidence is not skewed or unrepresentative of the crime, there is still plenty of scope for a verdict that is valid but not true. Indeed, the standard of proof guarantees as much. Suppose, for the sake of argument, that the standard of proof is something like 95 percent confidence in guilt. A jury hears a case and concludes that it is 80 percent

likely that the accused committed the crime. Now, the jury, if it acquits, will be producing a valid verdict, for the rules of proof demand acquittal even when the likelihood of guilt is as high as 80 percent. But that valid verdict is likely to be a false acquittal since, by hypothesis, the likelihood that the defendant committed the crime is quite high.

Likewise, it is easy to conceive how a jury might produce an invalid verdict that was nonetheless true, although these are apt to be less frequent than cases of valid verdicts that are false. What one hopes to achieve, obviously, is a verdict that is both true and valid. We want jurors to convict and acquit the right people and to do so for the right reasons. Both lack of truth and lack of validity will, as I am using the term "error," represent serious errors of the system, even though they point to quite different ways in which the system has failed. In our efforts to identify the principal sources of error in the legal system, we will be examining rules of evidence and procedure with a view to asking how such rules threaten either the truth *or* the validity of verdicts.

If the outcome of a criminal proceeding is erroneous in either of these respects – that is to say, if it is either false or invalid (or both) – the system has failed. If one or the other or both types of failure happen frequently, it may be time to change those parts of the system responsible for such errors. In later chapters, we will see that certain practices entrenched in our rules of evidence and procedure tend to produce invalid convictions and acquittals, that is to say, verdicts at odds with what a reasonable person – not bound by those rules – would conclude from the evidence available. Other features of the system, by restricting what can count as legal evidence, tend to produce verdicts that, even if valid, are false. The true/false and valid/invalid distinctions reflect the two primary ways in which a trial verdict may go awry: an inadequate (in the sense of unrepresentative) evidence base or faulty inferences from that base.

There is a third dichotomy that will prove helpful in thinking about sources of error. It distinguishes those erroneous decisions that are *reversible* from those that are *irreversible*. For instance, when Schwartz is convicted of a crime, he can appeal the verdict and may persuade a higher court to set that verdict aside. Epistemically, such a review mechanism is invaluable as a way of increasing the likelihood that the final result is correct. By contrast, if Schwartz is acquitted, the verdict cannot be appealed, however flawed may have been the reasoning that led the jury to acquit. Other things being equal, irreversible decisions are more troubling sources of error than reversible ones for the obvious reason that there is no machinery for catching and correcting the former while the latter can, in principle, be discovered and rectified. In due course, we will inquire into the rationale for creating a category of decisions, including verdicts themselves, that is wholly immunized from further review and correction.

Thus far, our focus on error has been principally with the *terminal* stage, that is, with erroneous verdicts. But many criminal investigations never get as far as this. Sometimes, police investigations simply run out of steam because

of lack of clues or bad investigative practices. Although these are errors just as surely as a false acquittal is, they will not be our focus. What will command our attention are those felons who slip through the system, not for lack of incriminating clues known to the police, but who escape trial because of the ways in which the rules of evidence and procedure impede further pursuit of the case against them. These errors will be as revealing a topic of study as false verdicts are.

We need to remind ourselves that a vast number of criminal investigations (probably the overwhelming majority of police inquiries) never reach the trial stage because, although the police have identified a suspect to their own satisfaction, someone or other in authority concludes that the case against him is too weak to take to trial. It may be the police themselves who make this determination or it may be the prosecutor. It can be a grand jury that issues a "no bill," precluding trial. Or it may be an arraigning judge who dismisses the case. At each of these stages, where a decision must be made whether to proceed along the route to trial or not, the participants are bound by an elaborate body of rules of evidence and procedure. Prosecutors who have in hand a confession know that it may be tossed out if there are doubts about its provenance. Similar questions may arise about much of the other evidence seized by police. Even when prosecutors have powerful evidence of a suspect's guilt, their decision to proceed to trial must be informed by a calculation on their part as to which parts of the evidence they now have in hand will actually be allowed to go before a jury. If there are rules of admissibility that exclude relevant evidence (and much of this book will address itself to rules of precisely this sort), then those rules will exert a weighty influence not only during the trial itself but on all the preliminary decisions about whether to proceed to trial. Even if we leave aside problems generated by the rules of evidence, the standard of proof likewise works to ensure that many parties who are probably guilty never go to trial. Specifically, prosecutors may believe that the evidence against a suspect strongly suggests that he is guilty but that such evidence would probably be insufficient to persuade a jury of his guilt beyond a reasonable doubt. Short on both financial and human resources, prosecutors are unlikely to proceed with such a case. Judge Richard Posner has put the point succinctly:

> Tight [prosecutorial] screening implies that some, perhaps many, guilty people are not prosecuted and that most people who are prosecuted and acquitted are actually guilty.[9]

It puts the importance of this class of problems into vivid perspective if we remind ourselves that there are far more dismissals than acquittals in the criminal justice system. In federal courts in 1999, for instance, there were about

[9] Richard Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, at 1506 (1999).