EVIDENCE, MISCHARACTERIZED INSIGHTS, AND THE NATURE OF LAW

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I.

In many areas of life, from hard science to managing one's everyday affairs, explanatory considerations help to guide inference. From the fact that some proposition would explain a given phenomenon we infer that the proposition is true. And when several propositions may explain a given phenomenon we infer the one that best explains it. Quantum mechanics best explains sub-atomic phenomena; evolutionary theory best explains species variations; that George Washington existed best explains the historical record concerning him; and the Cubs won yesterday best explains why today's newspaper reports that they did. These inferences all share the same structure, typically referred to as "abduction" or "inference to the best explanation." Because legal proof falls somewhere between science and managing one's everyday affairs, it should perhaps not be surprising that juridical proof process involves similar inferential practices.[1]

Most legal discussions of evidence focus on the somewhat technical notion of evidence in trials, or what Pardo and Allen call "juridical proof." I completely agree with them that this sense of evidence is perfectly captured by the theory of inference to the best explanation. In the present discussion, however, I want to focus on the methodological question of what constitutes (good) evidence for a jurisprudential theory. I will be arguing that developing and defending a jurisprudential theory is a process of assembling relevant data about legal systems, and then proposing an overall explanation of that data. If the preferred explanation offers the best explanation – if it is a better explanation than all known competitors – then by inference to the best explanation that data will provide good evidence for the jurisprudential theory.

Let's begin with a famous bit of legal evidence from a candidly juridical context.
>At first glance, the evidence that O. J. Simpson was guilty of the murder of his ex-wife was overwhelming. Shortly after the time that the murder took place, he caught a plane to Chicago carrying a bag that disappeared, perhaps because it contained the murder weapon and bloody clothes. Police who came to Simpson's house found drops of blood in his car that matched his own blood

and that of Ron Goldman. In Simpson's back yard, police found a bloody glove was of a pair with one that was found at the scene of the crime, and they found a bloody sock in his bedroom. Simpson had a cut on his hand that might have been caused a struggle with the victims who tried to defend themselves. Moreover, there was a plausible motive for the murder, in that Simpson had been physically abusive to his wife while they were married, and was reported to be jealous of other men who saw Nicole after the divorce.[2]

In the influential jargon of Gilbert Harman, this is an inference to the best explanation.

In making this inference one infers, from the fact that a certain hypothesis would explain the evidence, to the truth of that hypothesis. In general, there will be several hypotheses which might explain the evidence, so one must be able to reject all such alternative hypotheses before one is warranted in making the inference. Thus one infers, from the premise that a given hypothesis would provide a "better" explanation for the evidence than would any other hypothesis, to the conclusion that the given hypothesis is true.[3]

Simpson's guilt beautifully explains all of the relevant evidence.

The hypothesis that he was the killer explains why Nicole Simpson and Ron Goldman are dead, why Simpson's blood was found on a gate at the crime scene, why there was blood in his car, why a bloody glove was found in his yard, and why his sock had blood on it. Moreover, there is an explanation of why Simpson killed Nicole base on his past history of abuse and jealousy.[4]

As Harman notes, however, other rival hypotheses would also explain the relevant evidence.

The first task of the defense lawyers was to generate an alternative explanation of who killed Nicole Simpson and Ron Goldman. Based on Nicole's known history of cocaine use, they hypothesized that she was killed by drug dealers … In order to explain the circumstantial evidence linking O. J. to the crime scene, including the bloody car, glove and sock, the defense contended that the items had been planted by Los Angeles Police Department officers determined to frame Simpson for the crime.[5]

Most of us agree that Simpson's guilt better explains the evidence than the racist framing by the police rival explanation. According to inference to the best explanation that means that we concede that the original theory is supported by the evidence.

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[2] Paul Thagard, *Hot Thought* (Cambridge, MA: The MIT Press, 2006), p. 136.
[3] Gilbert Harman, "The Inference to the Best Explanation," The Philosophical Review 74:1 (1965), p. 89.
[4] Thagard, *op. cit.*, p. 137.
[5] *Ibid*, pp. 138-9.

II.

> There is, of course, a problem about how one is to judge that one hypothesis is sufficiently better than another hypothesis. Presumably such a judgment will be based on considerations such as which hypothesis is simpler, which is more plausible, which explains more, which is less ad hoc, and so forth. I do not wish to deny that there is a problem about explaining the exact nature of these considerations; I will not, however, say anything more about this problem.[6]

Much of the professional literature on inference to the best explanation focuses on the above problem of "judg[ing] that one hypothesis is sufficiently better than another hypothesis." Harman concedes the depth of the problem, and offers only the most abstract and general criteria for explanatory superiority. But David H. Glass has raised a second problem that is even more serious.

> What is the connection between explanation and truth? Is there any reason for thinking that the best explanation is likely to be true? Or to put it another way, does IBE track truth? Of course, no approach should be expected to lead to the truth in every instance, but if IBE is to be accepted as a rational mode of inference, there must be some reason for thinking that it provides a good strategy for determining the truth.[7]

The solution to the Harman's problem emerges directly from the solution to Glass's truth-tracking problem.

Larry Wright argues that normal human beings have a skill that he characterizes as perceptual – the ability to diagnose what is going on, or what has happened.

> Virtually everyone who has survived past infancy has a more or less well developed set of perceptual skills. These skills may be generally described as the ability to *tell what's going on* (sometimes) simply by seeing it … This is ability to tell what's going on—or what's gone on—even when we are not confronting it directly. We can often tell what has happened from the traces it leaves. We can tell there was a frost by the damaged trees; we know it rained because the mountains are green; we can tell John had some trouble on the way home from the store by the rumpled fender and the broken headlight. We reconstruct the event from its telltale consequences. It is this diagnostic skill we exploit in the most basic sort of inductive arguments; it is the foundation of our ability to evaluate evidence.[8]

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[6] *Ibid.*

[7] David H. Glass, "Inference to the Best Explanation: Does It Track Truth?" *Synthese* Vol. 185, No. 3 (2012), p.412.

[8] Larry Wright, *Better Reasoning* (New York: Holt, Rinehart and Winston, 1982), p. 51.

That is precisely the skill at work in the O. J. Simpson case. Why does this skill work? Why does IBE track the truth? The answer I believe is obvious. One might ask whether visual perception tracks the truth. Answers to this latter question have varied within the epistemological literature, but for almost everyone in the scientific community the answer is univocal. Of course vision tracks the truth! And, though our knowledge of how to open our eyes and see a tomato plant remains maddeningly difficult to articulate, we understand full well why, and to some degree how, we are able to do it. Animal and human vision evolved precisely to track the truth of the environment external to the organism. IBE tracks the truth for the same reason. The ability to understand aspects of the world on the basis of evidence, that is to say, to explain things, had obvious survival benefits for our ancestors.

Skills are a kind of knowledge. Great golfers know how to read greens, and they can see where to aim their putts, and how much force to impart. One might be tempted to think that great golfers would make great coaches, but history tells us that is far from the case. Plato, well his character Socrates, clearly articulated the underlying assumption – "[a]nd that which we know we must surely be able to tell."[9] In contrast Michael Polanyi proclaims, "we can know more than we can tell."[10]

> This fact seems obvious enough; but it is not easy to say exactly what it means. Take an example. We know a person's face, and can recognize it among a thousand, indeed among a million. Yet we usually cannot tell how we recognize a face we know. So most of this knowledge cannot be put into words.[11]

Polanyi introduces the technical term *tacit knowledge* to label knowledge or skills that "cannot be put into words." Now Polanyi engages in purposeful hyperbole. Most skills can be put into words, but these words are usually vague and general, and at times the words are downright misleading. I take it to be obvious that we have abilities that cannot be adequately described in precise language, rules, or necessary and sufficient conditions.

There's a still lot of work to be done in understanding inference to the best explanation. And this lacuna seems to be an obstacle to wider acceptance of the theory. Just as I admire David Marr's path breaking attempts to account for vision in computer simulations, I admire the attempts of philosophers like Paul Thagard to understand IBE, first in computational terms,[12] and lately in neurological terms.[13] But even though I hope all of this research provides understanding, and perhaps even leads to new skills, I doubt

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[9] Plato, *The Collected Dialogues of Plato*, edited by Edith Hamilton and Huntington Cairns, (Princeton: Princeton University Press, 1961), p. 133.

[10] Michael Polanyi, *The Tacit Dimension* (Chicago: University of Chicago Press, 1966), p. 4.

[11] *Ibid.*

[12] See, Paul Thagard, *Computational Philosophy of Science* (Cambridge, MA: The MIT Press, 1993).

[13] See, Paul Thagard, *The Brain and the Meaning of Life* (Princeton: Princeton University Press, 2010).

it will do much to clarify, or improve, the skills we already possess. Golfers make great putts, and major league hitters hit 95 mph fastballs. Admittedly these are skills that are not widely shared. But all of us can recognize a face, or discern the family resemblance between two siblings, or see the sad state of affairs concerning O. J. The fact that we lack complete understanding of these skills in no way mitigates the fact that we possess them. And the concession that we are good explainers is all that is needed for unpacking the lawyer's sense of legal evidence.

III.

> Any educated man might be expected to be able to identify these salient features in some such skeleton way as follows. They comprise (i) rules forbidding or enjoining certain types of behavior under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones.[14]

I am already on record as claiming that contemporary analyltical jurisprudence as an inherently explanatory enterprise, and that I think the structure and quality of evidence presented in defense of the grand theories of law can be usefully analyzed with the tools of IBE. H.L.A. Hart clearly sees philosophical analyses and definitions of law as a data driven process.

> e_1.   Any modern legal system includes rules forbidding or enjoining certain types of behavior under penalty.
>
> e_2.   Any modern legal system includes rules requiring people to compensate those whom they injure in certain ways.
>
> e_3.   Any modern legal system includes rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations
>
> e_4.   Any modern legal system includes courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid.
>
> e_5.   Any modern legal system includes a legislature to make new rules and abolish old ones.

He argues that all of this shared knowledge about law, both by legal professionals, but also by generally educated citizens, is made sense of, that is explained, by his restatement of legal positivism.

> t_0.   "Law [i]s the union of primary and secondary rules."[15]

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[14] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997), p. 3.
[15] This is the title of Chapter Five, *ibid.*, p.79.

But, of course, rival explanations abound. Many come from too narrow a fixation on relevant pieces of evidence, often single isolated pieces of evidence, and result in mischaracterized insights.

> [T]hese seemingly paradoxical utterances were not made by visionaries or philosophers professionally concerned to doubt the plainest deliverances of common sense. They are the outcome of prolonged reflections on law made by men who teach or practice law, and in some cases administer it as judges. More over what they said about the law actually did in their time and place increase our understanding of it. For understood in their context, such statements are *both* illuminating and puzzling: they are more like great exaggerations of some truths about law unduly neglected, than cool definitions. They throw a light that makes us see much in law that law hidden; but the light is so bright that it blinds us to the remainder and so leaves us without a clear view of the whole.[16]

All the major jurisprudential theories are guilty of similar, "great exaggerations", or mischaracterized insights.

> t_1.   Every *law* or *rule* … is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.[17]
> t_2.   Law is nothing more than the prophecies of what courts will do.[18]
> t_3.   [A]n unjust law is not a law.[19]

Austin's early legal positivism (t_1), in addition to having difficulties distinguishing between mobster rule of a neighborhood and legitimate legal statutes, results from an obsessively narrow focus on e_1, and seems woefully inadequate as an explanation of e_2 through e_5.

Oliver Wendell Homes' early legal realism (t_2), insists on the addition of relevant data, but then fixates on this new data regarding the law to the exclusion of e_1 through e_5. Hart also acknowledges these important facts about the law, though I think it is fair to say he does not grant them the seriousness they deserve. He offers an insightful diagnosis of two of the sources of what he calls "rule-scepticism." The first is quasi-linguistic. Legal rules to be at all useful must be general in two related ways. They must cover an identifiable range of behavior – armed robbery, say – and they must apply to a range of individuals – all adults, say. But general rules, just like the general terms that compose them will always admit of borderline cases.

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[16] *Ibid*, p. 2.

[17] John Austin, *Lectures on Jurisprudence*. First published in 1832. Reprinted in Joel Feinberg, *et. al.*, editors, *Philosophy of Law* (Boston: Wadsworth, 2014), p. 75.

[18] Oliver Wendell Holmes, *The Nature and Sources of the Law* (1902), s. 276. Quoted in Hart, *op. cit.*, p. 1.

[19] Translated and quoted in Hart, *op. cit.*, p. 8.

> Whatever device, precedent or legislation is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.[20]

The institution of law must clearly deal with this obvious fact.

    e₆.   Legal rules will always admit of borderline cases.

Hart's second source of rule skepticism is structural. Rules, whether stated in legal texts like statutes or constitutional provisions, or illustrated in relevant precedent, must always be interpreted by courts. Thus, courts seem institutionally superior to the rules they interpret. This is easiest to see in the decisions of "supreme tribunals," but really applies to all courts.

> A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered. … Consideration of these facts makes it seem pedantic to distinguish, in the case of a supreme tribunal's decisions, between their finality and infallibility. This leads to another form of the denial that courts in deciding are ever bound by rules: 'The law (or constitution) is what the court says it is.[21]

    e₇.   Rules must always be interpreted by courts, and ultimately by supreme courts.

Although Hart concedes the relevance of these additional pieces of data about legal systems, he is little deterred from his strong legal positivist faith in rules. This is partly because he remains confident that borderline cases in law are relatively rare, and that the easy cases reinforce the legitimacy of the rules on which they depend. But I fear that Hart almost willfully ignores the obvious empirical fact that underlies most legal realists' skepticism. Law and legal institutions are inherently the constructions of human beings. They are comprised and administered by human beings. The language and precedent must always be interpreted by human beings. And human beings, sad to say, are imperfect, at times irrational, and all too prone to blindness, prejudice, and a host of other cognitive failures.

> It is true that when we are unselfconsciously applying rules together, we have an unselfconscious experience of social objectivity. We know what is going to happen next by mentally applying the rule and it comes out the way we thought it would. But this is not in fact objectivity, and it is *always* vulnerable to different kinds of disruption—intentional and accidental—that suddenly disappoint our

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[20] *Ibid*, pp. 127-8.
[21] *Ibid*, p. 141.

expectations of consensus and make people question their own sanity and that of others. The vulnerability of the field, its plasticity, its instability, are just as essential to it as we experience it as its sporadic quality of resistence.[22]

Again, it is obvious that highly relevant data includes:

e₈.   The entire legal system is a product of, administered by, and subject to the weaknesses and failures but also the strengths of, fallible human actors.

IV.

The doctrine of Natural Law is part of an older conception of nature in which the observable world is not merely a scene of such regularities, and knowledge of nature is not merely a knowledge of them. Instead, on this older outlook every nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good—or *end* appropriate for it.[23]

The concept of natural law means different, though closely related, things to the moral and metaphysical philosopher, to the political theorist, and to the academic lawyer. Hart sees clearly that their origin in all these fields is ancient, and closely connected to metaphysical views long abandoned. The contemporary philosopher endorsing natural law will focus on three incredibly controversial positions. The first is moral realism – the theory that at least some moral questions admit of universal, objectively true, answers. The second is that human reason, apart for religious authority, is capable of discovering some of these normative answers. And the third is that there is a robust content to basic human nature that allows for these discoveries. Most philosophers, though of course not all, writing as Hart's contemporaries would have seen all of these positions as refuted by scientific discoveries, as well as theoretical advances in moral philosophy and philosophical psychology. It is really quite remarkable that in the fifty years since *The Concept of Law* was published how much of a comeback natural law has accomplished. I, for one, believe that a very plausible version of secular nature law can easily be constructed.[24] But little of this will assumed in the present discussion of natural law as a jurisprudential theory.

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[22] Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education*, vol. 36 (1986). Reprinted in Frederick Schauer and Walter Sinnott-Armstrong, editors, *The Philosophy of Law* (Fort Worth: Harcourt Brace, 1996), pp. 68-9.

[23] Hart, *op. cit.*, pp. 188-9.

[24] Jeffery L. Johnson, "Explanation, Human Nature, and Tort Theory," *Georgetown Journal of Law and Public Policy*, Vol. 4, Summer 2006.

The academic lawyer who is sympathetic to the insights of natural law will first need to jettison its traditional metaphysical and theological baggage. Most contemporary natural lawyers welcome such a move.

> What I have tried to do is discern and articulate the natural laws of a particular kind of human undertaking which I have described as "the enterprise of subjecting human conduct to the governance of rules." These natural laws have nothing to do with any "brooding omnipresence in the skies." Nor have they the slightest affinity with any such proposition as the practice of contraception is a violation of God's law. They remain entirely terrestrial in origin and application. They are not "higher" laws; if any metaphor of elevation is appropriate they should be called "lower" laws. They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.[25]

Fuller goes on to articulate his suggested natural laws for any legal system. These procedural constraints are beautifully paraphrased by Kenneth Einar Himma.

- (P1) the rules must be expressed in general terms;
- (P2) the rules must be publicly promulgated;
- (P3) the rules must be prospective in effect;
- (P4) the rules must be expressed in understandable terms;
- (P5) the rules must be consistent with one another;
- (P6) the rules must not require conduct beyond the powers of the affected parties;
- (P7) the rules must not be changed so frequently that the subject cannot rely on them; and
- (P8) the rules must be administered in a manner consistent with their wording.[26]

I summarize all of this as a single piece of relevant data about legal systems.

e_9.   Any legal system is bound by procedural constraints.

The classic mischaracterized insight of natural law is, with appropriate Latin formality, *lex iniusta non est lex*. Legal positivists have a field day with this one, pointing out that from Nazi laws to the Fugitive Slave Act, lots of patently unjust laws have nonetheless qualified as uncontroversially *real* laws. Contemporary natural lawyers don't deny that this sentiment, if not the exact wording, comes from Augustine and Aquinas, but they offer a radically different interpretation of what these classical natural law theorists were up to.

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[25]Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), p. 96.

[26] Kenneth Einar Himma, "Natural Law´ *Internet Encyclopedia of Philosophy* http://www.iep.utm.edu/natlaw/

A more reasonable interpretation of statements like "an unjust law is no law at all" is that unjust laws are not laws "in the fullest sense." As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: "she's no lawyer" or "he's no doctor." This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is "not really law" may only be to point out that it does not carry the same moral force or offer the same reasons for action as laws consistent with "higher law."[27]

We say these kinds of things all the time. Baseball fans remark without a hint of irony or embarrassment that "he's not really a shortstop," knowing full well the manager has penciled him in at shortstop all season long. These fans are merely noting that the player has a build and fielding and hitting statistics that are at odds with a paradigmatic shortstop.

Once the slogan of unjust laws not being laws has been tamed, we discover a lot of agreement between legal scholars, and not just natural lawyers, but positivists like Hart, and even realists like Posner, about data that seems relevant to the support of a modest natural law theory.

e_{10}.   There is remarkable overlap between, not just the language, but the substantive content of legal rules and moral rules.

e_{11}.   There are natural, i.e., physiological, psychological, and social, reasons why normative systems, whether legal or moral, will have similar, if not universal, content.

e_{12}.   The actions of legal actors, particularly of judges, is subject to professional standards that seems inherently normative.

V.

Understanding another person's conversation requires using devices and presumptions, like the so-called principle of charity, that have the effect in normal circumstances of making he says the best performance of communication it can be. And the interpretation of data in science makes heavy use of standards of theory construction like simplicity and elegance and verifiability that reflect contestable and changing assumptions about paradigms of explanation, that is, about what features make one explanation superior to another. … [A]ll

[27] Brian Bix, "Natural Law Theory," in Dennis M. Patterson (ed.), A Companion to Philosophy of Law and Legal Theory (Cambridge: Blackwell Publishing Co., 1996), p. 226.

interpretation strives to make an object the best it can be, as an instance of be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success.[28]

Ronald Dworkin's jurisprudence builds on all of the data in e_1 through e_{12}, but places special emphasis on the existence of inherently normative professional standards governing the work of judges. He phrases his theory of constructive interpretation in ways that disguise its affinity to inference to the best explanation. I think this is unfortunate for two reasons. One is that it makes his jurisprudential views seem, at least to many critics, idiosyncratic to the point of radical. The other is that, in accordance to the thesis being developed here, it makes the reasoning of jurists who would adopt the method seem mysterious and relativistic, rather than resting on recognizable cognitive skills and promising a great deal of intersubjective agreement, though not always in hard cases.

Dworkin treats scientific explanation as a subspecies of interpretation. He insists that interpretation is required for purposeful activities like literature and law. Most scholars in the humanities and the social science would agree. This might suggest that interpretative reasoning is different in kind from explanatory reasoning. But that is far from clear. The clearest cases of explanation are deeply causal. What caused the deaths of Nicole and Ron Goldman? Or the blood on the gate, glove and sock? But communication, or potential communication, is often explained in causal terms. I'm distracted and follow the car much too close. The driver raises his left arm to the side of his face. Was that an obscene gesture, or simply an itchy ear? Authors, artists, and legislators desire to do things, and they produce "texts" in order to accomplish these ends. We interpret, that is to say explain, these texts – how did they come to be? What do they mean? Was the driver ahead telling me something? What were the authors of the Fifth, Eighth, and Fourteenth Amendments up to when they produced these texts? Purposes, intentions, and lots of other deeply psychological states are certainly part of the story that makes sense of the texts. But philosophers have long seen reasons as causes.

> What is the relation between a reason and an action when the reason explains the action by giving the agent's reason for doing what he did? We may call such explanations rationalizations, and say that the reason rationalizes the action. … I want to defend the ancient-and common-sense-position that rationalization is a species of ordinary causal explanation.[29]

Thus, I am suggesting that interpretation – conversational, literary, or constitutional – is better seen as a subspecies of explanation.

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[28] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), p. 53.
[29] See, Donald Davidson, "Actions, Reasons, and Causes, *The Journal of Philosophy* 60:23 (1963).

Dworkin imposes some very idiosyncratic and controversial strictures on the inferences that judges make in hard cases. He is adamant that they are value driven exercises. Now it is obvious that value judgments are in one sense at the heart and soul of IBE. We are seeking the *best* explanation, and this is certainly a value laden enterprise. I have argued that it depends on a basic perceptual skill, but this skill, much like jurying an art exposition, judging a figure skating competition, or selecting the best Bordeaux, is perceptual and judgmental at the same time. But Dworkin sees constructive interpretation as much more deeply value laden.

His mythical judge Hercules, and all imperfect human jurists employing law as integrity, are instructed to impose unrealistic, and fundamentally normative, assumptions on the language of the germane legal texts, as well as the substance and justification in the relevant precedents.

> Law as integrity asks a judge deciding a common-law case … to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal with related problems, he must think of their decisions as part of a long story he must interpret and then continue, according to his judgment of how to make the developing story as good as it can be.[30]

If all that is meant is that a judge must "make sense" of statutes, constitutional provisions, and previous judges' thoughts as expressed in their opinions in previous precedent, this looks for all the world to be inference to the best explanation at work. But Dworkin is much more explicit about what counts as making sense, or explaining, of all this. He has judges assume that they are writing a chain-novel.

> Each novelist aims to make a single novel of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the best novel it can be construed as the work of a single author rather than, as is the fact, the product of many hands.[31]

I find much to admire in this view of law and judging. But I also think that the instructions to assume a single author, or "to make the developing story as good as it can be," are like the wine critic and author Michael Bettane, being interviewed in the delightful film *Red Obsession*.

> As soon as you have to use words to describe your sensation, you use words in a part of your brain which is linked to your memory, to your history, to your taste, to your education. In my brain, because it's my background, is music. This is like

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[30] Dworin (1986), *op. cit.*, pp. 238-9.
[31] *Ibid*, p. 239.

a voice a wine, it's like an instrument with what we call a timbre, which is different – a Steinway is not the same, and that's the difference between Laffite and Latour, between a Guarnerius and a Stradivarius . My perception is like that. I hear the wine, I don't smell. heh, heh.[32]

Mr. Bettabe's self-conscious chuckle at the end says a lot. He is not for a second suggesting that wine critics should be classically trained in music, or even that those who might be should "hear the wine." He is trying to deal with another case of tacit knowledge – trying to put into words something that defies precise articulation. Even Hercules, as superhuman as he may be, is not immune to challenge of tacit knowledge. He knows, because he is superhuman, the right answer to every hard case, but when he assumes that law is a chain-novel, and decides the cases by "mak[ing] the developing story as good as it can be," he should be seen as describing as well as he can how he does it, and not as prescribing a general adjudicative method. Judges, even superhuman judges like Hercules, must trust a basic cognitive skill shared by most other judges, at explaining legal language and precedent. Wise judges, and insightful academic lawyers like Dworkin, may advise and even try to teach their colleagues how to do all of this. But all of this advice and pedagogy will amount to little more than assuming the skill in the first place, and perhaps fine tuning it a bit.

Hercules is constructed to discover the right answer in hard cases. There is a delightful pun in this way of describing law as integrity. The adjective "right" means both correct as a matter of law, and superior as a matter of political morality. Either standard, however, is deeply normative. Dworkin, of course, is unapologetic about any of this.

> If … any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law. … Suppose this is natural law. What in the world is wrong with it?[33]

But one need not be a moral realist to concede, first, that there are hard cases in the law.

> e_{13}.   "[T]here are … areas of conduct which must be left to be developed by courts or officials striking a balance, in light of the circumstances, between competing interests which vary in weight from case to case."[34]

This development of the law in hard cases is not pure discretion – judges don't get to decide these cases on pure whim, who is the best looking advocate, or which party would they would most enjoy a beer with – but according to some recognized standard.

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[32] Michael Bettane, wine critic and author. Interviewed in *Red Obsession*. Dirs. David Roach, Warwick Ross. Lion Rock Films. 2013. Film.
[33] Ronald Dworkin, "Natural Law Revisited," *University of Florida Law Review* 34 (1982). Reprinted in Patricia Smith, editor, *The Nature and Process of Law* (New York: Oxford University Press, 1993), p. 240.
[34] Hart, *op. cit.*, p. 135.

e$_{14}$.   Judges are expected to decide hard cases on the basis of some recognized and widely shared standards.

Hart concedes that English law camouflages the standard.

> In a system where *stare decisis* is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body. In England this fact is often obscured by forms: for the courts often disclaim any such creative function and insist that the proper task of statutory interpretation and the use of precedent is, respectively, to search for the 'intention of the legislature' and the law that already exists.[35]

But though the 'intention of the legislature' is a kind of legal fiction, this does not mean that "anything goes" in Hart's view of judicial discretion.

> At any given moment judges … are parts of a system of rules of which are determinate enough at the center to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of authority to make those decisions which cannot be challenged within the system.[36]

And perhaps most surprisingly, even a strong legal realist like Richard Posner is willing to admit that judges exercising discretion are bound by rules or principles.

> You do not play chess unless you are prepared to play by the rules. The rules of the game of which I am speaking with reference to the judicial process are not legal rules… They are rules of articulation, awareness of boundaries and role, process values, a professional culture. Wholehearted compliance with the rules cannot be guaranteed, given judges' freedom from the kind of external constraints that operate on other game players. If you do not play chess by the rules, you are not doing anything. If you do not play judging by the rules, but instead act the politician in robes, you are doing something, and it may be something you value more than you do the game of judging as it is supposed to be played.[37]

VI.

> My aim in [*The Concept of Law*] was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and

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[35] Hart, *op. cit.*, pp. 135-6.

[36] *Ibid*, p. 145.

[37] Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008), p. 91.

clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect.[38]

We have assembled a good deal of relevant data about legal systems, data that legal positivists, legal realists, and natural lawyers will all concede is true.

e_1.   Any modern legal system includes rules forbidding or enjoining certain types of behavior under penalty.

e_2.   Any modern legal system includes rules requiring people to compensate those whom they injure in certain ways.

e_3.   Any modern legal system includes rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations

e_4.   Any modern legal system includes courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid.

e_5.   Any modern legal system includes a legislature to make new rules and abolish old ones.

e_6.   Legal rules will always admit of borderline cases.

e_7.   Rules must always be interpreted by courts, and ultimately by supreme courts.

e_8.   The entire legal system is a product of, administered by, and subject to the weaknesses and failures but also the strengths of, fallible human actors.

e_9.   Any legal system is bound by procedural constraints

e_{10}.   There is remarkable overlap between, not just the language, but the substantive content of legal rules and moral rules.

e_{11}.   There are natural, i.e., physiological, psychological, and social, reasons why normative systems, whether legal or moral, will have similar, if not universal, content.

e_{12}.   The actions of legal actors, particularly of judges, is subject to professional standards that seems inherently normative.

e_{13}.   "[T]here are … areas of conduct which must be left to be developed by courts or officials striking a balance, in light of the circumstances, between competing interests which vary in weight from case to case."

e_{14}.   Judges are expected to decide hard cases on the basis of some recognized and widely shared standards.

So what is the best explanation of all of this data? If our only candidates are the recognized schools of jurisprudence we get the following list.

t_1.   Legal positivism (as exemplified, say, in Hart's *Concept of Law*[39])

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[38] Hart, *op. cit.*, p. 239.

[39] *Ibid.*

t_2.   Legal realism (as exemplified, say, in Posner's *How Judges Think*[40])

t_3.   Natural law (as exemplified, say, in Dworkin's *Law's Empire*[41])

I've already more than hinted that my sympathies lie with Dworkin. It's obvious to me that e_9 through e_{14} require that the connection between law and normative standards be seen as structural, not merely the contingent relationships of culture and sociological necessity.

At the same time, however, I continue to believe that positivism and realism contain genuine insights into the nature of law, insights that are to some degree glossed over in Dworkin's (and other natural lawyers') treatment. I suggest a blended explanatory alternative.

t_4.   Law aspires to be a system of rules. These rules are subject to general procedural requirements. The entire system is designed and administered by fallible legal actors. There are situations requiring legal decision that are not clearly covered in the existing system of rules. Judges must make decisions in these situations, but the decisions should adhere to professional, political and moral norms.

t_4, I fear, will strike many as unparsimonious, and perhaps as a weak-willed failure to take sides. My only response is to remind readers that truth is often messy and complicated. Consider the causes of cancer. It's easy to find champions of three major theories.

t^*_1.   Environmental causes

t^*_2.   Genetic causes

t^*_3.   Viral causes

But I think we now know that the best explanation of, at least some, cancers is "all of the above."

t^*_4.   Environmental, genetic, and viral factors are all causally relevant to some cancers.

VII.

Internalism is not a facile relativism that says 'Anything goes.' Denying it makes sense to ask whether our concepts 'match' something totally uncontaminated by conceptualization is one thing; but to hold that every conceptual system is therefore just as good as every other would be something else. If anyone really believed that, and if they were foolish enough to pick a conceptual system that

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[40] Posner, *op. cit.*

[41] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

told them they could fly and to act upon it by jumping out of a window, they would, if they were lucky enough to survive, see the weakness of the latter view at once.[42]

Inference to the best explanation is the preferred strategy of realist metaphysicians. How do we explain our manifest success in perceiving and manipulating the external world except on the hypothesis that there really is a world out there to perceive and manipulate? As with any IBE there are, of course, rival explanations of those perceptions and manipulations, but none of these rivals seem anywhere near as simple(?), plausible(?), lovely(?), as the realist's account. I endorse the spirit of this reasoning, but suspect that it gets the explanatory direction backwards. Metaphysical realism is not so much supported by IBE, as presupposed. And the perceptual version of IBE that I have been defending is unapologetic about this presupposition.

Evidence is important as a device for discovering the truth. That is what almost every scholarly discipline ultimately depends upon. Eventually IBE depends on an assumption about the nature of truth. We have already seen that Inference to the Best Explanation straddles the subjective/objective divide. Individual human subjects, with complex sensory organs and central nervous systems, but also with unique, and culturally influenced, personal histories, seek to understand some part of an "objective world." They maybe police inspectors, jurors in grizzly murder cases, or academic lawyers defending theories of the nature of law. This duality of subjective thinking seeking models of an "objective" reality lies at the heart of the deepest issues in epistemology and metaphysics. I know of no better exposition of all of this than Peter Kosso's melding of the correspondence and coherence theories of truth.

> Though truth *is* correspondence with the facts it cannot be *recognized* by its correspondence. We cannot rely on the facts to guide proofs of scientific theories since the facts are irretrievably at the outer end of the correspondence relation. … So any indicators of truth must be internal. … The process of justifying, then, is a process of comparing aspects of the system, and the accomplishment of justification is the demonstration of coherence among the aspects.[43]

The problem, of course, is that such correspondence theories of truth fit the evidence in the O. J. Simpson case just fine, but seem to have a much more difficult time with H. L. A. Hart's and Ronald Dworkin's reasoning. There may be no "God's Eye" view of reality that we can inhabit to discover how things really are – independent of cultural and shared understanding – but almost all of us believe that there is something "out there" that limits what we can say and infer about what to Nicole and Ron Goldman. But it is

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[42] Hilary Putnam, *Reason, Truth and History* (Cambridge, UK: Cambridge University Press, 1981), p.54.
[43] Peter Kosso, *Reading the Book of Nature* (Cambridge: Cambridge University Press, 1992), p. 136.

much more problematic to say what that something out there be for debates about the "correct" theory of the nature of law possibly be? It is tempting to say that although the basic structure of inference to the best explanation as a theory of evidence fits criminal law, and jurisprudence with equal elegance, their ultimate appeal to truth seems radically different. The criminal law implicitly endorses metaphysical realism and a correspondence theory of truth, while jurisprudence seems to depend on a coherence theory of truth.

I remain hopeful, however, that we need not abandon the hope of reconciling evidence evaluation, explanation, and inference to the best explanation under one overarching (internal) realist theory of truth. Analyses of law seek to describe (define, analyze, etc.) something objectively "out there." This "something," of course, is inherently human in construction and administration, and varies in important ways from legal system to legal system. But unless language and translation totally mislead us, and ultimately trick us with a simple pun, these different systems have enough in common to warrant the single term **law**. The job of the legal theorist is, therefore, much like the job of ethnographer.[44] There are cultural, in this case legal, practices and documents that invite careful scholarly analysis. The jurisprudental scholar assembles and assesses relevant evidence in the hopes of *correctly*, i.e., *accurately*, characterizing this cross-cultural practice. This is ultimately no different than the physicist seeking to characterize the "ultimate" nature of physical reality in terms, say, of ten dimensional strings, or the jury seeking to discover what really happened to Ron and Nicole.

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[44] See, for example, Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1977).