EVIDENCE AND THE PURSUIT OF TRUTH IN THE LAW

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I.

Whenever we investigate anything—black holes or the causes of the First World War or the demography of the Cayman Islands or the ambiguity of Yeats’s poetry—our intrinsic goal is to find the truth about something. If we did not have that goal, we would not be inquiring.¹

Lawyers are concerned with truth. Practicing attorneys are concerned with the truth of factual circumstances in representing their clients, and making their cases to juries. Supreme Court Justices, indeed any appeals court judge, is concerned with the truth of their interpretation of the relevant law. Academic theoreticians are concerned with the truth of their grand theories of the nature of law. Perhaps there are some legal cynics who are not concerned with the truth – seeing their trial strategy, their published opinions, their scholarly books and articles as merely rhetorical games. Fortunately, though, these cynics are relatively few and far between.

The classical problem in epistemology is that truth is never, or almost never, manifest. This is the case in every profession and academic discipline. We know this because of controversy. Lawyers and jury members can, and often do, disagree about the truth of factual circumstances. As concurring and dissenting opinions amply illustrate, Justices disagree about interpretations of the Constitution. And the whole field of jurisprudence in some sense depends on disagreements about the nature of law. What, therefore are we to do? Abandoning truth to radical relativism, though in and out of fashion in recent decades, is profoundly unsatisfying. This approach is simply a repackaged cynicism that reduces law to rhetoric. What is needed is a method for discovering the truth, and all of the professions, and
virtually every academic discipline, endorses some such method. I claim that most of these methods reduce to a single method – the discovery and presentation of good evidence.

I defend what I take to be a very commonsensical and pedagogically useful theory of [good] evidence. I argue that this view, *inference to the best explanation*, captures most, if not all, of a practicing lawyer’s appeal to evidence, a Supreme Court Justice’s use of evidence to defend an interpretation, and a legal theorist’s defense of a comprehensive theory of the nature of law itself. Indeed, I would go further and suggest that *IBE*, to use the common acronym, is also the concept of evidence we find in science, history, literary theory, and most of everyday reasoning. Although I appeal to IBE as a unifying theory of legal evidence it is far from clear that a single unifying concept of legal truth survives as the unequivocal goal of the trial jury’s use of evidence to determine guilt or innocence as contrasted with the academic lawyer’s use of evidence to defend a positivist theory of the nature of law.

II.

(yeah, yeah, yeah, yeah, yeah, yeah)
(yeah, yeah, yeah, yeah, yeah, yeah)

When you left me all alone at the record hop
Told me you were goin’ out for a soda pop
You were gone for quite a while, half an hour or more
You came back and man oh man this is what I saw

Lipstick on your collar told a tale on you
Lipstick on your collar said you were untrue
Bet your bottom dollar you and I are through
Cuz lipstick on your collar told a tale on you, yeah

You said it belonged to me, made me stop and think
Then I noticed yours was red, mine was baby pink
Who walked in but Mary Jane, lipstick all a mess
Were you smoochin’ my best friend, guess the answer’s yes
What was Connie’s evidence that he was smooching her best friend, Mary Jane? She actually has quite a bit of relevant data. First, of course, is that he had lipstick on his collar. When confronted he told her that the lipstick was hers. She then noticed that the stain on his collar was red, but her lipstick was baby pink. He had left had her alone at the record hop for half an hour or more. And, finally when Mary Jane appeared, her lipstick was all a mess. We can schematize this evidence as follows.

- \( e_1 \). He left Connie all alone at the record hop.
- \( e_2 \). He was gone for half an hour or more.
- \( e_3 \). There was a lipstick stain on his collar.
- \( e_4 \). When confronted he claimed that the stain came from Connie’s lipstick.
- \( e_5 \). The stain was red.
- \( e_6 \). Connie’s lipstick was baby pink.
- \( e_7 \). Mary Jane’s lipstick was all a mess.

Does all of this provide evidence for her hypothesis about the origin of the lipstick stain? And for the normative assessment that he was untrue? And for the prediction that he and Connie are through? Is this evidence, \textit{good evidence}? Is Connie’s theory \textit{true}?
III.

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.\(^2\)

The above is Gilbert Harman’s canonical statement of inference to the best explanation. It is the concept of evidence we find in science, history, the law, literary theory, and most of everyday reasoning. As intuitive and functional as it is, however, IBE has been haunted by a number of seemingly insoluble philosophical problems. Harman foresaw the most serious of these problems.

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.\(^3\)

Harman’s strategy of generality and silence on the criteria for explanatory virtue is no longer an option for defenders of IBE. The challenge, therefore, is to present a philosophical and psychologically satisfying account of how normal human beings explain what is going on around them, and how they make confident judgments about the ordinal, and even in some cases the cardinal, value of competing explanatory candidates.

Russell Hanson relied on Peirce to articulate his version of IBE.
Before Peirce treated retroduction as an inference logicians had recognized that the reasonable proposal of an explanatory hypothesis was subject to certain conditions. The hypothesis cannot be admitted, even as a tentative conjecture, unless it would account for the phenomena posing the difficulty—or at least some of them. ... The form of the inference is this:
1. Some surprising phenomenon $P$ is observed.
2. $P$ would be explicable as a matter of course if $H$ were true.
3. Hence there is reason to think that $H$ is true.$^4$

The marshalling of evidence, as with presenting an argument, making a case, etc., is something that human beings do. Being persuaded by the evidence, convinced by an argument, and won over by the case are things that happen to human beings. This strongly suggests that psychology is the place to start an investigation of the concepts of evidence and good evidence. What goes on in human minds and brains when evidence is assembled, laid out, and ultimately succeeds or fails in affecting other human minds and brains in the desired way? This approach to evidence is candidly subjective – it is after all individual subjects who produce and consume evidence. It invites insights and discoveries from, not only cognitive psychology, but computer science, and cognitive neuroscience.$^5$ With the concession to subjectivity, of course, comes the contributions of anthropologists, sociologists, and the whole specter of relativism.

Countering this treatment of evidence are the notions of facts, knowledge, and truth; none of which are immediately psychological or relativistic. This suggests that the proper home for an analysis of evidence and good evidence are the age old pursuits of epistemology and metaphysics. Good evidence consists of true facts (perhaps a redundancy) that lead us to (new?) true knowledge (almost certainly a redundancy).

Hanson’s exposition mixes the psychological approach to evidence with the realist/metaphysical treatment. The psychological presentation emphasizes something like the
Surprising phenomena, \( P_1, P_2, P_n \), are observed. \( H \) renders the phenomena explicable (as a matter of course). Thus, there is reason to think \( H \) is true. Evidence is observations that are explained by a hypothesis that explains the observations.

\[
\begin{array}{c|c}
\text{Evidence} & P_1 \\
& P_2 \\
& P_n \\
\hline
\text{Evidential connection} & \Rightarrow \\
\text{Hypothesis (theory, etc.)} & H \\
\hline
\text{Observations} & \text{Justificatory reason to think} \\
\text{Explanation of observations} & \\
\end{array}
\]

In the metaphysical presentation the phenomena (in the sense of facts, events, objects, etc.) are true parts of the “real world.” \( H \) is a complicated model (usually causal) of the true arrangement of the relevant facts, events and objects. Evidence is now facts that are collected into a (causal) arrangement.

\[
\begin{array}{c|c}
\text{Evidence} & P_1 \\
& P_2 \\
& P_n \\
\hline
\text{Evidential connection} & \Rightarrow \\
\text{Hypothesis (theory, etc.)} & H \\
\hline
\text{Facts} & \text{Causal arrangement} \\
& \text{between facts} \\
& \text{New fact(s)} \\
\end{array}
\]

Good detective stories tantalize us with lots of potential suspects. So it often is with evidence in general. Inferences from observations to explanations, or causal models of how facts might be arranged, might give us some reason to think a hypothesis is true, but not necessarily good reason, because another explanation of the observations, \( H_{\text{rival}} \), could also render the observations “explicable as a matter of course if \( [H_{\text{rival}}] \) were true.” Other causal arrangements of the facts are possible. Consider poor Connie again. Lots of rival explanations, not only of the lipstick stain, but all the facts are easy to construct. Here are just a couple.

He went out for a soda pop, just as he said. When asked about the lipstick stain he responded that it came from Connie, since she was the only one he had been smooching. The laundry detergent his mother uses left a residue on his collar that chemically changed the baby
pink lipstick to a bright red color. Mary Jane had been smooching a new guy she met at the record hop, and this messed up her lipstick. We can label this rival explanation $t_1$.

Or the circumstances might be more sinister. He left Connie all alone because he was feeling ill, but thought it more decorous to say he wanted a soda pop. Mary Jane has been harboring a grudge against Connie since the last student council meeting. She found him in the lobby, distracted him, and smudged lipstick on his collar. After he left to return to Connie, Mary Jane smudged her lipstick with the back of her hand. When he returned and was asked about the stain, he told Connie it was hers because she was the only one he had been smooching. Let’s label this one $t_2$.

Hence, evidence is not simply an inference to an explanation, but aspires to be an inference to the best explanation. All of this immediately raises the question of how Connie (or the jury, the scientist, the literary theorist, etc.) determines which explanation is better than the other.

IV.

Despite its intuitive plausibility, IBE faces two key challenges. First, how exactly is IBE to be understood and made precise? There are various conceptions of the nature of explanation, but assuming some of these are suitable for IBE this still leaves the question as to how one explanation should be compared against another so that the best explanation can be identified. Second, 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.6
Many of the philosophical concerns about IBE stem from the very nature of evidence, or in the parlance of logicians, inductive arguments. Deductive certainty was the ideal, if not the realistic hope, of many earlier generations of methodologists. The sad fact is, however, is that evidence, even spectacularly good evidence, will never logically guarantee the truth. Even if every purported fact offered as evidence is conceded as true, and even if all rival explanations are ridiculously implausible, this will not prove (in the logician’s, not the lawyer’s, sense) that the theory being defended is true. We saw that already in the little bit of high school gossip concerning Connie. She has pretty strong evidence that he was smooching Mary Jane, but it’s possible that there was the chemical reaction with the detergent residue, or that Mary Jane is more cunning and devious than anyone ever suspected.

We cannot expect evidence to guarantee truth, but it must surely “track” truth – that it supply “some reason for thinking that it provides a good strategy for determining the truth.” I believe that evidence does supply a good strategy for determining truth, indeed I am tempted to say that it is the only strategy. I return to campus for the fall start of the academic year convocation. The first two people I see are my longtime colleague, Jill, just back from her year in South America, and my boss, Steve. Jill looks great; refreshed, and enthusiastic about returning to the trenches. Steve is a huge surprise, clean shaven and having lost a lot of weight. Surely I know that Jill and Steve are at the convocation without the need of evidence; I need no strategy for determining the truth – it’s manifest. But, of course, what I saw is really only evidence for the way things are. Jill and Steve being at the convocation are pretty darn good explanations of what my senses have told me. But ever since Descartes we have known that the senses sometimes lie. The rival explanation that it was not Steve, but the new hire in
Accounting who bears an uncanny resemblance to Steve, and that it was Jill’s twin sister is certainly possible, however unlikely.

So, then, how does IBE track truth? The answer, I am convinced, is illustrated in my knowledge that Steve and Jill were at the convocation. I saw them there! Yes, yes, skeptical doubts are possible, and on some definitions I should have placed the word knowledge in scare quotes. But, in fact, we are all skillful practitioners at recognizing human faces, particularly those belonging to good friends and colleagues. In similar fashion Connie saw, not just the lipstick stain, but the whole sordid situation with her boyfriend and Mary Jane. Larry Wright articulates this point beautifully.

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 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.

I confess to being something of a nativist, so I suspect that the truth tracking skill in determining what’s going on is deeply biological. But whether its origins are evolutionary, a gift from a benevolent creator, or the product cultural teaching, I don’t see how we can possibly doubt that normal human beings possess this skill.

V.

The baby, assailed by eyes, ears, nose, skin, and entrails at once, feels it all as one great blooming, buzzing confusion; and to the
very end of life, our location of all things in one space is due to the fact that the original extents or bignesses of all the sensations which came to our notice at once, coalesced together into one and the same space.  

Connie’s visual system sent tens of millions of signals to her brain every second, and billions of neurons processed these signals. When describe at this level it tempting to suppose that she must have experienced, in William James’ famous one-liner, “blooming buzzing confusion.” We now know that this does not accurately describe even infant perception, but as James clearly saw over one hundred years ago it certainly does not capture Connie’s experience. She does not experience millions upon millions of visual signals during the five minutes or so that puts things together, but rather sees shirt collars, lipstick stains, boyfriends, and soon to be ex, best friends. None of this is news. But it is still directly relevant. We should never forget how incredibly complicated, almost miraculous, perception really is.

All of that potentially blooming, buzzing confusion gets filtered, repackaged, abbreviated, and modeled at at least four different levels. One, of course, is the biological. We know a lot now about how the “simple” physics of optics, the physiology of the eyes, and the neuro-computational power of the human brain allowed Connie to see human beings, colors of lipstick, and the other objects that are the simple components of her narrative.

The human visual system sends ten million signals per second to the brain, where billions of neurons strip off random fluctuations and irrelevant, ambiguous information to reveal shape, color, texture, shading, surface reflections, roughness, and other features. As a result, human beings can look at a blurry, distorted, noisy pattern and instantly recognize a tomato plant, a car, or a sheep.

The next level is one of conscious awareness. As her suspicion and anger grows, she loses awareness of what record is playing, or that her friend Annette looks slightly ill. Her auditory
and visual systems are working just fine, but she doesn’t hear the song, nor see the distress. Perception automatically focuses, which means sensory data is necessarily edited out. Add to this the fact that perceptual reality is clearly socially constructed. Connie doesn’t see shapes, objects and motion, not even a young male and a young female, but a boyfriend and a best friend. She doesn’t observe color patches on faces; she sees lipstick. And she doesn’t “see” osculation, rather betrayal. Finally, when she records the day’s events in her diary, she has to capture all of what she has seen in language.

The use I want to make of all this is rather mundane. Biologists, neuroscientists, psychologists, and sociologists have vital things to teach us about how perception works. But, however valuable all this research is, it is of virtually no use in teaching Connie to see. Perhaps she is particularly dense and doesn’t see that her boyfriend is such a louse. Perhaps this is partly because she is one of those sad individuals who fails to notice things. We see the lipstick on his collar, and Mary Jane’s face when she reappears. How do we tell Connie to wake and smell the coffee? Imagine how absurd the following advice would be. “Connie, focus on those ten millions signals, allow your billions of neurons to process them more carefully. Don’t you see his is red but yours is baby pink?” The articulation of a theory of perception is entirely independent of a recipe or instruction manual for more accurate seeing. We seek a description of perception, not a primer for perceiving.

VI.

These five characteristics—accuracy, consistency, scope, simplicity, and fruitfulness—are all standard criteria for evaluating the adequacy of a theory. … [T]hey all play a vital role when scientists must choose between an established theory and an upstart competitor. Together with others of much the same sort, they provide the shared basis for theory choice. … Even those who
have followed me this far will want to know how a value-based enterprise of the sort I have described can develop as a science does, repeatedly producing powerful new techniques for prediction and control. To that question, unfortunately, I have no answer at all.\textsuperscript{10}

Connie’s new best friend, Sarah, listens to her sad story, and concludes that Connie’s evidence is pretty strong. Since Sarah has made a judgment about the quality of the evidence, according to IBE she has implicitly ranked the alternative explanations by some scale or standard.

\begin{itemize}
  \item \textit{t}_0. \quad \text{The smooching hypothesis}
  \item \textit{t}_1. \quad \text{The laundry detergent hypothesis}
  \item \textit{t}_2. \quad \text{The revenge hypothesis}
\end{itemize}

Why is \textit{t}_0 significantly better than \textit{t}_1 or \textit{t}_2? The answer is implicit in the earlier answer to why and how IBE tracks the truth. We are dealing with a human cognitive/perceptual skill; the challenge is to articulate how this skill works.

How do we judge that any explanation counts as better than any other explanation? Harman counsels simplicity, completeness and plausibility. Kuhn favors accuracy, consistency, scope, simplicity, and fruitfulness. Wright talks of explanations comporting with the data and seeks “fit.”

\begin{quote}
[T]he only very general thing we can say about what we do when we evaluate evidence is rather coarse-grained. When we do prefer one member of the list of rivals to the others, we do so simply because it comports best with the data we have, against the background of our relevant knowledge. Some rivals score better in some ways, others in others. We weigh the tugs in all directions and judge one rival to ‘fit’ better than the others, all things considered. . . . So at bottom it is always a complex judgment of fit: which one fits most easily with everything we know about the matter.\textsuperscript{11}
\end{quote}

Achenstein demands quasi-mathematical precision.
Evidence $e$ must be a good reason to believe $h$. ... $e$ is such a reason only if the probability of $h$, given $e$, is sufficiently high ... that is $e$ is evidence that $h$ if and only if $p(h/e) > k$, where $k$ is some threshold value for “sufficiently high.” ... If $k$ were less than one-half, since incompatible hypotheses can both have probabilities less than one-half, it would be possible for some $e$ to be evidence for each of two incompatible hypotheses ... Therefore we may conclude that $e$ is evidence that $h$ only if $p(h/e) > \frac{1}{2}$. ... Another way to put this is $e$ is evidence that $h$ only if $h$ is more probable on $e$ than its denial on $e$: $p(h/e) > p(-h/e)$.12

And Peter Lipton famously eschews probabilistic criteria, and insists on an aesthetic virtue.

The version of Inference to the Best Explanation we should consider is Inference to the Loveliest Potential Explanation. Here at least we have an attempt to account for epistemic value in terms of explanatory virtue. This version claims that the explanation that would, if true, provide the deepest understanding is the explanation that is likeliest to be true.13

Most of the literature treats such proposed criteria for judging explanatory virtue as though they were competing accounts. The players themselves often contribute to this view. Now, if what is being offered is an analysis, or definition, of the best explanation, they most certainly are incompatible pictures. I will offer a very different interpretation in the next section, but I cannot resist a pedagogical comment at this point.

Whatever is going on, I ask you to imagine teaching your students, or instructing a jury, based on either Achenstein’s or Lipton’s criteria. If Connie is anything like a good portion of my students, asking her to rank order the lipstick hypotheses on the basis of statistics and the probability calculus will be a laughable failure. And to ask the blue collar worker on the jury to assess preponderance of evidence, or proof beyond a reasonable doubt, on the basis of the loveliest potential explanation will have an equally disappointing end. Wright and Harman may
prove more pedagogically useful, but I suspect that has more to do with their more colloquial language, and the fact that their criteria are more general and vague.

VII.

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 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.14

David Glass identified two challenges for IBE – “how one explanation should be compared against another so that the best explanation can be identified,” and identifying “some reason for thinking that it provides a good strategy for determining the truth.”15 It should come as no surprise that I think both of these challenges have a single answer. I have already argued that IBE often successfully tracks truth because humans possess a perceptual skill at “seeing” the truth. This perceptual ability includes the ability to, not only see the truth, but to see why and how one hypothesis is better than another, and way, way better than yet a third. I realize that this will strike some readers as an appeal to mystery, and to some degree that’s exactly what it is. But I remain unapologetic, since much of human perceptual skill is even more mysterious. Consider hitting a major league fastball.

A typical major league fastball travels about 10 feet in just the 75 milliseconds that it takes for sensory cells in the retina to confirm that a baseball is in view and for information about the flight path and velocity of the ball to be relayed to the brain. The entire flight of the baseball from the pitcher’s hand to the plate takes just 400 milliseconds. And because it takes half that time merely to initiate muscular action, a major league batter has to know where he is
swinging shortly after the ball leaves the pitcher's hand -- well before it's even halfway to the plate.

The window for actually making contact with the ball, when it is in reach of the bat, is five milliseconds, and because the angle of the ball relative to the hitter's eye changes so rapidly as the ball gets closer to the plate, the advice to "keep your eye on the ball" is impossible to follow. Humans don't have a visual system fast enough to track the ball all the way in. A batter could just as well close his eyes once the ball is halfway to home plate. Given the speed of the pitch and the limitations of our physiology, it seems to be a miracle that anybody hits the ball at all.¹⁶

But, major league hitters not only succeed in making ball to bat contact, they manage to successfully get base hits somewhere between a quarter and a third of the time. How the heck are they able to do that? To continue with the theme of the last few sections, it is fascinating to more carefully explore a perceptual skill like hitting a fastball, but trusting hitters to describe the skill, or worse, taking these descriptions as instruction manuals for becoming a good hitter, is not only misleading, but downright counterproductive.

The wine critic, Michael Bettane, explains how he can recognize a world class Bordeaux by hearing the wine. I have included in the delightful quote from Red Obsession his self-conscious "heh, heh," at the end. I hear him as not smugly announcing a superior way of discerning a great wine, but as somewhat embarrassed at offering a ridiculous and unhelpful account of how he does it. I think it is useful to see the suggested criteria for explanatory virtue in a similar light, not embarrassed of course, but as idiosyncratic attempts to articulate something deeply perceptual. Those comfortable with numbers will find Achinstein’s statistical criteria insightful, and even useful. Those who are more at home with spatial and physical metaphors are more likely to be drawn to Wright’s discussion of tugs and fits. I take them all to be sincere and good willed attempts to articulate something that most humans are very good
at, and some humans like natural scientists are exceptionally good at. But as anyone who has ever tried to hit a fastball, or teach someone to hit one, can tell you, it’s easier to do it, than to put it in words how you do it.

VIII.

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.17

We are all wannabe lawyers. Movies, television, cheap mysteries, and the popular culture generally, have made us comfortable with caricatures of litigators rising to object with claims of irrelevance or hearsay. It’s hard, therefore, for the professional philosopher to claim surprised at the law of evidence, but it is nevertheless pause-giving to compare it to the workings of evidence in most other everyday and professional contexts. There are at least three idiosyncratic features of criminal evidence that diverge spectacularly from, say, scientific evidence. The first is that the rules of evidence are clearly designed to do more than simply discover the truth.

The philosopher of science, Larry Lauden, is close to outraged by the criminal law’s rules of evidence that routinely exclude relevant evidence.
To be admissible, evidence must not only be relevant; it must also meet a variety of other demands. For instance, the evidence cannot have been acquired by a violation of the rights of the accused. The evidence cannot arise from privileged relations that the accused had with various professionals or his spouse. The evidence generally cannot have been obtained illegally, even if its being seized violated none of the rights of the accused. The evidence cannot be such that it might inflame the passions of the jurors or unfairly cast the defendant in an unfavorable light. The evidence cannot inform the jury the defendant withdrew a confession of guilt, nor can it refer to admissions of guilt made by the defendant during negotiations about coping a plea. ... If the accused does not offer testimony on his own behalf, the judge explicitly instructs the jury to ignore that relevant fact, rather than supposing that the accused may have something to hide.\textsuperscript{18}

Lauden's outrage would be entirely justified, if Justice Powell's view of the criminal justice system was accurate.

Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision of guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover the truth according to the law.\textsuperscript{19}

Justice Powell may be guilty of a little linguistic trickery. By including the phrase “according to the law,” he may be trivializing his entire point. If the truth that the criminal justice system seeks is the truth \textit{according to the law}, rather than the \textit{objective truth} of guilt or innocence, then perhaps there is no quarrel with his hypothesis about the design of the criminal justice system, though this diagnosis now becomes close to begging the question. But assuming that the Justice was not engage in trickery and triviality, his claim about the purpose of the criminal justice system, at least about the rules of criminal evidence, is manifestly false, or more charitably, seriously incomplete.
It is not simply the inadmissibility of relevant facts, but the system as a whole that is designed to do much more than discover an objective truth regarding guilt of innocence. Guilty verdicts may be appealed, not guilty verdicts may not. Double jeopardy precludes the system from assigning guilt on the discovery of new evidence after an original trial. Defendants are innocent until proven guilty, and this proof requires not just good evidence, but evidence in support of a theory that is true beyond a reasonable doubt. We should neither be embarrassed, nor outraged, by these facts about these rules of criminal evidence and procedure. Indeed we should be grateful. These defendants’ rights are not designed to advantage the guilty, but to protect the innocent. Ronald Dworkin clearly sees the awesome power of the law, not just criminal law, but law in general.

We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is a sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or closed up in jail, all in the name of what our abstract and ethereal sovereign, the law has decreed.20

Perhaps nowhere is the sword and menace of the law more clear than in the criminal law. The state has all the power, vastly more resources, and the anonymity of speaking in the name of the state, rather than the living, breathing human beings with prejudices, grievances, and political agendas who administer the law. Clearly citizens need institutional protection from this clear power differential. And thankfully from the English common law to contemporary constitutional law the rules of evidence candidly acknowledge all of this.

IX.

Fact
A thing done; an action performed on an incident transpiring; an event or circumstance; an actual occurrence; an actual
happening in time space of an even mental or physical; that which has taken place. A fact is either a state of things, that is, an existence, or a motion, that is, an event. The quality of being actual; actual existence or occurrence.

Evidence
Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing in the minds of the court or jury as to their contention.

Black’s Law Dictionary: Abridged Fifth Edition

Although the Federal Rules of Evidence begin with a section on definitions, no definition of the central notion of “evidence” is to be found there. But, as we see above, Black’s offers one, and one that seems to take sides on an important issue in the philosophical literature regarding evidence and IBE. Peter Achenstein stipulates that even potential evidence must be in fact true.

Although Hempel and Carnap in addition allow e [the standard abbreviation of evidence] as well as h to be false, I am inclined to think that if there is a concept of potential evidence in use it is one that requires e to be true. ... The concept that Hempel and Carnap seek to analyze which has no such requirement could be described as “doubly potential” (“e would be potential evidence that h if e were true”).

Potential evidence in Achenstein’s sense advances to veridical evidence if h is true, and it further advances to strong veridical evidence if certain explanatory and probabilistic conditions between e and h are met, for our purposes (but not Achenstein’s), if h provides the best explanation of e.

I find all of this needlessly cumbersome, and in fact paradoxical. On such a model, Connie does not even have potential evidence that he was smooching Mary Jane until she has already determined that all of her alleged data is true. How is she going to do this? How will
she verify or authenticate that it was really Mary Jane and not her heretofore unknown twin
who appeared with her lipstick all a mess, or that it really was a lipstick stain on his collar and
not splashed cherry coke from his trek in search of a soda pop? There is, of course, a
straightforward method for addressing these kinds of worries when they are pressing. We
present evidence that it was Mary Jane and that it really was lipstick. But here again, to even
count as potential evidence the truth of whatever data is appealed to must first be shown as
ture with even more basic evidence. And we seem well on our way to an infinite regress.

Better, I think, is Hempel, Carnap, and Black’s usage. Evidence in the laboratory or the
courtroom is assumed to be true, but is not necessarily true. Witnesses take an oath when they
offer testimony and exhibits and documents are subjected to judicial inspection before being
admitted as evidence. Sadly, the assumption of truth occasionally proves unwarranted, and
adjustments in the reasoning that was based on this assumption, are required. Accommodating
all of this presents a bit of a problem for IBE, and constitutes a significant complication for legal
evidence.

The starting point is some jargon in deductive logic.

A deductive argument is said to be valid if and only if it takes a
form that makes it impossible for the premises to be true and the
conclusion nevertheless to be false. Otherwise, a deductive
argument is said to be invalid. A deductive argument is sound if
and only if it is both valid, and all of its premises are actually true.
Otherwise, a deductive argument is unsound. ... It is important to
stress that the premises of an argument do not have actually to
be true in order for the argument to be valid. An argument is valid
if the premises and conclusion are related to each other in the
right way so that if the premises were true, then the conclusion
would have to be true as well. ... A valid argument may still have a
false conclusion. When we construct our arguments, we must aim
to construct one that is not only valid, but sound.22
Deductive arguments can go array in three different ways. They may be invalid. As in the following which is guilty of the fallacy of affirming the consequent.

1. All philosophers are human beings.
2. Wittgenstein is a human being.
--------------------------------------------------
3. Wittgenstein is a philosopher.

They may be unsound because one of the premises is false. As premise (1) clearly is.

1. All philosophers are wise.
2. Wittgenstein is a philosopher.
--------------------------------------------------
3. Wittgenstein is wise.

And they may be unsound because they are both invalid and contain a false premise. Premise (1) is false and the argument affirms the consequent.

1. All biologists are wise.
2. Wittgenstein is wise.
--------------------------------------------------
3. Wittgenstein is a biologist.

Students in introductory courses have it easy. With very few exceptions, they spend all of their time one matters of logical form, developing techniques for distinguishing valid from invalid arguments. Thus they could easily spot the validity of the second little syllogism above, and the invalidity of the first and third. Nothing in their course, however, would give them tools for determining the truth of any of the premises, nor for that matter, the conclusions, and hence, they would have to remain silent on questions of soundness.

Now, evidence in science, the law, and most of everyday reasoning, is a far cry from the deductive reasoning one finds in logic, mathematics, and computer science. We have already seen that IBE promises neither formal validity nor soundness. But the distinction between form and substance in argument analysis remains vital. Consider Connie again.
e₁. He left Connie all alone at the record hop.

e₂. He was gone for half an hour or more.

e₃. There was a lipstick stain on his collar.

e₄. When confronted he claimed that the stain came from Connie’s lipstick.

e₅. The stain was red.

e₆. Connie’s lipstick was baby pink.

e₇. Mary Jane’s lipstick was all a mess.

He had been smooching Mary Jane during the half hour absence.

It is a very different thing to challenge her reasoning by suggesting that the laundry detergent hypothesis should be taken more seriously, and to challenge the truth of e₃ by claiming the stain was not lipstick at all, but cherry coke splashed when he was getting his soda pop. This latter hypothesis does not explain e₃, it denies it.

Scientists, lawyers, and heartbroken teenagers need arguments where the evidence genuinely supports their theories. Were their reasoning deductive, they would need not just valid arguments, but sound ones as well. Since it is not deductive, they need some inductive analogue for correct evidential form. IBE provides such a model of correct evidential form. But validity does not guarantee soundness, since premises may be false. And being the best explanation of the data, does not guarantee that the data offered as evidence is true, unless truth is smuggled into the definitions of “data” and “evidence.” So they need some assurance that what is being offered as evidence is in fact true. In one sense all of this is commonplace. But I am making such a fuss about it because the criminal law so thoroughly fuses questions of form and content. Juries are asked not only to best explain the data offered at trial, but to assess the truth or falsity of that data at the same time. Explaining the blood and DNA samples on the gloves found at the crime scene is a rather straightforward exercise in IBE, but
determining whether the gloves were really found there, or were actually planted there by racist police officers is a very different consideration. Both are essential, of course, in any reasonable decision about guilt or innocence.

X.

At the core of criminal justice jurisprudence in our time lurks a fundamental conceptual confusion. State succinctly, the notion of guilt “beyond a reasonable doubt”—the only accepted, explicit yardstick for reaching a just verdict in a criminal trial—is obscure, incoherent, and muddled.23

A quick review of the recent literature on reasonable doubt confirms Larry Laudan’s diagnosis of obscurity and muddle. Some scholars argue that the historical origin of the concept was not to make convictions hard, but actually to make them easier.24 Empirical studies show widely different understanding of what the standard requires of juries on the part of jurors themselves.25 Attempts to articulate to juries the meaning of guilty beyond a reasonable doubt on the part of trial judges and appellate courts has resulted in divergent and philosophically dubious models.26 But obscurity and confusion do not guarantee logical incoherence.

Laudan insightfully diagnoses one key source of conceptual confusion regarding reasonable doubt. The very language used to articulate the standard misdirects juries, and the jurists who instruct them, to focus on the purely psychological side of evidence evaluation. He imagines the reasonable doubt standard being applied in the natural sciences.

[T]his focus on the juror’s mental state is more than a little curious. Suppose that we tried to teach young scientists how to judge when a theory was acceptable by telling them what their mental state should be before they should accept a theory? Such advice would be seen as missing the point, for what matters is not their mental state per se, but how they came to that state. You
become a scientist not by learning the state of mind you should be in before accepting a theory but by learning how to evaluate evidence and its bearing on a theory.  

IBE acknowledges the psychological and subjective side of evidence evaluation, but also the more objective ability of normal jurors to “see” guilt when the evidence points them to it.

This leads directly to the second major source of confusion regarding reasonable doubt. The standard depends on a perceptual ability. But judges, appellate courts, and academic lawyers attempt to articulate theories that describe this skill. We have already seen the radical difference between having a skill, and having the skill at describing the skill. From the philosophical battles about the standards of best explanations, to wine critics articulating methods of determining great Bordeaux, to hitting coaches explain how to hit fastballs, the message remains unchanged. Descriptions and philosophical theories of perceptual skills, though interesting and even sometimes helpful, depend on the preexistence of the skill in question, and can rarely give it to someone who does not already have it.

Given the rant directly above, it would be a fool’s game to try and articulate a recipe for judging when evidence for guilt has reached the standard for being beyond a reasonable doubt. That doesn’t mean, however, that we can’t say something about this skill that our entire system of criminal trials presupposes. A reasonable starting place for such a general theory is an obvious fact about most skills – we can be remarkably skilled at something, and still occasionally fail. A skilled major league hitter will fail to get a hit two-thirds of the time. Tiger Woods will occasionally miss a gimme, and Itzhak Perlman must hit a bad note every once and a while. Juries, and judges too, must make mistakes from time to time in applying the beyond a reasonable doubt standard to the evidence presented at trial. My guess would be that when
this occurs it is almost always in the direction of acquittal, not guilt. But even when we can point to cases where we have prior agreement that the state has failed to make its case beyond a reasonable doubt, yet a guilty verdict was issued, that would not show that the standard is incoherent. To make that more radical claim, we would need to see a systematic pattern of failures in this direction. I am certainly willing to concede that there are very troubling cases where innocent defendants have been wrongly convicted, but I strongly doubt that these failures have much to do with misunderstandings of reasonable doubt. Police or prosecutorial misconduct, racism or some other sort of prejudice, incompetent defense, and a host of other factors are much more likely explanations of these judicial failures than misunderstandings about reasonable doubt.

But it still seems fair to ask, if distinguished trial and appellate judges fail so spectacularly at explaining reasonable doubt, do we really have the skill I am presupposing? I think that it is clear that we do. Consider the following very fanciful case. Jones is charged with assault. Sixteen witnesses testify that he was drunk and punched three individuals at the nearby table for simply smiling at his obvious and very public drunkenness. Jones foolishly goes to trial, defending himself, and is not able to impeach any of the state’s witnesses or other evidence. His entire defense is the possibility that Martians beamed a secret ray into the bar and implanted the false memories in all of the eyewitnesses regarding his behavior; it was actually someone else who mugged the victims. In terms of IBE, the state’s case looks something like the following.

\[ e_1. \quad \text{Eyewitness 1’s testimony.} \]
\[ e_2. \quad \text{Eyewitness 2’s testimony.} \]
\[ e_3. \quad \text{Eyewitness 3’s testimony.} \]
\[ ... \]
According to IBE the state’s case counts as good evidence of Jones’ guilt, only if the hypothesis of his guilt provides the best explanation of what has been presented as evidence. That means that \( t_0 \) must be compared to rival explanations. The default rival explanation in a criminal case will always be:

\[ t_1. \quad \text{The defendant is not guilty.} \]

But in the case imagined this rival is expanded through the Martian hypothesis.

\[ t^*_{1}. \quad \text{Jones is not guilty; Martians implanted false memories in the sixteen eye witnesses, and some unknown assailant assaulted the three victims.} \]

Although I still offer no magic formula for discovering the criteria for assessing the best explanation, I claim with complete confidence that we will discover virtually blanket intersubjective agreement that \( t_0 \) provides a superior explanation when compared to \( t^*_{1} \). And I go farther. We will find similar intersubjective agreement that \( t_0 \) provides a \textbf{vastly} superior explanation when compared to \( t^*_{1} \). Now what, you may well ask, qualifies an explanation as vastly superior to its competitors? Well, what makes a Bordeaux vastly superior to others in the tasting? Just as one critic had to resort to his musical background, and hearing the wine, we will need to resort to somewhat idiosyncratic metaphors. One favorite, of course, is statistical analogies. Perhaps a vastly superior explanation of the evidence at trial is one deemed to have a probability of .85, or maybe .9, or even .99. Horse racing aficionados could characterize the standard in terms of “lengths” – \( t_0 \) is ahead of \( t^*_{1} \) by more than 200 lengths; I
might be tempted to say it’s out in front by more than an million lengths. Or in Lipton’s favored vocabulary, t^* is atrociously ugly and t_0 is spectacularly lovely.\textsuperscript{29}

I have, of course, constructed a ridiculously easy case in my example. But easy cases are often useful in demonstrating and understanding a skill. We may as yet be without a complete model of judging explanatory success, both in an ordinal, but also a quasi-cardinal, sense, but the fact that virtually everyone of normal cognitive ability agrees about the order, and to some degree the relative “distance” between first and second place, tells us that we are dealing with something human beings are simply able to do. In cases where the separation between the best, and the next best, explanation is not so clear, the standard of reasonable doubt becomes both more interesting, but also problematic. Jury trials are wonderfully constructed to help jurors be more confident in their assessment of explanatory virtue. Skilled litigators guide jurors through the complexities of the evidence. Judges help to make sure that extraneous factors are minimized. And jury deliberations with discussion, lobbying, straw votes, and all help bring about intersubjective agreement.

\textbf{XI.}

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see \textit{Furman v. Georgia}, 408 U.S. 238 (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. ... From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--
along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative. ... The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.30

The concept of evidence is rarely used to describe the structure of an appellate opinion, but it is clear that Justice Blackmun is presenting an argument, both for why the Court should have granted certiorari in the case at hand, and defending his intention to find in all further death penalty cases that the punishment as now administered is unconstitutional. Taking Justice Blackmun as the lead, I hope to show how the argument can be expanded as depending on four distinct types of evidence, three of which I’m quite sure he had clearly in mind all along. In the section to follow we will apply the tools of IBE to all of this evidence combined.

The first sort of evidence is the constitutional language, itself.

1. From the Fifth & Fourteenth Amendments: "[No person shall be] deprived of life, liberty, or property, without due process of law."
2. From the Eighth Amendment: "[C]ruel and unusual punishment [shall not be] inflicted."
3. From the Fourteenth Amendment: "[No State shall] deny to any person within its jurisdiction the equal protection of the laws."
This language, as it stands is problematic to Justice Blackmun’s case against the death penalty for two reasons. The first, of course, is that the language of due process, equal protection, and cruel and unusual punishment is abstract, vague, and inherently controversial. How those words came to be in the Constitution, an inherently explanatory question, is the subject of deep historical and jurisprudential controversy. The interpretive question of what they mean is even more controversial. The second problem, though, is more immediate. The language of the Fifth and Fourteenth Amendments implies that persons may be deprived of life by the state without violating their constitutional rights.

To address this second problem Blackmun should appeal to a useful interpretive distinction first introduced by Ronald Dworkin. Dworkin notes that the venerable methodology of authorial or original intent is ambiguous. Consider the following, you have been newly elected to the Faculty Personnel Committee. This is a huge tribute for someone so junior in their career, but also a huge responsibility. Your vote will help to determine who is promoted, granted tenure, and in some sad cases, fired. You do me the great honor of scheduling a meeting with me and asking my advice about how these personnel decisions should be made. I ask you to give me the weekend to collect my thoughts, and we can discuss it the beginning of the week. Bright and early next Monday you show up at my office door, and it's time for me to put up or shut up. Suppose my advice goes as follows.

*Personnel decisions should always be made in the best interest of the university and its students. Since we are primarily a teaching institution, being a first rate classroom instructor is an absolute precondition for tenure or promotion. We also value scholarship, so being engaged in active and productive research is also required.*
Here's the problem. My little speech is a text, and I am its author. According to authorial intent models the words mean what I meant. We both know that Professor Green is up for tenure. Being indiscreet and more than a tad unprofessional I have let my colleagues know that I think Green should not be granted tenure. I believe he enjoys a great reputation as a teacher because he is showy, and an easy grader. I don't believe the students learn much in his classes at all. I also think his research is a joke. He's published several articles, that's true, but mainly in clubby journals edited by like-minded colleagues. So, since you ask my advice about tenure, and you know my thoughts about the concrete case of Green, if you respect my advice, you should vote against Professor Green. Right? Well, maybe not. My text didn't talk about Green at all. It appealed to abstract notions like "best interest of the interests of the institution and its students," "being a first rate classroom instructor," and "being engaged in active and productive research." You've looked at Green's record. You think the teaching evaluations are very impressive, and he really has more publications than I do. You think it's definitely in the best interest of the institution to tenure one of its brightest young stars. Dworkin argues that my words have both an **abstract intention** and a **concrete intention**. You might attempt to honor my advice by voting along the lines of my concrete intention regarding Green. But Dworkin argues, and I certainly agree, that you do more honor to my advice when you focus on the abstract considerations like best interest, first rate teacher, and active and productive research. Of course to do that honestly, it becomes your responsibility to assess Green against these abstract standards.

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**e.** The authors of the Fifth, Eighth, and Fourteen amendments concretely intended that capital punishment did not violate the Constitution.
The authors of the Fifth, Eighth, and Fourteen amendments abstractly intended that the entire criminal justice system, including capital punishment, adhere to the abstract standards of avoiding cruel and unusual punishments, and administering them with due process of law, and equal protection of the law.

Blackmun presents as important evidence recent constitutional precedent. The case of *Furman v. Georgia* was unusual in many respects. It initiated the one and only time in our nation's history when the death penalty was determined to be unconstitutional. It was an exceedingly close, 5 to 4, ruling, with the five Justice majority so at odds about why capital punishment was *cruel and unusual punishment* that the Court issued a rare *pur curium* (by the court), instead of the standard opinion of the Court authored by one or more of the Justices. Mr. Justice Stewart's reasoning is the most often seen as the relevant precedent.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously ... selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. ... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

The *Gregg v. Georgia* case did three things, two of which were to the dismay of death penalty abolitionists. Perhaps most significantly, it ruled that capital punishment was not, *per se*, cruel and unusual punishment under the Eighth Amendment. It also ruled that new sentencing procedures initiated after *Furman* had successfully eliminated the problem of
arbitrary and capricious administration of the death penalty in Georgia. But, and this is crucial
to Blackmun's argument, it reinforced the basic finding of *Furman* (in many respects this is
unsurprising, since the opinion was written by Justice Stewart who was quoted just above).
Justice Stewart quotes both himself and Justice White.

While *Furman* did not hold that the infliction of the death penalty
*per se* violates the Constitution's ban on cruel and unusual
punishments, it did recognize that the penalty of death is
different in kind from any other punishment imposed under our
system of criminal justice. Because of the uniqueness of the death
penalty, *Furman* held that it could not be imposed under
sentencing procedures that created a substantial risk that it would
be inflicted in an arbitrary and capricious manner. MR. JUSTICE
WHITE concluded that "the death penalty is exacted with great
infrequency even for the most atrocious crimes and . . . there is no
meaningful basis for distinguishing the few cases in which it is
imposed from the many cases in which it is not." ... Indeed, the
death sentences examined by the Court in *Furman* were "cruel
and unusual in the same way that being struck by lightning is cruel
and unusual. For, of all the people convicted of [capital crimes],
many just as reprehensible as these, the petitioners [in Furman
were] among a capriciously selected random handful upon whom
the sentence of death has in fact been imposed. . . . [T]he Eighth
and Fourteenth Amendments cannot tolerate the infliction of a
sentence of death under legal systems that permit this unique
penalty to be so wantonly and so freakishly imposed."

Lots of other death penalty precedent is relevant as well, and indeed Blackmun
highlights some of it in his *Callins v. Collins* manifesto. For our present purposes though,
*Furman* and *Gregg* provide evidence for his central interpretive claim – “the death penalty must
be imposed fairly, and with reasonable consistency, or not at all.”


The final part of Blackmun’s argument applies extralegal empirical facts. He will employ
an argumentative strategy that I have called the argument form contingent reality. He will
concede the *per se* constitutionality of capital punishment, but will then counter that contingent facts about its current application render it unconstitutional. To do so he will utilize at least four sorts of general facts. First, of course, will hearken back to *Furman*. He will document that an examination of current death penalty convictions remain arbitrary and capricious.

\[e_8\] Current (post-Gregg) death penalty convictions show the same pattern of arbitrariness and caprice that the Court was concerned with in *Furman*.

He will then remind the Court that there is a wealth of evidence that the above mentioned pattern in the sentencing is worse than simply capricious, but is actually discriminatory, both in terms of race\(^3^4\) and socio-economic class.\(^3^5\)

\[e_9\] The race of both the defendant and the victim plays a causally relevant factor in who receives a death sentence.
\[e_{10}\] The socio-economic class of the defendant plays a causally relevant factor in who receives a death sentence.

Finally, research demonstrates a troubling number of cases where there has been a near miss of convicting and executing an innocent defendant,\(^3^6\) and may go so far as to claim that innocent defendants have been executed.\(^3^7\)

\[e_{11}\] Demonstrably innocent defendants have been convicted of homicides that potentially carried the death penalty.
\[e_{12}\] Innocent defendants have probably been executed.

**XII.**

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 interpretation strives to make an object the best it can be, as an instance of, 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.  

Ronald Dworkin 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 like most death penalty 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 lipstick stain? Or Mary Jane’s face to be all a mess? 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.39

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

Justice Blackmun seems attentive to all of this. He includes the text, not just of the Constitution, but the authors of important precedent as well.

e1. From the Fifth & Fourteenth Amendments: "[No person shall be] deprived of life, liberty, or property, without due process of law."
e2. From the Eighth Amendment: "[C]ruel and unusual punishment [shall not be] inflicted."
e3. From the Fourteenth Amendment: "[No State shall] deny to any person within its jurisdiction the equal protection of the laws."
e4. The authors of the Fifth, Eighth, and Fourteen amendments concretely intended that capital punishment did not violate the Constitution.
e5. The authors of the Fifth, Eighth, and Fourteen amendments abstractly intended that the entire criminal justice system, including capital punishment, adhere to the abstract standards of avoiding cruel and unusual punishments, and administering them with due process of law, and equal protection of the law.

All of these texts must now be explained. Blackmun’s interpretation is straightforward.

t0. The death penalty must be imposed fairly, and with reasonable consistency, or not at all.
Dworkin imposes some very idiosyncratic and controversial strictures on inferences of this sort. 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.40

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 IBE and Justice Blackmun’s method in Callins. 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.\textsuperscript{41}

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 much more like the wine critic advising aspiring critics to “hear” the wine, or Wright counseling “the weigh[ing of] the tugs in all directions and judg[ing] one rival to ‘fit’ better than the others.” 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 advise and pedagogy will amount to little more than assuming the skill in the first place, and perhaps fine tuning it a bit.

This brings us to the most startlingly normative part of law as integrity. Dworkin’s method, just as with IBE, assumes that there will be rival explanations, or rival chapters in the chain novel. That was manifest in the \textit{Callins v. Collins} case. Justice Scalia concurs in the decision not to grant \textit{certiorari}.

Justice Blackmun dissents from the denial of certiorari in this case with a statement explaining why the death penalty "as currently administered," post, at 22, is contrary to the Constitution of the United States. That explanation often refers to "intellectual, moral and personal" perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, ... nor be deprived of life ... without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.\textsuperscript{42}

Scalia’s rival looks at the textual data, as well as the precedent, $e_1$ through $e_7$, and offers
a rival interpretation.

\[ t_1. \quad \text{The death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.} \]

His argument clearly privileges \( e_1, e_4, \) and by implication \( e_7. \) As a good originalist, he takes the language of the Constitution as relatively straightforward and paramount in deciding the case. He is close to dismissive of interpretive niceties like \( e_5, \) and has little patience with the Court’s construction of the dilemma of discretion in its recent death penalty cases.

By these decisions, the Court puts itself between the “rock and the hard place”; here arises the dilemma of discretion. In *Furman v. Georgia*, the Court had realized that discretion leads to arbitrariness, which fails to treat people equally, and hence fails to treat them with respect. Now that the Court has also realized that the lack of discretion leads to inflexibility [see *Lockett*], which fails to treat people as unique individuals, and hence fails to treat them with respect.\(^{43}\)

Justice Blackmun also sees the dilemma of discretion, but sees it as part of the evidence “that the death penalty experiment has failed.”

What is the best explanation? For me it’s a no-brainer.

\[ t_0. \quad \text{The death penalty must be imposed fairly, and with reasonable consistency, or not at all.} \]

When this is coupled with the contingent realities of \( e_8 \) through \( e_{12}, \) it yields the following constitutional judgment regard capital punishment.

\[ t^*_{0.} \quad \text{Capital punishment as currently administered in unconstitutional.} \]

I take this to be clearly superior to,

\[ t_1. \quad \text{The death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.} \]
The problem, of course, is that Scalia, Hercules if Scalia had created him, the majority of current Justices, to say nothing or the majority of Americans, would all disagree with my ranking. So who’s right?

Dworkin stated his rights thesis in his earliest writings. Although he has added nuance and clarification he has never wavered from what many critics see as the most controversial part of his jurisprudence.

Even when no settled rule disposes of the case, one party may nevertheless have a right to win. It remains a judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively. I should say at once, however, that it is no part of this theory that any mechanical procedure exists for demonstrating what the rights of the parties are in hard cases. On the contrary, the argument presupposes that reasonable lawyers and judges will often disagree about legal rights, just as citizens and statesmen disagree about political rights.44

All constitutional cases should be hard cases, otherwise why would the Court bother to hear them? But certainly no one will dispute that contemporary death penalty jurisprudence is a hotbed of hard cases.

We will need to defer to the last section discussion of how constitutional truth can be maintained. But we can close these last long sections on capital punishment by noting an important distinction in our application of IBE. Connie’s argument presupposed the likelihood of intersubjective agreement about what happened when he left her all alone. Proof beyond a reasonable doubt forces juries to come to intersubjective agreement about guilt or innocence. Easy legal cases are easy precisely because we have an expectation of intersubjective agreement, even though we have ascended from the realm of empirical facts to the much more abstract level of legal interpretation. Hard constitutional cases, however, presuppose a lack of
intersubjective agreement. In a way this is to be expected. Connie and the jury exercised a cognitive skill with ancient evolutionary history. Justices Blackmun and Scalia are presenting arguments with strong analogies to Connie’s and the prosecuting attorney’s. It’s pretty hard to imagine, however, that a skill at interpreting legal texts and cases would have had any great survival value for our hunter-gather ancestors.

XIII.

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.45

It will come as no surprise that I think of contemporary analytical 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.

e1. Any modern legal system includes rules forbidding or enjoining certain types of behavior under penalty.
e2. Any modern legal system includes rules requiring people to compensate those whom they injure in certain ways.
e3. Any modern legal system includes rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations.
e4. 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.
e5. 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, the hypothesis that:

\[ t_0. \quad \text{“Law is the union of primary and secondary rules.”} \]

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

These 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.

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

\[ t_1. \quad \text{Every law or rule ... is a command. Or, rather, laws or rules, properly so called, are a species of commands.} \]

\[ t_2. \quad \text{Law is nothing more than the prophecies of what courts will do.} \]

\[ t_3. \quad \text{An unjust law is not a law.} \]

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.

Whatever device, precedent of 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.\(^5\)

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

\(e_6\). 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.’\(^5\)

\(e_7\). 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 standard 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 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 resistance.  

Again, it is obvious that highly relevant data includes:

\[ e_8 \] 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.

XIV.

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.\textsuperscript{54}

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 its origins 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.\textsuperscript{55} It is really quite remarkable that in the fifty years since \textit{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.\textsuperscript{56} But little of this will assumed in our discussion of natural law as a jurisprudential theory.

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.  

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.  

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.

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.”

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 a shortstop all season long. These fans are merely noting that the player has a build 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.

Dworkin’s entire jurisprudence seems fixated on \(e_{12}\). We have already seen that 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?60

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

e13. “[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.”61

And secondly that 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 I most enjoy a beer with – but according to some recognized standard.

e14. Judges are expected to decide hard cases on the basis of some recognized and widely shared standards.

We have already seen that Dworkin’s law as integrity sets the standard in clearly moral terms. Judges in hard cases understand the state of the law as now is and must issue a decision that “make[s] the developing story as good as it can be.”62 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.63

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.64

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.65

XV.

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 clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect.66

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.

- **e₁.** Any modern legal system includes rules forbidding or enjoining certain types of behavior under penalty.
- **e₂.** Any modern legal system includes rules requiring people to compensate those whom they injure in certain ways.
- **e₃.** Any modern legal system includes rules specifying what must be done to make wills, contracts, or other arrangements which confer rights and create obligations.
- **e₄.** 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.
- **e₅.** Any modern legal system includes a legislature to make new rules and abolish old ones.
Legal rules will always admit of borderline cases.

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

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.

Any legal system is bound by procedural constraints

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

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

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

“[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.”

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.

Legal positivism (as exemplified, say, in Hart’s Concept of Law)

Legal realism (as exemplified, say, in Posner’s How Judges Think)

Natural law (as exemplified, say, in Dworkin’s Law’s Empire)

I’ve already more than hinted that my sympathies lie with Dworkin. It’s obvious to me that e9 through e14 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.

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.

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.

XVI.

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 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.70
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. Ultimately 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 may be broken hearted teenagers like Connie, juries in criminal trials, Supreme Court Justices puzzling about the constitutionality of the death penalty, or academic lawyers defending 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.\textsuperscript{71}

The problem, of course, is that such correspondence theories of truth fit Connie and juries just fine, but have a much more difficult time with Justice Blackmun, and H. L. A. Hart’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 happened when he left Connie all alone at the record hop. What could that something out there be for debates about capital punishment or the “correct” theory of the nature of law possibly be? It seems as though, although the basic structure of inference to the best explanation as a theory of evidence fits criminal law, constitutional interpretation, 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 constitutional law and jurisprudence seems to depend on a coherence theory of truth.
15 Glass, *op. cit.*
http://digitalcommons.law.yale.edu/fss_papers/1
28 This quick and dirty characterization ignores the niceties of official baseball scoring, actually good hitters will fail in two-thirds of their official “at bats.”
29 See, Lipton, *op. cit.*
32 *Collins v. Collins*, *op. cit.*
34 See, for example, Baldus study and GAO report.
35 See, for example Johnson and Johnson, *op. cit.*, and article on incompetent defense.
36 Bedau, et. al.
37 *May God Have Mercy*
41 *Ibid*, p. 239.
42 *Collins v. Collins.*


This is the title of Chapter Five, *Ibid.*, p.79.


Lots of citations here


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


See note 44.


Hart, *op. cit.*, p. 239.

*Ibid*.

Posner, *op. cit*.

