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Error BehInd the Plate and in the Law

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ERROR BEHIND THE PLATE AND IN THE LAW†

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Casey Stengel, the great manager of the New York Yankees, and later the New York Mets, once dreamed, or so he said, that he had died and gone to heaven. The Lord greeted him personally as he walked through the Pearly Gates. "Casey," he said, "I'm so glad you're here. I want you to form a baseball team." Casey looked around him. He saw Babe Ruth, Lou Gehrig, Ty Cobb, Tris Speaker, Christy Mathewson, Walter Johnson, Grover Cleveland Alexander, and others—all of baseball's immortals—and he said, "I'll see what I can do." Obviously, one can do a lot with such talent, and, Casey soon had a team of all-stars at the peak of their talents. The only question was who they could play.

Casey didn't have to wait long for an answer. No sooner was the team in top playing condition when the dugout phone rang. It was Satan

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† Professor Brilmayer's article, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363 (1986), is different in many respects from the paper she presented at the conference giving rise to this symposium issue. By rethinking and refining elements of her earlier position, Professor Brilmayer has acted as a good scholar should. Nevertheless, this puts me in a quandary. In commenting on Professor Brilmayer's previous version, I used what she originally had written to identify my own position on the issues. As I am more interested in advancing my own views than in criticizing Professor Brilmayer's, I present my original response largely unchanged. I hope Professor Brilmayer and the reader will indulge me and treat those views attributed to her but not reflected in the current text of her article as "strawmen," valuable only insofar as they help clarify my position on the matters we both discuss. Ultimately, we remain apart in the thrust of our analyses, for the primary purpose of my paper is to differ fundamentally with the conclusion of her current version: "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 authorative institution that is itself an indeterminate decisionmaker." *Id.* at 389.

I shall use footnotes to indicate other ways in which my analysis contrasts with the positions Professor Brilmayer espouses in the final version of her article. To avoid confusion, all page citations to Professor Brilmayer's article refer to the article as it appears in this symposium issue. References to Brilmayer without page citations specifically respond to her earlier version. The reader may judge their applicability to the current version.

I am grateful to my colleague Fred Schauer for his comments on an earlier version of this paper. They were wise and helpful, exhibiting the discernment one would expect from a Yankee fan.

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calling to challenge the Lord's team to a baseball game. "But you don't understand," said Casey. "You don't have a chance. I've got all the players." "No—*you* don't understand," said Satan, "I've got all the umpires."

It seems to me that the basic message Professor Brilmayer conveys in her article, "Wobble, or the Death of Error,"[1] is that the law, as enunciated by the ultimate decisionmaker, is the umpire.[2] If baseball is defined solely as a game played in accordance with the judgment of the umpires, then the umpires cannot be wrong. Similarly if law is defined solely as the will of the ultimate legal decisionmaker, then final judgments of law cannot be wrong. The question is, however, whether either baseball or the law are, in fact, so defined.

Baseball is not defined solely as the will of the ultimate decisionmaker. There are rules, which can be found in a book; and, by reference to them, one could criticize an umpire for being wrong if he called a batter out on the second strike or ruled that a pop fly caught by the shortstop was a home run. A manager confronted by an umpire who ruled in such a manner might pull his team off the field, declaring, "This isn't baseball."

Errors of this order—those that tend to transform the game of baseball into something else—are unlikely. The rules are too clear. The target, to use Professor Brilmayer's metaphor, is too large and easy to hit. What does occur, however, are mistakes that seem equally inconsistent with baseball's rules, at least as they are written. A pitch can be called a strike although the ball curves outside of the strike zone; a batter can be called safe even though the throw beats him to the bag; and a batter can be called out although his sinking line drive touched the ground before the center fielder's apparently brilliant catch. In these instances, a manager might argue about the umpire's call, and, if he is sufficiently unrestrained while doing so, the same umpire who made the bad call might eject him from the game.

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1. Brilmayer, *supra* note †.

2. I see this position in Professor Brilmayer's discussion of hierarchy. After advancing what I understand to be her preferred conception of error, Professor Brilmayer writes that the supreme decisionmaker in the hierarchy is, by definition, incapable of committing error. *Id.* at 379-80. She also argues, "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." *Id.* at 382.

To one who only knows the written rules of baseball, there is no obvious difference between these two types of errors. Both errors—holding that a team is retired after its second out and holding that a batter is retired when a ball touches the ground just before entering the fielder's mitt—violate the rules of baseball. Yet the first error might lead an experienced fan to question the umpire's sanity or, perhaps, to demand that he be barred from ever again officiating. The second error, however, would probably not result in so much as a raised eyebrow, unless it occurred in an especially important game or were too often repeated.

The reason for such different responses is not difficult to discern. The first mistake has no obvious cause, and there is no reason to expect that such errors will ever be made.[3] The second mistake is statistically inevitable.[4] Over the long run, some line drives that are trapped will appear as if they are caught. Such mistakes are unavoidable unless we change the way baseball is judged. As long as baseball's procedural rules, which require immediate rulings by human judges, remain unchanged, even certain knowledge that a mistake occurred will not reverse the outcome. Thus, instant replay cameras may show from ten different angles that a ball was trapped, but if the umpire called the batter out, the batter will be out. It is this respect accorded an umpire's judgments that leads to the aphorism, "The umpire is always right."

But note the limited sense in which this aphorism is true. People can talk meaningfully of the umpire's error. Fans might boo, announcers might mention it, and even the umpire might, after viewing the videotape, admit "I blew it." The result of the game, however, will not change. Even if the correct call would have changed the outcome of the game (e.g., assume it was the bottom of the ninth inning with two outs, and the winning runs had already scored from second and third before the ball was trapped) the result remains the same. In this sense, the umpire's decisions are constitutive of the baseball game. Rather than being right or wrong, these decisions become part of the game, integral to its outcome. But the umpire's erroneous rulings are not constitutive of the *game of baseball*; they have no necessary implications for it. Even if

3. In this respect, it is analogous to a clear mistake of law; anyone who understands the language of the rule would recognize the error.

4. In this respect, it is analogous to a mistake of fact. Since there is no perfect fact-finding system in law, such errors must occur. Both this footnote and the preceding one refer to expectations. There are, of course, mixed questions of law and fact, and difficult interpretative questions can arise when purely legal questions are posed. In the latter situation, the concept of error may be of limited utility, although it is the language a higher court uses when reversing a lower court's decision.

large numbers of batters are retired each year by trapped balls, the rule that a batter is not out on a trapped ball remains unchanged. It is this fact that allows us to criticize the umpire's ruling and call it erroneous, even though the rule is final and disposes of the game (the case, so to speak). The fact that we cannot or will not change a final score does not mean that we cannot spot error.

This description of umpire behavior looks very much like Professor Brilmayer's "wobble." Umpires tend to center around the target, but occasionally they miss, sometimes in one direction and sometimes in another. Wobble carries little pejorative connotation, for it captures the inevitable and minor nature of the deviations that ordinarily occur. But the fact that we can describe an umpire's errors as wobble does not preclude us from also saying that the umpire is occasionally wrong. Moreover, our ability to speak of error does not turn on the possibility of an appeal to a higher authority, such as the Baseball Commissioner. Here my knowledge of baseball fails me. I do not know whether appeals of such a mundane matter as a ruling that a ball was trapped are allowed, but my very ignorance is evidence that if such appeals are allowed, they almost never succeed. It is not the existence of an appellate hierarchy that allows us to declare decisions at the field level erroneous. Rather, we can take such action because field level decisions can be contrasted with the implications of clear and consensually validated norms: the rules of baseball.

Law is filled with wobbles of the kind that umpires make, wobbles that are properly called error. Indeed, error is often what the law *does* call them. When a trial court misapplies the hearsay rule, for instance, the jury's verdict may be reversed for error below; or, in the more usual case, the appellate court will, if it chooses to address the issue at all, characterize the trial judge's ruling as "harmless *error*." Similarly, a lower court decision will be reversed for error if there are insufficient facts to support the decision or if the lower court has misinterpreted the law.

Professor Brilmayer recognizes that error of this sort exists in the law. If she and I differ at all, it is that she apparently believes that such error is possible only because there is a hierarchy of courts, each of which can reverse those below it for mistakes of these kinds. Presumably, when a case is not appealed or when an appellate court sustains a decision

below without identifying harmless error, Professor Brilmayer would argue that no error, only wobble, exists.[5]

My view is that in law, as in baseball, it is the presence of a reasonably well-defined normative code, not an appellate hierarchy, that is necessary and sufficient to allow us to speak of error, at least where norms are clearly violated. Thus, in cases where an appeal is not taken, or in courts, such as small claims courts, from which appeals are not practicable or perhaps not allowed, it is still reasonable to talk of error when the law's precepts have been violated.

Suppose, for example, a small claims court judge rejects a consumer's suit to have a defective toaster repaired or replaced in accordance with the provisions of a full warranty because no negligence was shown in the manufacture or sale of the toaster. Surely we could call this decision erroneous, even if no appeal was taken or permitted. In reaching such a conclusion, we are judging the result in light of an internal or distinctively legal standard[6]—here, a rule which dictates that full warranties provide for the repair or replacement of defective merchandise without regard to the manufacturer's negligence.

This contrasts with situations in which we might judge a legal decision by a standard external to the law. Here, Professor Brilmayer's insistence on the impossibility of *legal* error is, as I understand it, correct. Suppose, for example, that in a prosecution for the possession of burglary tools the state's evidence is insufficient to find the defendant guilty beyond a reasonable doubt, because certain tools found through an illegal search were deemed inadmissible. While the defendant has in fact committed the crime charged, a jury acquittal would not be legally erroneous. This is true both because there is no internal legal standard that allows us to characterize the exclusionary rule as wrong and because the jury verdict was reasonable given the admissible evidence. A similar situation exists when a jury convicts a defendant based on evidence sufficient to find guilt beyond a reasonable doubt, but reliable exculpatory evidence that was never presented at trial (e.g., proof that the defendant was in jail at the time of the crime) later convinces us that the verdict was mistaken.

5. Brilmayer, *supra* note †, at 376-82.

6. In discussing the possibility of error, we must keep in mind the perspective from which or standard by which we can call something erroneous. Internal standards reflect substantive norms, institutionalized in the legal system and procedural or reasoning constraints (like requirements for logical consistency) that the law recognizes as valid. An external standard holds the law up to the standards of some nonlegal, normative order. An internal standard allows us to identify legal error, while an external standard allows us to characterize laws or other legal action as morally, pragmatically, or factually wrong and in these senses erroneous.

Given the legal norms and the evidence before it, the jury did nothing wrong. Nor does the analysis change if the exonerative evidence is discovered while the case is on appeal and the appellate court remands the case or enters an acquittal. The appellate court would not say that an error occurred below, but rather that there had been a miscarriage of justice which should be rectified. In short, we must recognize that not all decisions that are factually, morally, or otherwise mistaken are legally erroneous. To be legally erroneous, a norm internal to the legal system must have been breached.

It is interesting to consider the kinds of "cognitive illusions" Professors Edwards and von Winterfeldt discuss in their paper[7] with the foregoing discussion in mind. Suppose a jury falls prey to a cognitive illusion and convicts the defendant when the true probative value of the evidence does not justify a conviction. If the jury's understandable, but inaccurate, weighing of the evidence is sufficient for a finding of guilt beyond a reasonable doubt, should we call the decision "erroneous," as in the warranty example, or should we call it simply an injustice without legal error, as in the case of a defendant who is found gnilty because exonerative evidence was never presented?

In my view, we can properly speak of legal error in situations where jurors fall victim to cognitive illusions, even though such mistakes are both systematic and inevitable. The reason is that built into the rules of evidence is the expectation that fact finders will rationally evaluate the information they are given. The law does not allow for legal fact finders victimized by cognitive illusions, even though such victimization is inevitable.[8] The law does not expect, although it may presuppose, that a

7. Edwards & von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986). Cognitive illusions create intellectual error and are defined briefly as follows: "The first half of that phrase emphasizes the intellectual nature of the tasks; the second is intended to suggest that these phenomena are quite similar to a variety of perceptual illusions extensively studied by psychologists." *Id.* at 226.

8. *See* Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1977). We see this in the basic rules of relevance and in rules that exclude evidence which is likely to appeal to emotions rather than to reason and/or be improperly weighed. Professor Brilmayer's discussion of her fourth case suggests that she would agree that error exists in this situation. Brilmayer, *supra* note †, at 365. We part company when she says, "attention to process values . . . may greatly confuse the central question of whether a particular decision is an error." *Id.* I think we must understand process values in order to characterize certain legal outcomes as either erroneous or error free. It is, in part, because process values do not give to the adversary system the justificatory scope that Brilmayer sketches (or caricatures) that legal error can be recognized. *Id.* at 376-78. Even when a lawyer is responsible for a verdict that does not accord with the facts or law, this does not mean the decision is error free. Freedom from error depends upon the process norms and the legal values which underlie them. Thus if a plaintiff loses a case because counsel failed to offer the best available evidence, no legal error will have occurred because the law's norms give the parties the choice of what admissible

party will offer all the necessary, probative evidence available.

If a juror, for example, intentionally ignores relevant information, like complicated statistical evidence, because it is cognitively easier to do so, the law's norms concerning rational fact-finding will have been breached, and we can say the juror made an error. If, however, a party chooses not to present favorable evidence or fails to discover the best available evidence, the law's norms do not suggest that the party acted improperly or made a mistake. Thus, injustice attributable to such failures is not considered legal error. The fact that most verdicts hover around the "truth" for just these sorts of reasons appears to be an instance of Professor Brilmayer's wobble. If so, wobble is more than just another name for error or a way of characterizing theoretically indeterminate decisions. It implies that some decisions which appear to contravene legal norms are not really wrong and that other decisions which accord with legal norms are, from the standpoint of the legal system, not quite correct.

The fact that judicial decisions are or may be final does not change this analysis. There are often good reasons for finality, both where there is legal error and where there is an unjust result or one which is mistaken from some extralegal perspective such as the perspective of an observer aware of evidence not presented to the court.[9] Thus, the fact that a decision is final does not mean that it cannot be described as wrong according to the legal system's standards. As with an umpire who has called a trapped ball an out, errors which enter into final judgments may be constitutive of the law of the case (the judgment to be enforced) without being constitutive of the law of the land. This situation is most obvious when a conflict exists among the various federal circuits that the Supreme Court chooses not to resolve. Here, at least one circuit's decision is incorrect, yet the parties' rights turn on it.

As long as case decisions are not necessarily constitutive of more general law, the law provides a perspective from which to criticize the outcome of the case. When wobble consists of deviations from a legal

evidence to offer. However, if the plaintiff loses because counsel mistakenly construes precedent as less favorable than it is, and the judge accepts counsel's interpretation, error will have occurred: a judge is supposed to decide questions of law correctly regardless of counsel's input. The fact that an appellate court might not grant a reversal where counsel is in part responsible for a judge's error does not change the analysis.

9. Professor Brilmayer recognizes the importance of other values, such as the importance of law as a dispute resolving process. Brilmayer, *supra*, note †, at 368. As she also notes, a decision that we might respect on the basis of values other than truth (e.g., the need for finality) is not, because it is respected, necessarily error free. *Id.*

norm, the fact that a deviation is small or that such deviations are statistically inevitable does not mean we cannot fairly call wobbling judgments wrong. Nor is our decision to treat such judgments as error necessarily inconsequential. Criticism may mean that a wrong judgment will not guide future cases; it may preclude repetition of the error, and it may prevent the allocation of greater responsibility to the perpetrator of the error.

At the opposite extreme from wobble of this sort, which can and should ordinarily be called error, there is a class of wobbling which cannot be called wrong, because relevant norms allow for some inconsistency. In baseball, for example, a pitcher can request that a scuffed ball be exchanged for a fresh one, but the umpire decides whether the ball is so marred that a new one is needed. If the scuffing is minor, the umpire cannot make a mistake. Indeed the umpire would not have erred even if on one day the game continued with a ball that was more scuffed than one which had been replaced the previous day. The rules of baseball allow such discretion, and not just with respect to trivial matters like replacing scuffed balls, but also with respect to matters that touch the core of the game. Thus, while both the National and American Leagues have identical rules defining the strike zone, conventions are such that marginal pitches that are strikes in one league are balls in the other. Similarly, it may be said without criticism that the umpire is "giving pitchers the outside corner." This is possible because rules identifying the strike zone allow for indeterminacy around the edges, permitting an umpire to call certain pitches balls or strikes without error.

This general observation must, however, be qualified in two important ways. First, if the defined range of discretion is exceeded, we may again speak of error. For instance, it would be an error for an umpire not to provide a new ball when the cover is falling off the old one. Similarly, a pitch above the batter's head must be called a ball, whatever leeway the umpire has when the ball flutters around the armpits. Second, while discretion suggests that neither of two opposing decisions is wrong, and may even permit inconsistent decisions across games (cases), consistency norms permit us to speak of error when different decisions are rendered on similar facts within the same game. Thus, when a particular pitch hovers around the armpits, it may not be wrong to call it either a ball or a strike. However, if the pitch is called a ball when the Dodgers are at bat, a similar pitch should not be called a strike when the Yankees are hitting. Thus, normative systems not only provide absolute rules for evaluating behavior, they also provide rules for evaluating relationships

between actions. We may speak of error when relationships do not correspond with such norms.[10]

Again, analogies abound in the law. Many of the rules which relate to the conduct of a trial are of this character, including the fundamental rule of relevance.[11] This rule requires a judge to balance the probative weight of potential evidence against its prejudicial effect, its tendency to confuse the jury, the specter of wasted time, and similar considerations. Discretion resides in the judge: within broad limits there can be no error, whatever the judge decides. As with an umpire, however, a judge can exceed the range of permissible discretion. Thus, a decision to allow the testimony of only one of a defendant's alibi witnesses on the grounds that additional testimony wonld be cumulative should ordinarily be reversed as an abuse of discretion, since testimony from two consistent witnesses is likely to be substantially more believable than the testimony of one. If, on the other hand, six alibi witnesses had already testified to the same thing, decisions excluding or allowing a seventh witness' testimony might be equally correct.

We can most easily see that the area within which an action is error free (i.e., discretionary) is limited when a disagreement regarding what is discretionary leads a court (or legislature) to establish bounds. For example, in most jurisdictions trial judges have complete discretion to admit or deny a psychologist's expert testimony concerning eyewitness identification. A judge will not be perceived as having acted wrongly if the testimony is admitted nor will the trial court's decision be reversed if the testimony is disallowed. Thus, a judge deciding whether to allow such testimony cannot err; no legal norm constrains the judge's action. However, in two states, California and Arizona, supreme courts have recently held[12] that under certain circumstances it is an abuse of discretion—perhaps a constitutional violation—to preclude an eyewitness

10. The consistency criteria which Professor Brilmayer uses as evidence of indeterminacy in law exist because the law regards certain kinds of relational indeterminacy as error. Brilmayer, *supra* note †, at 371-73. For example, under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), it is error for a federal court in a diversity action to differ with the forum state's highest court on a question of state law. Unlike Brilmayer, I do not view the indeterminacy of legal decisions, whether theoretical or practical, as suggesting the impossibility of legal error. *See* Brilmayer, *supra* note †, at 369-71. As I argue in the text below, the indeterminacy which the law allows is typically confined. Decisions which exceed these confines may be called error. If Professor Brilmayer wishes to confine her conception of wobble to decisional variation within areas of permitted discretion, I will readily admit that legal decisions wobble; but if wobble is used in this sense, the indeterminacy which underlies it does not call the possibility of legal error into question.

11. For example, Rule 403 of the Federal Rules of Evidence and its state counterparts.

12. *See* People v. McDonald, 37 Cal. 3d 357, 690 P.2d 709, 208 Cal. Rptr. 236 (1984); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983). In holding that specific judges abused their discretion

expert from testifying. These courts have created a possibility of error which did not formerly exist.

Thus far, the thrust of my comments and the contrast with Professor Brilmayer's observations reflect, I think, the different perspectives from which we approach the law. As a social scientist and teacher of evidence, I approach law from the bottom up: action lies in the streets and in the lower courts. Because Professor Brilmayer has had a special interest in jurisdictional issues and the conflicts of law, she is accustomed to looking at law from the top down. Her work focuses on appellate decisions. When we examine the question of legal error at the appellate level, the problem becomes more interesting, and we must leave the analogy to baseball behind.

As we have seen, the finality of an umpire's decisions does not preclude judgments of error because the umpire's rulings, although constitutive of the baseball game, are not constitutive of the *game of baseball.* The norms of the *game* provide a standard by which we can judge the umpire's rulings (including erroneous ones) although they are inextricably bound up with a result we respect (e.g., the Yankees won 6-5 only because the umpire did not realize that Gene Woodling trapped the ball for the last out, but it is a Yankee victory nonetheless). The trial judge's situation is similar. Even if judge's rulings shape a jury verdict, they do not shape the law generally and can be criticized if they are discrepant. Indeed, if an appeal is taken, the trial judge's decisions and the verdict they influenced can be reversed for error.

Appellate courts engaged in lawmaking are in a different situation. High court decisions are constitutive not only of the "law" of the case, but also of the law in general, for they make up a body of rules binding on lower courts. Thus, it is plausible to suggest that high court decisions cannot be in error. For example, it is difficult to conclude that the Supreme Court's decision upholding six-person juries is wrong as a matter of law, since, as a matter of law juries, after the decision, need only contain six persons. Nevertheless, I believe there are several bases from which one may conclude that decisions which are constitutive of the law are wrong. Before I do, however, I would like to agree partially with Professor Brilmayer and suggest that often—perhaps always, in certain

in disallowing expert testimony, the California and Arizona supreme courts did not take away all trial court discretion to pass on the admissibility of eyewitness expert testimony, but they identified certain circumstances in which the decision was no longer discretionary.

senses—one cannot find error in this situation.[13]

The law embodies value judgments that need not accord with the values that predominate in other sectors of society and are not incorrect simply because they fail to do so. Social science experts often think the law is mistaken when it does not attend to the scientific information they offer or incorporate scientific standards in the decisionmaking process. But the law, not science determines the values law embodies, and these values encompass judgments about the modes and standards of proof that may properly inform legal decisions. I have previously suggested that, given the law's assumptions about fact finder rationality, decisions distorted by cognitive illusions may be considered wrong without moving beyond the vantage point provided by the law's own standards. It does not follow, however, that the law is wrong to bar either person-machine procedures of the kind Professor Edwards and others have explored[14] or certain kinds of expert testimony that might decrease cognitive errors or make fact-finding more accurate. The law may recognize rational fact-finding as a value, but the law also recognizes other values, such as individuality and the importance of jury trials. These values may outweigh incremental gains in verdict accuracy. Scientists encountering the legal process often seek to impose not only the techniques of their disciplines on the legal system, but also the values which underlie them, and they may criticize the legal system when it responds to nonscientific values. But it is the legal system which properly tells the scientist what is relevant, not the other way around. Simply because a legal rule does not make economic sense or a legal procedure accepts incorrect statistics does not mean the law has erred.[15]

It does not follow, however, that we must accept Professor Brilmayer's claim that there is no error in the law. At best, her claim is

13. It is in reference to high courts that Professor Brilmayer's indeterminacy argument has its bite, for while it is easy to see that the indeterminacy allowed lower courts is confined to regions of discretion, the bounds which confine high courts are not as obvious. Nevertheless, as I shall argue below, I think there are both internal norms and external moral positions which allow one meaningfully to say that a supreme court decision is wrong. With respect to supreme courts I might accept Professor Brilmayer's suggestion that indeterminacy may be theoretical and that "the premise that there is a right answer might be rejected altogether," Brilmayer, *supra* note †, at 370, but it does not follow from the absence of a "right answer" that there are no wrong ones. And it is the possibility of wrong answers we are discussing.

14. Person-machine procedures include procedures in which humans make certain value judgments or estimates of probabilities and computers calculate the implications of these judgments for the decisionmaking task in question. *See* Edwards & von Winterfeldt, *supra* note 7, at 264-67 (discussing the boundary between human cognition and the use of tools).

15. *See, e.g.*, Lempert, *Statistics in the Courtroom: Building on Rubinfeld*, 85 COLUM. L. REV. 1098 (1985).

true only in a tautological way and actually undercuts one of her basic perceptions. If we say that the law cannot be wrong, and if we define law as any authoritative decision that changes a legal rule, a decision which is constitutive of the law cannot, by definition, be erroneous. However, this argument rules out the idea of wobble as well. Far from wobbling, a court whose decisions appear inconsistent and varied is picking precisely those principles which constitute the law. To spot wobble requires a vantage point from which a pattern is visible.[16] But if we have such a vantage point, then we may spot error as well.[17]

I will refer to external vantage points when I discuss Professor Brilmayer's observations on legal scholarship, but first I shall consider internal perspectives. There are two internal vantage points from which we can criticize lawmaking decisions as wrong. Both rely on consistency criteria. First, I believe (or at least I am willing to argue) that the law presupposes that judicial law makers will adhere to certain kinds of interpretive consistency. Court-made law should be consistent with the meanings naturally or fairly attributable to acknowledged sources of law

16. Wobble implies that a legal decision differs somewhat from an apparently appropriate decision either because it deviates from a decision in a similar case or because it deviates from the decision apparently implied by a legal rule. (I assume that this is what Professor Brilmayer means when she speaks of the "amount of scatter that occurs when different decisionmakers each resolve a problem independently" and of the "extent to which systems depart from existing inputs, empirical facts, and legal reasons." Brilmayer, *supra* note †, at 389). Yet if we look in sufficient detail, every case is factually unique. Deviations from similar cases or rules can be seen only because there is a consensus that certain characteristics which make a case unique (ranging from trivial factors, such as a party's first name to ordinarily important considerations such as a party's intent) do not count when particular legal questions are at issue. Absent this consensus, we could not say that particular decisions wobble because each decision can be mapped onto one and only one set of facts (case). With such a consensus we can spot deviations from similar cases or from the apparent implications of apposite legal rules, and we can call them "wrong." If we take an external moral perspective, the earlier cases or apposite rules may be similarly labeled "wrong."

17. Professor Brilmayer argues that the law has procedural rules, like those of res judicata and collateral estoppel, which implicitly acknowledge the existence of wobble. I question the implication. Such rules may be designed to decrease error by encouraging parties to invest heavily the first time they litigate a case; they may reflect nonlegal values, such as cost savings; and they may recognize that where discretion exists and neither of two reasonable decisions would be erroneous, it would nonetheless be wrong for inconsistent outcomes to be reached on essentially the same facts. Professor Brilmayer uses a metaphor in the revised version of her paper that was not in the original. She refers to "a machine that projects pellets" against a wall. Brilmayer, *supra* note †, at 368. The virtue of this metaphor is that it discards the idea that a target exists around which the pellets scatter. The target idea undercut Professor Brilmayer's original argument because it suggested that, despite her language, even she believed there was something out there to hit. However, I do not think her argument is substantially strengthened by using the metaphor of pellets tossed against a wall. Even if no target exists, the eye will impose one as pellet marks accumulate on the wall near the same place. Arguably, this is what interpreters of the common law do. From a scattering of specific cases, they identify general principles which become the bases for determining correct decisions in future cases.

and with related aspects of the legal corpus. Assume, for example, that the Supreme Court were to decide that the sixth amendment right to jury trial was satisfied by a "jury" of one person chosen from a group the prosecutor selected for jury duty. Such a decision could be labeled erroneous even if it changed the law forever, because it enunciates a standard which cannot plausibly be derived from the body of law (i.e. the sixth amendment and cases under it) the Court purports to be interpreting.

The criterion of consistency with related law also affords a position from which one can argue that a particular decision is erroneous. This claim is most visible in the pedagogical philosophy of Christopher Columbus Langdell. Langdell believed that one could identify a string of leading cases which embodied the core principles of the common law.[18] Working from these principles one can criticize officially authoritative but inconsistent court decisions as erroneous. It is unclear, however, whether the criterion of consistency with core cases can operate without an external ethical perspective to complement it. In particular, without the guidance of some ethical perspective, there is no unique or consensually valid way to choose the set of cases which are authoritative.[19]

The other internal stance which allows one to characterize decisions constitutive of the law as wrong focuses on the quality of the lawmaking opinion. If the opinion is internally inconsistent, or if the conclusion does not follow from the premises, then one has a basis for calling it wrong. Consider the portion of *Williams v. Florida*[20] which holds that the sixth amendment permits six-member juries in criminal cases. Had the Court said only that the sixth amendment permits six-member juries, one could not say the Court erred uuless one subscribed to a jurisprudence which binds courts to original understandings of meaning. Although the constitutional framers almost certainly thought that juries would have twelve members,[21] a six-member jury, unlike the one-person jury I described above, does not do violence to the term "jury." The Court in *Williams* would be similarly immune from claims that it had erred had it followed the lead of Justice Harlan's concurrence and held that six-member juries were allowed because they did not contravene the

18. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, preface (1871).

19. The validity of the ethical perspective is always questionable, but there might well be widespread agreement on the set of core principles. Without an external ethical guide one has little basis to choose key cases from among cases that appear equally authoritative on their face. Such possible bases as "Massachusetts cases," "Judge X's opinions," "9-0 decisions," or "what I like best" are all unsatisfactory; and, while these suggestions may seem like caricatures, I do not think they can be improved upon unless an external ethical perspective is introduced.

20. 399 U.S. 78, 86-103 (1970).

21. *Id.* at 99-100.

due process guarantees of the fourteenth amendment.[22]

However, the Court took a third approach. It addressed the issue of jury size in functional terms, making the issue appear to turn on an empirical question: whether a six-member jury is functionally equivalent to a twelve-member jury with respect to the verdicts it returns.[23] The majority concluded that there is no discernible difference between the verdicts of six- and twelve-person juries and thus upheld the Florida law. To support this empirical conclusion, the Court cited a finding by Solomon Asch which the justices read as suggesting that a lone dissenter in a six-member criminal jury is as likely to hold out for acquittal as two dissenters in a twelve-member jury.[24]

However, the Court misinterpreted Asch. Asch found fundamental differences between the ability of one dissenter and the ability of two to resist pressures to acquiesce in a majority's views. Moreover, Asch found that a holdout with an ally is more likely to resist in a group of twelve than is a lone holdout in a group of six.[25] Thus, what the Court presents as a crucial justification for its holding points toward the opposite result. The Court's assumption that there are no discernible differences between the verdicts of six-person juries and those of twelve-person juries is also mistaken, particularly with respect to the likelihood of "hung" juries.[26]

Thus, if we abstract the rule in *Williams* from the case that gave rise to it and treat it simply as a legal pronouncement, we cannot call the Court's holding wrong. To this extent I agree with Professor Brilmayer. However, if we accept the Court's judgment that the constitutionality of six-person juries is contingent on the absence of any discernable difference between the verdicts of six- and twelve-person juries, we have in the Court's misreading of Asch and its ignorance of other relevant research a basis for saying that the Court erred, even though its decision is law. A similar critique could be made if a lawmaking pronouncement revealed a failure of logic rather than faulty empiricism.

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22. Such a decision might, however, have been open to criticism under one branch of our first consistency criterion—consistency with the body of related law—since by the time of *Williams* the sixth amendment right to jury trial had been applied to the states.

23. *Id.* at 100.

24. *Id.* at 101-102 n.49.

25. Asch, *Effects of Group Pressure Upon the Modification and Distribution of Judgments*, in GROUP DYNAMICS 189 (D. Cartwright & A. Zander 2d ed. 1960). Asch was examining problems that were cognitively quite simple and quite unlike the task jurors face.

26. *See* Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 644, 673-76 (1975).

These criteria for spotting legal error assume that a would-be critic must adopt a stance internal to the legal system, validated by the norms of the law or by canons of reasoning that courts purport to follow. This assumption is at the core of Professor Brilmayer's interesting conclusion, in which she argues that scholars cannot use some legal decisions as a basis for criticizing other decisions which are equally valid with respect to finality and enforceability. Instead, legal scholars are limited, on the one hand, to descriptive scholarship or trivial doctrinal criticisms and, on the other, to criticisms unabashedly based on external norms.

To my mind, the most interesting legal criticism involves an external normative perspective, and this is entirely appropriate, for law is the business of enforcing norms which are right by some ethical standard. Professor Brilmayer appears not only to deny that this counts as *legal* criticism, but also to suggest that it is strategically unwise: "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."[27]

This suggests that a possibly good strategy—but one which makes for dishonest scholarship—is to justify criticism by pretending it is based on the identification of a true legal norm. Nonconforming cases are criticized for deviating from this norm (the law) when, in fact, the critic has imported an external normative standard without acknowledging it. If I understand Professor Brilmayer's critique, this is what she accuses Ronald Dworkin, Richard Posner, and Brainerd Currie of doing.

Yet, there is another way to regard their scholarship and the mission of legal criticism in general. It is to integrate internal legal norms (which themselves have ethical content) with external ethical ones. Such scholarship seeks to define what law is by identifying what law aspires to be. The task is not to catalogue all law but to identify central ethical tendencies which unify a diverse set of cases. Outliers, that is, cases which do not fit the core characterization, do not threaten the validity of this approach any more than the fact that some women are taller than some men invalidates the observation that men are generally taller than women. However, as with statistical averages, central tendency information is considerably more informative if one has some sense of the dispersion around the mean value. Perhaps the authors Professor Brilmayer cites may be criticized for not providing sufficient dispersion information, or,

27. Brilmayer, *supra* note †, at 384.

as she suggests of Posner, for misjudging where the law's central tendency lies. I do not think they can be criticized for presenting their ethical views as if they were grounded only in the law,[28] for each author seeks openly to justify his claim by reference to external normative systems as well as by his reading of the law.

Legal scholarship of this sort is, of course, more than an exercise in descriptive statistics. Legal scholars commonly identify certain core legal norms of which they approve and, in light of these norms, criticize cases as both wrong (the external normative view) and aberrant (the internal consistency criterion view). If I understand her correctly, Professor Brilmayer would allow the former but not the latter. It is not clear, however, whether she would call the former "legal" scholarship. I would allow both. High court wobble may be inevitable in the law, but there are also central tendencies. If the core legal principles are not morally justified, they are properly criticized from an external normative perspective. If they are morally justified, legal scholarship serves society by pointing out when the bull's-eye has been missed, for this helps future decisionmakers come closer to the target.

The contrast between the positions Professor Brilmayer and I espouse is sharp, but at a practical level, the debate between us hardly matters. Legal scholarship will continue to serve society by criticizing court decisions whether there is, in some abstract sense, error in the law or not. All that is necessary is that there be error in the eyes of the beholder.

28. Professor Brilmayer's criticism is fair when she suggests that, on occasion, these scholars fail to distinguish between the criticism that internal and external perspectives allow. Moreover, these scholars and most others cannot avoid being influenced by external ethical views when deciding what the law really means.