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# SOME LIMITATIONS OF EXPERIMENTAL PSYCHOLOGISTS' CRITICISMS OF THE AMERICAN TRIAL

ROBERT P. BURNS\*

## INTRODUCTION

In a series of articles and in a book,<sup>1</sup> Professor Dan Simon has brought together the criticisms of the American criminal justice system and the trial, in particular wrought largely by experimental psychologists over some decades. In this, he has performed a service, for it offers us the opportunity to assess the significance of this work, both its promise and its limitations. As the title of the book suggests, the thrust of the work is largely negative, focusing on all the ways the criminal justice system and the trial go wrong and fail in “diagnosticity.” The initial plausibility rests largely on the recent spate of exonerations, often due to the availability of DNA evidence of those convicted after trial. My attempt here is to offer a series of distinctions that relativizes, but also appreciates, this critique so that we can undertake the urgent business of reform in a more informed way. A guiding principle informs this essay: showing that our cognitive abilities have limitations does not tell us what institutional arrangements should be embraced to address those issues.

The language within which the critique goes forward, is often quite alien to an American trial lawyer or legal scholar. And the translation that would be necessary to be utterly fair to both “sides” here would require an account of both the *explanatory* structure of these experiments and a *normative* epistemological account of reliable thought at trial.<sup>2</sup> This kind of translation is difficult because the work is not only negative, it is generally polemical, treating the generally posi-

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1. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012) [hereinafter SIMON, *IN DOUBT*].

2. These recall the philosophical debates surrounding “psychologism” and discontinuity of psychology and logic argued in the early part of the last century. See, e.g., Herman Philipse, *Transcendental Idealism*, in *THE CAMBRIDGE COMPANION TO HUSSERL* 260–61 (Barry Smith & David Woodruff Smith eds., 1995).

tive assessment of the trial as a kind of “nationalist” pathology, itself requiring psychological *explanation*. And the language of the argument is specific to a particular disciplinary matrix: “The prevailing sentiment within the American polity and legal profession is that the trial is indeed *acutely diagnostic*.”<sup>3</sup> “Human memory is a *powerful cognitive apparatus*, though it can be fickle and is vulnerable to error and contamination.”<sup>4</sup> A valid argument is one that is not “counternormative[.]”<sup>5</sup> A theory of the case is a “coherent mental model of the case at hand.” Our assessment of the evidence “is, to some degree, an artifact of the cognitive system.”<sup>6</sup> The task is to exploit “a wealth of knowledge about the mental processing that is inevitably implicated in the workings of the process.”<sup>7</sup> Participants “turn the wheels of the system through their mental operations.”<sup>8</sup> And much of the material is reported in quantitative terms: “People have been found to report ninety percent confidence when they are only sixty percent accurate, and report as many as twenty-five percent of inaccurate memories with maximal confidence.”<sup>9</sup>

It turns out that this critique addresses very different issues: our cognitive abilities in general, the criminal pre-trial process, and the adversary trial itself. I have little argument with regard to the first two topics. Very broadly, however, I will argue that the experimenters’ conclusions about the dangers of the trial’s features—its face-to-face character, its narrative structure, and the importance of the theory of the case—have to be placed within the context of the very positive functions, of very different sorts, that they serve. Once we do that, we can reach a fairer assessment of the significance<sup>10</sup> of this work. It should also be said that most social scientific investigators have rendered generally positive judgments on the trial. Indeed, it is explicitly part of Simon’s task to counterbalance this assessment.<sup>11</sup>

3. Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 144 (2011) [hereinafter Simon, *Limited Diagnosticity*].

4. *Id.* at 161.

5. *Id.* at 187.

6. *Id.* at 195–96.

7. SIMON, IN DOUBT, *supra* note 1, at 2.

8. Simon, *Limited Diagnosticity*, *supra* note 3, at 145.

9. *Id.* at 165.

10. I am addressing its significance here for the criminal trial, not its potentially broader significance for our understanding of human cognitive capacities in other contexts, a more universal aim to which some of the psychological experimenters aspire. See Jonathan Koehler & John B. Meixner, *Jury Simulation Goals*, in *THE PSYCHOLOGY OF JURIES: CURRENT KNOWLEDGE AND A RESEARCH AGENDA FOR THE FUTURE* (Margaret Bull Kovera ed., forthcoming).

11. See Simon, *Limited Diagnosticity*, *supra* note 3, at 210.

## I. THE POLITICAL CONSEQUENCES OF A NEGATIVE ASSESSMENT OF THE TRIAL

Some investigators are engaged in the purely theoretical study of our “cognitional apparatus” and find the trial to be solely one context within which some general correlations can be reached.<sup>12</sup> But, it turns out that this enterprise is of more than theoretical interest. The criminal trial that Simon criticizes so roundly has been steadily disappearing from the American scene.<sup>13</sup> Fewer than one in twenty federal criminal prosecutions go to trial and the percentage of state criminal cases that go to trial is similar.<sup>14</sup> A natural response to Simon’s arguments would be to conclude that little has been lost in this process, that the “pseudodiagnostic”<sup>15</sup> jury trial is best left to disappear into history, perhaps replaced in the few cases that plea bargaining fails to resolve by some form of summary judgment-like determination “on the papers”<sup>16</sup> or a non-adversary inquisitorial inquiry.<sup>17</sup>

A purely negative appraisal of the trial would, for example, make it less likely that we would credit William Stuntz’s argument<sup>18</sup> that revitalizing the jury trial is the central element of the kind of democratization of an increasingly bureaucratic criminal justice system that offers the most hope to correct a dysfunctional set of practices. It would tend to cast doubt upon Albert Dzur’s argument<sup>19</sup> that the jury trial is the best antidote to the kind of “punitive populism” that has crept into

12. Koehler & Meixner, *supra* note 10.

13. See ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009) [hereinafter BURNS, *DEATH OF THE AMERICAN TRIAL*]; GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003). Simon’s critique encompasses both the criminal trial and the crucial pretrial processes that shape and often distort the trial. I overwhelmingly agree with his criticism of those pretrial processes. But it turns out that a concrete understanding of our criminal justice system, which is characterized in the vast majority of cases by police interrogation followed by plea bargaining, cannot be fairly characterized as a “ritualized and highly proceduralized adjudicative process with the trial at its core.” Simon, *Limited Diagnosticity*, *supra* note 3, at 144; see ROBERT P. BURNS, *KAFKA’S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE* (2014) (The trial itself is an increasingly marginal feature of the process).

14. BURNS, *DEATH OF THE AMERICAN TRIAL*, *supra* note 13, at 82–86.

15. SIMON, *IN DOUBT*, *supra* note 1, at 203.

16. We are told that determinations made on a purely written record are at least as “diagnostic” as the results of face-to-face hearings.

17. Simon generally seems sympathetic to inquisitorial methods, or at least critical of our nativist refusal to appreciate their appeal. SIMON, *IN DOUBT*, *supra* note 1, at 213.

18. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

19. ALBERT W. DZUR, *PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY* (2012). Dzur, who is a political scientist, concludes that “European” models of criminal justice that rely on expertise and the trust of authority are simply unavailable in American political culture. It may be that Professor Simon has less background skepticism of expertise and authority than that which characterizes American political culture.

American institutions, perhaps the only one practically available in our relatively anti-statist political culture.<sup>20</sup> Stuntz and Dzur's arguments are *political* arguments and, with Alexis de Tocqueville, who told us, "He who punishes the criminal is the real master of society,"<sup>21</sup> they understand the jury trial as a largely political institution. They are consistent with Thomas Greene's conclusion<sup>22</sup> that the face-to-face nature of the common law jury trial preserved the notion that the trial was *somehow* about justice. And, at a higher level of abstraction, they are consistent with philosophical accounts that place the very foundations of the moral world in face-to-face encounters.<sup>23</sup> Some part, though only a part, of the relativizing of the experimenters' conclusions is to show that the positive function of the trial as a political institution is one that requires practices that may be in tension with a vision of the trial as a laboratory for determining "brutally elementary fact."<sup>24</sup> There are indeed threats to justice from factual inaccuracy at trial. Bentham was quite right: falsehood is the handmaiden of injustice.<sup>25</sup> But there are also threats to justice that come from the judicial deployment of state power imposed bureaucratically. There are threats to justice that come from failing to deploy all the resources our common sense morality contains to fairly ("accurately?") interpret and evaluate a human act. The dramatic face-to-face jury trial, largely composed of the enactment of the construction and deconstruction of narratives, is an important forum for the deflection of centralized state power and for empowering ordinary moral judgment. Indeed, Stuntz has argued persuasively that much of the current awfulness of the American criminal justice system stems from our raising the level of altitude and generality at which crucial decisions about liability and sentencing are made.<sup>26</sup>

20. There is always a question, especially when one comes to the most promising remedies, of how much of American political culture should be taken for granted, especially given the low likelihood of large scale cultural change.

21. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293 (Henry Reeve trans., Vintage Books 1945).

22. THOMAS ANDREW GREENE, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* (1985).

23. See DESMOND MANDERSON, *PROXIMITY, LEVINAS, AND THE SOUL OF LAW* 177-80 (2006).

24. HANNAH ARENDT, *Truth and Politics*, in *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 227, 260-64 (1954) [hereinafter ARENDT, *Truth*].

25. JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 209 (1827).

26. STUNTZ, *supra* note 18, at 308-09.

## II. THE TRIAL AS THE FORUM FOR INTERPRETING THE MEANING OF EVENTS AND BRINGING POLITICAL JUDGMENT TO BEAR

The importance of the political function of the jury trial may be masked by limiting the inquiry to questions of perceptible fact, what Hannah Arendt called “brutally elementary fact.”<sup>27</sup> These are facts, as Professor Simon tells us that are “in principle” determinable by other means: DNA testing or the viewing of a videotape of the event at issue.<sup>28</sup> Some criminal trials, often involving the identity of the defendant, do turn on this kind of fact. Professor D. Michael Risinger has long and eloquently argued for the importance of this subset of cases.<sup>29</sup> But many criminal trials address other sorts of issues, issues that may be called interpretive or evaluative. This can occur well before we “get to” the ultimate legal categorization that, in the received view of the trial, creates the verdict.<sup>30</sup> These issues of interpretation may, with only some distortion, be called “intermediate” between issues of perceptual fact and the ultimate legal categorization that, in the received view of the trial, creates the verdict. The trial’s methods must facilitate, or even elevate, those kinds of judgments as well as judgments of perceptual fact. Was a physical movement threatening in a way that could justify an assault verdict? Was a leading question an “accusation” of criminality that could justify a defamation judgment? Were the words and gestures of the alleged victim consent to sexual relations?

27. The following discussion focuses almost exclusively on determinations of facts that are, at least in principle, discernable—namely the identity of the perpetrator and the physical acts and circumstances of the criminal event. This Article has little to say about value judgments that factfinders are called to make, such as the reasonableness of an act, the morality of behavior, or the fairness of the law.

Simon, *Limited Diagnosticity*, *supra* note 3, at 148. As argued above, this omits a whole set of intermediate interpretive judgments that address the meaning of “physical acts and circumstances.” The inquiry also abstracts from “deliberate dishonest conduct” of state officials. Given the level of that conduct, this is another significant step away from the concreteness of the circumstances of the trial. The apparent unavoidability of this kind of misconduct makes it harder to assimilate the circumstances that surround the trial to those that prevail in an idealized laboratory.

28. There are important philosophical questions surrounding the question of whether purely perceptual judgments are “more fundamental” than are more interpretive and evaluative judgments. My view is that generally they are not, although the law of evidence seeks to push testimony in the direction of “the language of perception” for good practical reasons. See HANNA PITKIN, WITGENSTEIN AND JUSTICE (1972).

29. See D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1298–1301 (2004); see also D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Talking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869 (2011–2012).

30. ROBERT P. BURNS, A THEORY OF THE TRIAL 10–26 (1999).

In actual trials, issues of brutally elementary fact will likely accompany these interpretive questions: how exactly did the defendant move, what words precisely did the defendant in the defamation action speak, or what exactly did the alleged victim say? As I argue below, the lines of inference on these matters inevitably run in both directions. In many cases, questions of brutally elementary fact may be influenced by the plausibility of the interpretive theories within which they find their place. And so we need a proceeding that can resolve both kinds of issues “together.” Furthermore, the jury cannot but take into account the *moral* significance of the inevitable risk of error in a criminal case, even if the central issue is identity, and the trial’s methods must accommodate that kind of judgment (a formula like “beyond a reasonable doubt” does not itself resolve this question). And often the question of the identity of the perpetrator will depend on assessments of motive that can only take place through highly contextual circumstantial judgments about the relative plausibility of competing narratives. Finally, all of this occurs even in cases where the jury does not give content to a broadly normative term like “a reasonable man” or “due care” or fulfill an overtly political function like punishing police misconduct or rejecting an unjust law.<sup>31</sup>

Simon and Risinger are surely right in arguing that the question of the brutally elementary fact of the identity of the perpetrator of a crime has enormous importance.<sup>32</sup> It offends our basic notions of justice to claim that it may be “necessary for one man to die for the country,” that is, for us to privilege what might be called political expediency over individual justice in the particular case. That it is politically and even morally right that a heinous crime not go unpunished does not justify the punishment of an individual who did not commit the crime. This is the deep intuition that leads Risinger to want to separate guilt from “guiltiness” and to explore whether different methods might be appropriate for those different issues.<sup>33</sup> We expect that the grand jury, judges in preliminary hearings, and trial judges in considering defense motions for directed verdicts, would have this issue of brutally elementary fact near the center of their focus, and will, in the latter case, insist that there be evidence from which a jury can conclude beyond a reasonable doubt that the defendant is the perpetrator, regardless of the more general moral and political significance of the

31. On the levels of determinations at trial, see *id.* at 183–219.

32. See Risinger, *supra* note 29; see also Risinger & Risinger, *supra* note 29.

33. *Id.*

case. But beyond this threshold, in the final determination of guilt or innocence, the “really debatable” or “triable” considerations of meaning<sup>34</sup> and evaluation that the trial devices enable, must inevitably be intertwined even with the issue of the identity of the perpetrator.

In our academic culture, which is pervaded by the authority of scientific method, interpretive and evaluative issues may be thought more ephemeral, even unreal. Indeed, an important strand of twentieth century philosophy called emotivism,<sup>35</sup> once dominant in some American philosophy departments, explicitly taught that all evaluative judgments were without cognitive weight. And philosophical positivism had its effects in any number of social scientific fields, including psychology. We can still hear its echo in the notion that only those propositions that were “in principle”<sup>36</sup> verifiable (or perhaps falsifiable) were meaningful. For a theorist formed by emotivism or positivism or other forms of scientism, the temptation is great to think that these interpretive and evaluative aspects of the trial are less important, because they are literally about nothing. I have argued<sup>37</sup> that the methods of the trial *are* the methods best adapted to allow triers of fact to properly interpret and evaluate the human actions that are always the topics of criminal trials. The absence of *another* method by which to test the interpretive and evaluative conclusions of the trial may invite skepticism, but that skepticism is occasioned by implicit philosophical commitments rather than the nature of issues. Would it be so absolutely astounding that we would devise the best politically feasible proceeding for performing the interpretive and evaluative tasks the trial must resolve?

### III. IS THERE AN INHERENT TENSION BETWEEN THE POLITICAL FUNCTION OF THE TRIAL AND ITS COMMITMENT TO ACCURACY?

The question this raises is whether there is some deep tension between the practical, and in particular, the political, nature of the jury trial and the importance of accuracy. Such a tension might suggest pluralism in methods of evaluating the jury trial, some employing more self-consciously normative methods and some more focused on factual

34. Bruner explains that the scientific paradigm is especially weak in the determination of meaning. JEROME BRUNER, *ACTS OF MEANING* 2–11 (1990).

35. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 23–35 (2d ed. 1984).

36. Simon limits his inquiry to those issues that are “in principle” verifiable. Simon, *Limited Diagnosticity*, *supra* note 3, at 148.

37. BURNS, *supra* note 30, at 235–38.



“diagnosticity.”<sup>38</sup> More importantly, assuming that interpretive and evaluative issues are not about nothing, it raises questions on the level of institutional design about features that might enhance one at the expense of the other.<sup>39</sup> Simon approvingly quotes Hannah Arendt that truth is “the ground on which we stand and the sky that stretches above us.”<sup>40</sup> And it is true that she celebrated what she took to be the obsessive concern of the criminal trial with simple factual truth: “the grandeur of court procedure that . . . is concerned with meting out justice to an individual, and remains unconcerned about everything else—the *Zeitgeist* or opinions that the defendant shares with others.”<sup>41</sup> She also described a deep tension between virtues of the political dimension of our experience, concerned with action and inevitably dependent on opinion, and the virtues of the scientist and the philosopher, whose concern is with truth.<sup>42</sup> But it is also true that her own experience as a juror in an American jury trial led her to celebrate its function as an overtly political forum:

We have the last remnant of active citizen participation in the republic in the juries. I was a juror—with great delight and with real enthusiasm. Here again, all these questions are somehow *really* debatable. The jury was extremely responsible, but also aware that there are *different viewpoints*, from the two sides of the court trial, from which you could look at the issue. This seems to me quite clearly a matter of *common public interests*.<sup>43</sup>

And she emerged from the experience convinced that the kinds of issues that go to trial “*really belong*’ in a public realm” and that the jury provides one “of the very places where a non-spurious public still exists.”<sup>44</sup> So, put most broadly, is the political nature of the American jury in tension with what Simon rightly sees as the centrality of accuracy to the “solemn nature”<sup>45</sup> of the criminal trial? That is a question that cannot be answered in the abstract, and we will see how it plays out in the particular arguments Simon offers and the recommendations for reform that he makes.

38. Simon, *Limited Diagnosticity*, *supra* note 3, at 144.

39. Professor D. Michael Risinger has mused about this question. See Risinger, *supra* note 29; see also Risinger & Risinger, *supra* note 29.

40. Simon, *Limited Diagnosticity*, *supra* note 3, at 315 (quoting HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 259 (1977)).

41. HANNAH ARENDT, *Civil Disobedience*, in *CRISES OF THE REPUBLIC* 99 (1972).

42. Arendt, *Truth*, *supra* note 24 at 227, 260–64.

43. HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 317 (Melvyn A. Hill ed., 1979) (emphasis in original).

44. *Id.* at 318 (emphasis in original).

45. SIMON, IN DOUBT, *supra* note 1, at 3.

So the need to resolve both kinds of issues in one proceeding means that some elements of the trial may pose some threat to the appropriate resolution of one kind of issue in order to enhance the consideration of another. American trials are consciously hybrid institutions. Lawyers are permitted to tell largely unconstrained<sup>46</sup> stories in opening statements because narrative is the medium through which we must understand human action.<sup>47</sup> And, because of the constitutional role we want the criminal jury to play, which involves *evaluating* the written law,<sup>48</sup> we want the jury to have access to all the normative resources that the common sense of the jury offers to fulfill this political task. Many of those resources are embedded in responses to different forms of narrative and dramatic encounter. As Alasdair MacIntyre put it, any attempt to get down “below” narrative is simply providing the fragments of some incomplete narrative.<sup>49</sup> And Hanna Pitkin teaches us that the less fully characterized accounts of “brutally elementary fact” are not “truer” or “realer” than the ones that employ a broader range of interpretive and evaluative terms.<sup>50</sup> To think so is to adopt an uncritical empiricism.<sup>51</sup> These narratives are, in fact, designed to evoke an emotional response, because that response is, as Martha Nussbaum has shown, part of the “truest” response to many human events.<sup>52</sup> As Milner Ball put it, the importance of many of the trial’s interpretive, moral, and political features is lost when:

[T]he courtroom is thought of as a laboratory or a research library, with the mistaken consequence that the methods employed in the courtroom are urged to approximate the ‘methods of physicians or

46. There are some constraints, such as the rule forbidding allusion to matters about which there will be no admissible evidence. See MODEL RULES OF PROF’L CONDUCT R. 3.4.

47. BURNS, *supra* note 30, at 221–27.

48. See AKIL AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000).

49. MACINTYRE, *supra* note 35, at 212–13.

50. See PITKIN, *supra* note 28, at 167, 225–26.

51. See *id.*

52.

Emotions can sometimes mislead and distort judgment; Aristotle is aware of this. But they can also . . . give us access to a truer and deeper level of ourselves, to values and commitments that have been concealed by defensive ambition or rationalization.

But even this is, so far, too Platonic a line to take: for it suggests that emotion is valuable only as an instrumental means to a purely intellectual state. We know, however, that for Aristotle appropriate responses . . . can, like good intellectual responses, help to constitute the refined “perception” which is the best sort of human judgment.

MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 390 (1986). Simon is grudging: “Given the ubiquity and inextricability of emotion in everyday judgments, it would be impractical and inadvisable to try to rid the decision making of all emotion.” SIMON, IN DOUBT, *supra* note 1, at 172.

geologists' rather than those of playwrights, actors, and directors, and may be described as the making of metaphor.<sup>53</sup>

On the other hand, trials can be positively obsessive about the detail and particularity of individual fact. This obsession with detail in the course of the evidentiary phase of the trial serves to disrupt the emotional force of the more coherent and dramatic narratives that constitute opening statements. That the emotional or dramatic qualities of opening statement may mislead in a particular case, and that they have misled in cases in the past, would not itself tell us whether they should be retained or eliminated, or, as I suggest, counterbalanced by other aspects of the trial. The trial as we have it is not perfect, but it is responsive to a very broad range of competing values *all* of which have to be kept in view when evaluating it or proposing alternatives. Of course we may become complacent, but it remains true that the conservative's real insight is how much effort it takes to keep things from getting worse.

Then there are even more basic, and perhaps subtle, differences in the correct perspective to take on the trial itself. Most broadly, the trial is a human conversation among the adversaries, the judge, and the jury. Witnesses bear witness. The parties are moral agents responsible for their action. No part of the evidential base consists of "raw data" ripe for scientific manipulation by a state actor in the interest of verifying or falsifying hypotheses about matters of fact. Nor could it be. Nor should it be. Our understanding is embedded most obviously in the privilege against self-incrimination, which was thought to protect a defendant from treatment—even adverse examination in a relatively safe public environment—that was inconsistent with respecting the right of the defendant to speak or remain silent, to control his own public self-presentation. It shows up again in an element of the trial that a scientist may view to be purely negative: our preference for allowing witnesses to prepare their testimony with the help of counsel so they can determine in a considered way what they *choose* to say and what position they are taking responsibility for. As a purely empirical matter, the unreconstructed "raw" first account a witness gives may or may not be more reliable than an account that has been "reconstructed."<sup>54</sup> It is true that the same<sup>55</sup> devices of pretrial preparation that al-

53. MILNER BALL, *THE PROMISE OF AMERICAN LAW* 49 (1981).

54. Simon concedes that the first untutored response of a suspect claiming an alibi defense is likely to be less reliable than a more considered answer. See Simon, *Limited Diagnosticity*, *supra* note 3, at 171.

55. Robert P. Burns, *Professional Responsibility in the Trial Court*, 44 S. TEX. L. REV. 81 (2002).

low for a fuller, detailed and more coherent reconstruction of events—an account truer to the events themselves—allow for the sheer construction of events in the interests of the witness. Currently, we try to constrain the latter through overtly ethical prohibitions on the lawyer not to assist in the presentation of testimony he knows to be false and by criminal penalties against suborning perjury and perjury itself<sup>56</sup> (this scheme of disincentives, of course, leaves the lawyer and the client free to violate the law). Immediate emotions and the general incomprehension of the witness of his situation that lead to an unrehearsed, but also unconsidered, statement, can produce misleading evidence. But so can his self-interest leading to a calculated one. Which will have the greater negative effect will vary from case to case, but the benefit of counsel and the right to “take a position” at trial rest on other grounds. The kind of “defendant speaks” trial described by John Langbein,<sup>57</sup> in which an aristocratic judge was allowed to browbeat a defendant newly dragged from some awful prison into “spontaneous” answers to his questions, gives rise to questions about the accuracy of what the defendant said, however “raw” the data, but, to a greater extent offends our political-moral sense of how human beings should be treated.<sup>58</sup>

Consider a thought experiment. Simon suggests that all of the interviews by the police with all witnesses be videotaped from start to finish.<sup>59</sup> I agree with this proposal, one that is beginning to gain traction around the country. But what about videotaping every interview that each defense lawyer has with his client,<sup>60</sup> from the very first?<sup>61</sup> Surely, this would promote the kind of “diagnosticity,” Simon recommends for the reasons that he offers: that it allows the jury to see the development of the testimony as it emerged throughout the investiga-

56. MODEL RULES OF PROF'L CONDUCT R. 3.4(b).

57. See JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 48–61 (2003).

58. See JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 225 (2008), for Simon Weil's description of such an encounter:

[T]hose who most often have occasion to feel that evil is being done to them are those who are least trained in the art of speech. Nothing, for example, is more frightful than to see some poor wretch in the police court stammering before a magistrate who keeps up an elegant flow of witticisms.

We must be careful not to identify with the browbeating judge. That can come from the same primitive self-protective instinct that tempts us to identify with the schoolyard bully.

59. Simon, *Limited Diagnosticity*, *supra* note 3, at 217.

60. You could ask about the interviews that defense lawyers have with non-client witnesses. This raises other interesting questions as well.

61. Of course, this would violate the current ethical obligations of the lawyer and the current provisions of the attorney-client evidentiary privilege.

tion.<sup>62</sup> But would we want to do this? I think not, because, regardless of any increase in “diagnosticity,” it would intrude on a relationship that protects the client’s ability to function autonomously in the public world, to decide what it is he wants to say to the jury in a considered way, so his fellow-citizens can hear him out and pass judgment.

#### IV. THE VERY DIFFERENT SOURCES OF ERROR AND THE VERY DIFFERENT PRESCRIPTIONS FOR REMEDY

##### *A. What Empirical Studies Tell Us about What We Do at Trial: Methodological Issues*

There are *different* sorts of distorting influences on the criminal justice system. The first group of concerns surrounds limitations of our cognitive capacities in the sorts of contexts that arise regularly within trials, usually as studied in “laboratory” contexts more or less removed from the concreteness of the trial.<sup>63</sup> Many of the devices of the trial have been thought to minimize the negative effects of precisely these limitations, though “the law’s psychological sensibilities are often limited and inaccurate, and are frozen at the pre-experimental state of knowledge that prevailed at the time these common law rules were forged.”<sup>64</sup> Simon accepts the rather limited proposition that the legal system is not “entirely insensitive to the psychological aspects involved in the production of criminal verdicts.”<sup>65</sup> It is true, as he recognizes, that the psychological experiments giving rise to the most skeptical conclusions about the jury’s abilities at trial often occur in forms remote from the full context of the criminal trial. For example, experiments concerning the ability of an audience to determine whether a speaker is lying can employ short written statements as the “prompts” or ten-minute oral presentations given to college students, with no opportunity for cross-examination or argument or the presentation of contradictory evidence.<sup>66</sup> Many of the experiments indicating that we are “barely better than flipping a coin”<sup>67</sup> in determining the

62. See Simon, *Limited Diagnosticity*, *supra* note 3, at 217.

63. *Id.* at 148 n.14 & 149 n.15.

64. He thus quite rightly points out that many of these devices have not been shown with scientific rigor to achieve their purposes. I suggest below that evidentiary exclusionary rules, upon which he is inclined to rely, are among the devices about which the most skepticism on these grounds is warranted.

65. Simon, *Limited Diagnosticity*, *supra* note 3, at 149.

66. For a fair discussion of the relative strengths and weaknesses of the experimental study of the trial, see NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW* 58–62 (1995).

67. SIMON, *IN DOUBT*, *supra* note 1, at 166.

deceit of a storyteller are of this sort. Professor Jay Kohler has recently argued that different psychological investigators may be focused either on unearthing the general laws that govern general human cognition, or on the particular capabilities of juries, or on offering policy suggestions for the reformation of the process.<sup>68</sup> He argues empirical investigators, who want their results to be considered in the assessment of actual juries or in the policy debates, should pay more attention to creating simulations that parallel the conditions that prevail at trial, what he calls “ecological.”<sup>69</sup> Professor Norman Finkel has shown that there will *always* be a gap between any (ethically justifiable) simulated experiment and full concreteness of decision by a judge or jury who understands real consequences flow from his or her determinations.<sup>70</sup> That does not mean we cannot learn from “ecologically” sophisticated experiments, but it does counsel humility and caution, especially when one gets to prescriptions for reform:

Jury study research is of quite different sorts, including survey research on actual juries, participant-observer ethnological studies of trials or trial transcripts, and simulated jury studies conducted under a large range of conditions more or less abridged from those that prevail in actual trials and with greater or lesser degrees of rigor. As the more sophisticated investigators are themselves aware, each form of study has its own marked limitations. Questionnaires are limited by the self-selection and perceptions of those who choose to respond; ethnomethodological studies have been criticized for failing to produce falsifiable or reliably general hypotheses; and the more “rigorous” simulated studies often take place under “laboratory” conditions so far removed from those of actual trials that, to use considerable understatement, “literal extrapolation” to actual trials “would be imprudent.”<sup>71</sup>

Investigators rarely identify truly universal psychological laws that operate in an invariant manner in all circumstances or where the variations from context to context can be rigorously specified. This limits the concrete policy guidance that their conclusions can offer. For example, because there is some experimental evidence that demeanor is (slightly) negatively correlated with the accurate determination of credibility, can we draw concrete conclusions such as “appellate judges should be more aggressive in reversing jury verdicts”? Often too, any such generalization is likely to be “wrong” (that is, to suggest an infer-

68. Jonathan Koehler & John B. Meixner, *Jury Simulation Goals*, in *THE PSYCHOLOGY OF JURIES: CURRENT KNOWLEDGE AND A RESEARCH AGENDA FOR THE FUTURE* *supra* note 10.

69. *Id.*

70. FINKEL, *supra* note 66.

71. BURNS, *supra* note 30, at 141–42 (citations omitted).

ence inconsistent with the facts as they have actually occurred in a particular case) as often as is the evidence it is offered to exclude. That is largely a feature of social scientific explanation:

[W]hat will be the characteristics of the best possible available stock of generalizations about social life? It seems probable that they will have three important characteristics. They will be based on a good deal of research, but their inductively-founded character will appear in their failure to approach law-likeness. No matter how well-framed they are, the best of them may have to coexist with counter-examples, since the constant creation of counter-examples is a feature of human life. And we shall never be able to say of the best of them precisely what their scope is. It follows, of course, that they will not entail well-defined sets of counterfactual conditionals. They will be prefaced not be universal quantifiers but by some such phrase as "Characteristically and for the most part" . . . . We should not be surprised or disappointed that the generalizations and maxims of the best social science share certain characteristics of their predecessors—the proverbs of folk societies, the generalizations of jurists, the maxims of Machiavelli.<sup>72</sup>

The attempt to extrapolate from highly simplified experiments parallels the "logistical"<sup>73</sup> methods of classical physics, where the goal was to isolate the atomistic elements from which deductive methods could yield all of the conclusions the investigator sought and where simplified experiments have proven enormously fruitful. As distinguished social psychologist Jerome Bruner put it, however, social inquiry need not be driven by the logistic ideals of "reductionism, causal explanation, and prediction," which "need not be treated like the Trinity" so that "plausible interpretations [are] preferable to causal explanations, particularly when the achievement of a causal explanation forces us to artificialize what we are studying to a point almost beyond recognition as representative of human life."<sup>74</sup> As Harry Kalven Jr. and Hans Zeisel pointed out fifty years ago, comprehensive causal explanations of the judgments of *actual* juries are all but impossible:

[T]he social scientific student of actual juries that attempts to explain behavior by isolating causal factors (the method of "cross-tabulations") quickly runs aground on the need for enormously large samples. This failure is "flattering to the law" in that "[t]he variety of circumstances that affect the verdicts in criminal cases turn out, as a trial lawyer would suspect, to be so great as to hobble the use of cross-tabulation." The significance of this failure is important. It

72. MACINTYRE, *supra* note 35, at 104–05.

73. WALTER WATSON, *THE ARCHITECTONICS OF MEANING: FOUNDATIONS OF THE NEW PLURALISM* (1993).

74. BRUNER, *supra* note 34, at xiii.

means that sensitive empirical investigators observe such a large number of *potentially determinative factors* that it becomes literally impossible for them to isolate individual independent variables using the usual social scientific methods. . . . It shows that the more rigorous social scientific methods necessarily have a limited, though important, role in contributing to understanding the trial. Rather, the vastness of possible factual inferences, the range and variety of the kinds of “inputs” produced by the trial, *and* the complexity, subtlety, pervasiveness, and tacit nature of the normative judgments that constitute jurors’ life worlds create normative shoals on which any exhaustive empirical investigation will founder. This is a major methodological consideration that drives empirical investigators to create the controllable abstractness of laboratory conditions, increasingly unlike those that prevail in real trials.<sup>75</sup>

We are committed on normative grounds to attaching legal consequences to the results of an enterprise, the accurate reconstruction, proper interpretation, and fair evaluation of something that does not currently exist: an event in the past. We should be astounded that we can even begin to redeploy capacities that have evolved largely to solve practical problems in the present to this task. We should recognize then, to a degree, that is not politically acceptable in the United States today and that the criminal justice system’s basic commitment to punishing criminals comes at a price. It is an inconvenient truth that, for one reason or another, a crime that richly deserves punishment does not produce the evidence that will allow us reliably to reconstruct the identity and the mental state of the perpetrator to the level of certainty that justifies imposing punishment on a particular person. This is only partially the result of our cognitive limitations and institutional arrangements. These are precisely the kinds of cases where police and prosecutors can be tempted to construct evidence and which lead to false convictions. But a mature political culture will have to accept that some serious crimes will simply go unsolved. This has not been viewed as a tolerable situation at many times and places.

The systematic effort to cast doubt on ordinary cognitive capacities and of the methods we actually employ at trial have to be placed within a positive normative account of what occurs at trial. Indeed, the criticism is dependent upon a positive account of what and how our cognitive competency and the devices of trial actually accomplish. To invoke a distinction important in the philosophy of science,<sup>76</sup> we need

75. BURNS, *supra* note 30, at 145–46 (internal citations omitted).

76. RICHARD BERSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS* 61–66 (1983).



a rational reconstruction of the nature of the validity of the practice, before we can decide what adjustments need to be made to achieve those purposes. The danger of purely skeptical analysis alone is an implicit inference that, in fairness, Simon does not explicitly suggest, that the science of psychology could affirmatively show the way to the comprehensive reconstruction of the trial. The implicit ideal of knowledge in experimental psychology is and always will be inapposite. It may certainly suggest incremental improvements, but is always in danger of basically misconceiving the nature of an enterprise that proceeds through quite different methods and with different normative commitments.

There are issues that divide responsible empirical investigators which are often relative to philosophical judgments about appropriate methodology in knowing social reality and the kind of truth it seeks to establish. One perspective, the one the psychologists often take, can be called “objective”—the goal is to locate the objective truth about our “cognitive apparatus”<sup>77</sup> and its functioning.<sup>78</sup> There are, however, three other perspectives. One has been called revelatory or “diaphanous.” There, the task of the author is not to know the world of objects, but to reveal something that stands above or beyond the text or text-like practice.<sup>79</sup> The narratives of the trial have been thought to achieve that “revelation”:

No philosophy, no analysis, no aphorism, be it ever so profound, can compete in intensity and richness of meaning with a properly narrated story.” A well-told story can sometimes achieve “a transparent display of the inner truth of the event,” which other devices cannot approach. “There are things that cannot be put into words. They *make themselves manifest*.” Good storytelling, then, can unveil “epiphanies of the ordinary,” can “reveal meaning without committing the error of defining it” and bring about “consent and conciliation with things as they are . . . .”<sup>80</sup>

Or, as David Luban put it, “We narrate stories in order to manifest whatever unsayable meaning resides in them.”<sup>81</sup>

Simon’s heart is with science. He appreciates its rigor and its ability to upset self-indulgent accepted wisdom.<sup>82</sup> He has an affection for

77. Simon, *Limited Diagnosticity*, *supra* note 3, at 161.

78. Koehler & Meixner, *supra* note 10.

79. WATSON, *supra* note 73, at 28.

80. BURNS, *supra* note 30, at 160 (quoting HANNAH ARENDT, *MEN IN DARK TIMES* 22 (1955); LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 73 (D.F. Pears & B. F. McGuiness trans., 1961)) (internal citations omitted).

81. DAVID LUBAN, *LEGAL MODERNISM* 201 (1997).

quantification and the known probabilities that a certain kind of evidence may be misconstrued.<sup>83</sup> One can hear Kant's admonition that in any natural science "there can only be so much proper knowledge therein as there is mathematics . . .,"<sup>84</sup> even if here the quantification can only yield probabilities derived usually from laboratory conditions. Unsurprisingly the ideal of knowledge *of the trial* (the most fruitful method of studying the trial) and the implicit ideal *for the trial* (the ideal that the trier of fact should at least approximate in trial decision-making) tend to converge. One should attempt to analyze complex phenomena into simple units and then recombine them using deductive or statistical material. This "logistic" method has led to great successes in the natural sciences and Descartes's articulation of that method is simply a celebration of modern science:

By method, then, I understand certain and simple rules, such that if a man follows them exactly, he will never suppose anything false to be true . . . . All method consists in the order and disposition of those things toward which our mental vision must be directed if we are to discover any truth. And we follow this method exactly if we reduce involved and obscure propositions step by step to simpler ones, and then attempt to ascend by the same steps from the intuition of all those that are entirely simple to the cognition of all the others.<sup>85</sup>

So, the experimentalists attempt to create laboratory conditions to isolate particular cognitive operations, such as evaluating eyewitness testimony, and then recombine them to provide a "truthful" picture of what happens at trial. Just as there are different conceptions of truth, there are, however, other methods. There are "agonistic" (adversary) or "two-voiced" methods that illuminate a subject matter, multiply perspectives on it, and put them in contention with one another: "Agonistic methods have enjoyed great success in all that concerns man."<sup>86</sup> This style of knowing is what Stuart Hampshire meant when he wrote that "justice is conflict."<sup>87</sup> And there are dialectical methods, which go beyond the conflicting perspectives to an implicit or explicit resolution of the opposition, where:

82. Simon, *Limited Diagnosticity*, *supra* note 3, at 144–45.

83. See, e.g., *id.* at 152–53.

84. See IMMANUEL KANT, *METAPHYSICAL FOUNDATIONS OF NATURAL SCIENCE* (James Ellington trans., Bobbs-Merrill Co. 1970) (1786).

85. RENE DESCARTES, *RULES FOR THE DIRECTION OF THE MIND* (1684), *reprinted in FROM DESCARTES TO KANT: READINGS IN THE PHILOSOPHY OF THE RENAISSANCE AND ENLIGHTENMENT* 64, 68 (James Ellington trans., 1940); see also WATSON, *supra* note 73, at 79 (quoting the same).

86. WATSON, *supra* note 73, at 77.

87. STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000).

one loses or transcends his position in interaction with the other . . . . Dialectic is also opposed to logistic, for logistic begins from what is fixed and definite and pursues the consequences of this, whereas dialectic proceeds in the opposite direction toward that of which the fixed and definite is itself a consequence.<sup>88</sup>

The movement at trial from ambiguous evidence, where “every fact has two faces,” through the opposition of perspectives to a final resolution of a verdict is an instance of dialectic. In short, there are different understandings of the truths our methods achieve and different understandings of the methods best suited to achieve them.

My focus is not, however, on the limitations of the experimental method of studying complex human institutions and practices. I wrote many years ago and still believe that “[l]eaving this work out of account . . . would be foolish, especially where there appears to be a convergence of findings, and especially where investigators using different methods seem to reach analogous conclusions.”<sup>89</sup> That there are limitations of human cognitive capabilities that we must try systematically to address through artifices of one kind or another is well established.<sup>90</sup> Indeed the trial’s devices are attempts to address those limitations, and if contemporary psychology can suggest other artifices that are likely to achieve their purposes and do not come at too high a price for the other functions of the trial, it is all to the good.

Once again, showing that our cognitive abilities have limitations does not tell us what institutional arrangements should be embraced to address those issues. What do we do with an observation like the following, which expresses the empiricist spirit of the perspective: “A large body of basic and applied psychological research demonstrates that human memory is a powerful cognitive apparatus [!], but it can be fickle and is vulnerable to error and contamination.”<sup>91</sup> Yes, of course. The empirical evidence seems to show that eyewitness identification can often be wrong.<sup>92</sup> But, even in the experiments cited, it is right more than it is wrong.<sup>93</sup> It has a probative value far in excess to that which serves as the standard for admissibility of relevant evidence at trial. Alibi evidence “*can* easily hinder the fact finder’s ability to determine the facts correctly.”<sup>94</sup> But it *can* lead the trier of fact in the right

88. WATSON, *supra* note 73, at 85.

89. BURNS, *supra* note 30, at 142.

90. *See, e.g.*, Simon, *Limited Diagnosticity*, *supra* note 3, at 160–67.

91. *Id.* at 161.

92. *Id.* at 152–60.

93. *See id.* at 152; SIMON, IN DOUBT, *supra* note 1, at 150.

94. SIMON, IN DOUBT, *supra* note 1, at 165 (emphasis added).

direction. Corroboration “*can be misleading*,”<sup>95</sup> but, especially at trial, unlike in the investigative stage, it can point the way to the truth. Narrative can be illuminating, even on matters of brutally elementary fact, but a good story is not “*necessarily an accurate one*.”<sup>96</sup> The demand for coherence “is generally adaptive,” but “it *can* have serious implications for the integrity of some types of decisions, including criminal verdicts.”<sup>97</sup> Literally thousands of “bits” of information are routinely admitted as features of the episodes in the narratives told by witnesses in criminal trials. Much of this information is weakly probative. “A brick is not a wall,” as McCormick put it.<sup>98</sup> Some of it, in some (generally unpredictable) circumstances, may lead in the wrong direction, but Rule 403’s standard for exclusion<sup>99</sup> is high. The assumption is that, in almost all cases, the critical devices of the trial itself—cross examination, argument, and the presentation of contrary evidence—will help move the jury to assigning the correct weight to all this evidence. Any attempt to assign a numerically precise “probative value” to this material in an atomistic, piece-by-piece manner and empower the judge to exclude the evidence that falls below some threshold is likely to distort the evidentiary picture the jury receives (and empower the judge to impose his own preconceptions of what the evidence should show).

### B. Other Sources of Error

Simon also addresses the distorting effects of aspects of the human situations that give rise to trials. These are, to *varying* degrees, inevitable aspects of the human condition. Partisan witnesses will be with us as long as parties and those with affection for them actually care about the outcomes of trials. Likewise, the intense emotion surrounding many cases cannot (and should not) be eliminated. Most alibi evidence will inevitably come from friends and relatives of the defendant. Even if wholly truthful, there will be reason to doubt its credibility—doubts that are not irrational. Race discrimination is a somewhat

95. Simon, *Limited Diagnosticity*, *supra* note 3, at 181. Again, the argument about the dangers posed by corroboration have more force regarding the accumulation of error than can occur at the investigative stage.

96. SIMON, *IN DOUBT*, *supra* note 1, at 169 (emphasis added).

97. *Id.* at 175 (emphasis added).

98. CHARLES T. MCCORMICK, *MCCORMICK ON EVIDENCE* 317 (Kenneth S. Broun ed., Thomson West 2006).

99. Rule 403 allows for the exclusion of logically relevant evidence only if one of the pragmatic “trial concerns” substantially outweighs that logical relevance. The standard for logical evidence is quite low. FED. R. EVID. 403.

more contingent factor, but is highly likely to be with us for the foreseeable future.

Then there are specific elements of our pretrial process that may further distort the truth.<sup>100</sup> The adversarial spirit with which detectives conduct line-ups and interrogations, and the astuteness with which they know how to extract from these encounters persuasive evidence, guarantees what the studies of the exonerated tend to show: that it is a major source of error at trial.<sup>101</sup> The low level of discovery<sup>102</sup> to which criminal defendants are entitled is indeed a scandal. The Supreme Court's hesitation<sup>103</sup> in recognizing a citizen's fundamental right to not be executed if innocent invites satire. Simon is quite right that the laxness of the controls on witness preparation can contribute to this result<sup>104</sup>: I am given to believe that some prosecutors routinely prepare all their police witnesses to testify together, sandpapering away any likely differences in their testimony. The pretrial criminal process in the United States is the source of too much error and too many false convictions. Some of this is the result of police and prosecutor misconduct and some is the result of new legal procedures that distort the evidence, especially with regard to interrogation and line-ups. Courts have recently taken steps in an attempt to remedy these problems, largely by videotaping the entire pretrial procedures, just as Simon suggests.<sup>105</sup> This is for the good. Expert witnesses can be helpful, particularly with regard to the conditions under which eyewitness identifications and confessions are unreliable, but jurors tend to be skeptical of the inevitable "dueling experts" (perhaps someday there will be jury instructions that lessen the need for expert testimony). Allowing the court to choose a single, "impartial" expert conflicts with our skepticism about state authority, and with good reason. We can make incremental improvements, but will always have a fallible instrument.

100. See SIMON, IN DOUBT, *supra* note 1, at 17–143.

101. See generally, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).

102. *Id.* at 207.

103. *Id.* at 213.

104. Simon, *Limited Diagnosticity*, *supra* note 3, at 165–67.

105. See Dan Hinkel, *Quinn Signs Bill Expanding Recording of Police Interrogation*, CHI. TRIB., Aug. 26, 2013, <http://www.chicagotribune.com/news/ct-met-ct-met-videotaped-interrogations-law-20130827-story.html>.

### C. *The Failings Attributable to the Trial Itself*

Finally, there are the claims that the trial's methods themselves lead to factual error. This is the area of analysis in which I am most interested and where I have the largest concerns with the doubt that Simon encourages. Initially, I am inclined to think that a fair assessment of the trial's strengths and weaknesses cannot occur until the deep failings of the pretrial process are addressed. If they are, perhaps a clever experimentalist may devise a "natural experiment" that assigns subsequent errors to one or other cause. But the uncertainty about causality is another reason to counsel a conservative perspective on the methods of the trial itself.

Simon concludes that the "courtroom is hardly the ideal environment for rational, astute, levelheaded decisionmaking. Jurors are presented with a cacophony of ambiguous, conflicting, and incommensurable evidence . . ."106 Of course, this begs the question of whether the evidence in a given case is indeed ambiguous, conflicting, and incommensurable. If it is, and in "triable" cases, it is likely to be, then an adversary presentation that does not smooth over these tensions through an authoritarian direction of the proceedings will be "fairest" to the underlying evidence. The "polarizing force fields of adversarial advocacy" may be most consistent with justice that appreciates real conflict.<sup>107</sup>

I will not rehearse here the centrality of narrative to the structure of the trial and all the ways it contributes to accuracy, good interpretation, and fair evaluation.<sup>108</sup> Narrative is not simply a fictional superstructure imposed on a (scientifically determinable) substrate. "The attempt to understand human actions 'in themselves' and before, so to speak, the employment of narrative categories will yield only 'the disjointed parts of some possible narrative.'"109 Narrative, especially the highly constrained and juxtaposed narratives of the trial,<sup>110</sup> is a positive thing, not primarily a danger to its converging on the truth. Simon concedes as much:

106. SIMON, IN DOUBT, *supra* note 1, at 168; Simon, *Limited Diagnosticity*, *supra* note 3, at 184.

107. See HAMPSHIRE, *supra* note 87. The "coherence effect" may well affect a judge's direction of questioning as well.

108. BURNS, *supra* note 30, at 158-66.

109. *Id.* (quoting ALASDAIR MACINTYRE, AFTER VIRTUE 215 (1984)).

110. Robert P. Burns, *The Distinctiveness of Trial Narrative*, in 1 THE TRIAL ON TRIAL: TRUTH AND DUE PROCESS (R. A. Duff et al. eds., 2004).

To be sure, there is nothing inherently counternormative about the impact of narratives on courtroom persuasion, nor can one conceive how evidence could be presented without resorting to a narrative of one sort or another. There is also reason to believe that in reality, truthful evidence is more likely than untruthful evidence to produce a good narrative.<sup>111</sup>

However, the force of his argument is again mainly negative, emphasizing the “dangers” of the “narrative effect.”<sup>112</sup> It seems a matter to lament that “there seem to be no workable solutions to counter the effects of good narratives.”<sup>113</sup> It is not apparent to me that experimental psychology illuminates the appropriate balance between honoring narrative’s power and determining its limits. Still less does it tell us what the appropriate remedy should be: (1) the expansion of each lawyer’s ability to offer detailed evidence that “disrupts” the narratives proposed by his opponent, or (2) the expansion of the judge’s ability to exclude evidence that has narrative saliency, but risks rousing distorting emotion (the wrong view, in my opinion).<sup>114</sup> We have the same difficult issue of the relationship between explanatory psychological and normative “logical” accounts in his treatment of alibi evidence: “A number of studies have shown that corroboration by strangers, neighbors, and store clerks reduces the rate of convictions, but corroboration by friends and family members does not.”<sup>115</sup> But isn’t that consistent with reasonableness, not a sign of unreliability, even though it may, in a given case, lead in the wrong direction?

It is usually thought that the coherence of a theory of the case, the ways in which its factual and interpretive elements “fit together” in a plausible way is a normatively positive feature of that theory.<sup>116</sup> Coherence, the lack of internal contradiction, makes the theory more likely to be true. This is true for scientific theories as well as legal theories. Simon makes the rather limited concession that the demand for coherence is “adaptive” since “successful decisionmaking entails a certain distortion of the evidence.”<sup>117</sup> The notion is that our demand for coherence leads us to distort the meaning or probative value of some bits of evidence in order to render them coherent with other bits of evidence and an emerging “abductive” best explanation, one that will often be in

111. SIMON, *IN DOUBT*, *supra* note 1, at 169.

112. Simon, *Limited Diagnosticity*, *supra* note 3, at 186–87.

113. SIMON, *IN DOUBT*, *supra* note 1, at 177.

114. See above on the positive effects of emotion.

115. Simon, *Limited Diagnosticity*, *supra* note 3, at 173.

116. BURNS, *supra* note 30, at 38–49.

117. Simon, *Limited Diagnosticity*, *supra* note 3, at 196.

narrative form. This is why the “coherence effect” threatens the reliability of the kind of decision-making that occurs at trial. This is particularly offensive to someone who is committed to one feature of the “rationalist tradition” of evidence law:

A second key feature of the coherence effect poses a challenge to one of the implicit normative principles of the rationalist tradition whereby each item of evidence ought to have an invariant informative value (so long as it is not logically dependent on other evidence items). Recall that because of the interconnectivity of the Gestaltian process, all evidence items are interconnected with all other items and ultimately with the entire decision. Hence, the feature of nonindependence, by which evidence items can be influenced by the emerging verdict, and they can be influenced also by other items to which they have no logical relation.<sup>118</sup>

There is, however, no reason to think that the evidence presented at trial has this adamant, atomistic character. Trial lawyers like to say “every fact has two faces.” That is an exaggeration. The evidentiary pudding is a “lumpy pudding,” to quote Henry James<sup>119</sup>: some pieces of evidence resist reinterpretation, but many do not. The meaning of much of the evidence presented, and the determinations of the relative credibility of many witnesses, is subject to reinterpretation in light of all the evidence. Theoretical holism is in play at trial: the meaning of each individual piece of evidence is dependent on the whole, and the meaning of the whole is dependent upon the meaning of each bit of evidence. This is true even at the level of “brutally elementary fact.”<sup>120</sup> Perceptual circumstantial evidence will often be disputed. But even when it is not, its *probative value* will inevitably depend on holistic judgments:

[E]ven when the identity of the circumstantial evidence is relatively determinate, that evidence is always linked to an episode in the “bare narrative” . . . by a commonsense generalization that provides its “logical relevance.” The jury will necessarily ask implicitly, “How universal is the commonsense generalization that links the circumstantial evidence to the episode (F1) in the bare [perceptually determinable] narrative for which it is offered as proof?” Since the structure of commonsense generalizations that provide those links is always “Generally and for the most part . . .,” the next question is always “Are those additional facts in this case (F1 . . . Fn) such as to make the generalization more or less powerful than it would be, other things being equal?” But the existence of these latter facts (F2 . . . Fn) and their proper characterization will themselves be in

118. SIMON, *IN DOUBT*, *supra* note 1, at 175–76.

119. BURNS, *supra* note 30, at 180.

120. *Id.* at 190.



dispute just as is F1. And the strength of the commonsense generalizations that link those facts to what the proponent seeks to show is also caught in another web of mutually determining probabilities.<sup>121</sup>

And so, it is not at all irrational for a jury to reassess the probative value of a particular bit of evidence when another bit of evidence has changed the likelihood of the entire theory of the case within which it is embedded. It is not a kind of pathology (“the coherence effect”) that suggests the weakness of the trial. Even when the new bit of evidence has no “logical relation”<sup>122</sup> to the interpretation of another bit of evidence (but does change the likelihood of the entire theory of the case being true), those bits of evidence will often (almost always) lack the adamantine atomistic quality that (reasonably) resists reinterpretation.

It seems completely rational to reinterpret one piece of evidence because another piece of evidence with which it is not directly connected logically renders the entire theory of the case more plausible. It is offensive only if one contends that any one piece of evidence has an adamantine probative value unconnected with all the other evidence—that there is no holism that operates legitimately. Simon does assert that this is not the way it should be, that each bit of evidence has an “invariant informative value.”<sup>123</sup> But where does this “should” come from? It emerges from a *model* of the trial, not from a description of the trial itself. This model is tied historically with the logical empiricist vision of scientific reason described above.<sup>124</sup> The trial may converge on the truth of a human situation only if the “hermeneutical circle” can yield genuine knowledge, as I believe that it can. And, in any event, there is no alternative.

The coherence effect does have a real effect that can lead to another source of error *in the investigative process*, as police investigation is driven by the continuing narrowing effect of the first eligible hypothesis, together with the devices in detectives’ hands to create evidence. But this particular problem seems less acute at trial, where the

121. *Id.* There is also practical holism at play: the meaning of each piece of evidence is also dependent on a practical (though still reasonable) determination of what the practical consequences of a judgment should be. An account of this would bring us too far afield.

122. SIMON, *IN DOUBT*, *supra* note 1, at 176.

123. *Id.* at 175.

124. WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 35–98 (2d ed. 2006). On the decline of logical empiricism in the philosophy of science, see Frederick Suppe, *The Search for Philosophical Understanding of Scientific Theories*, in *THE STRUCTURE OF SCIENTIFIC THEORIES* 62–118 (Frederick Suppe ed., 2d ed. 1977).

adversaries have already determined their theories of the case and are presenting the strongest evidence to support them.

*D. The Remedies for the Trial's Limitations: Against Exclusionary Rules*

Simon's essential prescription runs as follows: "Diagnosticity can be enhanced by limiting the admissibility of unreliable evidence, increasing the use of expert witnesses, and instructing jurors to refrain from relying on unreliable cues, especially the witnesses' demeanor."<sup>125</sup> I agree that jury instructions based on reliable psychological studies that establish counter-intuitive conclusions about recurring forms of evidence may do some good, though jurors' comprehension of instructions is notoriously weak.<sup>126</sup> And expert witnesses may also contribute something, though it is hard to resolve the dilemma between relying on the court's witnesses as opposed to (or in addition to) experts retained by the state and the defendant.

It is not hard to see why Simon is inclined to rely on new *exclusionary* rules to remedy the issues he identifies. There is a kind of natural sympathy between the professor and the judge. Each wields his own kind of authority. They tend to trust one another. This, in my view, can result in an overestimation of the power of the law of evidence, where the judge, not the jury, holds sway. Whenever evidence that one party believes probative (otherwise it would not be offered) is excluded, *all* the probative value of that evidence disappears. It does not take very much of this to distort the entire evidentiary field. Therefore, exclusion should be a last resort (the strongest case can be made with regard to forensic evidence. I, for one, do not see any alternative there other than relying on authoritative and independent authoritative sources, such as the National Academy of Sciences, to evaluate at least those categories of forensic evidence sufficiently reliable to be offered at trial.).

However, the general principle should be that exclusionary rules be considered only where the critical devices of the adversary trial are clearly inadequate in weighing a category of evidence's probative value. Studies suggest that eyewitness identification can go wrong in a significant minority of cases and that a minority of confessions are

125. Simon, *Limited Diagnosticity*, *supra* note 3, at 147.

126. See R. Channow and V. Channow, *Making Legal Language Understandable: A Psychological Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

false.<sup>127</sup> It is quite true that the circumstances surrounding initial line-ups and show-ups, and the conditions under which interrogation takes place, should be dramatically improved. But the suggestion that a unit of evidence should be wholly excluded because it is likely to suggest a false inference even in the majority of cases misconceives the nature of the trial. The standard of relevance for the admissibility of evidence is rightly very low; it has some tendency to make some fact of consequence to the determination of a material fact more or less likely.<sup>128</sup> If we make changes in pretrial procedure that increase the transparency of eyewitness and confessional evidence, would we have a settled conviction that the devices of the adversary trial are still inadequate to allow its proper weighing? I suspect not. Simon argues that we should “restrict the admissibility of evidence that is clouded by serious doubt. Put simply, the evidence admitted at court must be reasonably reliable.”<sup>129</sup> But evidentiary exclusionary rules are blunt instruments and will often work against the criminal defendant himself. The goal should instead be to lift the quality of the deliberation that occurs *within* the democratic trial, not to invoke inevitably authoritarian and overly general exclusionary rules. Judge Jack Weinstein was quite right when he observed that:

[t]he jury’s evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis of evidence which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence. . . . In giving appropriate, if sometimes unreflective, weight to a specific piece of evidence the trier will fit it into a shifting mosaic.<sup>130</sup>

A reliance on exclusionary rules stems in part from a distrust of the inevitable holism of jury deliberations discussed above and tends to assume an evidentiary atomism that is simply inconsistent with the way the jury actually assesses the evidence. That is why Simon’s suggestion that we should provide *more* evidence about the way in which police and prosecutors develop the evidence actually presented<sup>131</sup> is much more promising.

127. Simon, *Limited Diagnosticity*, *supra* note 3, at 152–70.

128. See FED. R. EVID. 401, 402.

129. Simon, *Limited Diagnosticity*, *supra* note 3, at 215.

130. *United States v. Chipani*, 289 F. Supp. 43 (E.D.N.Y. 1968), *aff’d*, 414 F. 2d 1296 (2d Cir. 1969).

131. See Simon, *Limited Diagnosticity*, *supra* note 3, at 208, 217.

If we could abstract from political reality, ever more pressing thanks to the current Supreme Court,<sup>132</sup> we could recommend that trial judges, *viewing all of the evidence together*, be more aggressive in deciding whether juries could conclude beyond a reasonable doubt that the defendant was, indeed, the perpetrator.<sup>133</sup> This would give due weight to all the probative value of all the evidence, including the contextual evidence that was relevant to the interpretation of events, and thus, derivatively, to the “brutally elementary fact” of the identity of the perpetrator.

#### CONCLUSION

Professor Simon has helpfully identified limitations on our cognitive abilities and institutional defects in our criminal pretrial procedures that call out for reform. His focus on perceptible fact in the trial limits the range of practical significance of his findings in charting the most fruitful remedies. We should proceed with the reforms of the pretrial process and be cautious in recommending dramatic changes to the trial itself, especially though the proliferation of new exclusionary rules.

132. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2003); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

133. George Thomas III tells the story of an Arizona judge who sentenced a defendant to life in prison, rather than imposing the death penalty, where he found himself in doubt that the defendant was indeed guilty. JOSHUA DRESSLER & GEORGE THOMAS, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES* 58–59 (2012).

