2006

When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials

Lisa Blomgren Bingham

When We Hold No Truths to be Self-Evident: Truth, Belief, Trust, and the Decline in Trials

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In *A World Without Trials?*, Professor Marc Galanter documents a decline in both the absolute number and rate of civil trials and jury trials in state and federal courts, a decline that is both long-term over the past century and yet precipitous in the past two decades.[1] He identifies five 'vanishing trial stories' as hypotheses to explain the phenomenon: convergence of common law and civil code systems; displacement of trials to administrative, arbitral, and other dispute resolution mechanisms; assimilation of trial-like procedures and due process into surrounding institutions other than courts; transformation of the legal system from a rational, rule-centered and formal system into an informal decisional process entailing negotiation, participation, and interaction; and evolution of an adversarial process into something different, entailing process pluralism 'intelligently designed' to produce more optimal outcomes. There is, of course, some basis for each of these accounts.

There is also a paradox of life in the modern world that underlies all of these hypotheses. The more information we have, the less we seem to know. We have too much information; we no longer know who to believe or what to trust, including our senses. We have lost confidence in the capacity of judges and jurors, among many other institutions, to determine the truth. In response, we are asserting more control over our sources of information, filtering information out, and trying to control the information we want used in disputing. We are trying to assert control over the process for deciding the outcomes of disputes as a way of managing how the decision-maker responds to information. We are turning to expert tribunals and decision-makers, people with substantive knowledge to better interpret the information we give them. Perhaps a by-product is the decline in the frequency and number of traditional civil adversarial trials.

This article will explore the relationship between the "vanishing trial" and the changing ways in which we think about truth. First, it briefly overviews how we think about knowing what is true: epistemology and the history of philosophy. Second, it looks to the philosophy of science and history of social science for new theories and methods about how we ascertain and construct meaning and what we believe to be real and true. Third, it examines our changing relation to information in the face of the "information explosion": information is the evidence upon which we reach a conclusion about what is true. Fourth, it relates these changes to

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    1. Marc Galanter, *A World Without Trials*, 2006 J. DISP. RESOL. 7.

the philosophy of law and theories of the jury and adversary system. Fifth, it ex-
amines what social science has taught us about truth, belief, trust, justice, and
control over information. Finally, it addresses how these changes may explain
why litigants are using mediation, arbitration, and other forms of appropriate dis-
pute resolution in lieu of the adversarial civil trial.

People are choosing to exercise control over what information is used in dis-
puting and over who is using it for what purposes. This takes them away from the
civil trial, a formalistic process with strict rules about who can be a witness, what
they can say on the stand, what information is admitted as relevant and material to
a decision, and what standards the decision-maker must use to evaluate that in-
formation. If complexity in the modern world has taught us anything, it is that we
no longer hold much to be self-evident.

I. EPISTEMOLOGY AND PHILOSOPHY OF KNOWLEDGE: TRUTH BECOMES IRRELEVANT

Law has always borne a special relation to that study known as philosophy,
the love of wisdom.[2] Law entails the exercise of judgment, discerning what is real
and true in an account of events, identifying the evidence and people we believe
or disbelieve, and the practical wisdom to know the difference. Western philoso-
phy[3] gives us two distinct traditions for understanding what is true and how we
know it to be so: Platonic rationalism and Aristotelian empiricism. Plato posited
that the ultimate reality is found in the forms, ideas that exist apart from the mate-
rial world, and which we can but barely discern, as shadows on the walls of a
cave. Aristotle posited that we identify truths about reality when we generalize
from a sequence of observations in the material world. Together, these create the
"mind-body problem," which in turn has attracted loyal adherents to one side or
the other through the history of philosophy. In the rationalist or mind side of the
tradition, St. Thomas Aquinas reasoned into existence a complex theocratic real-
ity; Descartes famously observed, "Cogito ergo sum"; and Immanuel Kant as-
serted *a priori* the indivisible autonomy of the individual as the basis for an ethical
philosophy.[4] The rationalist tradition is also an authoritarian one. Truth exists
independently from us; the divine know it, even if we may not. In the rationalist
tradition, we looked to their representatives on earth to tell it to us.[5] They discov-
ered it through contemplation; they trusted neither their senses, nor ours, to reveal
it.

In contrast, the empiricists discover truth through observation and ultimately,
science. Truth exists independently from us, but it is based in the material world,
not in our heads. The British Empiricists, John Locke, George Berkeley, and

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2. RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 104–13 (1999).
3. Eastern philosophy did not play a formative role in the common civil justice system, although it
may have informed certain early Greek pre-Socratic philosophers.
4. JOHN PATRICK DIGGINS, THE PROMISE OF PRAGMATISM: MODERNISM AND THE CRISIS OF
KNOWLEDGE AND AUTHORITY 428 (1994) (describing Descartes's "logocentrism," and that "reason
logically preceded language and that objects cognitively presided in the mind, a rationalism that Kant
continued by making consciousness and intentionality the focus of knowledge").
5. John Dewey, *The Construction of Good, in* THE AMERICAN PRAGMATISTS, 201-02 (Milton R.
Convitz & Gail Kennedy eds.,1960).

David Hume, all give priority to our senses. Hume asserted that we cannot think of something unless it has an antecedent in our sense perception. We can determine what is true through the exercise of careful observation and the scientific method. We cannot simply trust ourselves to reason our way there.

Both traditions posit that truth exists objectively outside of us and that it may be knowable. However, both traditions lend themselves to authoritarianism. The wise can contemplate their way to truth; the scientists can discover it. Both of these are better at finding truth than the average person.

In sharp contrast, the American pragmatists developed a new empirical philosophy of knowing.[6] William James, Charles S. Peirce, and John Dewey posited that truth is a function of belief based on interaction between people and their environment; it is subject to revision.[7] A hallmark of truth is the utility and practicality of it.[8] Essentially, truth is a belief structure, a function of humans acting in relation to information.[9] We use information through our relation to the world as organisms in our environment and thereby construct knowledge.[10] What is important is how information is used. Truth is a function of the dominant shared belief and its hallmark is utility—that it moves us forward.[11] This is fundamentally a democratic construction of truth; average people can know it based on its usefulness to them and whether a majority of them accept it. However, with more information, our assessment of what is true will, and should, change. There was some criticism that the pragmatists confused truth with justification; Dewey argued philosophers should focus not on truth, but on 'warranted assertibility.'[12] This is an "instrumental approach to knowledge."[13]

Oliver Wendell Holmes brought this philosophical background into American law.[14] Holmes rejected "the deductive method of formal logic."[15] Instead, he asserted that the Constitution "is an experiment, as all life is an experiment."[16] Pragmatism is fundamentally consistent with the trial jury; a dozen average people can, based on empirical information (i.e., evidence, and experience with how the world works), determine with reasonable likelihood that they believe certain asserted facts are true.[17] In fact, "twelve good men [sic] and true" are better at determining truth in this framework than a cleric on a mountaintop.[18]

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6. *Id.*

7. WILLIAM JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING; POPULAR LECTURES ON PHILOSOPHY 53 (1907) ("Truth for us is simply a collective name for verification processes. . . . Truth is *made*, just as health, wealth and strength are made, in the course of experience.").

8. *Id.* at 46.

9. Charles S. Peirce, *The Fixation of Belief*, 12 POPULAR SCI. MONTHLY 1, 1-15 (Nov. 1877).

10. Dewey, *supra* note 5, at 201-02 ("Judgments about values are judgments about the conditions and results of experienced objects; judgments about that which should regulate the formation of our desires, affections and enjoyments.").

11. William James, *Truth and its Misunderstanderers, in* THE AMERICAN PRAGMATISTS 68 (Milton R. Convitz & Gail Kennedy eds., 1960) ("Realities are not *true,* they *are,* and beliefs are true *of* them.").

12. RORTY, *supra* note 2, at 32.

13. DIGGINS, *supra* note 4, at 2.

14. Milton R. Convitz & Gail Kennedy, THE AMERICAN PRAGMATISTS 143 (1960)

15. DIGGINS, *supra* note 4, at 343 (characterizing Dewey's praise of Holmes).

16. *Id.* at 342 (quoting Holmes).

17. Oliver Wendell Holmes, Jr., *The Best Test of Truth...*, in THE AMERICAN PRAGMATISTS 170 (Milton R. Convitz & Gail Kennedy eds., 1960) ("[T]he best test of truth is the power of the thought to

The pragmatists were succeeded by the neo-pragmatists. They argued that "inquiry [is] a way of using reality," there is no one "Way the World Is," and therefore knowledge cannot represent reality.[19] Instead, justified belief helps us act in order to realize happiness. In fact, certainty is neither possible nor necessary:

> To say one should replace knowledge by hope is to say . . . that one should stop worrying about whether what one believes is well grounded and start worrying about whether one has been imaginative enough to think up interesting alternatives to one's present beliefs.[20]

In addition, poststructuralists contributed to the conclusion that: "[T]he search for truth must be forsaken as a quaint illusion from a previous age of innocence. In the absence of knowledge the world consists in structures of domination that move almost invisibly without any apparent human agent."[21]

Instead of truth, we are left with language, culture, context, history, and power. While this reflects primarily an elite discussion within the academy, it has also found its way into popular culture and debate. Typically, it is reduced to political challenges of 'moral relativism' compared to 'moral values,' an increasingly central debate between the right and left. That it is present in popular culture is a testament to the power of the ideas.[22]

II. HISTORY OF SCIENCE AND SOCIAL SCIENCE: TRUTH BECOMES INACCESSIBLE TO THE AVERAGE JOE OR JANE

The history of science gives us a parallel narrative on truth. In Kuhn's *Structure of Scientific Revolutions* he describes how scientific theories evolve in an alternation of deductive and inductive reasoning, neither form of learning having primacy. Scientists observe phenomena in the world starting from a set of expectations or hypotheses that are derived from beliefs and preconceptions. They collect data. With the accumulation of a sufficient body of disconfirming or inconsistent information, and changes in social and cultural conditions, there can be a 'paradigm shift,' through which scientists, and all of us, adopt a new belief about reality. Neither belief is necessarily objective truth. The paradigm shift is not linear; rather, it is a kind of 'tipping point.' It is not necessarily cumulative. Galileo, Copernicus, Tycho Brahe, and Johannes Kepler illustrate the shift from an

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get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

18. DIGGINS, *supra* note 4, at 344 ("Thus in legal philosophy as well as in pragmatic philosophy the search for truth becomes the struggle for acceptance, whether in the marketplace, the committee, the courts, the schools, or the broader popular culture.").

19. RORTY, *supra* note 2, at 33.

20. *Id.* at 34.

21. DIGGINS, *supra* note 4, at 434.

22. Mitchell Stephens, *We're All Postmodern Now; Even Journalists Have Realized that Facts Don't Always Add Up to the Truth*, COLUMBIA JOURNALISM REV., Jul.-Aug. 2005, at 60 (arguing that journalism needs to debunk spin and be good postmodernists who seek truth rather than just report competing spin even while recognizing that absolute objectivity may be impossible and interpretation or analysis essential).

earth-centered to a sun-centered solar system, and from one positing planetary motion in perfect spheres to an accurate account of planetary motion. In each shift, an entrenched view of truth about reality yielded in a dramatic shift to a new view. Science moved forward from the rationalism of mathematics and physics to the empiricism of astronomy, chemistry, and biology, and then the science of the mind, psychology. Kuhn helped break down the hierarchy of disciplines and methods, to open up discussion about the way human language, culture, and belief shape science.[23]

One of pragmatism's founders, William James, was not only a philosopher, but also one of the founders of experimental psychology. Experimental psychology endeavored to study systematically how it is that we perceive our world and make sense of it, yielding us perception, neuro-psychology, neuroscience, social psychology, and cognitive science, with its feet in both the camps of computer science and psychology. The development of this discipline paralleled that of epistemology. While all of the discipline used empirical methods, there was a mind-body divide in interpreting the results. Neo-rationalists argued that the brain is hard-wired, that we match what we see to images in the brain to interpret them. Radical empiricists argued that the brain develops by the organism interacting with the environment and building a body of sense-derived knowledge. More recently, with the advent of experiments with psychotropic drugs, some argue we see what we can use; we pay attention to information important to survival, sorting it out from a rich array of incoming sense data. Survival means not paying attention to all of it; hence, we have scientists studying attention. Magnetic imaging of brain activity during various tasks attempts to pinpoint where and how interacting with the environment may create knowledge.

At a fundamental level, as organic features of organisms acting in relation to an environment that we have evolved in, our senses provide us with the information we need to survive. However, as this discipline has systematically explored the human mind, we have learned about various illusions and ways in which our senses are unreliable.

Moreover, all scientific disciplines have progressed to levels of complexity unknowable by the layperson. Biotechnology has given us DNA sequencing and analysis as a tool in the courtroom. Computer science gives us new tools that operate seemingly magically through invisible bodies of code. Statistics permit sophisticated arguments about inference and causality.[24] Using these tools, experts can tell juries to disregard what a common sense assessment of the evidence might dictate as an outcome. A series of high profile exonerations using DNA

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23. Thomas Kuhn, *Rocks and the Laws of Physics*, in PHILOSOPHY AND SOCIAL HOPE 181 (1999). Kuhn relates:

> All of the social sciences, and all of the learned professions, have by now gone through a process of Kuhnianization, marked by an increased willingness to admit that there is no single model for good work in an academic discipline, and the criteria for good work have changed throughout the course of history, and probably will continue to change.

24. Joseph Saunders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 363 (1998) ("[T]he most difficult type of evidence for jurors is that containing statistical and technical information."). For a discussion about the growing complexity of scientific and technical evidence in the adversarial system, see MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT (1997).

testing of criminals condemned to die have brought home again and again the unreliability of the adversarial process.

In the past century and a half, the social sciences have come into their own. The systematic study of human relations in a myriad of cultural contexts through anthropology, sociology, and political science has given us theories about the human construction of meaning. Americans no longer share a single cultural frame of reference as the correct or only frame. We know it is possible for people to construct meaning very differently from each other. With names like deconstructionism and postmodernism, these theories illustrate our loss of shared belief structures and the fragmentation of what we know and believe to be true along political, religious, racial, ethnic, gender, gender preference, and other ideological lines.

III. INFORMATION: WE NOT ONLY CANNOT SEE THE FOREST FOR THE TREES, WE HAVE BECOME LEAF PEOPLE

A. *The Information Explosion*

The phrase 'information explosion' is commonplace, but accurately captures an aspect of our reality. Technology for humans to communicate with each other has evolved fundamentally, in ways unforeseen and unknowable when the common law adversary system first emerged. The means of communication have moved from localized forms like speech, signal fires, and drums to distributable physical forms, like handbills, printed books, journals, magazines, papers, recordings, and tape. We have moved from purely local to mass publication and worldwide distribution networks of these physical forms. In the past thirty years, we have shifted to digital media, subject to both physical and digital worldwide distribution. We have moved from speech through air to communication through satellites and fiber optic cable in cyberspace and on the Internet. As the means have evolved, so too has the speed of communication, from weeks or months on foot or horse, to days or weeks on train, to hours or days by plane, to minutes and hours by telegraph, to nearly simultaneous by telephone, satellite, and fiber-optic cable. We can communicate around the planet within seconds. We can watch reality unfold in real time in places we have never been and never will be.

This has included a proliferation of sources. Our sources of information about what is real and true no longer come from just church and/or a sovereign, but now from different levels and agencies of government, public and private schools, colleges and universities, an array of houses of worship, the many entities in the private and nonprofit sectors, civil society, voluntary associations, unions, public interest groups, political parties, and individuals, among others. The last decade has also seen the ground-up democratization of information. Anyone can set up a website and publish information to the world. There is no licensing process, as there is for radio, TV, cable, or satellite communications. Bloggers tell us daily what is happening in Iraq. We have more access to eye witness evidence about events around the world, and how others interpret them and understand reality, than we have ever before had in human history.

It is too much to know; this vast, geometrically increasing body of information is fundamentally unknowable. Once upon a time, reading a daily paper was

sufficient to be well informed. Now, there is little consensus on what it means to be well informed, because there is no consensus on the right source of information. Instead, the focus has turned away from keeping up with information to filtering it out efficiently. An article in a recent in-flight magazine interviewed eight professionals and executives on how they decide what information to consume and what to screen out and ignore.[25] This is not a problem that was much in evidence at the turn of the last century, at the beginning of our decline in trials.

B. The Failure of Information Filtering Institutions: The Implosion of Journalism

As information becomes easier to access, as sources proliferate, demand for it from historic sources diminishes. There has been a loss of monopoly. Neither churches nor government nor network TV can claim supremacy in credibility. TV journalism presents a case in point. The era of a single or even a handful of authoritative voices is over. We had Edward R. Murrow in the 1950s, Walter Cronkite in the 1960s and 1970s, and the triumvirate of Dan Rather, Tom Brokaw, and the late Peter Jennings in the 1980s and 1990s.[26] However, with their retirement, there is fragmentation of audience. The national TV networks have seen a diminution of their audience with the advent of cable and on-demand TV; less than half of those surveyed recently reported that they regularly get news or information from the national nightly network stations.[27] The newspapers, even the national newspapers of record, are struggling with declining subscriber bases as people elect to get their information elsewhere.[28] One survey of internet use found that people went online to get news because they could get information on the Web not available elsewhere (9 percent), it was more convenient (50 percent), the sources reflected their own interests and values (6 percent), and they do not get all the news and information they want from traditional news sources such as the daily newspapers or the network television news (33 percent).[29]

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25. Jenna Schnuer, *Our Daily Read,* AMERICAN WAY, Jan. 1, 2006 *available at* http:// american-waymag.com/aw/lifestyle/feature.asp?archive_date=1/1/2006 (last visited Apr. 4, 2006) ("Information overload getting you down? These readers learned to control the flow and dumped the pileup guilt.").

26. Shari Wolk, *Rather on Rather: 50 Years of Journalism,* THE DAILY COLONIAL [GWU] Sept. 27, 2005 (observing that many are calling the stepping down of Tom Brokaw, Dan Rather, and the death of Peter Jennings 'the end of an era'); and David Bianculli, *Two are Top of the 'World,'* DAILY NEWS, Dec. 6, 2005, at 61, *available at* http://www.nydailynews.com/news/gossip/story/372126p316 468c.html (last visited Apr. 4, 2006) (reporting on new co-anchors taking over from Peter Jennings and observing that evening newscasts' audience levels have dropped, and that there is no "pool of potential anchors with Dan Rather-type gravitas," so they are revamping the show with blogs and complementary internet materials).

27. Roper Center at University of Connecticut Public Opinion Online, PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL INTERNET TRACKING POLL, Question ID USPSRA.122104, R46B (2004). Forty-five percent report regularly watching CBS, ABC, or NBC, while 38 percent report regularly getting news or information from cable news channels such as CNN, MSNBC, or the Fox News Cable Channel. *Id.* at Question ID USPSRA.122104, R46C (2004). The good news is that 15 percent reported regularly getting their news from National Public Radio. *Id.* at Question ID USPSRA.122104, R46D (2004). However, a majority, 58 percent said they sometimes or regularly go to the major network and cable websites for news. *Id.* at Question ID USPSRA.122104, R47H.

28. Only 10 percent report they regularly get news or information from the New York Times or USA Today. *Id.* at Question ID USPSRA.122104, R47B.

29. *Id.* at Question ID USPSRA.122104, R38.

Although two-thirds of Americans report that they regularly get information from local television news,[30] and more than half say they regularly get news from a local daily newspaper,[31] there is a perceived failure of local journalism to maintain its independence and serve its historic role as a watchdog at the local and community level. Mergers and the emergence of a few giant media conglomerates have undermined resources for reporting on news that has only a local or regional market as opposed to a national market.

Moreover, there has been a shift away from reporting real news to infomercials and commercialized news: journalism as marketing. This is illustrated by the move from news shows to celebrity news and news magazines, by constant product placements in morning shows and cross marketing of regular TV programming through guest appearances at special event coverage like the Macy's Thanksgiving Day Parade. This in turn has generated a loss of faith in the authenticity of information.[32]

One short cut is subjective faith in the source. As an illustration, one survey examined how much trust people have in various sources to provide accurate information about health problems or issues, a subject of importance to them. Seventy percent of those polled responded that they had a lot of trust in doctors and health care professionals,[33] while the response for pharmacists was 53 percent,[34] and for friends and family was 25 percent.[35] In contrast, all forms of media rated much lower for the response "trust a lot"; books rated 23 percent,[36] the Internet 14 percent,[37] magazines 10 percent,[38] television 10 percent,[39] newspapers 7 percent,[40] and radio 5 percent.[41] People have more faith in traditional authority figures like doctors than in the work product of journalism. Another poll found that people are more willing to trust religious leaders (51 percent) and military or police leaders (45 percent) than they are to trust journalists (28 percent) whose job it is to tell the truth in a disinterested and presumably objective fashion.[42] Even after Enron, people were more willing to trust business leaders (31 percent) than journalists (28 percent) or politicians (23 percent).[43] In a separate national adult survey, only 30

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30. *Id.* at Question ID USPSRA.122104, R46A.

31. *Id.* at Question ID USPSRA.122104, R47A.

32. For a discussion of recent scandals and ethics in journalism, see Marianne M. Jennings, *Where are our Minds and What are we Thinking? Virtue Ethics for a "Perfidious" Media,* 19 N.D. J. LEGAL ETHICS & PUB. POL'Y 637 (2005).

33. Roper Center at the University of Connecticut Public Opinion Online, PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL E-HEALTH AND THE ELDERLY: HOW SENIORS USE THE INTERNET FOR HEALTH INFORMATION SURVEY, Question ID USPSRA.05EHLTH, RO5A (2005).

34. *Id.* at RO5B.

35. *Id.* at R05I.

36. *Id.* at R05E.

37. *Id.* at R05F.

38. *Id.* at R05D.

39. *Id.* at R05G.

40. *Id.* at R05C.

41. *Id.* at R05H.

42. Roper Center at the University of Connecticut Public Opinion Online, ROPER ASW PUBLIC ATTITUDE MONITOR SURVEY, Question ID USROPER.04PAM2, R01 (2004).

43. *Id.*

percent of the population reported that they think that all or most of what televi-sion reporters say is the truth;[44] newspaper reporters fared worse (28 percent).[45]

A related development is the perceived use of disinformation and misinfor-mation for political purposes. This includes, but goes beyond, the phenomenon of spin, in which an agreed set of events is given a particular interpretation.[46] For example, there is discussion of the failure of traditional journalism in relation to the Iraq war,[47] in both the reporting on claims that Iraq had weapons of mass de-struction and in challenging Bush administration assertions about the relation of the Iraq war to the war on terrorism.[48] More recently, government agencies have created 'journalistic' footage, supposed news releases in which an agency has entirely created and filmed the footage subsequently released by news media as original journalism, rather than government-produced public relations. Another recent poll asked a national sample of registered voters who they trust more to tell the public the truth, government officials or news reporters, and the results were that only 18 percent of people trust government, while 38 percent trust reporters, 5 percent trust both, and 33 percent trust neither.[49]

C. The Disintegration of Shared Knowledge

People are choosing whom they want to believe. This has always been true to a certain extent, but there were fewer people to choose from. With the failure of traditional filtering mechanisms in the face of the information explosion, the loss of monopoly, the weakening of historic sources through massive competition, the restructuring of the information marketplace, and in light of the paradigm shift in epistemology, people are using heuristics, or shortcuts, for truth.

In the more value-laden area of public policy and politics, they go to the in-formation sources they want to or are disposed to believe, and they reject and filter out information inconsistent with their existing ideological frame. A major-ity of those polled went online for information about the 2004 election cam-paign,[50] but it is telling that a majority (60 percent) of them did not bother to

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44. Roper Center at the University of Connecticut Public Opinion Online, CENTER FOR SURVEY RESEARCH AND ANALYSIS, UNIVERSITY OF CONNECTICUT NEWSPAPER EDITORS SURVEY, Question ID USCSRA.03MEDIA, R01F (2003).

45. *Id.* at USCSRA.03MEDIA, R01B.

46. Jacob Weisberg, *Beyond Spin: The Propaganda Presidency of George W. Bush*, SLATE MAGAZINE, Dec. 8, 2005, *available at* http://www.slate.com/id/23117868/ (last visited Apr. 4, 2006) (observing that propaganda and spin exist on a continuum, but that they differ in that spin does not involve lying or misleading anyone about factual matters).

47. James Wolcott, *Flooding the Spin Zone: Stunned by the Hurricane Katrina Disaster, the Media Came out of its Defensive Crouch and Lambasted Washington*, VANITY FAIR, Nov. 2005, at 176 (com-paring the media's aggressive reporting of Hurricane Katrina to its failure of journalism with the inva-sion of Iraq).

48. *Id.* (describing the Bush administration's 'information war'). *See also* Chris Lehmann, *Rumsfeld Guns for the Press While the Lincoln Group Spins*, NAT'L. OBSERVER, Dec. 12, 2005, at 4 (describing propaganda placed in Iraqi press by Bush administration).

49. Roper Center at the University of Connecticut Public Opinion Online, FOX NEWS/OPINION DYNAMICS POLL, Question ID USODFOX.072805, R35 (2005).

50. Roper Center at University of Connecticut Public Opinion Online, PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL INTERNET TRACKING POLL, Question ID USPSRA.122104, RW1B (2004). In the same poll, 43 percent said they went to the websites of major news organizations

check the accuracy of claims made by or about the candidates.[51] They can find radio show hosts[52] and bloggers who share their viewpoint.[53] In a recent survey, 42 percent of those responding somewhat agreed or strongly agreed that they rely heavily on independent sources like Internet chat rooms, blogs, or other alternative media to get news and information.[54] It is interesting that 14 percent of those polled in another national survey responded that they thought they could trust partisan web sites such as those run by political parties, a candidate or a campaign to provide information that is accurate and not misleading just about always or most of the time, although 47 percent responded that you could only trust these sites some of the time.[55] A higher percentage, 21 percent, said they could trust websites run by groups focused on specific issues such as the environment, gun control, abortion, or health care reform to provide accurate information just about always or most of the time; a majority said they trusted these sites only some of the time.[56] Ten years ago, these information sources would not have been available.

It is true that when national disasters unfold in real time and they become the subject of 24/7 news coverage on CNN, the networks and their websites, they will attract a national audience.[57] However, that audience dissipates once the emergency is over. These are at best temporary exceptions to the rule. They are invariably followed by commentary on how the country came together in the face of the disaster, and then the national unity evaporates as commentators pick apart who is to blame for the disaster, its handling or the consequences, with the customary fragmentation along political lines.

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like CNN or the New York Times, while a total of 19 percent indicated they went to candidate, political, issues-oriented, or other websites. *Id.* at Question ID USPSRA.122104, R32.

51. *Id.* at Question ID USPSRA.122104, R37J.

52. As to Rush Limbaugh, 16 percent report they listen regularly or sometimes. *Id.* at Question ID USPSRA.122104, R46K. Howard Stern attracts 11 percent regularly or sometimes. *Id.* at Question ID USPSRA.122104, R46L.

53. Thirty-four percent responded yes when asked if they ever visit web sites that provide information about specific issues or policies that interest them, such as the environment, gun control, abortion, or health care reform. *Id.* at Question ID USPSRA.122104, R35. Over a quarter reported that most of the time they visited websites that share their point of view, 32 percent went to neutral sites, and 21 percent went to sites that challenge their point of view. *Id.* at Question ID USPSRA.122104, R41.

54. Roper Center at University of Connecticut Public Opinion Online, HARRIS INTERACTIVE EXECUTIVE, CONGRESSIONAL AND CONSUMER ATTITUDES TOWARD MEDIA, MARKETING, AND THE PUBLIC RELATIONS PROFESSION SURVEY, Question ID USHARRIS.111105A, R1D (2005).

55. Roper Center at University of Connecticut Public Opinion Online, PRINCETON SURVEY RESEARCH ASSOCIATES NOVEMBER 2002 TRACKING SURVEY, Question ID USPSRA.121302, RP09EA (2002).

56. *Id.* at Question ID USPSRA.121302, RP09EB.

57. Fifty percent of those polled responded that they used the internet to get information about Hurricane Katrina or Hurricane Rita hitting the Gulf Coast and their aftermath. Roper Center at University of Connecticut Public Opinion Online, PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL INTERNET TRACKING POLL, Question ID USPSRA.112405, RM01 (2005). Seventy-three percent said they used the website of a major news organization such as cnn.com or msnbc.com to get information about the hurricanes, while 32 percent went to the websites of nonprofits like the Red Cross or United Way. *Id.* at Question ID USPSRA.112405 RM02A. *See also* Question ID USPSRA.112405 RM02E. 17 percent went to Internet blogs. *Id.* at Question ID USPSRA.112405 RM02D. Government websites did only slightly better than blogs, at 19 percent. *Id.* at Question ID USPSRA.112405 RM02F.

In other words, in response to the information explosion and the journalism implosion, people are choosing to exercise control over what information they are exposed to. They exercise choice through cable TV, the web, media choice, commentator choice, print or other forms of media. There is no single universal source for credible information upon which there is a national consensus.

IV. PHILOSOPHY OF LAW AND THE ADVERSARY SYSTEM: WE DO NOT TRUST LAWYERS TO TELL THE TRUTH

Early theories of law suggested a logical and rationalist process through which judges in syllogistic fashion reason from a preexisting set of rules and propositions (like the forms of Plato) and apply them to a specific set of facts to generate an almost preordained outcome. With Oliver Wendell Holmes, Jr. and pragmatism came legal realism. It became more important to examine what judges actually do, instead of what they say they are doing.[58] Holmes viewed law as a science engaged in the "prediction of the incidence of public force through the instrumentality of the courts."[59] Judges are not divine unquestionable sources of truth, not the prophets of the scriptures, but instead humans who form beliefs based on evidence and experience and then act on them. Holmes viewed "the law as a function of need rather than an embodiment of truth."[60] He took the measure of law away from intent and moral values of good and bad, and substituted notions of effects and repercussions.[61] Holmes became fascinated with the history of legal rules and the anachronistic nature of their justification. He is seen as a "precursor of postmodernism"[62] because he was preoccupied "with what survives and perpetuates itself."[63] Later, Holmes saw law as a function of context, embodying social practices and habits, not reason and evolutionary growth, not objective truth.[64]

The collective body of the judiciary was not notably diverse at the turn of the century, and more recent theories of law look at how judges coming from a single racial, gender, cultural, and ethnic lens bring their values and frame of reference into the process of judging.

A. *The Adversary System and Truth*

The theory of the modern adversary system is that it produces accurate factfinding: it is the best way to find truth. In her account of the drafters' theory behind the Federal Rules of Civil Procedure, Judith Resnik observed:

> They claimed that the procedures they championed would enable judges or juries to render fair judgments. The "adversary system" was their shorthand for the procedures they sought to foster—a lawyer-based proc-

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58. DIGGINS, *supra* note 4, at 350-51.
59. *Id.* at 344 (quoting Holmes)
60. *Id.* at 351.
61. *Id.* at 352.
62. *Id.* at 355.
63. *Id.*
64. *Id.* at 357 (citing Thomas C. Grey, *Holmes and Legal Realism,* 41 STAN. L. REV. 787 (1989)).

ess in which each side was responsible for generating information to be used either by the parties (to reach an accommodation) or by judges and juries (to assess and then to impose an outcome). The rules that they crafted were to enable attorneys, facing off within the tradition of adversarial encounters, to provide information to judges who would, in turn, produce acceptable (indeed perhaps good) outcomes.[65]

She described the assumptions behind the rules, that the parties are rational, have access to resources to generate information, and have lawyers as their agents who share their interests.[66] She observes:

A final, and central, assumption is that competition between balanced opponents (these autonomous attorney-client units) will lead to the triumph of truth—or at least to the emergence of insights with normative power.[67]

This conception embodies a pragmatist epistemology: judges and juries will use information in partnership with attorney-gatekeepers to form beliefs as to what is true and to produce good, practical, functional, and fair outcomes.

However, the presumptions underlying this theory may no longer hold. There has been a growth in the complexity and nature of evidence in the adversary system.[68] There has also been a variety of empirical studies to assess the ability of the jury to engage in accurate fact finding and reliable decision-making in the face of this complexity; while the results are mixed, there is a growing body of evidence pointing to the inconsistency of outcomes and difficulty jurors report in assessing scientific and technical information.[69] In the face of this complexity, jurors use heuristics like the credentials of expert witnesses, their appearance, and the number of arguments they make.[70] The difficult-to-challenge scientific evidence of experts and increasing use of it, and the problems this creates for accurate fact-finding by juries, is perceived to undermine the effectiveness of the adversarial system.[71] The result has been a series of reforms that move control away from litigants, or rather away from litigants' attorneys, by giving judges more control over expert testimony (both the number of experts and the admissibility of testimony), and by permitting bifurcation of expert testimony on causation from evidence on culpability.[72]

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65. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 504-505 (1986).

66. *Id.* at 513.

67. *Id.*

68. Joseph Saunders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 356 (1998) ("[T]he growth of the use of science in court and the accompanying increase in fact finding complexity have placed pressures on the ability of the civil jury, embedded in an adversarial set of procedures, to correctly resolve disputes. These pressures are nowhere greater than in the trial of complex (often mass) torts that involve the use of scientific experts.").

69. *Id.* at 357-66.

70. *Id.* at 363-64 (citing Joel Cooper et al., *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379 (1996)).

71. For a review of the empirical research on the use of expert witnesses and jurors grappling with complex scientific and technical information, see Joseph Saunders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355 (1998).

72. *Id.* at 383-84.

Similarly, there is evidence that elite users, leaders in business and their in-house counsel have lost faith in the adversary system.[73] In an interview and survey study of executives in large companies, inside counsel and outside counsel, Professor John Lande documented the prevalent lack of confidence in the process of adversarial civil justice among executives[74] and to a lesser degree, their inside counsel.[75] Only outside counsel, whose livelihood depended upon it, had faith in the adversary system.[76] In all instances, there was a relationship between views of the adversary system and confidence in the ability of juries and courts to determine the truth accurately. Those interviewed by Professor Lande complained about the capacity of juries to make decisions,[77] felt that business issues are too complex for jurors to handle,[78] and felt that in many commercial contracts business people waive their right to a jury trial because they are not "willing to trust twelve peers off the street."[79]

B. Loss of Trust in Lawyers

In early Greece, there were both philosophers who were seekers of truth, and sophists who were masters of rhetoric and built beautiful arguments. Both were respected. The word sophistry did not have the negative connotation it does today. However, lawyers, the modern professionals who practice rhetoric, are not trusted to the same degree as other professionals. For example, one national survey by the Harris Poll found that while 65 percent of the adult population would trust judges to tell them the truth, only 24 percent would trust lawyers to tell them the truth.[80] Another poll found that only 11 percent of the national adult population trusts what lawyers say in their advertisements most of the time; 48 percent hardly ever or never trust lawyers' advertisements.[81] Not only do people not trust lawyers, but lawyers have also been blamed for loss of social capital and the decline of trust generally.[82]

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73. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions,* 3 HARV. NEGOT. L. REV. 1 (1998).

74. *Id.* at 52 (observing that executives felt litigation "was an untrustworthy mechanism for finding the truth and producing fair results, especially when juries are involved").

75. *Id.* at 53 ("[T]hey expressed qualms about the factfinding process, especially by juries" and that their "faith in litigation was significantly correlated with satisfaction with the results and especially the process in their experiences with litigation. . . . In particular, it was related to their critical evaluation of juries' assessment of damages and the courts' ability to determine the truth.").

76. *Id.* at 48-50.

77. *Id.* at 34.

78. *Id.*

79. *Id.* ("And that doesn't mean that people are stupid. It means that businesses have become very complex in many respects.").

80. Roper Center at University of Connecticut Public Opinion Online, HARRIS POLL, Question ID USHARRIS.112702, R1S (2002).

81. Roper Center at University of Connecticut Public Opinion Online, PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL HEALTH POLL REPORT, Question ID USPSRA.05HPRFB, R05B (2005).

82. Frank B. Cross, *Law and Trust,* 93 GEO. L.J. 1457 (2005) (reviewing literature on the decline in social capital in America and its relation to law and lawyers).

C. *Loss of Trust in Public Institutions that Make or Interpret Law*

Looking on the bright side, 68 percent of people trust the Supreme Court 'at least a fair amount,'[83] while the number is 62 percent for Congress[84] and 52 percent for the Executive Branch.[85] Given a forced choice on what branch of government they trust the most, 33 percent responded the judicial branch, 22 percent responded the executive branch, and 20 percent responded legislative branch.[86] However, in another national survey, 61 percent responded that they could only trust the government in Washington to do what is right some of the time or never.[87] When asked why, among other responses, 5 percent responded they mistrusted politicians, 5 percent responded that politicians lie, 5 percent said the government withholds information and 10 percent cited politicians' self-interest.[88] The majority of Americans do not trust what politicians say in their advertisements.[89] On the other hand, Americans have become distrustful of people in general; another survey reported that only 32 percent responded that you can trust most people, while 60 percent responded you cannot be too careful.[90]

V. TRUTH, TRUST, JUSTICE, AND CONTROL OVER INFORMATION

In an environment in which people do not have high levels of trust in each other or in institutions for determining truth, reporting truth or making policy decisions based on reality, social science has much to tell us about human behavior. There is a substantial and growing body of research on trust. There is well-developed literature in social psychology and organizational behavior on perceptions of justice, including distributive, procedural, organizational and interactional forms of justice.

A. *Trust*

There are two different directions for inquiring about trust and the adversary system. People must decide whether to trust each other in a transaction or interaction that may yield a dispute that later ends up in the courts, and then whether to trust each other in a settlement. People must also decide whether they trust the institutions for resolving this dispute. Professor Cross suggests that the law can

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83. Roper Center at University of Connecticut Public Opinion Online, GALLUP POLL, Question ID USGALLUP.092805, R14B (2005).
84. *Id.* at Question ID USGALLUP.092805, R14C.
85. *Id.* at Question ID USGALLUP.092805, R14A.
86. Roper Center at University of Connecticut Public Opinion Online, FOX NEWS/OPINION DYNAMICS POLL, Question ID USODFOX.061605, R07 (2005).
87. Roper Center at University of Connecticut Public Opinion Online, CBS NEWS NEW YORK TIMES POLL, Question ID USCBSNYT.090702B, R08B (2002).
88. *Id.*
89. *Id.* at Question ID USPSRA.05HPRFB, R05G.
90. Roper Center at University of Connecticut Public Opinion Online, PRINCETON SURVEY RESEARCH ASSOCIATES INTERNET TRACKING POLL, Question ID USPSRA.102203, R02 (2003); Cross, *supra* note 82, at 1471-72 (reviewing Robert Putnam's BOWLING ALONE and the data on the decline in the percentage of Americans who say "most people can be trusted," from a peak in 1962 of 55 percent to a low of 33 percent among adults and 25 percent among high school students).

enhance social capital and trust for economic transactions; he identifies emotional affective and rational cognitive dimensions of trust.[91] He examines how the rule of law can build societal trust and trust between parties to a contract or transaction.[92]

Lewicki and Wiethoff report that trust has also been the subject of research by multiple social science disciplines: personality theorists look at individual disposition to trust; sociologists and economists look at trust in and among institutions based on interactions; and social psychologists look at interpersonal and inter-group transactions that foster or inhibit trust.[93] Trust is related to information, belief and truth because it is defined as both belief in a person and a willingness to act upon what they say or do.[94] They suggest that there are significant differences between trust and distrust; these are not simply different quantities of the same thing.[95] Trust is "confident positive expectations" regarding another, while distrust is "confident negative expectations."[96] Trust is a function of relationship; the more multifaceted the relations and the more interactions in a wider array of settings, the more complex the relationship and greater opportunities to develop trust.[97] Trust and distrust can exist simultaneously.[98] There are two significant dimensions to trust. First, people can calculate trust based on impersonal interactions and a kind of personal cost/benefit analysis; Lewicki and Wiethoff call this 'calculus-based trust.'[99] It bears similarities to the rational or cognitive dimension of trust.[100] Second, people develop trust based on identifying with another person's values and goals; this is "identification-based trust."[101] It bears similarities to the emotional and affective dimension.[102]

These definitions suggest a problem for the adversary system. The polls reported above show that we have become in general a people with a tendency to distrust others. In relation to the civil trial court, it would seem difficult for the average litigant to build either calculus-based or identity-based trust in the court as an institution. Many litigants are one-shot players who file one lawsuit in their lifetime, and few of these ever see the inside of a courtroom.[103] They cannot build either calculus-based or identity-based trust through repeated interactions. For

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91. Cross, *supra* note 82 (arguing that the law can help build trust, particularly in creating conditions in which expectations concerning contracts are reliably met and enforced).

92. *Id.* at 1514 (arguing that "strong control systems" enhance trust "among those governed by the systems," and providing a review of the empirical literature regarding such systems and trust between potential disputants or litigants).

93. *See* Roy J. Lewicki & Carolyn Wiethoff, *Trust, Trust Development, and Trust Repair, in* THE HANDBOOK OF CONFLICT RESOLUTION 86-87 (Morton Deutsch & Peter T. Coleman eds., 2000) (providing an excellent review that synthesizes the research from multiple social science disciplines).

94. *Id.* at 87 ("[W]e adopt as the definition of trust "an individual's belief in, and willingness to act on the basis of, the words, actions, and decisions of another.").

95. *Id.* at 90.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Cross, *supra* note 82, at 1513.

101. *Id.*

102. *Id.*

103. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95 (1974) (describing the relative advantages of repeat players over one-shot players in the civil justice system).

that matter, neither can institutional corporate repeat players. Their managers are the ones who appear in court. Lande found that these managers had little experience with court, and not much good to say about those experiences.[104] Neither one-shot players nor repeat players' management employees have much to identify with in the legal system; their in-house and outside lawyers may have identity-based trust in the system,[105] but the litigants themselves have no reason to. To build identity-based trust, researchers suggest parties should interact by sharing values, perceptions, motives and goals, or be in situations where they stand together;[106] litigants cannot do this much with the jury or the court as an institution.

Since most litigants cannot form their own relationships and conclusions based on repeated experience with players in the adversary system, they may look to proxies, heuristics, and vicarious experience. In the alternative, it may be easier to rebuild trust in the other disputant than in the institution for resolving the dispute.[107]

B. *Justice*

Justice theory in social science examines peoples' perceptions of fairness in, and satisfaction with, the process and outcome of institutions to resolve conflict. Socio-legal scholars have developed theories of distributive, procedural, and interactional justice in contexts ranging from the courts to the workplace.

1. *Distributive Justice*

Distributive justice has its roots in social equity theory. It posits that social behavior occurs in response to the distribution of outcomes. Distributive justice emphasizes fairness in the allocation of outcomes. Thus, in mediation research, distributive justice suggests that satisfaction is a function of outcome, specifically the fact and content of a settlement or resolution. In theory, participants are more satisfied when they believe that the settlement is fair and favorable. There is a substantial body of empirical research that supports the distributive justice model as an explanation of satisfaction.[108] The research suggests that distributive justice is a better explanation for satisfaction related to conflicts over resource allocation, such as wage disputes than other cases in which fairness matters.

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104. Lande, *supra* note 73, at 39 (observing that managers, in-house lawyers, and outside lawyers all believed that top executives and organizational superiors believe the civil justice system is working poorly).

105. *Id.* at 49-50 (observing that outside counsel had generally favorable views of litigation and were pleased with the results, and that faith in litigation was strongly related to their satisfaction with the process of litigation and their personal experience).

106. LEWICKI & WIETHOFF, *supra* note 93, at 97.

107. Cross, *supra* note 82, at 1509 (examining both directions of trusting relationships, and argues that the law can help build interpersonal or affective trust by creating the conditions under which parties act consistently with expectations as reflected for example in contracts).

108. DEAN G. PRUITT, NEGOTIATION BEHAVIOR (1981); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); JEFFREY RUBIN & B. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION (1975).

2. *Procedural Justice*

Procedural justice refers to participants' perceptions about the fairness of the rules and procedures that regulate a process.[109] In contrast to distributive justice, which suggests that satisfaction is a function of outcome (the content of the decision or resolution), procedural justice suggests that satisfaction is a function of the process (the steps taken to reach that decision). Among the traditional principles of procedural justice are impartiality, voice or opportunity to be heard, and grounds for decisions.[110] Procedural issues such as neutrality of the process and decision-maker,[111] treatment of the participants with dignity and respect,[112] and the trustworthiness of the decision-making authority[113] are important to enhancing perceptions of procedural justice. Extensive literature supports procedural justice theories of satisfaction in a variety of contexts involving both courts and dispute resolution.[114] In general, research suggests that if organizational processes and procedures are perceived to be fair, participants will be more satisfied, more willing to accept the resolution of that procedure, and more likely to form positive attitudes about the organization.[115]

3. *Interactional Justice*

Beginning in the 1980s, organizational justice researchers developed the notion of interactional justice, defined as the quality of interpersonal treatment received during the enactment of organizational procedures.[116] In general, interactional justice reflects concerns about the fairness of the non-procedurally dictated aspects of interaction. Research has identified two components of interactional justice: interpersonal justice and informational justice.[117] These two components overlap considerably. However, empirical research suggests that they should be

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109. William G. Austin, & Joyce M. Tobiasen, *Legal justice and the psychology of conflict resolution, in* THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES. (R. Folger ed, 1984); JOHN THIBAUT & W. LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) [hereinafter THIBAUT, PSYCHOLOGICAL ANALYSIS].

110. M. D. BAYLES, PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS (1990).

111. Tom R Tyler & E. Allan. Lind, *A relational model of authority in groups, in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 25, 115-92 (M. Zanna ed., 1992) [hereinafter Tyler, *Relational Model*].

112. Robert J. Bies & J. S. Moag, *Interactional Justice: Communication Criteria of Fairness, in.* RESEARCH ON NEGOTIATION IN ORGANIZATIONS, 43-55 (R. J. Lewicki et al. eds., 1986) [hereinafter Bies, *Interactional Justice*]; E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) [hereinafter LIND, PROCEDURAL JUSTICE].

113. Tyler, *Relational Model, supra* note 111.

114. LIND, PROCEDURAL JUSTICE, *supra* note 112; E. Allan Lind et al., *In the eye of the beholder: Tort litigants' evaluations of their experience in the civil justice system,* 24 LAW & SOCIETY REV., 953-96 (1990).

115. LIND, PROCEDURAL JUSTICE, *supra* note 112; Tyler, *Relational Model, supra* note 111.

116. Bies, *Interactional Justice, supra* note 112, at 44.

117. R. FOLGER, & R. CROPANZANO,. ORGANIZATIONAL JUSTICE AND HUMAN RESOURCE MANAGEMENT (1998); Tom Tyler & Robert J. Bies, *Beyond formal procedures: The interpersonal context of procedural justice, in* APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS 77-98 (J. Carroll ed., 1990) [hereinafter Bies, *Formal Procedures*].

considered separately as each has differential and independent effects upon perceptions of justice.[118]

a. Informational Justice

Informational justice focuses on the enactment of decision-making procedures. Research suggests that explanations about the procedures used to determine outcomes enhance perceptions of informational justice.[119] Explanations provide the information needed to evaluate the structural aspects of the process and how it is enacted.[120] However, for explanations to be perceived as fair they must be recognized as sincere and communicated without ulterior motives,[121] be based on sound reasoning with logically relevant information,[122] and be determined by legitimate rather than arbitrary factors.[123]

b. Interpersonal Justice

Interpersonal justice reflects the degree to which people are treated with politeness, dignity, and respect by authorities. The experience of interpersonal justice can alter reactions to decisions, because sensitivity can make people feel better about an unfavorable outcome.[124] Interpersonal treatment includes interpersonal communication,[125] truthfulness, respect, propriety of questions, and justification,[126] and honesty, courtesy, timely feedback, and respect for rights.[127]

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118. Jason A. Colquitt, *On the dimensionality of organizational justice: A construct validation of a measure*, 86(3) J. APPLIED PSYCHOL. 386-400; Jason A Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425-45 [hereinafter Colquitt et al., *Millennium*].

119. Robert J. Bies, *The predicament of injustice: The management of moral outrage, in* RESEARCH IN ORGANIZATIONAL BEHAVIOR 9, 289-319 (L. Cummings & B. M Staw eds., 1987.); Robert J. Bies, & Debra L. Shapiro, *Voice and justification: Their influence on procedural fairness judgments*, 31 ACAD. MGMT. J. 676-85 (1988); Jerald Greenberg, *Organizational justice: Yesterday, today, and tomorrow*, 16 J. MGMT 399-432; Debra L. Shapiro, *Reconciling theoretical differences among procedural justice researchers by re-evaluating what it means to have one's views "considered": Implications for third-party managers, in* JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT 51-78 (1993); Bies, *Formal Procedures, supra* note 117, at 77-98.

120. Colquitt et al., *Millenium, supra* note 118; Jerald Greenberg, *The social side of fairness: Interpersonal and informational classes of organizational justice, in* JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT (Russell Cropanzano ed., 1993) [hereinafter Greenberg, *Social Side*]; Jerald Greenberg, *Using socially fair treatment to promote acceptance of a work site smoking ban*, 79 J. APPLIED PSYCHOL. 288-97 (1994) [hereinafter Greenberg, *Smoking Ban*].

121. Robert J Bies, Debra L. Shapiro & L. L. Cummings, *Causal accounts and managing organizational conflict: Is it enough to say it's not my fault?*, 15 COMM. RES. 381-99 (1988).

122. Debra L. Shapiro & H. B. Buttner, *Adequate explanations: What are they, and do they enhance procedural justice under severe outcome circumstances?* (Paper presented at the annual meeting of the Academy of Management, Anaheim, CA., 1988).

123. R. Folger, D. Rosenfield, & T. Robinson, *Relative deprivation and procedural justification*, 45 J. PERSONALITY & SOC. PSYCHOL., 268-73 (1983).

124. Colquitt et al., *Millenium, supra* note 118; Greenberg, *Social Side, supra* note 120; Greenberg, *Smoking Ban, supra* note 120.

125. Bies, *Interactional justice, supra* note 112.

126. *Id.*

127. *Id.*

4. *Control, Group Value, and Fairness Heuristic Theories*

There are three psychological models that explain these research results: control theory,[128] group value theory,[129] and fairness heuristic theory.[130] Control theory is related to social-exchange theory and posits that decision control allows disputants to shape the final outcome while process control allows them to present evidence and arguments that will in turn affect outcome.[131] Group value theory suggests that people value fair process (neutrality and respectful, dignified treatment) because it signals their value and standing within a social group.[132] In early models, the trustworthiness of the third party authority was an element of perceived fairness.[133] Most recently, fairness heuristic theory suggests that people use information about perceptions of fair outcome or fair process as a shortcut, or heuristic, to deciding whether an authority can be trusted.[134] In other words, justice theory is explaining why fairness is important; it is a short cut to trust. Professor MacCoun suggests that the fairness heuristic theory of research has "almost no notice in the law and social science literature."[135]

C. *Control, Uncertainty, and Trust*

The experience of control is an important component of justice. Fairness heuristic theory suggests that what we are trying to manage and control is fundamentally uncertainty.[136] Control over outcome is managing uncertainty about what an authority figure may direct disputants to do. Control over process is control over the information that the authority figure may use to reach a decision about outcome. Both forms of control are means of trying to cope with uncertainty about the future. Efforts at control become a rational response in an era when we face heightened uncertainty because we have too much information, too many sources, a loss of consensus over which sources to trust, and insecurity about the ability of anyone to determine what is real and true.

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128. THIBAUT, PSYCHOLOGICAL ANALYSIS, *supra* note 109.

129. Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group Value Model*, 57 J. OF PERSONALITY & SOC. PSYCHOL. 830 (1989) [hereinafter Tyler, *Group Value Model*].

130. Kees van den Bos & Allan Lind, *Uncertainty Management by Means of Fairness Judgments*, 34 ADVANCES IN EXP. SOC. PSYCHOL. 1 (2002). For a review of the literature, see Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 171-201 (Volume publication date Dec. 2005), accessed at CENTER FOR THE STUDY OF LAW AND SOCIETY JURISPRUDENCE AND SOCIAL POLICY PROGRAM, JSP/CENTER FOR THE STUDY OF LAW AND SOCIETY FACULTY WORKING PAPERS, UNIVERSITY OF CALIFORNIA, BERKELEY, PAPER 30 (2005) *available at* http://repositories.cdlib.org/csls/fwp/30 (last visited Mar. 14, 2006).

131. MACCOUN, *supra* note 130.

132. Tyler, *Relational Model*, *supra* note 111.

133. Tyler, *Group Value Model*, *supra* note 129, at 831.

134. Kees van den Bos, *Uncertainty Management: The Influence of Uncertainty Salience on Reactions to Perceived Procedural Fairness*, 80 J. OF PERSONALITY & SOC. PSYCHOL. 931 (2001); *see also* MacCoun, *supra* note 130.

135. MacCoun, *supra* note 130, at 16.

136. Van den Bos, *supra* note 130; MacCoun, *supra* note 130, at 16 ("Fairness heuristic theory starts with a proposition that has motivated many other psychological theories, the notion that people have a fundamental need to reduce uncertainty about the future.").

VI. Dispute Resolution as a Means of Controlling Information and Reducing Uncertainty

Resnik observes that the move to settlement may be based in part "upon the devaluation of adjudication as it is currently conducted with lawyer-based information generation and presentation."[137] Mediation and arbitration, as forms of dispute resolution, leave much more control over the flow of information in the hands of the disputants—as distinguished from their lawyers—than does the traditional trial in the adversary system. There is no question that the use of mediation and arbitration has grown dramatically in the past three decades.[138] Eight years ago, Professor Lande explored perceptions of the civil justice system among elite users and suggested that private dispute resolution may be one method for addressing 'failing faith.'[139]

A. Mediation and the Trial Compared

1. Gatekeepers

In *Adversary Legalism,* Professor Robert Kagan characterizes the American legal system along two dimensions, formality and participation, in comparison to other national systems. Kagan argues it is more formal and, at the same time, more participative than the civil code tradition. It is formal in its rules of civil procedure and evidence; it is participative because the disputants themselves determine what evidence to present to the judge and jury, and how best to present it. The judge has far less knowledge about the case at the outset of a trial in the adversary common law system than in the civil code system.

While this much is true, it is also true that the disputants rarely participate alone; they do not choose what evidence to present in a vacuum. To the contrary, the trial bar provides the gatekeepers who control this flow of information. Gatekeepers control information in two directions: they determine what information about the case a judge or jury will ever see or hear, and they determine what information about the adversary system and trial process their clients receive. They coach their clients as witnesses; clients learn that simply telling what they know in their own words may not be good enough. In fact, it may not be permitted. Some of what they know or believe may be inadmissible as hearsay, for example. Similarly, clients learn that all of their witnesses are coached, as are the witnesses for the other side. Lawyers are in control of information flow, not clients. There is evidence that this control over a disputant's ability to participate has an impact on satisfaction with a process. In a study of mediation participants and their representatives, participants reported both higher satisfaction with their ability to participate and higher satisfaction with mediation when they represented themselves

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137. Resnik, *supra* note 65, at 537.
138. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004).
139. Lande, *supra* note 73, at 55-66.

or had union representatives rather than when they had lawyers as their represen-
tatives.[140]

In general, participation in dispute resolution allows clients more direct and
personal control over the flow of information than they have in litigation. In both
mediation and arbitration, clients may represent themselves or bring a layperson
advocate or friend. It is common for domestic relations clients to consult with
their lawyers, but then participate in divorce mediation without them. In media-
tion of discrimination claims, employees may choose to represent themselves.
This is easier to do than acting as a pro se litigant and gives the client much more
control over what information comes into the dispute resolution process. There
are no gatekeepers to tell you what you should and should not say and no one to
stop you from apologizing because it is an admission against interest.

2. *Rules of evidence*

Dispute resolution processes are also less formal, so there are fewer rules to
act as barriers to information that clients believe is relevant. The rules of evidence
evolved to constrain what information is submitted to a judge or jury as part of an
adversary trial. They exist to keep certain information away from a jury because
of the risk that the jury will not use that information appropriately. Hearsay rules
in particular have this purpose.

In contrast, during arbitration the neutral routinely admits hearsay "for what it
is worth." During mediation, there is no question of rules of evidence because it
is not a fact-finding proceeding leading to a third party's decision. Instead, it is a
process of negotiation and persuasion, in which all forms of information arguably
can be discussed. Nothing is off the table—no information excluded—unless the
parties mutually agree not to discuss it.

3. *Confidentiality*

One element of control over information is the question of who else has ac-
cess to it. A trial is a public event.[141] A jury trial is a form of public participation
to ensure that democratic values are brought to bear in the enforcement of our
law.[142] Jury nullification is an important check on the power of government.[143] In
jury nullification, the jury can refuse to find guilty a defendant who engaged in
civil disobedience of an unjust law. The layperson's values, as a citizen on a jury,
are relevant and intended to represent the voting public.

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140. Lisa B. Bingham, Kiwhan Kim & Susan Summers Raines, *Exploring the Role of Representation
in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341 (2002).

141. Resnik, *supra* note 65, at 553-54 ("[O]ne of the saving graces of adjudication is its 'public di-
mension'—the accountability and education which flow from its public, visible nature—I have more
qualms about mediators than I do about summary jury trials....") [citations omitted].

142. For this reason, some civil code jurisdictions that are in transition from more authoritarian to
more democratic forms and practices of government are beginning to experiment with the jury. For a
discussion on these developments in the Republic of Korea [South Korea], see Lisa Blomgren Bing-
ham, Sun Woo Lee & Won Kyung Chang, *Legal Infrastructure and Dispute Resolution: The Case of
South Korea*, __ TRANSNATIONAL LAWYER __ (forthcoming 2006).

143. Resnik, *supra* note 65, at 545-46 ("When juries decide, no reasons must be given; the commu-
nity's judgment, expressed by this ad hoc political institution, required no explanation.").

In contrast, in dispute resolution, the parties have the process to themselves. In mediation and arbitration, with some limited exceptions,[144] the meetings, communications, and products in terms of settlements or awards are all confidential unless the parties agree to disclose them.[145] The parties control what they disclose to each other in mediation, and what they disclose to others after the process. The parties get to negotiate over the scope and degree of discovery in arbitration, and they have more control over the arbitrator in managing what information is submitted during the process.

4. Lay and Expert Evidence

An adversary trial may become a battle of the experts. Increasingly, evidence from scientific or technical experts is necessary to resolve factual disputes.[146] In mediation, the parties may decide to exclude expert evidence, admit lay evidence, or stipulate to a system for getting the assistance they need.[147] In many mediation models, disputants are encouraged to bring to the table the information they believe to be important.

5. Discovery

Discovery is the formal process for getting access to information in the hands of the other side in the adversary process. A strength of the adversary process is that judges can force disputants to disclose unfavorable evidence. However, if a disputant does not wish to disclose that evidence, they may be able to avoid doing so through mediation.[148] Similarly, while arbitration of certain categories of cases, such as big commercial disputes, is becoming more formalized and legalistic with as much discovery as a civil trial, it is also possible for parties to negotiate the scope of discovery. The arbitrator may order reasonable discovery, but this power is narrower in scope than that of a judge. In most arbitration cases, there is less use of discovery than in court. However, discovery is subject to abuse and trial court adjudication may produce an unnecessary amount of information.[149]

6. Emotions Versus Facts

An adversary trial is a process for finding the facts; emotion may leak in through the sympathetic (or unsympathetic) client, but this is a strategic use of emotion to sway a jury. In contrast, in mediation, emotion is often central to the

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144. In the public sector, certain processes to which government is a party are governed by freedom of information or sunshine laws. For a discussion of confidentiality in the federal sector, see Jeffrey Senger, FEDERAL DISPUTE RESOLUTION, 177-99 (2004).

145. *See* Federal Interagency ADR Working Group, *Draft Confidentiality Guide, available at* http://www.adr.gov/draftguides.html (last visited Apr. 5, 2006).

146. Joseph Saunders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes,* 48 DEPAUL L. REV. 355 (1998).

147. Adler & Birkhoff USIECR paper

148. Resnik, *supra* note 65, at 538 ("[M]any defendants (and their attorneys) in products liability and antitrust cases have championed the curtailment of discovery and now seem intrigued by ADR as a means of protecting themselves from negative publicity and from outcomes they have disliked.")

149. *Id.* at 554.

dispute process. This is yet another form of information that is permitted to a much greater degree in mediation than in court.

7. *Values Versus Law*

In mediation, and even to some extent in arbitration, the disputants retain control over the standard by which they wish information to be evaluated. In courts, the law defines the decision standards. A fired employee may be faced with at-will employment; her recourse may be limited to public law defining prohibited discrimination. However, the underlying cause of the dispute has to do with a sense of injustice and unfair treatment by a supervisor not cognizable under law. In mediation, the disputants may engage in a discussion of values that are outside the bounds of the law. In arbitration, the disputants can define a decision standard such as just cause, one that is a creature of contract and not a mandated legal standard. Of course, this power to define the standards can also be used in adhesive arbitration plans to unbalance the playing field.[150]

8. *Moral Standards, How Defined and by Whom*

If the law has become more concerned with what judges do and the consequences of human behavior, and less concerned with morality in the sense of the great religious traditions, that does not mean the people who are subject to the law necessarily agree. In mediation, it is possible for disputants to hold each other's conduct up to moral standards they believe to be relevant. They can have a discussion about these standards. The parties can define these moral standards.

9. *Control Over the Neutral*

In the adversarial system, there is little control over which judge or jury will handle your case. In comparison, in arbitration, one or both parties have control over the selection of either the arbitrator, private judge, or arbitration panel who will decide the outcome. The parties can make this decision based upon the expertise of the fact-finder. There is substantial empirical evidence that control over information and the decision-maker is important in the choice of ADR over adversarial system.[151] Mandatory arbitration, whether binding or advisory, represents the exercise of control by one party. Through the use of an adhesive contract, one party may impose its choice of decision-maker on the other.[152]

In voluntary mediation, the parties have not given the neutral control over the outcome, but they are ceding control over the process. Thus, the choice of mediator is an important dimension of process control. Not only can the parties choose whom to trust as their mediator, they have the opportunity to explore different models and mediation styles. They can manage uncertainty about outcome be-

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150. Lisa Blomgren Bingham, *Control Over Dispute Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (2004).

151. Lande, *supra* note 73.

152. Bingham, *supra* note 150 (arguing that control over dispute system design allows one party to shift transaction costs through adhesive contracts).

cause they retain control over it. They can manage what information to share in mediation in part through selection of the mediator and mediation model. In all respects, they have more control in their interactions with an arbitrator and mediator than they would with a judge or jury.

VII. CONCLUSION

This effort only begins to explore the relationship between changes in our relation to information, the resulting uncertainty and loss of trust, and its impact on the civil trial. We are swimming in new oceans of information. At the same time, we are less willing to agree with each other on what is credible, real, or true. We hold no truths to be self-evident. The civil trial is something with which few litigants have direct experience. They cannot form a belief about whether to trust the system based on that experience. They need to use heuristics. Controlling uncertainty to the greatest extent possible is one shortcut. Among other means of controlling uncertainty, dispute resolution allows litigants to manage the flow of information directly. It gives them wider latitude to assert what they believe to be true. Perhaps that has greater value to people than a day in court.