Holistic Legal Epistemology: A Plea for Institutions
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I. Factual Conditions, Triggering Conditions, and Legitimacy

For any action, there are what we might call factual conditions of success: those non-moral facts that must obtain for that action to be either a moral or prudential success.

For a subset of legal and political actions—actions that might be described as the State acting against particular individuals—these actions are permissible only if certain triggering conditions obtain.

In a decently good legal/political system—a system that we might call even minimally legitimate—there will be legally-codified ‘triggering’ conditions that allow State action only in those cases in which the relevant moral conditions obtain. We can think of these as the “elements” of a crime or other statutory provision.

Just as there is a concern about political legitimacy in how laws are created, so, too, there are concerns about legitimacy in how general laws are applied to particular individuals.

[There might be other kinds of normative constraints on action—such as acting only on those propositions that one knows or (at least) that one is justified in believing; or treating a proposition as a reason for action only if one knows that proposition.1 We might expect for there to be institutional analogues of these so-called “knowledge norms.” These are norms of the form: φ only if one knows some specified proposition, p (where φ might be ‘assert that p’, ‘believe that p’, ‘treat p as a reason for action’). Consider, for example, the following norm:

If an institution, IN, can only permissibly φ if it is the case that p, then IN can only permissibly φ if IN knows that p.

There then would be questions of how to conceptualize what it is for an institution to know (or justifiably believe). Even in the individual case, there is a question of what kinds of norms these are. (Are they norms of practical rationality, moral norms, epistemic norms, norms of communication, or constitutive norms of various actions or practices, so that one counts as engaging in that action or practice just in case one abides by this norm?) I will assume that whatever kinds of norms these are, they either require just as much as the legal or political or moral norms that will be my focus, or they do not compete with, trump, or otherwise override those norms.]

Let us focus, then, on the context in which the State will or might take action vis-à-vis a particular individual, A, by maintaining that, because certain legally codified triggering conditions obtain in A’s specific situation, that law should be applied to A, and certain consequences may, or should, follow with respect to A.

This describes, albeit abstractly, many of the direct confrontations that occur between the State and particular individuals, including all situations in which

(a) individuals are said to have violated the criminal law  
(b) immigration law is applied to particular individuals to remove them or to alter their status  
(c) an individual is deemed to be mentally ill and in need of involuntary commitment to a medical facility or involuntarily administered medication  
(d) it is suggested that some individual does not qualify for a government benefit that he has been receiving or has attempted to receive  
(e) the State threatens to remove a child from a parent’s custody or to terminate parental rights,  
(f) the State maintains that some individual or corporation (owned, collectively, by some group of individuals) violated an administrative regulation (e.g. by exceeding the allowable limits of expelling some pollutant into the environment).

In these cases, the State can permissibly act only if the relevant underlying moral conditions obtain.

II. Epistemic Structural Quality

Acknowledging the ways in which we—and the institutions we might create—are neither omniscient nor infallible, some error is expected from both a moral and a legal perspective.

A. Error

Error arrives from two directions.

(1) The first is that the legally codified conditions might not match the actual moral conditions.

(2) A second source of error comes in the application of general legal rules to particular cases. For any particular case, there is a question of whether the underlying facts are such that the legally codified conditions are actually satisfied.

Extensive legal and institutional processes must be present to determine whether these “triggering conditions” obtain in a particular case.

B. Epistemic Structural Quality

If there is a morally grounded right to high quality epistemic process in these State versus individual cases, we should ask: what makes an institutional process of high epistemic quality? It is plausible that institutional epistemic quality will be tied to the extent to which there are institutional mechanisms that help individual institutional actors

- to produce and acquire knowledge through processes of discovery and investigation;  
- to produce and acquire knowledge of those propositions that are relevant and important to the potential State action and to whether the relevant triggering conditions are actually satisfied in a particular case;  
- to have true beliefs about the facts of particular cases;  
- to avoid error and false belief;  
- to have one’s (whether an individual or an institutional agent) beliefs and confidence levels be appropriately responsive to one’s evidence.
There may be other aims and virtues that might also be on this list, whether fundamentally or only derivatively:

- to be able to identify reliable sources of evidence and testimony;
- to employ belief-forming processes that are rational, justified, reliable, safe;
- to be able to engage with and draw from diverse sources of knowledge and evidence, including extant technical, esoteric, and expert knowledge;
- to accurately and appropriately assess, weigh, and evaluate evidence;
- to organize and disseminate evidence and knowledge so that it is readily available and appropriately salient for decision-making purposes.

On one view, we should understand institutional (social, political, legal) epistemology as veritistic, focused on the production and promulgation of important and relevant true beliefs, and the avoidance of error (false belief) and ignorance (the absence of true belief).

Of legal institutions, we can ask, then, in a Goldmanian vein: which legal institutions and practices “have a comparatively favorable impact on knowledge [understood in the weak sense of true belief] as contrasted with error and ignorance”?

On this kind of view, other epistemic values like justification and warrant and perhaps even understanding are either of no or only secondary importance when thinking about political and legal epistemology. We care about how truth-conducive our practices and institutions are; we don’t otherwise or independently care about whether they are justification-conducive, etc.

There is more than one way in which practices and institutions can be truth-conducive.

(1) One way is to increase the number or percentage of true beliefs relative to false beliefs, or of significant truths accepted compared to significant errors made—but to do this by improving the epistemic situation of particular individuals in the community or institution in terms of what they believe. Call this institutional epistemic evaluation with respect to veritistic effects on individuals: the extent to which the institution promotes true belief and the avoidance of false belief of those individuals who are affected by the institution.

(2) But institutions and practices can also affect whose beliefs—whether true or false—matter, and how much they matter, and this can lead institutions to have something like collective or “effective” epistemic virtues, even if they don’t affect whether particular individuals in the community have any more or fewer true or false beliefs. Call this institutional epistemic evaluation with respect to veritistic structural quality: the extent to which the institutional structure ensures that the effective or factual predicate beliefs of the institution (including the beliefs of the relevant, empowered institutional actors) are true.

In particular, we might ask: to what extent does the institutional structure ensure that the effective institutional beliefs about the underlying factual triggering conditions of particular cases are true?

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III. Holism and Epistemic Systems

With this background in place, we can see many particular aspects of a legal system as designed to improve the legal system’s veritistic structural quality. The main point of the paper is this:

**Holism**: epistemic evaluation of an individual part/rule/procedure of a legal system in terms of how that part/rule/procedure contributes to veritistic structural quality of the institution is only possible if one considers not just the local effects of that part, but also the broader effects of that part.

I won’t offer a long argument for Holism here. The basic argument relies on these two ideas:

- Most modern legal systems are complex epistemic systems.
- The veritistic structural quality effects of any particular part/rule/procedure of a complex epistemic system are a function of how that part/rule/procedure interacts with the rest of the system.

Let me now describe some of the main parts of the complex epistemic system that is a modern legal system.

**Case Elements**

-What are the particular triggering conditions of distinct kinds of cases? What must be shown before the government can act against a particular individual in a case like this one?
-How precisely are they specified?
  - Are there mental state elements?
  - Is there a causal element?

**Case Initiation (general and targeted)**

-What are the rules and processes by which a general legal case is created and begun?
  - Rules regarding reporting of criminal offenses, contacting INS/DHS
-What are the rules and processes by which a legal case becomes targeted toward a particular individual?
  - Probable cause to arrest
  - Initiation of termination of parental rights proceeding or deportation
-Which officials have the responsibility for starting and targeting a case?
-How are they selected, trained, incentivized?
  - Police, prosecutors, individual citizens
-What can targeted individuals do to prevent being targeted or respond to inapt targeting?
  - Rules regarding cooperation and immunity
  - Pre-trial motions to dismiss
  - Sanctions for frivolous lawsuits
  - Provision of legal fees for those wrongly charged, sued, etc.
Investigation

- Who is responsible for investigation? What rules are there governing that investigation?
- What are their incentives?
  
  • Interrogation techniques, permissibility of deception, re: suspect
  • Interrogation techniques, permissibility of deception, re: witnesses
  • Lineups and eyewitness ID
  • Collection of physical evidence
  • Consultation with experts

Representation

- Is it an adversarial model?
- Who represents the State? Who represents the Individual?
- Are Individuals assured legal representation?
- Is there quality oversight or a quality threshold?
- What are the legal rules governing lawyers of each kind? How are they enforced?
- What are the incentives that lawyers face?

Pre-Trial: Discovery, Motions, Hearings

- What evidence of each side is discoverable? What are the rules regarding discovery requests?
- What kinds of pre-trial motions can be made, and how are they judged?
- What kinds of pre-trial hearings exist to decide evidentiary and pre-trial motions? Who rules in those hearings?

Pre-Trial: Plea Bargaining

- Are plea deals available? Are they common?
- What are the rules (procedural, evidentiary, reviewability) governing plea bargaining?
- What are the incentives of those involved in the plea bargaining process?

Jury selection

- Are juries used as fact-finders at trial?
- How are juries selected? Is it genuinely at random? Are there only for-cause challenges? Are there peremptory challenges?

Trial Procedure (General)

- Are there opening statements? What rules govern them?
- What is the structure of presentation? (Plaintiff/Prosecutor Case-in-Chief, Defendant Case-in-Chief, Rebuttal, Subrebuttal, Motions for Judgment as a Matter of Law or Judgment of Acquittal, Closing Arguments, Jury Instructions from Judge)
- Is there a burden of production/prima facie case that has to be satisfied?
- What is the substance of the role given to Judge v. Jury?
- What jury instructions are offered?
**Standards of Proof**

- What degree of confidence does the fact-finder have to have in the correctness of the propositions at issue to support a vote in that direction? (preponderance of the evidence, clear and convincing evidence, beyond a reasonable doubt)

**Burdens of Persuasion**

- For particular issues, which party has the burden of persuasion on that issue (so that they will lose on that issue unless the jury finds that the burden has been met)?
- What are the grounds offered on which one side is given the burden?
  - caution/convenience: burden placed on the one seeking change
  - policy considerations: do we want to encourage/discourage this litigation
  - fairness/epistemic: burden should be with one likely to control the evidence on that issue

**Presumptions**

- Are there rules providing that proof of one fact has a predetermined effect in establishing the existence of another fact?
  - e.g. a letter properly addressed, stamped, and deposited in an appropriate receptacle is presumed to have been received in the ordinary course of the mail
  - a writing with a date is presumed to have been accurately dated

- Are there both rebuttable and unrebuttable presumptions?

**Rules of Evidence**

- What are the rules governing the presentation of evidence at trial?
  - Relevance as a requirement
  - Rules governing testimony, hearsay, and competence to testify
  - Rules governing experts and expert testimony
  - Rules governing authentication, identification, and exhibits
  - Rules governing confrontation of witnesses

- Does the system recognize evidentiary privileges? (Lawyer-client, doctor-patient, marital, privilege against self-incrimination, executive privilege)

**Jury procedure**

- What are the rules and procedures governing jury deliberation?
- How large is the jury?
- What are the voting rules? Does the jury have to decide via unanimity/consensus?

**Appellate Review**

- What are the rules regarding appellate review of decisions and judgments?
- What has to be shown by the person seeking review?
- What are the grounds of review?
- Who is making the determination about review, and who will be involved in what parts of the review if the case is re-opened?
IV. Benefits of Holistic Legal Epistemology

There are two main benefits to moving to a more holistic legal epistemology.

(1) There are lots of interesting questions about

(a) parts of legal procedure that are so far ignored by legal epistemologists

- if we are concerned about veritistic structural quality, we should be paying quite a lot of attention to
  - interrogation techniques
  - plea bargaining and the long shadow of long sentences
  - jury selection

(b) how various parts of legal procedure interact in terms of their epistemic consequences

(2) A proper attention to the broader system can help illuminate puzzles regarding more local issues or particular parts of the system.

A few quick examples:

(a) the issue of statistical evidence

Why isn’t purely statistical evidence tolerated?

One possible answer: imagine other aspects of the process if it were allowed

- what would the effects be on investigation?

  Disincentivize substantive investigation into the particular case and whether the general law should be applied to this particular individual

  - shifts a statute from a law to something more like a regulation (with different procedure, elements, etc. both for creation and enforcement)

  - what would the effects be on plea bargaining? Basically shifts burden of production onto defendant…

(b) quantifying or making more precise the “beyond a reasonable doubt” standard

Why isn’t this standard articulated in statistical/quantitative terms?

One possible answer: uncertainty here is actually useful, for forcing more extensive investigation on the part of the prosecutor, which has significant epistemic benefits

- avoiding rush to judgment
- requiring focus on possible “relevant alternatives” to eliminate them