Wobble, or the Death of Error

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What does it mean to say that a decision is a legal error? Does “legal error” have any real meaning? This Article approaches legal error in the same way that a scientific paper might approach perpetual motion machines. The purpose is to question whether anything really fits that description and to show that things which may seem at first to constitute legal error, upon closer inspection, do not. As usually understood, error requires two things. First, there must be a hypothetical result, determined by the relevant decisionmaking inputs, which is inconsistent with the actual result. This is the requirement of determinacy. Second, it must be the case that the actual result should have conformed to that hypothetical result. This is the requirement of direction of fit.

Both of these characteristics present problems for legal systems. The difficulty with determinacy concerns whether there are pre-existing right answers to legal problems. The difficulty with the second concerns the coercive effect of the decision that is actually made. In both cases, however,—for determinacy and direction of fit—the primary source of the problem is the legal system’s devout respect for process values, or at least for rationalizations based upon process values. A few examples at the outset should show how, at a minimum, the concept of legal error is much murkier than might be thought.


1. It is possible that there might be more than one right answer to a problem, although this is not the usual situation. Authors who have assumed the existence of right answers, such as Dworkin, have assumed that if there is a right answer, there is only one. See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY 279 (1977) (discussed infra text accompanying notes 32-41). If there are several right answers, however, then there might be both free choice and the possibility of error. Aside from this difference, the possibility of several right answers does not alter the textual analysis, and for simplicity I will refer to the uniquely determined “right answer.” Thus, according to the arguments following in the text, there would not be error even in the “two right answer” scenario.
First, consider a typical automobile accident litigation where the defendant has run over the plaintiff. Assume that the plaintiff’s damages are assessed at one million dollars, and also assume that there is no doubt about either the cause or the extent of the plaintiff’s injuries. The only issue is whether there was contributory negligence, which would bar recovery altogether. If the plaintiff is entitled to recover, the damages should be one million dollars. If, on the other hand, there was contributory negligence, then the recovery should be zero. On the eve of the trial, the parties settle for five hundred thousand dollars. If the settlement is clearly a compromise, is it an error?

We know that substantively the correct decision would be either one million dollars or nothing; no state of facts would make five hundred thousand dollars the correct amount. Few of us, however, would say that the decision was erroneous because it resulted from compromise and negotiation, both of which are process values we want to protect. Yet if five hundred thousand dollars is the correct answer, did it “pre-exist” in any intelligent sense? Would a compromise of four hundred thousand dollars have been wrong? And if there was a different pre-existing right answer (say, for example, it would have been factually correct to grant an award for the defendant), why should that answer give way to the negotiated settlement?

This may not seem like an appropriate example because it involves settlement, which does not usually entail a judicial decision. Judicial decisions, however, are also a product of interaction between the parties. Consider next an example of the type addressed by other authors in this Symposium. A case goes to trial and the jury is supposed to reach a conclusion based upon statistical and factual evidence. The jury reaches what a decision theorist would find to be the wrong result. Is this legal error? The answer may depend on how the “error” occurred. Consider the following:

Case 1: The defendant’s attorney fell asleep in the middle of the trial and therefore did not present an argument that would have convinced the jury.

Case 2: The defendant’s attorney failed to counter a misleading argument made by opposing counsel with an argument that would have convinced the jury.

2. On certain occasions, of course, settlement agreements are subject to court approval. The best example of this involves settlement of class actions in federal court, which must be approved by the court. Fed. R. Civ. P. 23(e).
Case 3: The defendant's attorney presented what would have been a convincing argument to the jury but did so in such an inept manner that the jury did not understand it and therefore ignored it.

Case 4: The defendant's attorney sought to present an argument, but the judge ruled the argument inadmissible because the judge was ignorant of a statistical inference and thought the argument unsound. The defendant's attorney sought to explain the statistical reasoning but was so inept that the judge did not understand the explanation and ignored it.

I think that in the first case, most of us would say that there was no legal error, although there was attorney negligence. In the last case, according to some authors discussing uses of decision theory at trial, there would probably be legal error. But where does one draw the line? Is failing to convince a judge about a legal rule different from not making the argument in favor of the legal rule at all? Does lawyer incompetence absolve the legal system of claims of error? Many controversial legal decisions may have been products of inept presentation by counsel. Do process values explain why there is error in some of the examples and not in others?

Attention to process values, which I will return to later, may greatly confuse the central question of whether a particular decision is an error. The consequences of undermining the concept of error are widespread and serious. The virtual absence of a serious concept of error undercuts the legitimacy of the legal process. "Erroneous" decisions are deemed as worthy of respect as are "correct" ones. The absence of a concept of error also undercuts much post-realist legal scholarship. The grand efforts to reconstruct law in terms of economic efficiency or moral rights assume that the common law already embodies these process values. But consistency-based efforts to project these values onto future cases founder because consistency is not the value scholars think it is. Failure to be consistent is not necessarily error.

I. WOBBLE, ERROR, AND INDETERMINACY

To start, I would like to differentiate a phenomenon that somewhat resembles error. This related concept, which I refer to as "wobble," performs a similar role, namely to indicate discrepancy between a decision and the relevant decisionmaking inputs. Wobble is the result of institutional indeterminacy; it means that the result is not a unique function of

3. See M. FINKELSTEIN, QUANTITATIVE METHODS IN LAW 59-105, 263-87 (1978) (discussing the resulting errors from failure to take into account statistical analysis).

4. See infra section I(D).
the relevant inputs. The legal process' reluctance to treat wobble as error suggests that it may be meaningless as a legal matter to speak in terms of uniquely determined right answers and mistakes. The reason for introducing the concept is to make it possible to discuss variation between inputs and outputs without using the pejorative term "error." Wobble fulfills the same functions as the term "error" without creating the misleading appearance that there are objectively right answers.

It is hard to observe indeterminacy on a case-by-case basis. Such an observation requires investigation of a counterfactual assertion—namely, that the result could have been different. Typically, it will be a matter of opinion whether the result was uniquely correct given the relevant inputs. Critics of a decision often disagree with the court or legislature, but this does not by itself show indeterminacy. These critics might just as easily be mistaken as the court or legislature about the proper decision to reach on a particular set of precedents or facts.

It is easier to understand indeterminacy by thinking of it as variations in decisionmakers' treatments of the same problem. Wobble evokes a graphic image of repeating the same decision process many times to see if the result will be the same. It is reminiscent of possible worlds analysis in contemporary philosophy because it suggests many possible tests being run simultaneously. By utilizing the metaphorical device of imagining a decision process run over and over again, wobble translates questions of determinism and necessity into a mere comparison of results—an inquiry into whether the results are the same.

A physical analogy may be helpful. Imagine that I have a gun in my hand and wish to shoot at a particular target. After a dozen shots, what pattern of bullet holes appears on the target? The scatter of bullet holes depends upon a number of things, the most obvious being my ability as a marksman. Other considerations would include wind conditions, any bias in the gun itself (such as a faulty bore), whether someone has grabbed my arm during any of the shots, and so forth. To the extent that there are extraneous factors influencing the shooting, we expect to find greater scattering of bullet holes around the center of the target. To the extent that these factors have been adjusted for, the range of scatter will be smaller. With a little luck, there might be only one bullet hole, right in the middle.

5. For a discussion of possible worlds approaches, see Plantinga, Transworld Identity or Worldbound Individuals?, in NAMING, NECESSITY, AND NATURAL KINDS 245 (S. Schwartz ed. 1977). Possible worlds approaches address the questions of counterfactual and contingent empirical statements that might have been true (or false) but are not.
Something analogous to this occurs in legal decisionmaking. Many factors enter into a decisionmaking process designed to achieve a single goal. In the decisionmaking context some of the factors include: the personalities or political biases of the decisionmakers, the extent to which complex factual issues are adequately understood, the pressure brought to bear by various social groups, and so on. There is no assurance that even if the goal is kept clearly in sight the decision will be “on target.” And what if it were possible to pose the exact same legal question a dozen times, the way the marksman fired the gun a dozen times? Depending upon the extent to which extraneous factors were controlled for and relevant factors dominated the decisions, we would expect to find the results grouped more or less closely together.

In the marksmanship analogy, what would be likely to happen when by dint of practice I increase my skill, learn to adjust for wind factors, and tell people in advance not to grab my arm? The scatter will probably decrease, and the pattern of bullet holes close in on the target’s center. Will I ever be able to guarantee on a run of one dozen shots that I will only make one hole in the target? Will I ever feel confident that I could shoot bullets indefinitely and still hit the center every time? Probably not. Maybe I will suddenly drop dead as I am shooting, or maybe a tornado will strike before the bullet hits the target. There is always this sort of possibility.

But there is another potential problem. How do I know, even if all goes well and my marksmanship is perfect, that the bullet will in fact hit the center? Of course, we take it for granted in this type of mechanistic process that as long as all these mechanical inputs are controlled, the proper result will ensue.6

The same is less obvious for legal decisionmaking. Perhaps after extensive study we will understand the economics, sociology, and psychology of legal problems sufficiently to explain decisions completely. But perhaps not. It is conceivable that, after all of the analysis and assignment of weights to various variables, some unexplained residue will remain. There are two different ways this might happen.

First, there may be room for choice. In a trivial sense there is always choice, because in every decision a choice is made. But “free choice” is another matter altogether. Free choice is real choice. There is no real choice when the result is predetermined by the various influences

6. This Article is no place to challenge this assumption. For a collection of readings of determinism, see Determinism, Free Will, and Moral Responsibility (G. Dworkin ed. 1970).
that affect the decision. In such cases, the decision can be adequately explained by examining the mechanical inputs into the decision process. Real choice means that the decision process cannot be broken down into smaller explained elements, either internal or external to the decisionmaker.

External elements, such as precedents and pressure groups are obviously a threat to real choice, because there is no autonomy if the decisionmaker is merely responding to outside forces. Internal forces, such as the psychological makeup of the decisionmaker, have the same effect—if indeed there are any purely internal forces. Perhaps the decisionmaker decided one way because of some personal neurotic need, such as a desire to expand his or her own power. If so, what is the source of this neurosis? Psychological determinism traces the personal elements that may be responsible for such neuroses to forces outside of the individual, explaining away apparent assertions of will in terms of external influences and denying free choice in the process. But psychological determinism is far more difficult to accept than mechanical determinism, and many people continue to believe that free choice is possible.

There is a second way of explaining the remaining scatter. This is that there may not be any bull's-eye at all. Imagine a machine that projects pellets at a large wall. Again, we can examine the overall pattern of holes on the wall and determine the amount of scatter in the pattern after a certain number of shots. As with the marksman, it is probably true that fine tuning the machine will reduce the amount of scatter, although it is not clear whether the scatter can be eliminated entirely. The machine is simply part of a process for projecting projectiles against a wall. It is not a means to an end but an end in itself. The point is not to hit a particular spot, but simply to propel projectiles.

Is legal decisionmaking more like the marksman or the pellet throwing machine? There are reasons for wondering whether the analogy to the pellet throwing machine is not more appropriate. Law is, perhaps, just a process for resolving disputes. The essence of law may simply be to make sure that decisions are made, not to aim at some particular right result. This perspective might be combined with the proposition that it is appropriate for a judge to exercise free choice, although the two positions are logically distinct.

It is jurisprudentially controversial whether a perceived variation in outcomes is due entirely to explainable phenomena. Given any particular level of understanding or expertise, there is some degree to which the outcome can be explained, predicted, or controlled. There will also be
some residue that cannot be explained, predicted, or controlled. Admittedly, the fact that we are unable to make precise predictions does not mean that there is no bull's-eye or that a judge is free to choose not to hit it. To fully explore this proposition, however, will require a short digression into the difference between theoretical and practical indeterminacy.

A. THEORETICAL AND PRACTICAL INDETERMINACY

In daily life we often fail to differentiate between phenomena that are unpredictable because we lack the practical tools to make accurate predictions and those that we assume cannot be determined by past events. For instance, we treat the outcome of a coin toss as random (i.e., unpredictable). This does not mean that we believe the laws of physics do not apply to moving coins. It simply means that we do not trust predictions, given the sensitivity of the outcome to minute differences in the input. We treat the outcome of the coin toss as indeterminate in practice although we believe it to be determinate in theory.

Looking at the problem operationally there is not much difference between phenomena that are unpredictable in practice and those that are indeterminate in theory. Determinists believe that phenomena are all ultimately explainable, so that the latter category of theoretical indeterminacy is empty. But this is an article of faith, unsubstantiated by scientific evidence. Similarly, the contrary belief, that after all scientific explanation some unexplained residue of free choice remains in human behavior, is unsubstantiated.

This is equally true when decision, rather than scientific prediction, is involved. Is there a single right answer to every legal question that might be posed, or is there an element of free choice or discretion? A spectrum of opinion exists on this issue. At one extreme, one might believe in the existence of a mechanistic decision process by which even an unskilled decisionmaker can analyze the inputs and arrive at the proper result. The process would be objective enough that it would produce the same result on every application to the same set of facts. It is unlikely that any modern jurist espouses this view.

The next possibility is that a decision process exists, but it is sufficiently subjective to allow only skilled practitioners to apply it accurately. While the decision process could be experimentally duplicated with a right answer to every legal question, that right answer would be somewhat harder to find. A similar position would share the premise of a unique right answer, but deny that even a subjective decision process can be established in advance. Under this view, even the most rigorous
legal training would not ensure that conscientious decisionmakers would all reach the same result. This is a position of practical, but not theoretical, indeterminacy.

Finally, the premise that there is a right answer might be rejected altogether. Under this view, there are simply not enough relevant constraints to rule out all possibilities but one. The decision process requires exercise of choice among several alternatives. While it is fairly easy to refute the mechanistic decision process (by pointing out that intelligent people disagree) and maybe even the subjective but empirically repeatable decision process,7 how can one choose between the last two models? Conceding that certain legal questions are not susceptible to verifiable answers (i.e., the decision process cannot be experimentally reproduced with the same results), is it meaningful to ask whether they nonetheless admit of only one right answer?

To deny the existence of legal error, one need not adopt a position of theoretical indeterminacy. Theoretical indeterminacy is a sufficient but not a necessary condition for denying the existence of errors. Even if the relevant inputs produce a unique right answer in theory, there still would be no error unless the legal system requires the decision to conform to that unique answer. Thus, the indeterminacy may only be practical and still no concept of legal error would exist. If, however, the legal system recognizes a decisionmaker's right to make and not simply choose that answer, then neither choice should be characterized as error.

Wobble includes both theoretical and practical indeterminacy. No effort will be made to argue that right answers do or do not exist in some metaphysical sense.8 Instead, the hypothesis is that the legal system acts as though unique right answers do not exist. Talking about right answers in this context necessarily implicates extralegal assumptions. We can only speak of error if right answers do exist, and not if the decisionmaker is authorized to exercise free choice. By refusing to speak in terms of error, the legal process suggests either that there are no right answers or that the decisionmaker has no obligation to follow them. In either case, the decisionmaker has the functional equivalent of free choice.

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7. See infra section I(B) (showing that wobble exists).
8. Such an endeavor involves questions of truth, provability, and logical completeness. If a system is logically incomplete, then there are statements that are neither provably true nor provably false. The mathematician Godel proved that certain types of mathematical systems are incomplete in this sense. Analogously, one might say that a legal system is incomplete if there are issues as to which the precedents (i.e., axioms) do not provide a demonstrable answer. On the issue of logical completeness, see E. NAGEL & J. NEWMAN, GODEL'S PROOF (1958).
The section that follows argues that wobble exists, that different solutions to the same problem may be scattered. Moreover, legal processes in no way distinguish between scatter due to theoretical indeterminacy and scatter due to error. In effect, the legal system canonizes free choice by treating all wobble alike. Thus decisions that are only indeterminate in practice receive the same deference as those which in theory are open to choice.

B. WOBBLE IN THE LAW

Indeterminacy can be illustrated in several ways. Most directly, if several decisionmakers address the same problem, the results will not necessarily be the same. Less obviously, synchronization constraints may be introduced which foreclose contradictory redetermination of the same issue in an effort to prevent the appearance of the symptoms of wobble. Sometimes this requires that the decision be routed to another, more authoritative decisionmaker whose preferred outcome cannot be determined in advance. While the symptoms of indeterminacy are thereby suppressed, the synchronization constraints themselves are evidence of indeterminacy.

A particularly clear example of this evidence of indeterminacy is the *Erie* doctrine. For a long time different decisionmakers addressed the same problems with widely incongruent results. On the one hand were the state courts, and on the other the federal courts sitting in diversity. Both were bound by the federal constitution and federal statutes, as well as the state constitutions and statutes. This experiment, as we will call it, concerned interpreting the “general common law” of contracts, torts, and the like. Although the variables conceded to be relevant were controlled, there were still variations in results since neither court system was bound to adhere to the other’s interpretations. Over time, the results diverged until it was eventually decided that synchronization constraints had to be imposed. In *Erie Railroad v. Tompkins*, the federal courts were required to adhere to the interpretations of state common law that the state courts had adopted.

Such synchronization constraints recognize the inevitability of discordant results, even when employing the same decision process and controlling all of the legally significant variables. The law recognizes this anomaly by introducing artificial constraints on the number of times that

10. 304 U.S. 64 (1938).
a specific problem can be resolved (i.e., typically the number of trials is limited to one). Once a decision is made by a duly authorized decisionmaker, later decisionmakers are obliged to refrain from redeciding the same question.

The doctrinal manifestations are diverse. Each synchronizes the activities of different decisionmakers to promote consistency of result. Res judicata and collateral estoppel are the most obvious examples. The double jeopardy clause\(^{11}\) is very much in tune with these, as well as the full faith and credit clause.\(^{12}\) While these examples operate only at the level of adjudicative judgments, the phenomenon is more general. At the level of adjudicative lawmaking, the doctrine of stare decisis recognizes that formulation of legal rules has an element of indeterminacy.

These restraints on relitigation are motivated by awareness of indeterminacy. Of course, another reason for barring relitigation is simply that it would be tiresome, even if the result was the same every time. Relitigation wastes the time of both the legal system and the initially prevailing party. But there is more to it than this. If there were no indeterminacy, it would be unnecessary to bar relitigation because there would be no incentive to relitigate. Having lost the first time around, the loser would realize that the same result would obtain even if the decision experiment were run infinitely. Losers typically want another bite at the apple precisely because they hope that the second bite will be sweeter than the first.

In addition to these doctrinal efforts to forestall indeterminacy, decisionmakers route cases with a large amount of indeterminacy to the most appropriate or highest "authoritative source" for resolution. The federal-state jurisdictional system has many general doctrines of this type to deal with indeterminacy. Abstention is appropriate when a federal court confronts new or complex questions of state law,\(^{13}\) as is certification in states where such a procedure is available.\(^{14}\) Highly fact-specific issues such as domestic relations are routinely dismissed by federal courts even though other bases for jurisdiction, such as diversity, exist.\(^{15}\) There is much legal indeterminacy in such cases because it is extremely difficult to articulate an adequate formula upon which to base decisions. A number of subtle variables may be relevant, with each case turning on its precise

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11. U.S. Const. amend. V.
facts but with enormous discretion for the decisionmaker to determine what those facts are.

It is clear that these consistency constraints only partially alleviate the symptoms of indeterminacy, rather than eliminate the underlying cause. The primary decision (i.e., the one that is ultimately followed) is neither more predictable nor less indeterminate than when there are no consistency constraints. What has changed is merely that the underdetermined result is applied consistently. Inconsistency is evidence of wobble because it reveals that the result is not a unique function of the substantive inputs. The converse is not true, however. The fact that subsequent decisions are consistent with the first one does not tend to show that the first result was uniquely determined; consistency can result from nothing more than a requirement of synchronization.

Further, synchronization does not completely alleviate the symptoms of wobble. First, it is always possible that the second decisionmaker will wobble in its attempt to perpetuate the first result. For example, the second decisionmaker may simply fail to take into account the prior resolution between the same two parties as res judicata or may not uncover an important state precedent in the *Erie* context. Proper observance of consistency constraints is no more guaranteed than proper interpretation of the substantive inputs. This is particularly true when the consistency constraints themselves are ambiguous, as they frequently are.\(^{16}\)

Second, other considerations may override the consistency constraints, leaving the second decisionmaker free to resolve the issue de novo. For instance, in the res judicata context, an individual is not ordinarily bound by a decision to which he or she was not a party.\(^{17}\) This creates the infamous problem encountered in mass disaster cases wherein some injured plaintiffs successfully recover while others do not. Consistency in these cases is sacrificed for individualized decisionmaking on the theory that all plaintiffs should have their day in court.

C. WHAT WOBBLE SIGNIFIES

This evidence suggests only that decisionmakers will often differ in their reactions to a particular problem, hardly an astounding revelation. Without more, it does not disprove the existence of a concept of error or

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16. In the res judicata context, for example, it may be difficult to determine whether the same or a different cause of action is involved.

correctness. The evidence is consistent with the notion that there is a single correct answer and that any deviation from that answer constitutes error. In other words, it illustrates a practical, not a theoretical, indeterminacy. The distinction may simply be the result of imperfections often found in human institutions. The real issue is whether wobble is indeed the result of these imperfections. It can and has been argued that law (or, at least, judge-made law) is legitimate only when the uniquely determined right answer is ascertained and followed. 18 Under this view, wobble signifies error.

In support of this position, there are a number of reasons why indeterminacy might be troubling. First, it may be that only certain institutions in society are properly vested with the power of free choice. In a democracy, many contend that courts should not create rules of decision but should instead apply the decision rules formulated by the elected branches. 19 Some people find this argument more convincing than I do. 20 This phenomenon, though, is admittedly problematic if courts are expected to apply the law but nonetheless create law by covertly promoting values dissimilar from those articulated by the elected branches.

Second, there is a problem of retroactivity. Institutions that promulgate rules after expectations can be criticized if such rules do not reflect the existing legal norms. While this criticism seems to be directed primarily at the judiciary, executives and legislatures are as likely to upset established expectations as are courts. For example, most people purchasing homes take into account the tax deduction available for interest. Hence, if the federal government repealed the interest deduction, it would retroactively make the purchase decision more expensive. Almost any type of business regulation upsets the expectations of current businesses. Zoning, for example, raises some land values and lowers others. Upset expectations are nothing to get upset about. 21

19. Dworkin, supra note 18, at 84.
20. See Brilmayer, supra note 9, at 1176-78. Even in those situations where the argument is most forceful (namely those in which legislation is invalidated) this countermajoritarian difficulty is not a problem. If legislatures were to enforce the Constitution against popular pressure, they too would be acting in a countermajoritarian fashion. The only way to avoid being countermajoritarian is to ignore the Constitution, which is the source of these tendencies. Brilmayer, The Jurisprudence of Article III, 93 Harv. L. Rev. 297, 303-04 (1979).
21. Or, at least, they are nothing that the legal system gets upset about in the retroactivity context. To name just a few examples, the legal system does not hesitate to apply legal rules that were impossible to ascertain because of their vagueness to individuals, so long as a limiting judicial interpretation is available after the fact or the defendant's conduct could have been proscribed.
Perhaps the real problem is simply that it bothers us not to know who is making the decision. The decision seems so arbitrary, so subjective. Why should decisionmakers interject their value preferences into the decision process; why should they exercise free choice? We try to justify their decisions based upon pre-existing legal principles, the will of the majority, or the implementation of the Constitution, but as long as there is wobble, we cannot be completely successful.

Despite these apparent reasons for preferring a system which identifies and effectuates unique right answers, our legal processes fail to do so. Our legal system consistently and deliberately refuses to inquire into the correctness of a decision before recognizing or enforcing it. There is no attempt to reopen the issues or to determine whether the decisionmaker acted contrary to existing legal authority. Once something is settled, hardly anyone in the legal system cares about whether any indeterminacy existed beforehand, or whether the decision was a consequence of practical incapacity or theoretical incompleteness. In sum, there is virtually a complete lack of interest in whether the result was correct. Stare decisis and res judicata are considered much more important. It is difficult to envision a right to a correct decision, as some philosophers would have it, that is so utterly ignored in practice.

Practical indeterminacy, in other words, is treated as though it were theoretical. As long as an authoritative resolution is reached, few, if any, adverse operational consequences arise if the theoretically correct answer is not reached. The legal system treats the issue as closed regardless of the extent of judicial discretion. In fact, if any challenge is made to the enforceability of a decision, the system does not respond in terms of substantive correctness but rather in terms of process values. The decision is correct because the parties had an adequate opportunity to present their arguments in court; the process justifies the result.

Parker v. Levy, 417 U.S. 733, 752-57 (1974); L. Tribe, American Constitutional Law §§ 12-26 (1978) (recognizing limits on the principle in the first amendment area). Similarly, there has never been a constitutional requirement that the precedent on which a rule of law is based be clear or easily understandable to lay persons. Instead, there is an obligation that each citizen know the law, no matter how confusing. In addition, the contracts clause and ex post facto clauses are not applicable to judicial decisions. Brilmayer, supra note 9, at 1178-79. In fact, it is prospectivity, not retroactivity, that is considered troubling.


23. The most likely exception would be the writ of habeas corpus. Its contemporary utility as a counterexample is severely restricted by cases such as Wainright v. Sykes, 433 U.S. 72 (1977).
D. The Role of Process Values

To all of this it might be answered that we have taken too stingy a view of what correctness means. Once we refine our data base to include process values, the scatter can be eliminated. More variables are entered into the calculation. One such variable that must be taken into account is the legal system’s responsiveness to process concerns. For instance, in a mass tort case the reason some plaintiffs win while other similarly situated plaintiffs lose is because of different levels of adversarial competence or commitment. The new data base must include such variables. The correct result is now the one that reflects all of the substantive considerations together with all of these process variables.

This takes us back to the hypotheticals posed at the beginning of this Article. We asked whether it would be appropriate for the legal system to allow the plaintiff to recover where the defense attorney negligently failed to make relevant arguments that would have won the case. Most legal scholars would deny that the legal system committed any error in such situations except perhaps where the system itself had an obligation to provide a competent lawyer as in certain criminal cases. The legal system could be said to have decided correctly given the data that was presented to it. Similarly, if the defendant’s lawyer managed to present the facts but did so ineptly, it would not be legal error if the jury granted recovery to the plaintiff. Thus, the concept of correctness that our legal system has adopted reflects the adversarial nature of the system. Measuring the correctness of any decision requires taking into account the relative skill of the lawyers, the arguments and quantity of evidence actually presented, as well as objective factual accuracy.

The adversarial system, however, is just a powerful myth. It is a myth because it seems to justify results but does not. In the adversarial system, a result is supposedly fair even though it is not supported by the substantive merits. But the fact is that the adversarial system cannot justify results at all. The reason, paradoxically, is that it justifies all results, or rather that it justifies all results equally well. The adversarial system assumes, without proof, the very facts upon which the rationale depends. It assumes, without inquiry, that the losing party was one with the less effective advocate; ineffectiveness is simply equated with losing. It is the pinstriped suit version of “blame the victim.”

Process values cannot justify anything if there is complete unwillingness to inquire into whether such values were actually vindicated in particular cases. But we cannot simply take it as an article of faith that if
you lose, you deserved to lose because either you were wrong or your lawyer was incompetent. Is it not possible that you were right and your attorney competent, yet you still failed to convince the judge? Some judges may be stupid, biased, or indifferent to the quality of legal presentation.

Actually, the metaphor of the marketplace of ideas should make this clear. The ability of market participants to identify their own best interests is the source of whatever justifying power the free market theory possesses. Market success determines the worth of a product precisely because worth is, by definition, satisfaction to the market participants that choose to buy it. No one has a right to second-guess an individual’s choices or call them errors. To reject the notion that market choice is free choice is to destroy the normative appeal the market system offers.

Similarly, a decision within the adversarial system can be normatively justified only if one is willing to accept the decisionmaker as the ultimate arbiter of the worth of all arguments relevant to a decision. Under this justification, it is acceptable for a judge to disregard unappealing legal arguments in the same manner market commodities that do not strike one’s fancy are disregarded. If the judge has free choice, then, like a buyer in the market place, how that choice is exercised cannot be second-guessed. There is no right or wrong answer; it is all personal preference.

If one uses appeal to the decisionmaker as the standard measure of correctness, then as a definitional matter, all decisions are correct. The side that wins is always the side whose arguments appeal to the decisionmaker. However, a standard that is tautologically satisfied has no justifying capacity. The important point, for present purposes, is that this concept of correctness carries with it no concept of incorrectness.

While it is arguably reasonable to equate market choices definitionally with personal interests, legal decisionmakers arguably have responsibilities to their constituents and corresponding restrictions on the exercise of personal preferences. If we are reluctant simply to equate “best decision” with “the judge’s actual decision” as a definitional matter, we cannot say that success in the legal marketplace of ideas is proof of worth. Thus, anyone committed to standards for evaluating decisions by other than demonstrated appeal to the decisionmaker cannot accept adversarial explanations at face value. This is true even if the standard

for evaluating decisions is simply that the most effective advocate prevailed. Skill in advocacy is no more guaranteed to convince a judge than skill in manufacturing is guaranteed to attract consumers. We cannot simply assume that some product failed because of the ineptitude of its originator unless we definitionally equate market failure with ineptitude.

The American reliance on the adversarial system thus strongly supports the vision of law as naked process. Law is not the marksman aiming at the target; law is simply a machine that propels projectiles against a wall. Whether this view of legal error is attributable to some affirmative sentiment that judges ought to be authorized to exercise free choice (like consumers in a marketplace) or simply to a circumscribed role of law as a means of getting cases resolved, it forecloses inquiry into whether the decisions made are correct or incorrect. There is no error; there is only wobble.

E. The Bright Side of Wobble

Whether this is a gloomy conclusion depends on how you look at it. Indeterminacy appears to be a defect in the decision process. So does the reluctance to correct errors. This phenomenon suggests that pre-existing legal rights may go unrecognized without any legitimate justification. It also suggests that legal decisions are subjective and ultimately incomprehensible. There is another way, however, to view the matter. From a cybernetic point of view, lack of complete determinacy may be the better result.

That indeterminacy might be desirable arises from several considerations. Determinacy places the present in the clutches of the past. Indeterminacy will never be creative.26

While the conditions that spawned the value choices of the past may have remained unchanged, the value choices themselves may nevertheless be different. Furthermore, evolution proceeds in part through chance mutations. Creativity results from happenstance built into the process — through serendipity. Randomness pulls us out of our ruts; something that is determined by the scheme of the rut cannot remove us from it. This, of course, is the standard argument that machine intelligence will never be creative.26

25. C.f. Brilmayer, supra note 9, at 1176-77 (querying whether it is any less contrary to democracy to decide according to the precedents formulated by English judges of several centuries ago).

Randomness is also acknowledged to be a value in law. All of us are familiar with the metaphor of the fifty laboratories. This metaphor recognizes the desirability of conducting the same experiment fifty different times, in fifty states. The learning process inherent in such programs is invaluable, and any divergence in results is neither a cause for concern, nor error.

Similarly, the refusal to inquire into the correctness of a prior decision can be positive, a show of solidarity. Refusal to inquire into the correctness of other institutions' decisions is probably accompanied by an expectation of reciprocity. Through mutual cooperation, the interests of both sovereigns would be advanced. While it may not be reasonable to assume that voluntary reciprocity will necessarily be forthcoming, the finality doctrines, which limit the opportunity to relitigate, police a legal rule that is in the long-run invaluable, and any divergence in results is neither a cause for concern, nor error.

In short, the attitude is precisely that the decisionmaker is free to make a choice. Whether the wobble is due to actual indeterminacy (because of insufficient guidance in existing norms) or variation in the application of theoretically determinate legal standards is irrelevant. Indeed, it is even inappropriate to intimate which of these characterizations applies since doing so supposes a superior ability to identify what existing norms required.

Numerous examples of legal deference based upon jurisdiction evidence unwillingness to inquire into the legality of another sovereign's acts. The notion that "the king can do no wrong" underlies many doctrines regulating the division of institutional competence. The act of state doctrine is the clearest example which, with limited exceptions, requires other nations to respect completely the actions taken by a government within its own national boundaries. Sovereign immunity is a comparable doctrine within the American federal system. In addition, the United States Supreme Court is not empowered to examine the correctness of state court decisions of state law. On issues to which state

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27. Through mutual cooperation, the interests of both sovereigns would be advanced. While it may not be reasonable to assume that voluntary reciprocity will necessarily be forthcoming, the finality doctrines, which limit the opportunity to relitigate, police a legal rule that is in the long-run interest of all.

28. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1963); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("the courts of one country will not sit in judgment on the acts of the government of another done within its own territory").


sovereignty extends, indeterminacy is not merely tolerated by other institutional actors but genuinely respected. It is almost fair to say that in the rhetoric of deference, indeterminacy is venerated.\textsuperscript{31}

The absence of an operational concept of error is indicative of the underlying political structure. When one part of the institutional decisionmaking structure is reluctant to inquire into the correctness of another decisionmaker's result, it is in effect saying that the latter was vested with the power to decide the issue either way. Refusal to question state interpretations of state law is due to the fact that state law is, tautologically, what the state courts say it is. By definition, error cannot exist, because of the division of lawmaking authority.

\section*{II. ERROR AND DIRECTION OF FIT}

The indeterminacy discussion suggests that there are insufficient constraints in the relevant institutional inputs to identify decisions as correct or incorrect. There may, in fact, be no bull's-eye. The other problem is that even if there is a center to the target, it may not be clear how to respond to divergence between the off-center bullet hole and the center. Which is the correct spot, and which is the error?

\subsection*{A. HIERARCHY AND DIRECTION OF FIT}

One context in which error may exist confirms the discussion of wobble and leads to an explanation of why failure to conform to relevant decisionmaking inputs is not typically considered error. That context involves departure from the norms of a higher institutional authority. The explanation for this departure is that the relevant direction of fit imposes the legal decision upon external standards rather than external standards upon the law.

A decision may truly be error, even within the confines of the legal system, if another part of the institutional hierarchy is empowered to change it. For instance, an appellate court generally may correct a lower court on determinations of law. Furthermore, legal error has meaning within an established hierarchy. The United States Supreme Court cannot call a state court determination of state law an error because the United States Supreme Court is not hierarchically superior to state

\begin{footnotesize}
\textsuperscript{31} In this regard, compare the deference shown by courts to legislatures when economic legislation is challenged on constitutional grounds. Courts seem to bend over backwards, not only to validate the legislation, but to emphasize their obligation to defer to the legislature. See, e.g., Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981); New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); Allied Stores v. Bowers, 358 U.S. 522, 528 (1959).
\end{footnotesize}
courts on state law issues. It can, however, correct a lower court on matters of federal law because it is the ultimate arbiter of federal issues. To say that one decisionmaker may correct the errors of another is to say that the former is hierarchically superior to the latter with regard to specific issues.

By analyzing the ways in which the term "error" is used, we may learn who has the power to decide what. Tracing a decision to the point where there is no longer anyone authorized to denominate the decision, an error identifies the jurisdictional boundaries. Persons or institutions that play no part in correcting wrong decisions recognize both the propriety of the first decisionmaker's jurisdiction and their own lack of jurisdiction.

There are some peculiar things about restricting the usage of the word "error" to this situation. First, it acknowledges that the supreme decisionmaker in the hierarchy is, by definition, incapable of committing error. This calls to mind the famous quote about the Supreme Court—that the Court is not final because it is infallible: it is infallible because it is final. Second, if a higher authority is empowered to wobble, then lower authority error consists of not wobbling in anticipation. Error does not consist of failure to conform to ordinary decisionmaking inputs but of failure to do what one will be told. If the relevant precedents, policies, and constitutional provisions all indicate one result, reaching that result may nonetheless be erroneous if the higher authority would do the opposite.

Error amounts to an inconsistency between the decision made and the applicable standards. One cannot have error without hierarchy, although "higher authority" takes on different meanings in different intellectual disciplines. Thus, scientific error exists if a hypothesis does not fit the empirical world. Moral error amounts to an inconsistency between conduct and what morally should have been done based upon a set of moral norms. To characterize something as error involves an assumption about whether a theory should fit the facts or whether a set of facts should determine the theory. This is what is meant by the "proper direction of fit."

Direction of fit is a normative, not a factual, conclusion. Scientific theories ought to fit the facts; moral theories, in contrast, ought to conform not to actual conduct, but the reverse. Characterizing a legal decision as error is possible within an established hierarchy because in such a hierarchy there is an accepted direction of fit; the lower court's judgment is supposed to fit the appellate court's.
The reigning political theory specifies the direction of fit, just as it specifies jurisdictional boundaries. Political theory dictates either that institution A must conform to institution B (with regard to a certain issue), or B to A, or that each is free to decide on its own. An individual who takes the political structure seriously and recognizes the legitimacy of the decisionmaking hierarchy will define error in conformity with the ultimate decisionmaker in the hierarchy. As a result something may not be error in the legal sense even though it is error according to our ordinary intuition. Our persistent intuitions that certain legal decisions are erroneous often result from discontent with the legal system’s prevailing direction of fit. Inconsistent beliefs about the proper direction of fit present problems: should the law accommodate external standards, or vice versa? The coercive power of law dictates that the latter direction of fit will predominate, but competition between well entrenched notions of direction of fit results in constant tension.

This tension can be demonstrated in other areas where competing norms create contradictory directions of fit. Science may point in one direction while moral/religious reasoning points in another. The evolution debate exemplifies this. What is a scientist who happens to belong to a fundamentalist religion supposed to believe about the origin of the human species? The person may believe that the scientific evidence points toward a gradual evolution over millions of years, while religion points toward creation within the last ten thousand years. Some religious scientists attempt to reconcile this inconsistency by asserting that the scientific evidence compels a creationist conclusion. But this maneuver fails if further evidence rebuts the creationist hypothesis. What about the miracles in the Bible? Is biblical evidence more compelling than belief in scientific limits or vice versa? To resolve this issue, one needs a hierarchy of moral/religious and scientific values that will specify whether to adjust one’s version of the facts to conform to one’s religious beliefs or to scientific theories.

The types of situations we are most prone to call errors are those where one direction of fit competes with other normative conceptions which we believe should govern. Crises of conscience by judges (whose moral beliefs may diverge from their beliefs about what the law is) are problems of this sort. Legal hierarchy norms require decisionmakers to defer to institutional sources of superior authority, while conscience requires them to follow their own moral beliefs.

A comparable problem involves competition between legal hierarchical norms and empirical/scientific norms about conformity to fact.
Sometimes a decisionmaker must defer to a decision that is erroneous as a matter of fact. For instance, the exclusionary rule may require a finding of "not guilty" when a criminal defendant is most clearly guilty of the crime. Or a judge may enforce a prior judgment despite its factual inconsistency with other enforceable judgments, knowing full well that one of them is wrong.

In some of these situations, one merely shrugs. In others, where one is unwilling to let go of more firmly entrenched ideas, one characterizes what the law has done as an error. But the error is not perceptible as such within the legal system. If no one is situated to examine the decision for error, then the variation will instead be treated as wobble at most. Once all avenues of appeal have been exhausted, by definition the decision becomes final and further argument becomes pointless.

One can either be cynical or accepting regarding the law's direction of fit. From the cynical perspective, law is coercive and defines error solely in terms of decisionmaking hierarchy, without reference to either factual accuracy or moral validity. This is true, at least to the extent that legal actors cannot ensure factual accuracy or moral validity.

But is any other approach feasible? The more accepting point of view admits that no alternative dispute resolution process can hope for better. First, law requires decisions because decisions are necessary predicates for action. At some point a decision must "harden" in such a way that further contrary arguments and evidence will not be admitted. Scientific decisions do not harden in this way: they remain tentative hypotheses indefinitely, as do moral decisions.

Legal decisions may be unique in that the direction of fit changes. Moral and factual arguments are relevant at first, but not after the legal decision has been reached. The moment of decision is an abrupt break with the past. Things that were once relevant are no longer relevant. The decision is new information in the sense that it is neither contained in, nor necessarily determined by, the inputs. These discontinuities, these breaks from the past, give the law its unique adaptive and evolutionary character.

B. Direction of Fit and Legal Scholarship

If any of this is valid, one would expect it to have serious repercussions for legal scholarship. Scholarship would hopefully rise above the purely descriptive level to offer evaluative conclusions about law and legal decisionmaking. Conversely, if this perspective on legal error is of
no moment to legal scholarship, then why bother? In fact, these conclusions do have significant ramifications for substantive legal scholarship, and certain weak spots in legal scholarship owe their existence precisely to this feeble definition of error.

Of course, some types of legal scholarship are not affected at all. Purely descriptive scholarship, if any exists, can proceed as usual. Systematizing efforts are usually not entirely descriptive since there are always a number of hypotheses to fit a finite set of facts. But even if not completely value-free, attempts at systematization avoid these difficulties as long as they are offered descriptively, or to influence pending decisions. These issues only arise when a hardened decision is characterized as error.

In addition, it is only characterization as "legal error" that runs into these problems. If one takes an unabashedly normative approach to law, incorporating norms or methodologies from other disciplines and expecting the legal system to change, then it makes no difference whether "legal error" is a serious concept. Error would then consist of departure from these external norms—with the direction of fit running from outside norms to the law instead of vice versa. Critical scholarship is eminently possible with such a perspective. It may not, however, always be a good strategy to concede that one's chosen norms are not embodied in the law already. Such approaches will invariably be more controversial for being so clearly value-laden.

The implications for legal scholarship stem from the tendency of wobble to foul up attempts at legal criticism that do not rely heavily upon normative input from nonlegal sources. Doctrinal criticism usually is successful only if administered in the very smallest doses. In its usual forms, purely doctrinal criticism consists of arguments against a legal decision that reveal its inconsistency with other legal decisions. For instance, a decision will be criticized for failing to take into account precedents that arguably ought to have determined or influenced the decision. At first blush, this sort of criticism seems not to require any externally imposed value judgments, because it relies only on past precedents and the consistency constraints of stare decisis.

But a final decision is equally correct regardless of how it was decided. The reason for this is that a certain amount of wobble is to be expected, and legal institutions protect this indeterminacy. The criticized decision is as authoritative as those on which the criticism is based.
Conversely, the precedents were as much a product of wobble as the decision now under fire. By relying on precedents, the doctrinal critic undercuts his or her position by implicitly acknowledging that a decision is correct merely by virtue of being precedentially consistent. If so, the criticized case is also correct.

On occasion there may be situations where the right answer is so clear under existing law that no reasonable disagreement exists. In some of these situations, the court that ignores that answer either has no power to change the law or denies having done so. Where the vast weight of previous decisions and hierarchical authority dictate one result, no justification, including free choice, can support a contrary result. Note, however, the limited scope this leaves for doctrinal criticism: it is reduced to criticizing those decisions where the proper result is transparently clear.

Three examples will illustrate how scholarship goes astray when it builds grand theories relying on precedents and then calls contradictory decisions errors. The first is found in Ronald Dworkin’s book Taking Rights Seriously. Dworkin claims that, in theory, law is a deterministic system. Even hard legal questions have right answers, and wrong decisions violate the rights of the losing litigant. The moral subtleties of prior cases must be considered in arriving at the right answer. A decisionmaker must look not only at the black letter rules but also at the moral principles embedded in and supporting those legal rules. While Dworkin realizes that judges are not infallible, he asserts that failure to observe legal rights constitutes error and that these errors can become entrenched in legal authority.

Dworkin’s argument amounts to a doctrinally based attempt to further the liberal moral values Dworkin believes to be embedded in the legal system. Judges following Dworkin’s methodology are said to be deciding legal, not “background” moral rights, because their reasoning is

32. R. DWORKIN, supra note 1. There is a serious question whether the arguments presented by Dworkin are internally consistent. Compare, for example, his insistence that legal decisions be based upon institutional legal rights and not background moral rights, see infra note 36, with his suggestion that lawyers should rely upon Rawlsian moral theory, R. DWORKIN, supra note 1, at 149. This sort of confusion is evident elsewhere in his book. Dworkin insists on “institutional autonomy” in the law, id. at 101-05, while developing purely external moral theories for judges to rely upon, see, e.g., id at 206-39 (arguing that we should change the law to reflect a right of civil disobedience). Mindful of these inconsistencies, the description in the text is simplified for clarity.

33. See R. DWORKIN, supra note 1, at 290; Dworkin, supra note 18.

34. R. DWORKIN, supra note 1, at 119.

based upon precedents. While this system might appear to provide a powerful moral tool for legal criticism, it cannot. Assuming that Dworkin can find legal support for his liberal program—itself a doubtful proposition—he cannot mount a consistency-based critique of decisions he does not like. In the very course of identifying such decisions, he undercuts his own claim to descriptive accuracy.

There is a further interesting methodological twist to Dworkin's thesis. In an effort to show why prior legal rights should be respected and why failure to do so constitutes error, Dworkin relies heavily upon the values of consistency, nonretroactivity, and judicial restraint. But are these legal or external moral values? Dworkin fails to realize that the legal system has a much more sanguine view of errors and a much more tolerant view of retroactivity and inconsistency than he does. The earlier discussion of finality doctrines revealed that legal decisionmakers disregard the correctness of a decision in the process of enforcing it. Moreover, at present, there is no way to alter state law finality doctrines without federalizing them. Such an attempt seems unlikely and would violate Dworkin's premise that background rights should not be employed to change the law. Federalizing state law finality doctrines would be a change premised upon background rights since under current doctrine a state's failure to correctly interpret its own state law is not a constitutional violation and furnishes no other appropriate occasion for federal intervention.

Dworkin's model is internally inconsistent. It accepts past precedents simply because they are authoritative pronouncements but refuses to extend that courtesy to the decision being criticized. In order to be

36. R. DWORKIN, supra note 1, at 101-02 (discussing "institutional rights").
[The concrete rights upon which judges rely must have two other characteristics. They must be institutional rather than background rights, and they must be legal rather than some other form of institutional rights. . . .

[The referee in a chess tournament] might hold, as a matter of political theory, that individuals have a right to equal welfare without regard to intellectual abilities. It would nevertheless be wrong for him to rely upon that conviction in deciding difficult cases under the forfeiture rule.

Id.; see also id. at 127 (a judge's decision about constitutional protection for abortion is "a very different decision from the decision whether women have, all things considered, a background right to abort their fetuses"); id. at 89 (explaining how rights thesis requires enforcement of politically unjust legal rules). For an illustration of how Dworkin uses precedents, see id. at 81-130.

38. R. DWORKIN supra note 1, at 88 (consistency); id. at 84-85 (nonretroactivity); id. at 84 (role of judges in democratic society).
39. See supra text accompanying notes 18-22.
40. See Brilmayer, supra note 9, at 392-93.
coherent, Dworkin must acknowledge heavy reliance upon moral norms that are not legal norms. These may or may not be incorporated into legal decisions, but, even if they are, their Authoritativeness comes from their moral truth, not from their legal adoption. This is probably Dworkin's real game, since half of his book is devoted to the development of moral norms—apparently for judges to rely upon—without the benefit of doctrinal support. This entire project, however, is unlikely to be successful. Given the difficulty of arriving at any consensus on moral issues, it is all the more difficult to change the judicial system with nonlegal arguments.

A second author who occasionally treads on thin ice on such issues is Richard Posner. Posner, like Dworkin, hedges his bets by developing both legal and extralegal support for his conclusions. At times, however, Posner's thesis rests upon positive, not normative, grounds. It is this aspect of Posner's efficiency thesis on which I would like to focus. Posner argues that the common law is efficient. His proof, in large part, consists of examples wherein the common law developed a rule that reached the efficient result. The examples cited by Posner seem to reveal either efficiency or something closely resembling it.

As long as these revelations are utilized in influencing decisions still in process, the wobble phenomenon creates no methodological difficulties. When they are aimed at final decisions, however, serious problems arise. There tends to be some unexplained selectivity in deciding which are the authoritative precedents and which are the ones subject to critical evaluation. Posner's critique of particular antitrust decisions, as Clark has noted, only serves to undercut his thesis that the common law is efficient. By finding too many cases to criticize, critics such as Posner run the risk of destroying their descriptive thesis about the law's efficiency. Only if the deviations from the descriptive thesis are minor can a critical program proceed without external normative support.

41. See R. DWORKIN, supra note 1, at 240-58.  
43. In many circumstances, fairness between the parties may give the same result as efficiency. This is particularly true in contracts law. The reason is that voluntariness may be an important element of individual fairness as well as an indication that the parties are both improving their positions through the transaction (Pareto optimality).  
44. Clark, The Interdisciplinary Study of Legal Evolution, 90 YALE L. J. 1238, 1271 n.62 (1981) (noting the irony that Chicago-trained commentators were harshest on Warren Court antitrust decisions).
Perhaps a more mundane example will illustrate that this sort of error is not committed solely by the normative/theoretical system builders of the last fifteen years. A third scholar who tried to bootstrap himself into a critical theory using only descriptive premises was Brainerd Currie. Currie developed the choice of law theory known as "governmental interest analysis." Currie was disturbed that courts used traditional choice of law rules in deciding whether to apply local law to cases with foreign elements. According to Currie, these traditional rules artificially truncated the reach of a forum's substantive policy. To eliminate this problem, he proposed a system based upon promoting the governmental interests of the forum: local law should be applied if the state has an interest in the disputed matter. The determination of whether the state has an interest is essentially the familiar process of "statutory construction and interpretation." Currie's system was designed to prevent thwarting the will of the elected branches of government.

This statement of the methodology is equivalent to the descriptive reliance of Posner and Dworkin upon case precedents. While the institutional source is legislative rather than judicial, Currie similarly eschewed outright importation of external value preferences and opted instead for values already embodied in the law. Like the others, Currie failed to realize that the standards he was criticizing had as entrenched an institutional status as the values he sought to promote.

Even before Currie's theory, states had firmly developed notions about how far their laws ought to reach. Most of these ideas were territorial, like the rules that Currie himself rejected. While Currie might claim that states were deluded about their own best interests, his definition of their own best interests obviously had to stem from noninstitutional sources. In fact, the rhetoric of statutory construction and interpretation served as a distraction, keeping conflicts scholars preoccupied while Currie's own normative premises crept in the argumentative back door.

Such descriptive/normative fudging is the hallmark of the more expansive post-realist legal theories. What was in an earlier historic period

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46. An example of these traditional rules is found in tort cases where the law of the place of the wrong governs.
47. B. CURRIE, supra note 45, at 183-84.
49. Id. at 402 (reasoning of interest analysis, based on normative assumptions and not legislative interpretation, is comparable to drawing rabbits from hats).
depicted as self-evident deduction from first principles is now disguised as "the way that the law already is." Reliance upon the existing state of the law seems to allow value-free critical scholarship. This is because neither logic (consistency constraints) nor empirical research (the need for factual accuracy) seems at first to require the addition of new normative premises. Each is supposedly value-neutral, a valuable characteristic for any theory building tool to have.

But even the most apparently value-neutral tool—consistency constraints—is controversial. Constraints are the enemy of free choice, and some theory of official free choice is required to preserve the structure of authoritative decisionmaking. Empirical accuracy, likewise, is subordinated to the structure of authority. This is a consequence of making a decision and determining the appropriate direction of fit in resolving incompatible interests. Making a decision means hardening against further input, and enforcing it means subordinating the interests of the loser over his or her continued protests.

Methodologically, error cannot exist in the legal system in the commonsensical meaning of the word. At most, it means departure from the norms of a more authoritative institution that is itself an indeterminate decisionmaker. It makes sense to speak of the extent to which systems depart from existing inputs, empirical facts, and legal reasons. Similarly, the amount of scatter that occurs when different decisionmakers each resolve a problem independently is also relevant. But the prerogative of sovereignty is to call one's errors wobbles. To err is human; to wobble is divine.