

He Said-She Said:

On Credibility and the New Reason

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Abstract

The traditional wisdom in the field of evidence holds that, if there is a direct contradiction between the testimony of two witnesses, one of them must be lying. The jury is to discover which version is more credible. The traditional wisdom is wrong. This article uses an actual criminal case to establish that a direct contradiction in testimony can arise from another source – a fundamental difference of conceptual frame. In this case, both witnesses were telling the truth as they knew it, but were talking past one another. Words that were 100% true in the victim's conceptual frame were 100% false in the defendant's frame and vice versa. The rules which governed the presentation of evidence in this trial were structurally incapable of even identifying this frame difference, let alone managing it appropriately. One of several unacceptable results was that the defendant genuinely believed his victim lied on the stand and the system made a mistake in convicting him. The prosecution did not secure the public safety or do justice for all.

The rules of evidence used in this trial are similar to rules used all across the country. The type of conflict in testimony identified here could readily be found in all kinds of litigation, both civil and criminal, both state and federal. Existing rules are incapable of identifying and managing differences of conceptual frame because they are grounded in universal reason, a theory of reason which has become obsolete. To correct this situation, we need rules grounded in the New Reason. With such rules, the apparent conflict in testimony would disappear and litigation would produce significantly better results. Replacing the theory of reason used in law is a very large and important professional undertaking. It will require adjusting several existing professional practices, such as adding systems development to law school faculties.

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“I’m innocent. . . I’ve been railroaded They believed her. I treated her right. I worked hard to support her and my child. . . . I can’t figure out what went wrong . . . I never cheated on her, I was always faithful. I couldn’t believe what she did . . . I ask God to forgive my ex for doing what she did to me.”¹

(post-trial comments of David Lopez, convicted on 24 counts of domestic violence, referring to his girlfriend’s behavior and testimony at his trial.)

Introduction

There is a very big problem with the way issues of credibility are conceptualized in existing evidence literature.² This article will identify that problem and a related procedural issue, and propose as much of the remedy as can be offered in a single article. The evidentiary problem will be raised by examining one case, a domestic violence prosecution serving as our example. Solving the evidentiary problem offers a major conceptual advance for the field of domestic

¹ Elizabeth Fernandez, *Lila’s Story: A True Tale of Crime, Punishment – And Courage*, S. F. Examiner Magazine, Jan. 14, 1996, 16-7.

² This article is an adaptation of Chapter 2 of my book THE BRIDGE OF REASON (here TBOR), in progress (draft on file with author). It is the second book in a trilogy introducing the New Reason, see *infra* n. 112 and accompanying text. The first book in the trilogy is A DIFFERENCE OF REASON (1997) (here ADOR). The third volume will be titled ENGAGING REASON.

violence as well.³ It offers both a new understanding of the type of violence known as patriarchal terrorism⁴ and a new way to work with all domestic violence cases. Because evidence and domestic violence are two different fields of inquiry, each with its own unique concerns, the major domestic violence issues are not directly considered in this article. They are explored instead in this paper's companion article, *Patriarchal Terrorism Revisited: Domestic Violence and the New Reason*, which uses the same case as its example.⁵

³ As explained in Section IV, *infra*, particularly n. 102 and accompanying text, this cross-field significance is a manifestation of the systemic nature of the credibility problem to be identified here. A systemic problem requires a systems inquiry. This article is an example of such an inquiry in several ways. Two important ways are described *infra* nn. 18 and 67 respectively. The third and related way, described in Section IV *infra*, is that it is based in the interaction between two traditionally separate fields within the legal academy, domestic violence and evidence. Systems scholars are trained to bridge boundaries between fields. For a definition of a system, see TBOR, *supra* n. 2, Introduction and Chapter 3 (*Treating a System as a System*). Chapter 3 offers some examples of how systems professionals would work in practice in various legal systems across the country.

⁴ Sharon Portwood, *When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings*, 24 PACE L. REV. 221, 223-225 (2003) (defining “patriarchal terrorism” as a type of systematic, escalating violence and control exercised by men who hold rigid patriarchal normative systems.)

⁵ Paper on file with author, under review at other journals. The need for two articles arises for reasons defined and explained in Sections IV and V *infra*. To anticipate that discussion, the reasons include (1) the systemic nature of this subject matter, which means it is both conceptually and organizationally larger than the field of evidence for which this article is written and (2) the fact

The inspiration for this article stems from personal experience. As a legal services attorney, I handled hundreds of domestic violence cases over my years in practice, and worked to make the legal system more effective in these cases. Even after we got to the point where the legal system worked well, when I looked at what the law was able to produce in my clients' lives, it often seemed oddly impotent, as if the legal system was still somehow helpless or even vaguely misdirected. The same disconnect, that odd impotence, appeared in other kinds of cases as well, but it was particularly perceptible in domestic violence cases. During my years in practice, I never lost the feeling that we were trying to shove these cases into a system that in some deep way had never been designed for them. Even the advent of specialized domestic violence courts⁶ in some locations has not solved that sense of disconnect or lack of fit.

that the domestic violence community uses somewhat different conceptual standards than the evidence community to understand, judge, and act upon material that they read. It is important for an author to address the standards used by the discrete community intended as the audience for an article. To try to include domestic violence standards in an article written for the evidence community would serve neither community well.

⁶ This innovation is a good development, at least as far as it goes. It has the potential to solve at least some of the systemic problems identified in TBOR, *supra* n. 2, Chapter 3, regarding the lack of coordination and information-sharing between various parts of the criminal justice system, all of which undermine the goal of ending the violence. For a discussion of the trend toward specialized domestic violence courts with explanations of how they differ from traditional adjudication, see, e.g., Greg Berman and John Feinblatt, *Beyond Process and Precedent: The Rise of Problem Solving Courts*, 42 JUDGES J. 4 (2003); Hon. Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication*, 27 SEATTLE U. L. REV. 981, 987 (2004) (“... there are now more than 200 domestic violence courts”); Jennifer Thompson, *Who’s Afraid of Judicial*

Initially, the perceived lack of fit did not seem to arise from what happened inside the courtroom so much as from what occurred outside it. Yet after years of looking, trying to understand that elusive sense of disconnect and systemic ineptitude, it has become clear to me that a key part of its source does indeed lie in the courtroom. This article will identify that disconnect. A key part of it lies in the design of the rules of evidence that structure the trial. The quote with which this piece began is an expression of it.

In the introductory quote, David Lopez voiced a sentiment that may be quite widespread among defendants. It is common in domestic violence cases although without too much difficulty it can be found in other cases as well. David genuinely doesn't get it – after a full jury trial and three appeals⁷, he does not understand why he was convicted, or why his girlfriend gave the testimony she did on the witness stand. He believes she lied.⁸ Although some of David's comments are self-interested and not reliable, this article will establish that one very key element of his belief that his girlfriend lied is veritable. It was produced by the existing rules of evidence and their supporting procedural rules – our much-vaunted legal process is responsible for misleading David. The way the legal system currently understands and handles issues of credibility – as codified in the rules of

Activism: Reconceptualizing A Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs, 56 MAINE L. REV. 407 (2004); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

⁷ The case is filed in Sonoma County, California, as *People v. Lopez*, Superior Court SCR 21210. The case was appealed three times to the California Court of Appeals, First Appellate District Division 4, see A066851 (September 29, 1995), A073671 (January 24, 1997), and A089515 (May 31, 2000). All decisions, in both trial and appellate division, are unpublished.

⁸ Fernandez, *supra* n. 1; personal communication with defense counsel.

evidence and procedure – lies at the heart of that disconnect, the systemic ineptitude that I have been perceiving for so long now.

The problem with the rules has some very significant and disturbing implications for the quality of justice which this nation’s courts are able to produce in many different kinds of cases, but the focus of this article will remain on domestic violence cases. In them, it can make the difference between whether or not litigation breaks the cycle of violence. If the cycle is not broken, all a lawyer can do for a client who has been battered is to temporarily suspend the violence while the abuser is in jail or shift the violence to new relationships as the abuser and his victim (and any affected children) go on with their lives.⁹

In David’s case, *People v. Lopez*¹⁰, the legal system worked as advocates against domestic violence want it to work. David’s principal victim, Lila Sannes, was his girlfriend and the mother of his child. She was able to tell her story to a sympathetic police detective, had a victim advocate at her side throughout the trial and subsequent appeals, and was represented by a skilled, knowledgeable assistant district attorney who successfully advocated that David should receive the maximum sentence.¹¹ Lila is certain she told the truth on the witness stand, and the jury believed her. Yet even after David’s conviction and sentencing, Lila still has trouble sleeping at night. She remains so afraid of David that she moved out of the area. She hopes both to hide from David and

⁹ Berman and Feinblatt, *supra* n. 6, quote New York State Chief Judge Judith S. Kaye as saying: “In many of today’s cases, the traditional approach yields unsatisfying results. . . . The battered wife obtains a protective order, goes home, and is beaten again. Every legal right of the litigants is protected, all procedures are followed, yet we aren’t making a dent in the underlying problem.”

¹⁰ *Supra* n. 7.

¹¹ Fernandez, *supra* n. 1.

to keep her daughter away from him. Lila is worried that after David serves his sentence, he may come after her again. Given what David believes, her fears seem justified.

In this article, we will primarily consider just one type of comment that a victim such as Lila may make on the witness stand in a criminal prosecution for domestic violence. Similar kinds of testimony may come up in related civil proceedings that might be filed between the victim and abuser, such as in a hearing seeking a protective order or in a custody or divorce case. Of course, civil proceedings are very different from criminal trials, using very different rules and burdens of proof. In the kinds of civil cases which may arise in domestic violence situations, the finder of fact is usually a judge rather than a jury. Unfortunately, the problem with how credibility is handled that we will uncover in David's criminal prosecution is generic. It may just as easily be found in civil cases as in criminal ones, not only in domestic violence matters but also in any other kind of case that might be litigated.

To be specific, in domestic violence cases, the problem arises when, for example, a victim like Lila testifies that she did nothing to provoke the abuse she endured.¹² David honestly believes that she did provoke the abuse and would so testify in any proceeding between them. As the rules for both civil and criminal cases currently stand, this kind of conflict in testimony would be a case

¹² The issue of provocation is endemic in domestic violence litigation. The reason is noted in Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 SO. CAL. L. REV. 1463, 1472-3 (1996) (mentioning "a misogynistic view common to cyclical batterers that women are to blame for failed relationships." It is also found in the social scientific literature: DONALD G. DUTTON AND SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* at 93 (1995); Henning, Jones and Holdford, *infra* n. 91, (reporting research that batterers in general, whether male or female, attribute greater blame for the violence to their spouse/partner than they accept for themselves.

of “he said-she said”, an issue of credibility to be resolved by the finder of fact. The conventional wisdom is that one of them must be lying, and the finder of fact will resolve the question. At present, both the case law and the scholarly literature on evidence uniformly treat this kind of conflict in testimony as involving a lie, and describe the jury’s function as that of lie detector.¹³ This seems straightforward enough – so simple it is taken for granted in legal cases across the nation.¹⁴ Yet this is the source of the evidentiary problem – the source of the legal system’s odd

¹³ See, e.g., *United States v. Scheffer*, 523 U. S. 303, 313 (1998) (“A fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’” (citation omitted)); George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575 (1997) (history of the evolution of the jury’s role to that of lie detector); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 DUKE L. J. 776 (1993) (assessing the reliability of the trial rules for determining credibility); Chet K. W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLIAMETTE L. REV. 373, (2005) (assessing jury’s ability to detect lies when racial differences are present). Pager notes the frequency of credibility issues: “In a recent study polling administrative law judges, 62% frequently and 15% very frequently were faced with witness testimony that conflicted directly with testimony from another witness. Forty-seven percent frequently and 16% very frequently made findings of fact contrary to the testimony of a witness,” citing Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*, 20 NAT’L. ASSOC. ADMIN. L. JUDGES 1, 11-12 (2000).

¹⁴ See, e.g., *supra* n. 13; Spencer A. Gard, JONES ON EVIDENCE (6th ed.) 1972, § 29:9, at 308: “It is the exclusive province of the jury, or of the judge who tries the case without a jury, to pass upon the credibility of the witnesses and to weight the evidence in arriving at a factual determination.”; Pager, *supra* n. 13 at 375, “Determination of witness credibility is the exclusive domain of the jury. This axiom is deeply embedded in both our history and jurisprudence.”

impotence or misdirection. Simply stated, the conventional wisdom is flawed. The real source of the conflicting testimony can be a fundamental difference of conceptual frame.

If we had rules of evidence and procedure specifically designed to identify and manage differences of conceptual frame during the presentation of the evidence, we would get a very different outcome. For the jury in David's case, the apparent conflict in testimony on this issue would disappear. To be sure, a few other minor disputes about facts would remain for the jury to resolve, yet the real difference between Lila's version of events and David's lay less in the facts than in their interpretation. Lila and David reasoned very differently about the facts – about which facts mattered and why. They did so because they used different conceptual frames. If we control for this difference, we would see that Lila's statement is 100% true in her conceptual frame *while at the same time* being 100% false in David's conceptual frame. David's denial of responsibility in the introductory quote is 100% true in his conceptual frame, 100% false in Lila's. This particular conflict in testimony does not stem from a lie. Rather, we have two people each telling the truth as they knew it but talking past one another; and because the state uses a different conceptual frame than does David, we have another source of confusion. With new evidentiary and procedural rules, the evidence would be developed and presented so that this difference of conceptual frames was obvious. Both David's and Lila's truths would come out, with each placed in its appropriate context – each would be seen as one part of a larger whole truth. Further, the state's way of conceptualizing the issues, as embodied in law, would be articulated in ways that would make its meaning clear to David. David would at least accurately understand the outcome, and thus would likely be more accepting of it.

The case law and evidence literature begin and end with consideration of the jury's role in discovering the truth of the past events that produced the litigation. Lawyers who handle domestic violence cases know that the jury's findings as to the truth are only part of the process of ending the violence, and often not the most important part. If the violence is to end, what David believes is

perhaps even more important than what the jury finds.¹⁵ The current rules of evidence and procedure do nothing to ensure that the defendant genuinely understands what happened, or to ensure that evidence and outcome are presented in terms that are meaningful to him.¹⁶ This is a serious shortcoming, one that needs to be remedied.

The difference of conceptual frames is the source of both David's sense that Lila lied on the stand and his misunderstanding about his conviction. The rules of evidence and procedure used in David's trial were never designed to identify or manage differences of conceptual frame. Consequently, the legal system in which David was tried was impotent to prevent David's post-trial

¹⁵ The argument developed in ADOR and TBOR, *supra* n. 2, broadens the focus of jurisprudential inquiry, moving beyond a focus solely on the outcome produced by the legal system (trial verdict, appeal, doctrinal law) to include the actual social outcome. As Hon. Judith S. Kaye, Chief Judge of the State of New York and Chief Judge of the Court of Appeals of the State of New York, states in *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 *Hast. L. J.* 851, 854 (1997): "the public deserves and demands courts that are both just and effective." The legal system needs to look "at the outcomes our court structures actually achieve. . . [and] look[s] at court operations not just from the perspective of judges and lawyers but from the perspective of the public it is trying to serve. . . ."

¹⁶ *Infra* n. 56. Like most lawyers, neither David's lawyer nor the prosecutor were trained to identify and manage differences of conceptual frame in the testimony so of course, neither of them recognized the disconnect described in this article. The defense attorney recognized that David did not understand his conviction, but was unable to clear up the misunderstanding since he did not understand the evidentiary problem himself, and believed the conviction to be partly in error, see text accompanying n. 48, *infra*.

beliefs, beliefs which, as it happened, were also shared by many in the local community.¹⁷ A trial process using rules of evidence and procedure specifically designed to identify and manage differences of conceptual frame could prevent this kind of misunderstanding. Indeed, it would have the capacity to open up both David's view of this couple's history and Lila's, helping each of them understand how differently the world looks to the other. More importantly, it would give both of them a much deeper understanding of the violent dynamic they lived through, an understanding crucial to each one's ability to avoid violent relationships in the future. Of course, the current trial process has some limited capacity to educate both abuser and victim, but not nearly at the level which would be available if the rules were explicitly designed to identify and manage differences of conceptual frame. This capacity is necessary if litigation is to successfully end domestic violence.

The new conceptualization of patriarchal terrorism which is the subject of this paper's companion article must also be briefly set out to flesh out the evidence problem. It details the violent dynamic that David and Lila experienced. By scrutinizing the interaction between these two individuals in a way that takes account of the differences in their conceptual frames, we not only uncover the credibility problem, we also find a new and powerful way to understand and work with domestic violence, which in turn should improve the quality of the legal system's performance.¹⁸

¹⁷ See *infra* nn. 45-48 and accompanying text.

¹⁸ This is an important way in which this is a systems inquiry, *supra* n. 3. In a social system, events happen between people. Both the rules of evidence and existing evidence literature have incorporated, no doubt unconsciously, a defect in the branch of the philosophy of science known as epistemology, or the study of how we know. As philosopher Alvin I Goldman explains in *KNOWLEDGE IN A SOCIAL WORLD*, 4 (1999), "[t]raditional epistemology . . . was highly individualistic, focusing on mental operations of cognitive agents in isolation or abstraction from

Actively managing differences of conceptual frame between David and Lila solves the “he said-she said” conflict facing the finder of fact. When coupled with the active management of differences of conceptual frame between David and the state, the legal system’s effectiveness at ending the violence will improve significantly.

Section I of this article will describe the background relevant to *People v. Lopez* and the litigation itself. Section II reviews the actual outcome post-trial, illustrating the legal system’s current impotence. The legal result was what advocates against domestic violence wanted, but the case still failed to do justice for all, to ensure the victim’s safety, and to promote public safety in general. This section also introduces two new kinds of partiality, fact-based partiality and concept-based partiality, that lawyers must understand if we are to accurately identify and appropriately manage differences of conceptual frames. Section III then demonstrates that the differences of conceptual frame present in this case are the source of the problem with credibility. This section also begins to show how the legal system can more effectively produce justice for all if it adopts an evidentiary and procedural system specifically designed to identify and manage differences of conceptual frame.

Once this is established, the normal evidence article would move to its conclusion by doing two things: offering a proposal for revising one or more of the existing rules and speaking to any traditional evidentiary issues which might be relevant to that proposal, in this case the risk of jury nullification and the ban on character evidence. Because of the basic nature of the credibility problem, this is not and cannot be a normal evidence article. The credibility problem is a systemic

other persons.” A systemic jurisprudence requires that we understand events by thinking in terms of individuals in interaction with one another instead of in isolation from one another. For a discussion of the philosophical issues, see generally, the books cited *supra* 2; *infra* n. 88.

problem.¹⁹ Sections IV and V will define the basic nature of a systems problem. At this point, we can summarize the changes by saying that the normal evidence article works *within* the existing intellectual framework of the litigation system. It seeks to refine the existing system to improve its performance, but it accepts the fundamental intellectual foundation on which that system rests. Law is always grounded in reason, so one key part of the litigation system's intellectual foundation consists of a particular theory of reason. The theory assumed by the existing litigation system is inadequate and antiquated, not suited to this age of diversity.²⁰

If we were to adopt an evidentiary and procedural system specifically designed to identify and manage differences of conceptual frame, we would be taking a major step toward shifting the litigation system to that necessary new intellectual foundation. After exploring some of the organizational and conceptual challenges presented by a systemic problem, Section IV defines and discusses the terms, *universal reason* and *the New Reason*.²¹ Universal reason currently grounds the

¹⁹ *Supra* n. 3

²⁰ In personal correspondence, Ed Imwinkelried labeled my approach a jurisprudence for an age of diversity. The term is entirely appropriate so I will use it here. There are actually several characteristic of modern society that makes the existing intellectual foundation inadequate. Diversity is the one that matters most to this article, but the revolution in communications and transportation, pervasive professional specialization with its concurrent differentiation, and globalization are also factors which require a new intellectual foundation. Differentiation is also very relevant and will be addressed in a little more detail in the discussion of the compartmentalization of the academy's work in Section IV, *infra*.

²¹ *See generally* ADOR and TBOR, *supra* n. 2. TBOR first uses the term, the New Reason. ADOR uses the term "perspectivist reason", but that term is awkward and only captures one feature of the New Reason. In the Introduction, TBOR defines the New Reason as consisting of three

litigation system.²² It is at the root of our credibility problem. The New Reason provides its replacement. The distinction between them is simple: the New Reason is designed to recognize and work with differences of conceptual frame while universal reason is not. To remedy the credibility problem, will need to understand this distinction. The distinction also equips us to undertake Section V's twin tasks of (1) critically evaluating some of the rules of evidence in effect when the *Lopez* case was tried and (2) considering our two traditional evidentiary issues, the ban on character evidence and the risk of jury nullification.

Obviously, changing the theory of reason assumed by the litigation system is a major undertaking. For evidence professionals, it will entail changes in how the field is understood,

characteristics: (1) perspectivist (meaning able to take account of differences of conceptual frame), (2) action-based (using a logic of creation, defined in ADOR at 275), and (3) relies on systems concepts and principles.

²² Actually, two distinct theories of reason, universal reason and pragmatic reason, can be found in the existing litigation system. Both are inadequate, and both need to be replaced. One philosophical discussion of the distinctions between the three forms of reason is found in ADOR *supra* n. 2, Chapter 1. The discussion in this paper is limited to universal reason, defined in text accompanying n. 113 *infra*. It is the foundation of the credibility problem in *People v. Lopez*, and it structures the rules to be criticized in Section V. A future paper, a revision of Chapters 5-6 of TBOR, will deal with pragmatic reason as found in the content of Supreme Court decisions. It is tentatively titled *Politics on the Bench: The Commerce Clause and the New Reason*. Pragmatic reason is primarily visible in judicial decisions rather than in rules. The other part of the intellectual foundation of the existing litigation system that is inadequate is the form of science it assumes, noted *infra* n. 84. A discussion of the scientific base of legal procedures, drawing on the philosophy of science, is found in ADOR, chapter 2.

taught and practiced. Both Sections IV and V speak to the conceptual and organizational nature of the changes. Many of them arise from the fact that, by its very nature, a systemic problem that appears in one field of law (here evidence) is deeply linked to many other areas of legal practice and scholarship. The full resolution of the evidentiary problem will require recognizing and actively managing all those links, and evidence professionals will need to play an important role in that work. The conclusion speaks to where we go from here.

I. The Case: Background and Litigation

People v. Lopez resulted from events that took place between Lila Sannes and David Lopez.²³ They never married but were involved in an intimate relationship and lived together, in Sonoma County, California, for a period of about two years. Lila and David first began their romantic involvement when she was 17 and he was 19. For both, it seemed like love at first sight. About a week after they met each other, David invited Lila to come live with him at his family's home. She accepted and lived there continuously for the next two years except for a few very brief separations. They had a child together, a daughter named Ariela, who was born a few months before the final separation. Criminal charges were filed against David at the time of their final

²³ Most of the facts set out in this section are taken from Fernandez, *supra* n. 1. As noted in ADOR, *supra* n. 2, at 202-3, the information needed to do the type of inquiry necessary to uncover the problem with credibility is not currently available in existing trial records. The work can only be done in cases such as this where relevant information is developed in other publicly-available sources. See also *infra* n. 66.

separation. The charges were for violent acts committed during the two years that David and Lila lived together. A total of 24 counts – one misdemeanor and 23 felonies – were filed.²⁴

To help identify the conceptual frames that David and Lila used, we need to know a little about their personal backgrounds. Lila came from a middle class family, and she and her family are white.²⁵ Before moving in with David, Lila lived with her mother and younger brother. Her mother

²⁴ The case, *supra* n. 7, includes four counts of spousal battery under CAL. PENAL CODE § 273.5(a) (1977 as amended) (West, 1999), all with enhancements CAL. PENAL CODE §§ 12022.7 (1976) and 12022 (b) (1953 as amended) (West 2000) (habitual criminal provisions requiring adding five years to basic sentence), (enhancements are defined at CAL. PENAL CODE § 667 (1982 as amended) (WEST 1999); nine counts of assault with a deadly weapon under CAL. PENAL CODE § 245 (a) (1) and (2) (1872, as amended) (West 1999), all with similar enhancements; three counts of false imprisonment under CAL. PENAL CODE § 236 (1872) (West 1999), all with similar enhancements; three counts of making terroristic threats under CAL. PENAL CODE § 422 (1988 as amended) (West 1999), all with similar enhancements; one count under CAL. PENAL CODE § 206 (1990) (West 1999) (torture); one count under CAL. PENAL CODE § 207 (1872 as amended) (West 1999) (kidnapping) (no enhancements); one count under CAL. PENAL CODE § 288a (c) (2) (1921, as amended) (West 1999) (forced oral copulation); and one count of possession of a controlled substance under CAL. HEALTH AND SAFETY CODE 11377 (a) (1972 as amended) (West 1991). The misdemeanor is resisting an officer, CAL. PENAL CODE § 148 (a) (1872 as amended) (West 1999).

²⁵ Some readers may object to the inclusion of information about race and ethnicity, believing it to be politically incorrect. There is ambivalence within the domestic violence community about its relevance, see Leslie Espinoza Garvey, *The Race Card: Dealing With Domestic Violence in the Courts*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 287, 305-7 (2003). The problem with speaking about this kind of information lies in its misuse, but it is hoped that there is no misuse here. The

has a managerial position in a technical service department of a large university. Lila's mother and father divorced when Lila and her brother were young, and Lila's father was almost totally absent from her life. Lila was having difficulty with her mother and was going through a period of teenage rebellion when her relationship with David began.²⁶ Lila had been drinking and smoking marijuana at school, and her grades were going down. Her mother was not happy with that situation. When David asked Lila to come live with him in his parents' home, she not only found an intimate partner, she also discovered an outlet or haven from her mother. When she accepted David's invitation, even though she was still a minor she did not tell her mother where she was for the first ten days. Once her mother found out, she persuaded Lila to return home. After only a few days, Lila moved back with David.

information is included here because (1) it is helpful to determining and working with each person's conceptual frame, (2) some problems with the actual social outcome cannot be understood without it, and (3) it is important for dealing with some of the systems aspects of the case. For a more extended discussion, see TBOR, *supra* n. 2, Chapters 2 and 3.

²⁶ Kenneth Karst has aptly described the problem of female independence in the context of the battle over abortion but the point is equally applicable to the young woman who becomes a victim of domestic violence in cases such as Lila's. See LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER AND RELIGION (1993):

In moving to a new relationship with her parents, one that involves both connection and separate identity, the [teenage] woman may see her sexual behavior and expression as a central ground on which that passage can be negotiated, the one place in her life where she wields real power. . . . as she tests the meanings of adulthood. One major risk here is that sexual behavior will prove to be the medium through which the young woman simply moves from dependence on her parents to dependence on her boyfriend.

David was out of school by the time he and Lila met. He is from a low-income family. The family is large and close. Although David and his family are American citizens, they take pride in their Mexican ancestry and culture.²⁷ Lila and David lived in his parents' home while they were together. David supported Lila and his daughter throughout that time.

The physical violence began very early in the relationship. The first incident of abuse came at a point when Lila told David she was dissatisfied and planned to leave. He slapped her in the face. She stayed even though she remained dissatisfied with the situation. The abuse escalated as the relationship continued. Toward the end, David would whip Lila with a heavy-duty extension cord which he knotted for extra impact. She lost consciousness from this treatment on more than one occasion. He had martial arts training which he used to kick her. He dragged her around by her hair. Several times he held a gun to her head and once stabbed her with a knife. Frequently he verbally threatened her life and the lives of her mother and brother. When Lila got pregnant, she hoped that having a baby would, in her words, "calm him down".²⁸ Unfortunately, the pregnancy did not change anything. He beat her throughout the pregnancy, although unlike some abusers he never hit her in the stomach. A few months after their daughter was born, he threatened the baby with a switchblade. This happened during an extended episode in which he hit Lila with a crowbar and forced her to engage in oral copulation. This incident, and in particular the threat to the child, cemented Lila's decision to leave and to prosecute David.

When the abuse first began, Lila kept it to herself. She covered it up in ways that are very typical for battered women.²⁹ She lied to others about her bruises, making up patently absurd excuses such as saying she accidentally ran into a door. Lila's mother did not believe the excuses.

²⁷ For the reason that ethnicity is mentioned, see *supra* n. 25.

²⁸ *Supra* n. 1 at 7.

²⁹ For the need to understand these issues in an appropriate context, see Raeder, *supra* n. 12.

Yet, as is also common with battered women, Lila's mother was not able to get her daughter to take steps to escape the abusive relationship. Out of concern, Lila's mother called the police several times. Lila admitted the abuse only once during a brief separation, but declined to prosecute because she thought she saw improvements in David's behavior.³⁰ Every other time the police were called, Lila denied any abuse had taken place and became furious at her mother for calling them. Again, this behavior is typical of battered women.³¹

³⁰ In Sonoma County at the time these incidents took place, the victim's cooperation was required for a prosecution. Since then, the county adopted a mandatory prosecution policy, instituting criminal charges when the evidence warrants it whether the victim cooperates or not. For a detailed discussion by a prosecuting attorney, see Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

³¹ I suspect that battered women deny the abuse for many of the same reasons that they fail to report abuse to police, see *Intimate Partner Violence*, Bureau of Justice Statistics Special Report, NCJ 178247, May, 2000 (hereafter BJS Report) p. 7 Table 8. The most common reason reported, even for women, was that it was a private or personal matter (35%). Only 19% failed to report out of fear of the abuser while 7% thought the matter was too minor and 2% thought the facts were such that it was not clear a crime was committed. Many battered women believe they can handle the situation without outside interference, and they really want to handle it themselves. They deny out of a desire to keep others out of their own business. They believe, as Lila believed, that there is something they can do that will make their partner treat them in the way they want to be treated. Sometimes battered women believe that outside interference will make the situation worse, putting them at greater risk. They deny out of fear. Sometimes battered women literally believe their abusers' promises that the abuse was a mistake and will never happen again. They deny to protect their abuser. Some battered women accept the abuser's claims that the abuse was the victim's

The abuse primarily took place at the residence where the couple lived with David's parents and siblings. The abuse often occurred in view and/or hearing of other family members. No member of David's family ever intervened to stop or limit the violence although David's mother did apologize when David stabbed Lila with a knife. Lila herself believed that this particular wound had been an accident, that David did not intend to stab her. He was trying only to frighten her with the knife but accidentally went a little further than he intended. In a sense, when David's mother apologized it confirmed Lila's belief in the accidental nature of the injury. Other than that one incident, David's family counseled Lila to do what David wanted and warned her of how angry he would be if she did not do so. When Lila confided to them that she was unhappy and wanted to leave, they reported her comments to David but did nothing to help Lila. It is unknown whether David's father used physical discipline in the home either toward his wife, David's mother, or toward his children.³²

Crimes of domestic violence take place in the context of an intimate relationship which shapes the behavior of the parties. Common patterns of behavior often appear, patterns that are increasingly well documented in the social scientific literature.³³ Since information about these

"fault." These women deny out of embarrassment. Some women make the conscious choice to stay in a battering situation for social, cultural and/or other more personal reasons. They will deny that the abuse is sufficiently serious to warrant them taking action to prosecute or end the relationship.

³² If statistics provide any guide, it is likely that he did. People live what they know, see DUTTON & GOLANT, *supra* n. 12, at 123; Bancroft, *infra* n. 35 at 325.

³³ The social scientific literature has become so voluminous that it literally defies the capacities of a footnote as Elizabeth Schneider proved by listing the social scientific material produced just in one two-year period in a lengthy footnote in *Epilogue: Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245, 1246 n. 4 (1995). Because of this voluminous research,

patterns can help us determine and work with the conceptual frames of David and Lila, references to that literature will be included at various points in this section of this article.

David followed patterns of behavior common to batterers while Lila followed patterns common to victims.³⁴ No single social scientific theory adequately covers all battering behavior, and none fully accounts for what happened between David and Lila. A number of theories partly explain what transpired. For example, parts of Lenore Walker's theory of a cycle of violence are visible in the case of David and Lila.³⁵ After an episode of violence, David would engage in a

considerable progress has been made in understanding the phenomenon. A recent summary of the literature is found in Raeder, *supra* n. 12.

³⁴ The pattern has been widely documented, see Raeder, *id.*; Nancy Rourke, *Domestic Violence: The Challenge to Law's Theory or the Self*, in KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY 266 (Diana Tietjens Meyers, et. al, eds. 1993) (citing DONALD DUTTON, THE DOMESTIC ASSAULT OF WOMEN (1988) and LENORE WALKER, THE BATTERED WOMAN'S SYNDROME (1984)).

³⁵ Walker, *supra* n. 34. Walker's theory was the first in the field but it is no longer the only one available. In some respects, it is not the best theory available. EDWARD GONDOLF and ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988) offer one major alternative, superior in some respects to Walker's theory. Dutton, *supra* n. 34, documents a category of abuser that Walker fails to recognize or accommodate in her theory. Batterers in this category do not believe the battering is wrong. As will become clear later, it is possible, even likely, that although David appeared contrite to Lila and at times to others, he also did not believe his battering was wrong. Lundy Bancroft, who was one of the first to begin to offer programs for abusive men, believes that most men who physically abuse women believe

period of what Walker calls love-contrition. He would court or woo Lila, promising that things would be better in the future. He brought her flowers and told her of his love for her. Lila would see what appeared to her to be improvements in David's behavior. She believed his promises, trusted him, forgave him, and reconciled with him. Yet once they reconciled, the violent behaviors quickly returned. Tension would build until the violence would erupt again. As is also common, the trend in the violence went in one direction only – it got progressively worse.

As is always the case, the violence was only one aspect of the relationship. David had his good points. As noted previously, throughout the relationship he supported Lila and their child. He was faithful to Lila. Except when he was working, he was with Lila, spending time with her and their child. He was an active, involved father. He gave Lila something she deeply wanted and needed – a sense of belonging. At one point Lila summed up her life with David by saying "I wasn't who I wanted to be. But while I was with him, I belonged to someone."³⁶ And she really wanted her child to have what she never had – to grow up with both parents in the house.

Unfortunately, the closeness between David and Lila was not that of a healthy relationship. David was like many batterers in that he tried to exercise increasing amounts of control over Lila's life, isolating her from her friends and family and requiring her to do what he wanted.³⁷ She had to be with him or in their home at all times. He tried to cut Lila off from her family, forcing her mother to make an appointment if she wanted to see Lila, and then only when Lila's bruises and scars were not particularly visible.

their actions are justified, see WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN, 35 (2002).

³⁶ *Supra* n. 1 at 9.

³⁷ This pattern has been documented, see Dutton, *supra* n. 34 at 154; Portwood, *supra* n. 4.

Lila's mother was surprised at the level of control that Lila allowed David to exercise over her during the relationship. Lila had been raised to be an independent person, to think for herself and to value herself. Lila's mother described her daughter as generally very independent.³⁸ Indeed, Lila had demonstrated her sense of independence when she left her mother's home and went to live with David and resisted her mother's efforts to get her to return. Nevertheless, once she was with David, Lila seemed to give up her independence and submit to his control. The presence of high levels of control is a hallmark of an abusive relationship. Controlling relationships are always abusive on a psychological level and often abusive on a physical level as well.³⁹

We have seen that one way that David controlled Lila was through threats to her and her family. Threats were effective methods of control up to a point. Lila's fear for her own life and the lives of her mother and brother kept her under David's control. The first time that David threatened Ariela, his threats no longer produced the results he wanted. Lila now had to fear for her daughter's life as well as for her own life and the lives of her mother and brother. David had gone too far. Lila began to make plans to escape. By this time, David was exercising almost total control over her life, watching her closely and controlling her every move. A month passed before Lila had an opportunity to leave. While David was briefly distracted from his efforts to control her, she grabbed the baby and ran. David was not far behind, but strangers helped her get to the police and to safety. After each of the earlier separations, Lila reconciled with David in the hope things would get better. This time the separation was permanent. Lila began to speak openly and honestly about

³⁸ *Supra* n. 1 at 7.

³⁹ Bancroft, *supra* n. 35, makes this point repeatedly. For example, at 8, he discusses the relationship between verbal and physical abuse. At 152-3, he talks about the intrinsic satisfaction the abuser gets from his power and control over his partner. Dutton and Golant make the same point *supra* n. 12 at 13.

the abuse. For the first time since the relationship began, she cooperated with this prosecution. She resisted David's efforts to woo her back.

The police detective who investigated the case, Detective Dan Lujan of the Santa Rosa Police Department, was the first to interview Lila in depth after her escape. He described how her demeanor told him something important about the severity of the abuse: "She was stunned, almost emotionally bankrupt. . . . She seemed so traumatized that she was almost beyond expressing it. When people are so beyond the state of terror, they often aren't capable of expressing emotion. That's how I knew how serious this was."⁴⁰ He also related what happened during his interrogation of David: "He tried to lead me to believe that she verbally demeaned him, that she asked for it in the way she spoke to him and treated him. . . . It's your classic rationalization of a person who commits violence toward women."⁴¹ The seriousness of the abuse produced the criminal complaint containing 24 counts against David.

David had legal counsel throughout the proceedings.⁴² During the investigation, David confessed to parts of the abuse. Nevertheless he denied several of the more serious allegations, such as that he had hit Lila with a crowbar during the extended beating which had solidified her decision to leave.⁴³ There were pre-trial negotiations about a plea bargain. Because David was

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 15.

⁴² The county's public defender office represented him through the trial and private counsel represented him on each of his three appeals.

⁴³ Many abusers will admit parts of the abuse while denying the worst incidents, Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 40, Martha Albertson Fineman and Roxanne Mykitiuk eds., 1994, at 23.

willing to admit violating some minor criminal code sections but denied the more serious charges, the negotiations were not successful. The case went to trial before a jury. David's taped confession was admitted into evidence during the trial. The jury believed Lila's testimony and that of the other prosecution witnesses including the investigating detective. David was convicted on all 24 counts. At his initial sentencing, he was given a lesser sentence than the law mandated but the district attorney appealed.⁴⁴ David was ultimately sentenced to 21 years imprisonment, the maximum sentence allowable. At the time in California, this meant that he would serve about seven years in prison before becoming eligible for parole.

Throughout the proceedings, and despite his willingness to plead guilty on some of the minor counts, David denied responsibility for the violence. He acknowledged that he may have gone overboard a few times; but except for those incidents he appeared to sincerely believe that he had done nothing wrong. Thus at trial David willingly admitted most of the facts upon which the jury would base its verdict of guilty, but he consistently denied the implication the prosecution, and eventually the judge and jury, associated with those facts. He did not reason about those facts in the same way as the prosecutor, the judge or the jury. Different conceptual frames were in play. Here, there were differences not only between David and Lila, but also between David and the state. Just as the existing rules of evidence and procedure are not equipped to handle differences of conceptual frame between Lila and David, those rules are not designed to accommodate such differences between David and the state.

The legal system's inability to identify and manage differences of conceptual frame between the various parties in a case in litigation (here defendant, prosecuting witness, and the state) lies at the root of the odd disconnect or systemic ineptitude I sensed during my years of

⁴⁴ There were actually three appeals, see *supra* n. 7. The details are not relevant for purposes of this paper. The opinions are not published. Neither statute nor doctrine are controversial.

practice. To understand that phenomenon in more detail, let us now turn to the actual social outcome in *People v. Lopez* to see how it fell short of meeting the criminal justice system's purposes or goals.

II. The Actual Social Outcome

This litigation produced six different results which are unacceptable when measured against the criminal justice system's purposes or goals of ensuring public safety and doing justice. Those unacceptable results are: (1) polarization in the broader community; (2) David's misunderstanding of both Lila's testimony and his conviction; (3) the risk of future violence; (4) Lila's continuing fear and need to hide; (5) the risk to Ariela's development; and (6) collective ignorance about how to avoid future violence.

a. Polarization in the Broader Community

We begin the analysis of the unacceptable aspects of the social outcome of *People v. Lopez* by briefly looking at the broader society within which this case arose. The legal outcome received mixed reviews and showed how the "he said-she said" dynamic of the trial had ripple effects in the broader community. One segment of the local community, including but not limited to local feminists and advocates for battered women, acclaimed the outcome as a success.⁴⁵ A case of

⁴⁵ *Supra* n. 1 at 6. The battered women's movement would see the case as a success because of the history of the field. As Robert C. Davis and Barbara Smith document, *Domestic Violence Reforms: Empty Promises or Fulfilled Expectations?* CRIM. & DELINQ. 41:541, 542 (1995): "During the 1970's the police and criminal courts came under attack for being lax with perpetrators of domestic violence. Critics charged that they were not being arrested as often, prosecuted as vigorously, or sentenced as severely as other violent criminals." To have a knowledgeable investigating officer

severe abuse was successfully prosecuted to conviction and the offender was given a stiff sentence. This segment of the community believed that the prison sentence would punish David for past misconduct and persuade him not to batter again, and that the trial's results would also send a message to other batterers, thus working to end domestic violence more generally.⁴⁶

On the other hand, members of the large local Latino community saw the legal outcome as evidence of continuing discrimination in the criminal justice system against Latino defendants. The case did not become as much of a cause within that community as in the feminist community, but because of the publicity feminists were able to generate, many Latinos learned about the case.⁴⁷

and prosecuting attorney, a sympathetic jury, and an appeals court willing to force the trial judge to abide by mandatory sentencing provisions, is a system that is working as battered women's advocates want it to work. Thus it is a success using these standards of measure. It is not nearly so successful under the standards of measure used in this article.

⁴⁶ This is the theory held by prosecutor Hanna, *supra* n. 30; it also appears in a number of papers found in Mykutiuk and Fineman, *supra* n. 43. Yet as Judge Shaffer notes *supra* n. 6 at 983, the premise that "holding batterers criminally accountable would reduce future violence" is a "hypothesis" that "has not been fully tested, and likely will not be until more time has passed to allow for assessment." (citing Tsai, *supra* n. 6 at 1314-15.). Indeed, Deborah Epstein, Margaret E. Bell, and Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victim's Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U.J. GENDER SOC. POL'Y & L. 465, 467 (2003), believe that prosecution and conviction does not always protect victims, that ". . . the short term, narrow focus typically taken by prosecutors is simply not enough to assure a victim's long term protection from abuse."

⁴⁷ Personal conversations with several leaders of the local Latino community. The local feminist community made domestic violence a cause and regularly monitored the performance of the local

Many local Latinos agreed with the defense counsel. He asserted that there was a run-away jury and that even though the conviction may have been appropriate on some counts, the evidence did not support conviction on all counts.⁴⁸ The jury's verdict did not persuade this segment of the local population of David's culpability. Thus two parts of the local community drew very different messages from the litigation.

What about the general population of the county in which this trial took place? As we will see more clearly in Section III, some parts of that population may not have received the kind of message they needed to get to prevent future domestic violence.

b. The Defendant's Misunderstanding of the Victim's Testimony and His Conviction

Perhaps the most worrisome aspect of the actual social outcome is the message the defendant drew from the case.⁴⁹ After the trial, David sat in prison utterly convinced that the system

courts. There was no similar focus, on either domestic violence or the criminal justice system, among the local Latino community.

⁴⁸ Personal communication with the trial attorney, a public defender. Despite this attorney's view, there was no appeal on the sufficiency of the evidence. The family chose to replace the public defender's office on appeal, turning instead to private counsel. The family took the type of appeal they could afford.

⁴⁹ Despite the criticism set out in this section, we also need to recognize that there can be good social outcomes under the existing system. The most important in this case involves something Lila was able to do. At the time of the trial, she was struggling to move beyond the point where she was vulnerable to *David*. Lila was able to accomplish something important in the formal process of the trial. It was described by her victim-witness advocate as follows:

made a mistake by convicting him, and that Lila lied on the stand.⁵⁰ The quotation with which this article began came from a reporter's interview with David in prison. David still hoped for a chance to prove his innocence and expressed outrage at the damage the case has done to his reputation. It is doubtful whether David believed everything he told the reporter, but there is undeniably a measure of good faith in David's claims.

Lawyers are currently trained to question statements that appear to be as self-interested as David's. We assume his view is partial, in the sense of biased or self-interested, and therefore unreliable or not credible.⁵¹ Yet when we begin to work with differences of conceptual frame in their own right, we quickly discover that this traditional legal approach is not adequate to the task. Certainly bias in the form of self-interest can be present, but we must also distinguish two new

When she was on the stand telling about all these horrendous things that happened to her, she looked down, she looked so small, she wouldn't look at him . . . He was sitting there, his legs crossed, smirking. But as she kept talking, she started sitting up straight, she started looking right at him. It was like she grew bigger. *Supra* n. 1 at 15.

Lila was retaking control over her own life, standing up to the man who had so mistreated her. This ability is characteristic of women who escape a battering relationship. It illustrates why advocates for battered women view the current legal system as potentially empowering. Under the new evidentiary and procedural structure proposed in this paper, the type of empowerment which would be available is even greater.

⁵⁰ *Supra* n. 1.

⁵¹ Uviller, *supra* n. 13, sets out the "tools of credibility" (at 780) that are available to lawyers to help the jury "distinguish liars from truth-tellers". Evidence of bias is one of those tools. Uviller describes it thus: ". . . the relevance of evidence of bias is in the line of inference from the witness's interest in the case to a slant in his testimony according with his interest. Temptation to fabricate is the implicit ingredient. . ." (at 785).

forms of partiality – fact-based partiality and concept-based partiality.⁵² Both are forms of bias which the legal system must address if it is to uncover the larger reality, the whole truth concerning a past event that is the subject of litigation. These forms of partiality are very different than interest-based partiality. Both these forms of partiality are of a different category of bias than interest-based partiality, and will significantly affect how we understand whether a comment is credible.

To summarize the argument advanced in the book *THE BRIDGE OF REASON*, in any situation in which people might find themselves there are usually more “raw” facts present than any single individual can take into account.⁵³ We select facts on which to focus, both to avoid being overwhelmed and in order to make an event meaningful. Our conceptual frames play a vital role in determining which facts we select as meaningful. Any person’s version of events (especially events that are the subject of a conflict) will consist of a selection of facts drawn from a larger whole. The facts upon which a person relies may be entirely true, but they are also likely to be partial in the sense of being part of that larger whole. This is fact-based partiality. Unlike interest-based partiality, this type of bias does not imply the presence of a falsehood. Instead, it implies the presence of difference – a difference of conceptual frame. Indeed, so long as we assume that a difference in the identification and description of facts must be the result of a self-interested distortion or lie, we will not even be able to detect this type of bias.

If the legal system is to have the ability to identify and appropriately manage differences of conceptual frames, we need to expand our professional attention beyond facts. We cannot identify and work appropriately with fact-based partiality without also taking account of concepts. We need to identify the conceptual frames in play, including beliefs, theories and norms. The concepts a

⁵² These issues are discussed in more detail in *TBOR*, *supra* n. 2, particularly chapters 1-3.

⁵³ *Supra* n. 2.

given person uses may be entirely legitimate but again be partial in the sense of being only one of multiple concepts relevant to an adequate understanding and just resolution of the conflict. This is concept-based partiality. Again, its presence does not imply the occurrence of a lie, nor of a distortion or other error of reason. It implies only difference. So long as we reflexively infer dishonesty or mistake or distortion when we hear difference, we will not be equipped to handle this type of partiality. In Section III, we will discover that two different norms were in play in *People v. Lopez*, one held by David and a different one held by Lila. This difference of norms is the real source of the disparity in their respective interpretations of the cause of the abuse. Similarly, there is a difference between the norm held by David and the one incorporated in law and thus held by the state.

Although some of David's claims may be false in the sense of being biased and self-interested, none of his remarks cited in the introductory quotation can be completely dismissed as dishonesty or exaggeration and safely labeled false. Those claims are all true but partial in the sense of being part of a larger whole, both with respect to facts and concepts (here norms). David's views constitute one of two partial truths (parts of a larger whole) which are present in the case. The other partial truth is found in Lila's view. Neither of these partial truths can be entirely accommodated within or addressed either by the system of evidence and procedure used in this case or by the actual legal outcome of the litigation. Neither was handled as would be needed to produce the kind of outcomes that would adequately ensure public safety and do justice even for Lila and David, let alone for all. In Section III we will see that the legal system's current lack of ability to handle claims that are partial in this new sense misled David. It produced his belief that Lila lied on the stand and that his conviction was a mistake.

Despite his belief, David claims to have forgiven Lila and has been writing to her from prison professing his love and his desire to resume the relationship.⁵⁴ He told an interviewer that he still hopes for a chance to clear his name, to correct what he perceives as the mistake made by the system. He also said, “I still love (Lila), I still care for her, I pray for her every night and my daughter.”⁵⁵ Post-trial, he remains inconsistent in his acknowledgment of the abuse, sometimes admitting most of it, never admitting all of it. At the same time, he remains entirely consistent in never acknowledging any moral responsibility for wrongdoing. He believes what he did was right even if he did violate the law in the process. Despite a full trial on the merits and three appeals, the litigation did not convince David that there was anything wrong, other than some technical legal violations, with his actions. His conviction may be technically correct under the current law, but can we say that justice was done when the legal process has convicted a criminal defendant in a way that he does not understand?⁵⁶

c. The Risk to Public Safety

With respect to public safety, the most important problem is that taken as a pattern, David’s cluster of beliefs and behaviors presents a clear indication that the cycle of violence has not been broken – at least not for him. If his beliefs and behaviors continue, upon release he is likely to try to renew his relationship with Lila and may again resort to violence if she chooses not to do what he

⁵⁴ *Supra* n. 1 at 16.

⁵⁵ *Id.* at 17.

⁵⁶ Anyone tempted to see this as a potential due process defense for David should first read Chapter 4 of TBOR, *supra* n. 2. This type of defense would raise a systemic due process issue which differs in fundamental ways from traditional due process issues and requires significantly different treatment.

wants. Even if he does come to accept the end of the relationship, he may seek revenge based on his perception that she lied.

Lila is deathly afraid of David. She and her family have moved out of Sonoma County to escape him. Despite the fact that immediately after he is released he will be on parole, Lila is likely to live the rest of her life in fear, always looking over her shoulder. A condition of his parole might be that he stay away from her and her family but a parole requirement is a fairly flimsy guarantee of their safety. The recidivism rate in cases of domestic violence is fairly high, and legal prosecution has proven to be at best only a partial deterrent to future violence.⁵⁷ Thus Lila has good reason to be worried about the prospect of future violence. Even assuming Lila and David never resume their lives together, we cannot overlook the possibility that David might use violence against her again.

Further, David has not learned how to avoid illegal violence in future relationships with other women.

d. The Victim's Continuing Fear and Need to Hide

David's post-trial belief also carries other negative consequences for the social order. One such consequence has already been noted: Lila felt the need to flee in order to be safe from David. She and her daughter moved to another county and made efforts to ensure that David never learns of Lila's whereabouts. When considering the social outcome of criminal prosecution, this development is relevant if we believe that the legal system should do what it can to ensure the

⁵⁷ Dutton and Golant, *supra* n. 12, 175-76; BJS Report, *supra* n. 31. Deborah Bybee and Chris M. Sullivan, *Predicting re-victimization of battered women 3 years after existing a shelter program*, 36 AM. J. COMMUNITY PSYCHOL., 85 (2005) "examined re-victimization by ex-partners and found that, across a 2 year period of time, 36% of their sample had been assaulted at least once."

minimum disruption to the social order in the wake of a criminal act. The social order is not well served if, despite prosecution and conviction, victims and their families still feel the need to flee and hide from a member of society who has broken the law. It may never be possible to completely eliminate this type of outcome, but the legal system should do all that it reasonably can to minimize the chance that it will seem necessary.⁵⁸

e. The Risks to the Child's Development

Another untoward consequence arises from the fact that violence is already a part of Ariela's life experience. As young as she was while David and Lila were together, the violence has affected her social development. Ariela has been manifesting a strong fear of men and of raised voices.⁵⁹ Lila sought counseling to help her cope with the past and hopefully the impacts on the child will be addressed during that counseling. Yet we cannot focus only on the past. Parent-child relationships do not end upon conviction of a crime. Before his incarceration, David was an involved father. Except for the abuse, he was a fairly good father.⁶⁰ He clearly loves his daughter very much. As a parent, David has at least a putative legal right to a relationship with his daughter.

⁵⁸ To do so would be in keeping with California's legislative intent, see CAL. PENAL CODE § 679 (1986) (West, 1999)(rights of victims and witnesses of crime): ("the Legislature declares its intent . . . to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity.")

⁵⁹ *Supra* n. 1 at 16.

⁶⁰ Those who work with batterers recognize that they may, to the best of their ability, be good parents. Unfortunately, the beliefs and behaviors that produce the physical violence are usually not any better for young children than they are for their mother. Bancroft, *supra* n. 35 at 8, 235-72; Dutton and Golant, *supra* n. 12 at 124-26.

David's belief about Lila's testimony and his conviction will seriously affect Ariela's life in unacceptable ways. Lila is determined to resist any effort David may make to maintain a relationship with his daughter. Thus one possible outcome is that Ariela will grow up without knowing her father, enduring all the social and psychological harm this situation can wreak on a child's life. Of course, this scenario is far less damaging to her than being raised in a violent household, but it is still more harmful than if she had a non-violent loving father involved in her life. Another possible outcome is that David will get both parole and some type of visitation but his belief that Lila lied on the stand will infect the relationship, doing further damage to Ariela's well-being and to familial relationships. In summary, while it is impossible to predict precisely what damage to Ariela will follow or how serious it will be, we can accurately predict that some damage will be done and that it has the potential to be quite serious. A truly socially good outcome has no chance whatsoever of coming about: there is no chance of Lila and David feeling comfortable with each other as they play their respective roles in raising their daughter, no chance they will be able to cooperate effectively and without violence.

f. Collective Ignorance About How to Avoid Violence in the Future

The final consideration for the social order stems from the fact that domestic violence involves learned behaviors that are often serial in the sense that people who enter one abusive relationship tend to enter others. Thus, a batterer is likely to beat a future spouse or intimate partner, and a victim is likely to be victimized in a future battering relationship.⁶¹ Those who have experienced domestic violence must understand the patterns that produce the violence, and unlearn any parts of it which may be within their own control, if it is to be avoided in the future. Clearly the

⁶¹ Dutton and Golant, *supra* n. 12 describe the abusive personality, see e.g., at 39. See also, Bancroft, *supra* n. 35 e.g., at 29; Bybee and Sullivan, *supra* n. 57; BJS Report, *supra* n. 31.

bulk of the work of understanding the unhealthy dynamic, unlearning dangerous behavior patterns and developing new patterns belongs to therapy or professional counseling.⁶² Yet there is also a role for law that is currently unfilled. It is a smaller role than the roles appropriate to therapists and counselors, but it is nevertheless a critical role.⁶³ As will become obvious as we continue, despite the full trial neither Lila nor David adequately understands the violent dynamic they lived out. It is also doubtful that either Lila or David has learned what they need to know to avoid violent relationships in the future or to help their daughter avoid getting into such a relationship when she grows up. Furthermore, if David and Lila do not fully understand what happened, it is highly unlikely that members of the general public learned what they could from a case like this. A trial

⁶² As Bancroft describes, there is also a large role for others who interact with an abusive man, people such as his friends and family, clergy, and community groups, *supra* n. 35 at 376-81.

⁶³ The approach articulated here is based in systemic jurisprudence. A number of articles in the domestic violence field advocate therapeutic jurisprudence, a term which has been used to encompass both problem-solving courts, see *supra* n. 6, and a social-work type of practice. Samples of this literature include David B. Wexler and Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, 89 ABA J. 54 (May, 2003) (including lists of references and a website); Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2003). Opponents of the approach include James L Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (2003); Hon. Morris B. Hoffman, *A Neo-Retributionist Concurs With Professor Nolan*, 40 AM. CRIM. L. REV. 1567 (2003). Systemic jurisprudence would result in a new type of verdict which would have the capacity to be more helpful to those who litigate, but the driving force of systemic jurisprudence is not to produce psychological therapy. It is based in an understanding of the nature of justice, see ADOR, *supra* n. 2, e.g., at 112, 265.

structured to manage differences of conceptual frames could help impart the necessary information not only to Lila and David, but also to the broader community.

Each of these six undesirable social outcomes flow, directly or indirectly, from the structure of the evidentiary and procedural system used in today's courtrooms – in particular from its lack of ability to manage differences of conceptual frames.⁶⁴ Moreover, these six outcomes are hardly exhaustive of the range of inappropriate outcomes that could result from the failure to identify and manage differences of conceptual frames during the trial process.⁶⁵ They serve merely as examples. The legal system ought to make sure that the law's processes do not mislead people. Both the courts and the people who go through court proceedings need the kind of information necessary to produce better social outcomes. The legal system as a whole should ensure that its processes handle information in litigation in ways that help people learn what they need to know to ensure a good social order.

In the next section, we examine David and Lila's differing conceptual frames to see the role that their frames played in producing these unacceptable social outcomes. Their divergent views were not successfully addressed in an appropriate context during the trial. The result was that the trial produced no shared understanding of events, either between Lila and David or between David and the state. Neither did a common understanding emerge among the members of the broader community. The trial did not even produce the *possibility* of any of these common or shared understandings. We will also see that such understandings become possible if we identify and effectively manage differences of conceptual frame.

⁶⁴ See *infra*, Section V.

⁶⁵ Although the case used in this article does not involve a mistaken verdict, it is all too possible that the failure to manage differences of conceptual frame during a trial could produce verdicts which are both inaccurate and unjust.

III. The Source of the Violence

Evidence scholars usually examine a trial record to look for problems. To understand the need to manage differences of conceptual frames during a trial, we need to look elsewhere first. We need to examine the real-world situation out of which the criminal charges arose.⁶⁶ The method of inquiry used here is the inverse of the usual lawyerly process. In law schools, students are usually taught the rules of evidence by asking them to apply the rules to the facts and law of a given case. The aspects of the real-world situation that the rules permit lawyers to consider are developed in witness testimony and presented to juries (or judges) for deliberation and determination. The method of inquiry used in this article begins instead with the real-world situation and seeks to understand it. It then examines the rules of evidence and procedure to see if they are capable of capturing that real-world situation. When the answer turns out to be a resounding no, as it is here, the legal system must be reformed. It needs to be equipped to capture and work with that real-world situation.⁶⁷

A person's normative system structures and defines that person's expectations of a relationship. David held traditional patriarchal norms while Lila held more egalitarian norms. As a result, their expectations of the relationship, and of what constitutes proper behavior in a

⁶⁶ Thus the need for extra-legal sources, see *supra* n. 23. The rules of evidence and procedure will need to be modified and lawyers trained to identify and manage differences of conceptual frame before trial records will be adequate for this work.

⁶⁷ This is the primary work of systems development as a new field of legal scholarship and practice. It works in conjunction with helping to manage the interrelationships between the various fields of law. See also nn. 102-110 *infra*, and accompanying text.

relationship, are different. This difference in norms, a difference of conceptual frame, is the real source of the disconnect between David and Lila – the source of the “he said-she said” dynamic.

The norm a given person holds is frequently held by many more people than that one individual.⁶⁸ This was true for both David and Lila. Their relationship was, in microcosm, a reflection of a major social shift that has been taking place. Our society has been undergoing a "paradigm shift from a model of private female subordination within [the] family hierarchy" to a more egalitarian social structure.⁶⁹ The models differ with respect to the role played by each partner, both as to the definition the proper relationship between the partners and that between the couple and the state. For example, under the patriarchal model, the state rarely intervenes into the family when the man uses violence to control the woman or the children. Interventions occur only when the man uses egregious violence.⁷⁰ The home is deemed private. The man is considered the head of the household, and as such is treated as if he is authorized to use violence to discipline those under his control.⁷¹ Indeed, he has a social obligation to do so.⁷² Under the egalitarian model, the state defines its role as requiring intervention whenever violence is used in the home. The home

⁶⁸ See generally, Marion Smiley, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* (1993).

⁶⁹ Jane Maslow Cohen, *Private Violence and Public Obligation* at 370, in Fineman and Mykitiuk, *supra* n. 43.

⁷⁰ Tsai, *supra* n. 6 at 1288-89.

⁷¹ Rourke, *supra* n. **Error! Bookmark not defined.** at 58-60, citing Ann Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 31-2, 34 (1994); VICTORIA BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH* (1992); and MURRAY STRAUSS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES* (1987).

⁷² Rourke, *id* at 59.

is private but not as against the state when violence is involved. The man and woman are seen as equal partners, and each has the right to be protected from violence, even violence in the home. Under the patriarchal model, men will not usually be prosecuted when they engage in domestic violence. Under the egalitarian model, they will be prosecuted and severely punished for committing the same acts.

The different normative theory or model that David and Lila each used can be inferred from their own words and deeds and those of their extended families.⁷³ David sees a high level of patriarchal control as normal family behavior.⁷⁴ His father and mother offer the model of intimate family life that he accepts as proper. David's mother subordinates herself as wife and mother in a patriarchal, hierarchical family. The family lives according to the assumption that the man is the head of the house and that the woman is subordinate to him. Thus for David, so long as he is fulfilling his responsibilities under the patriarchal model of the family, it is Lila's responsibility to ensure his comfort.⁷⁵ In his mind, Lila's role consists of taking care of him and of the home and

⁷³ Of course, individuals may generally use a given model even though their reasoning may not entirely or strictly conform to that model. Thus it is impossible to use the model to determine or define what a person was thinking at a given time. Their actual thoughts must be determined.

⁷⁴ This is typical of a certain category of batterer, see Portwood, *supra* n. 4 (describing and distinguishing “patriarchal terrorism”, the type of systematic, escalating violence and control exercised by men who hold patriarchal norms, and “common couple violence”, which is “occasional and fleeting in nature,” at 225).

⁷⁵ Marcus, *supra* n. 43, compares the thought-patterns of batterers to the archaic legal doctrine of coverture in which the woman's legal identity is merged into the man's:

As a cofacilitator of court-mandated educational groups for batterers, I have repeatedly heard revealing statements of deeply held beliefs made by batterers which speak to the daily life practices of coverture -- the muting or denying of a

family. Lila's role does not include having a life or identity of her own, or at least not one that differs from her assigned role.

The roots of Lila's egalitarian normative system can likewise be traced to her family of origin. Lila's mother has a non-traditional, semi-professional job and an independent life style. She divorced her husband and raised her children on her own. She was head of their household. Lila's mother preferred to use reason to convey her normative beliefs and maintain order in her home. She

separate and separable identity for a partner or spouse. Men are "in charge" of a relationship; it must be structured to their liking or comfort; abuse and violence are among the means to "ensure" these outcomes and to control a partner or spouse who challenges the ordering of domestic life.

The archaic legal term has a psychological equivalent. It is called enmeshment, a state in which a person's sense of self is not sufficiently differentiated from that of others. The term was introduced by Salvador Minuchin in the late 1960's. I have never found a good quotable definition of it but it is illustrated and discussed in a number of works. In *FAMILIES AND FAMILY THERAPY* (1974), Minuchin describes human psychological functioning as a range, the mid-point of which is healthy functioning while the extremes are socially dysfunctional. At one extreme, boundaries between people are *rigid*. At the other, they are diffuse or poorly defined. This extreme is the enmeshed family system. At 53, Minuchin states that "The function of boundaries is to protect the differentiation of the system." At 144 he states "In an enmeshed family, the boundaries must be strengthened to facilitate the individuation of family members." In other words, people in intimate relationships have the ability to intrude on one another's self-definition. If the social whole (the family in Minuchin's work) is to function in a healthy way, the individuals in that social whole must be healthy themselves. Strengthening the boundaries in an enmeshed family is the same task as ensuring a separate and separable identity for a partner or spouse in Marcus's discussion of coverture.

preferred reason to corporal discipline. Lila's mother raised her children to be independent, to think for themselves and to value themselves. Indeed, she described her daughter as generally very independent.⁷⁶ Lila is thus likely to want to define her own role in her relationships rather than passively accept a role imposed on her.⁷⁷ Remember that she said that when she was with David, she wasn't the person she wanted to be.⁷⁸ Despite her sense of independence, Lila accepted the role David imposed on her at least to some degree for a time.

In all normative systems, the partners to an intimate relationship have specific obligations to fulfill. The obligations differ in the two normative systems involved in this case. David's beliefs about his proper role in the family are visible in some of his comments, and reflect the model of the patriarchal family.⁷⁹ He sees his role as that of breadwinner. The good treatment of his partner consists of being faithful to her, of being with her and supporting her and the child. Each partner's identity is defined by the role they play, and he is in charge. Under the egalitarian model, the good treatment of a partner includes faithfulness, companionship and support but excludes male domination. Instead, the partners are equal and obligations are mutual. The support each expects of the other goes beyond financial support and extends to understanding and emotional support. These additional types of support are necessary to help each partner to achieve her own sense of identity and feel fulfilled. That sense of identity is defined by the individual as an autonomous reasoning agent rather than by social role.

Each model also provides methods for one partner to use to induce the other to conform to her expectations. In the patriarchal family, physical discipline may be used. Corporal punishment is

⁷⁶ *Supra* n. 1 at 7.

⁷⁷ Text accompanying n. 36 *supra*.

⁷⁸ *Supra* n. 36.

⁷⁹ *Infra* n. 89 and accompanying text.

not the sole method of enforcing norms in the patriarchal family, but it is often seen as a permissible method. Another common method of seeking conformity with one's normative beliefs or expectations is verbal criticism. Verbal criticism can be used in both the egalitarian and the patriarchal model. As a method of enforcing norms, criticism is probably far more common than corporal punishment in all models. When we criticize those who deviate from our norms, we both express our own normative beliefs and attempt to achieve compliance with those norms by holding the other person's behavior to our standards.⁸⁰

The relationship between David and Lila started when both were fairly young – David was 19, Lila 17. Things moved very fast. This couple began living together one week after they met. Each went from a household with a homogeneous normative system into a relationship with someone holding a significantly different normative system. Indeed, David did not even leave his household. Lila entered it. Each of them no doubt continued to live according to his/her own normative beliefs, and each no doubt violated the other's normative expectations in the process. Lila did not naturally behave in ways that conformed to David's expectations and vice versa.

The first incident of violence came early in the relationship, and the pattern set in that first violent incident repeated itself over and over. In that incident, Lila expressed dissatisfaction and said she wanted to leave. In the process, she may also have criticized David's behavior by

⁸⁰ In most scholarship, norms are treated as a social or group phenomenon rather than an individual one. However, that interpretation tends to ignore the fact that social groups are made up of reasoning individuals each of whom must hold any given norm in common with others if that norm is to govern the group. Norms also undergo evolution and refinement in the course of interpersonal interaction within the group and between members of the group and outsiders. Each of us engages in normative reasoning and normative dialogue as we participate in the process of defining ourselves and our communities. An excellent discussion is found in Smiley, *supra* n. 68.

complaining about it, but her very act of wanting to leave violated David's norm. Under his norm, that decision does not even belong to Lila – it belongs to David as head of household. David responded to Lila's concerns by slapping her in the face. He sought compliance with his norm by using physical force. Her dissatisfaction and desire to leave are signs of independence, not part of David's view of the woman's proper role in the relationship. If she criticized him or complained about his behavior when expressing her desire to leave, he may have experienced her words as if she were demeaning him, just as he later told Detective Lujan. People often feel as if "the whole self has been violated when its opinions, values, rules or definitions are challenged [, and] such differences [are] experienced as transgressions."⁸¹

If this is what happened, we have the making of a clash of conceptual frames, this time as a result of different norms. David interpreted Lila's words and deeds as holding the meaning they conveyed in his frame. He did not recognize that Lila did not share his frame, and that the meaning she put into her words and deeds came from her frame, not his. In *THE BRIDGE OF REASON*, this is called the two-frame flaw – a type of flaw in human reason that occurs when one person draws inferences about the meaning of the words and deeds of another while failing to recognize that the second person is using a different conceptual frame.⁸² It is a very common flaw found in the reasoning of many people today. David's reasoning contained this flaw, and so did Lila's. Our own reasoning embodies the two-frame flaw if we fail to take account of differences in frames in our interactions with someone who does not hold our frame. In the case of David and Lila, it produced tragic results. It played a major role in the violence Lila endured and for which David was

⁸¹ Robert Kegan, *IN OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE* 231 (1995)

⁸² *Supra* n. 2, Chapter 2. The flaw lies in the first person's interpretation of the meaning of the second person's words and deeds.

prosecuted. It also produced each of the unacceptable social outcomes described in the previous section. Let us probe the case a little further to see the flaw in action.

David and his family seem to accept the belief that the man is the disciplinarian in the family, responsible for the behavior of the members of that family. Thus in David's mind and the minds of his family, the physical assaults on Lila were probably viewed as justified discipline, necessary to force her to conform with his norms. David likely does not define physical discipline as abuse (lay or common language) or as assault or battery (legal language). Just as there is controversy over whether spanking a child is "normal" discipline or child abuse, a man like David may honestly believe there is a clear distinction between disciplining his girlfriend and abusing or criminally assaulting her. He may believe that what he did was to inflict "normal" and "socially-acceptable" discipline.⁸³ His treatment of Lila was obviously acceptable within his extended family. Remember that no member of David's extended family took any steps to intervene and protect Lila from his abuse. The only action any of them took was his mother's apology to Lila when he accidentally stabbed her. He and his family were using a different concept, a different standard, than Lila used, or than the law used, to define what behavior is acceptable.

When Lila did not do what David expected given his personal belief-system, in his mind she was quite literally the cause of the violence in the relationship. To use the language of action

⁸³ Bancroft, *supra* n. 35 at 34-35 ("An abuser almost never does anything that he himself considers morally unacceptable. He may hide what he does because he thinks *other* people would disagree with it, but he feels justified inside.") This view also finds support in the sociological literature, see Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 550-1 (1992) discussing the work of sociologist Jack Katz who found that homicides are often viewed in the mind of the killer as a "legitimately justified act of law enforcement."

science, the interpretation of events that holds causal explanatory power for David as a reasoning agent is that Lila caused the beatings.⁸⁴ Action science recognizes that “people are self-interpreting beings. Their interpretations enter into their actions.”⁸⁵ We will return to the action science treatment of causation and agency in Section V’s discussion of the significance of this credibility

⁸⁴ Action science is the product of Chris Argyris and Donald Schön. Perhaps the most complete statement of it is found in CHRIS ARGYRIS, ROBERT PUTNAM, AND DIANA MCLAIN SMITH, ACTION SCIENCE (1985). Action science is the first scientific method specifically designed to work in action contexts (human interaction and human activity). It is distinguishable from the more traditional methods used in the social sciences because the threats to validity in the action context are different. ADOR, *supra* n. 2, devotes a Chapter 2 to spelling out the distinctions. A quick summary of a very complex subject is to say that action science is action-based while the traditional social sciences are observer-based. While the traditional social sciences have a great deal to offer law, action science reaches law’s core in a way that the social sciences cannot. Litigation evaluates and judges action contexts, and does so for action-based reasons (ensuring public safety, doing justice). Thus, as noted *supra* n. 22, it provides an important part of the new intellectual foundation needed in law, a foundation discussed *infra* n. 86.

⁸⁵ The action science treatment of agency is worth describing in more detail. The passage from which this quote is taken is found in Argyris, et. al., *supra* n. 84 at 27:

. . . people are self-interpreting beings. Their interpretations enter into their actions. Hence a proffered interpretation can be valid in the sense of possessing causal explanatory power only if it was a reason for the agent in question. . . . [As to an alternative explanation, it] makes sense for an agent to say, for example, "I can see how that might be a reason for doing what I did, but that wasn't what I was thinking."

problem for evidence law and scholarship.⁸⁶ For now, we return to our discussion of the role that Lila and David's differing conceptual frames played in this case.

Lila acted in ways that violated David's expectations and the facts upon which he will focus are the facts that establish both her violation of his norm (e.g., facts such as that she "asked for it" in the way she spoke to him and treated him) and his compliance with his norm (e.g., that he was the breadwinner and was faithful). In his mind these facts justified his efforts to enforce his normative beliefs. In David's normative system, he has the right, even the duty, to physically discipline Lila to force her to conform. Regardless of both our own normative beliefs about the situation and the legal norms applicable to this case, this is in all likelihood precisely what happened. It is easy to see how David might not understand that he did anything wrong – even after his trial and conviction. His behavior is literally not wrong in his personal belief-system. Moreover, there is a measure of legitimacy to his normative system. The law prohibits violence, but it does not prohibit a man from holding a patriarchal normative system. In a free country David has the right to hold such a belief system. Because of his belief-system, David's reasoning about the situation, as expressed in both his conversations with the police and at trial, is certain to reflect both fact-based partiality and concept-based partiality. These are in addition to any interest-based partiality which may also be present. The legal system needs to be equipped to deal with both of these types of partiality if it is to end the violence. In a society in which people with different views of the world interact regularly, they are at least as important, if not more so, than interest-based partiality.

Lila's behavior in the situation was parallel to David's. She expected something other from the relationship than what she got. She wanted her own identity, something to which she would be

To this observation, it needs to be added that humans also interpret the behavior of others, and those interpretations similarly enter into their actions.

⁸⁶ *Infra* nn. 117, 129 - 131 and accompanying text.

entitled under the egalitarian model. If David was not recognizing or respecting Lila's sense of personal identity, he was triggering Lila's dissatisfaction because he was not being the partner she wanted and expected. Of course, a man who accepts patriarchal norms does not expect to have to honor his partner's identity. In the patriarchal model, both partners' identities are defined by their role in the relationship, not by either the man or the woman as reasoning agent in their own right. Lila may have criticized David when he did not live up to her normative expectations of the relationship, for example, by exercising too much control over her or by not respecting her personal sense of identity. The facts that establish this conclusion will be the facts that matter to her. For Lila as reasoning agent, the interpretation of events that holds causal explanatory power is that David caused her criticism of him by not living up to her expectations of him. Of course, the facts that matter to Lila will be irrelevant to David. They do not count for anything in his normative frame.⁸⁷

By considering both frames in our interpretation of this relationship, we can make sense of the repeated episodes of escalating abuse followed by reconciliation. David responded to the problems in the relationship by asserting increasing levels of control over Lila. He also used increasing levels of physical violence. Given his normative system, he was doing *exactly what he thought he should do* to create and maintain a “good” relationship as he understood that term. After an episode of abuse, Lila saw David courting her and interpreted his behavior through her conceptual scheme. She thought he had recognized the error of his ways and in the future would treat her in accordance with her normative expectations. David courted her out of a very different understanding of the situation – namely that she had learned her lesson and would not continue to

⁸⁷ Bancroft, *supra* n. 35, does not recognize the role of differences of conceptual frames as is set out in this paper, but he recognizes this type of reaction in abusive men: “Her side of the argument counts for nothing in his eyes, and everything is her fault.” (at 9).

disobey him or criticize him. He thought she would live in accordance with his normative expectations.

Each was reasoning about the situation in a way that embodies the two-frame flaw. David was trying to create the kind of relationship he wanted while Lila was trying to create the kind of relationship she wanted. The problems between them arose because they were not trying to create the same thing. This is a classic case of a socio-psychological phenomenon.⁸⁸ A dual dynamic took place between Lila and David. David "caused" Lila's criticism in exactly the same way that she "caused" his physical abuse – each violated the other's normative expectations. Neither understood how to handle the situation in a way that could end the conflict. The relationship generated conflict because each participant employed a logic incompatible with the other's. Although each person acted in ways they believed to be right, each person's behavior triggered unintended adverse reactions from the other because of the differences in their respective logics. Lila did not naturally behave in ways that corresponded with David's expectations and vice versa. Each may have done reasonably well in a relationship with a partner who shared their normative belief system. This particular relationship, however, was in deep trouble right from the very beginning. For example, David was not able to give Lila what she wanted or needed even when she complied with his wishes. He gave her what he thought was proper behavior, not what she thought was proper behavior.

We can describe such a situation by borrowing concepts from law. Their relationship was a joint endeavor that was not truly joint. In this relationship there was no meeting of the minds. Because of the normative differences between Lila and David, each of them selected different facts

⁸⁸ The technical term is schismogenesis, a term introduced by Gregory Bateson in STEPS TO AN ECOLOGY OF MIND 68-72 (1972). It is a downward spiral in a relationship caused by a conflict in logics employed by the participants in the conflict. It is a very common phenomenon.

on which to focus and drew significantly different inferences about those facts, and thus about what happened during the time they spent together. Each was trying to produce a different type of relationship than the other. Their time together was shared in the sense that they physically lived together, but it is equally true to say that the experience was not shared because there was no meeting of the minds. While they lived together, each lived in his or her own conceptual world, a world to which the other had little or no access. It is little wonder that when this kind of situation gets to trial in a court today, we end up with a credibility problem – a case of “he said-she said.”

We can see David’s selective use of facts and his normative beliefs at work in comments he made in the interview from prison not long after his sentencing. He described himself as being faithful to Lila, and claimed: “I treated her right. I worked hard to support her and my child.”⁸⁹ He sincerely believes he fulfilled his part of the bargain *in fact* and was a good partner to Lila. In other words, he did what he needed to do to “cause” the outcome he wanted from the relationship, at least when the situation is viewed from within his normative system. His claims are partial truths, exhibiting both fact-based and concept-based partiality. Nevertheless, they are part of the whole truth of the case. Lila might readily agree with the facts he cites, that he was faithful and did work hard to support her and their daughter. Of course, these facts were not the ones that mattered most to her. Further, because she holds a different normative system, in her mind the facts that mattered to David would only partially support the conclusion that he was a good partner in the relationship. Other facts, ones that matter both to Lila and to the law, supported the opposite conclusion.

It is easy to see how David could end up with the good faith belief that Lila lied on the stand.⁹⁰ We saw the most likely scenario in the introduction. The prosecutor may have asked Lila

⁸⁹ *Supra* n. 1 at 17.

⁹⁰ There has never been an opportunity to ask David what specific lies he believes Lila told on the witness stand. The discussion here is the one that seems most plausible.

whether she did anything to provoke the beatings. Alternatively, Lila may have volunteered that information on cross-examination. Provocation is often an issue in cases of assault and battery. Lila's comments, words which are 100% true in her own conceptual frame, expressed her belief that she did not provoke the beatings. In David's conceptual frame, however, this answer appears to be 100% false. To David, the opposite is true. Lila did cause the beatings because she criticized him and "misbehaved" (in the sense that she behaved in violation of his normative system) even though he was doing what he was supposed to do given his normative beliefs.⁹¹ This is one of the many points where the existing legal system can actively mislead lay people. David is sitting in prison unable to fully figure out what went wrong because we use an evidentiary and procedural system that was not designed to tell him in terms that make sense to him.⁹² If the violence is to end and if Lila is to be safe in the future, he needs to understand. The consequences of his misunderstanding could be quite serious.

If the "lie" Lila told on the stand involves causation of the abuse, David's claim that she lied is made in good faith. To him, given his normative frame, the truth is very different. At trial, the legal system needs to reach his separate truth to create a shared or common understanding of events. Unfortunately, this type of truth cannot be reached by any court using any existing evidentiary system available today because: (1) evidentiary systems are structured solely as an

⁹¹ This type of situation may be quite common in domestic violence cases. Social scientists Kris Henning, Angela R. Jones and Robert Holdford studied people convicted of abuse and found that "both (male and female abusers) attribute greater blame for the recent offense to their spouse/partner than they acknowledge for themselves", *"I didn't do it, but if I did I had a good reason": minimization, denial and attributions of blame among male and female domestic violence offenders*, 20 J. FAM. VIOLENCE 131 (2005).

⁹² *Supra* n. 56.

inquiry into facts, (2) the rules do not require the identification and management of differences of conceptual frame, and (3) the rules are not concerned with how the defendant understands the issues. The question of provocation, or causation if we use action science terms, inherently involves much more than facts. Provocation or causation is interpretive because it relies on interpretations held by the agents involved in the litigation, namely the defendant and the chief prosecuting witness. Lila's claim is true in fact under her frame and false in fact under David's. To reach the whole truth of such a claim – the kind of truth we need to produce better outcomes – we need rules that introduce the concepts in play to the jury. We also need procedures structured so that the fact-based and concept-based partiality in each witness's testimony can be identified and set into a broader and more appropriate context. We need to work with not only the norms or concepts that individuals hold, but also those embodied in law. In short, we need a system designed to achieve joinder on two levels – both on the level of fact and on the level of concept (here a norm). If we had this type of system, we would reduce the chances that even after conviction, a criminal defendant like David would admit most of the facts that produced his conviction while concurrently denying the implication the court assigns to those facts.

Joinder of facts and concepts needs to be achieved both in pretrial pleadings and in the way trial testimony is handled.⁹³ Joinder must begin from the recognition that David's facts matter to David and make sense in his normative frame even though his facts and concepts (here primarily a

⁹³ The general process of achieving joinder is described in Section V *infra*. Some evidence professors write about various distinctions between the guilt phase and the sentencing phase of a criminal trial. For example, Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001), notes that character evidence is generally banned from the guilt phase but used in the sentencing phase of the trial. Managing differences of conceptual frames would need to take place in both phases.

norm) are only part of what both the judge and the jury as finder of fact need to consider to reach the whole truth and do justice. Lila's facts matter to Lila and make sense both in her normative frame and under the law. The judge and jury also need to consider them, recognizing that Lila's facts and concepts are as partial as David's. The legal system's rules of evidence and procedure need to recognize that while law applies equally to all, not all will reason in accordance with the precepts built into the law. To successfully convince a defendant like David of the justice of the verdict against him, and to end the violence, the trial needs to produce a shared or common understanding of those events that are the subject of the litigation. In a world in which people reason differently, shared or common understandings need to be actively created by adequate rules and procedures. We can no longer rely, as we currently do, on the mere assumption that a shared or common understanding will result from litigation.

When David claimed that Lila lied on the stand, he was probably referring to this issue of provocation. There are, however, two other possibilities, both of which also deserve to be addressed. The first concerns whether David hit Lila with a crowbar in the episode that cemented her decision to leave. David claims he did not. Lila claims he did. There is a single truth with respect to this incident, and it is a factual truth.⁹⁴ Nevertheless, issues of interpretation can inherently be mixed into that factual truth. If Lila testifies that he did hit her and David claims he did not, then we have a straightforward question of credibility for the jury on an issue of fact. The revisions to the rules needed to manage differences of conceptual frames will not change this aspect of the trial. At the same time, we need to keep in mind that more is going on at a trial than

⁹⁴ Of course, if he did hit her with a crowbar, another fact – namely David's state of mind – is an element of the crime. He must have hit her with the requisite intent to do bodily injury. However, for purposes of this paragraph, the physical act of hitting Lila with a crowbar is a fact that is distinguishable from the state of mind that was present when the blow was inflicted.

merely the reaching of a verdict. The way the legal system handles those facts will need to change to achieve joinder on both levels: fact and concept. There may be more than one possible reason for David to deny the claim. Obviously, he may be behaving in conformity with the usual assumption lawyers currently make about such situations – he may be intentionally lying. He has good reason to lie: traditional self-interest. He was facing a long prison term, and whether he actually did hit her with a crowbar might make a difference in the length of that sentence. Yet even if David did in fact hit Lila with a crowbar and then deny doing so, it does not necessarily follow that he is intentionally lying. He may be in denial, and/or may quite literally not remember doing it at the level of consciousness. For example, it may be an instance of “red out”, a psychological phenomenon in which people in a fit of rage act in ways they do not consciously remember once the rage is past.⁹⁵ If his claim arises out of some source other than an intentional lie, both facts and norms may need to be handled differently than is currently the case, and the differences may need to extend from initial arrest through post-trial procedures, and from initial sentencing through parole hearings.⁹⁶ We will return to this issue in Section IV.⁹⁷ For now, the point is that lawyers

⁹⁵ Raeder, *supra* n. 12 at 1470; DUTTON & GOLANT, *supra* n. 12 at 47; Daniel Jay Sonkin and William Fazio, *Domestic Violence Expert Testimony in The Prosecution of Male Batterers*, in DOMESTIC VIOLENCE ON TRIAL 218 (Daniel Jay Sonkin ed., 1987).

⁹⁶ A few of the issues that need to be addressed are considered in Erin Street Mateer, *Compelling Jekyll to Ditch Hyde: How the Law Ought to Address Batterer Duplicity*, 48 HOW. L.J. 525, 558-62 (2004) (concerning negligent duplicity, a category of dishonesty that is distinguishable from the intentional lie). Although not relevant to the issue of red out, Chapter 3 of TBOR, *supra* n. 2, is devoted to a discussion of one aspect of the police investigation of domestic violence which needs to change if the legal system is to successfully manage differences of conceptual frame. That chapter identifies another flaw in human reason, the action flaw, to illustrate how Detective Lujan,

need to move beyond the simplistic assumptions about the nature of evidence that we currently use. Even when dealing with matters that appear essentially factual in nature, the role played by a person's conceptual frame may be important.

The other possible "lie" concerns the stabbing incident. The prosecution and defense traditionally seek to establish facts and only facts (subject to the tools of credibility⁹⁸). David was in fact holding a knife in a threatening manner and the knife penetrated Lila's skin. Lila may not have been able to explain, either on direct or cross, both that she understood the stabbing to be an accident and why. The law may recognize David's action as a felony regardless of whether the stabbing was intentional or merely unacceptably reckless, but the distinction may matter a great deal to David and thus to Lila's future safety.⁹⁹ When lawyers look only to facts and ignore conceptual frames, issues that matter to the parties may be overlooked or treated in a way that confuses or misleads them. The result may be an unacceptable social outcome.

To get to the type of truth that could produce better social outcomes, we need to achieve joinder on the level of fact and concept or norm, and we must attain joinder not only between David and Lila but also between David and the state. With such a procedure we could directly reach the flawed inferences that permeate this case and perhaps even fix those flaws, thereby helping the parties learn to reason more appropriately. If so, we could remedy each of the

the investigating officer, may have contributed to David's misunderstanding of his conviction by how he handled both the investigation and his subsequent testimony at trial. Similar kinds of activities may be necessary for instances of "red out".

⁹⁷ *Infra* nn. 101 and 141 and accompanying text.

⁹⁸ Uviller, *supra* n. 51.

⁹⁹ Of course, David's intent, as he understands it, does not and should not control how Lila or the jury interprets these events. His interpretation is only one part of the larger whole truth.

unacceptable outcomes discussed in the last section. We could reduce or eliminate David's misunderstanding both of Lila's behavior and of his conviction. With an adequate procedure, joinder will spell out for David what went wrong in the relationship and why he was convicted, and it will do so in a way that will make sense to him given his conceptual frame. If David comes to accurately understand these things, his prosecution will more likely alleviate Lila's fear of David and her need to hide from him. If David can be brought to understand the situation, he should recognize the need to make a choice about his relationship. He needs to either (1) give up his romantic attachment to Lila, recognizing that she is not the kind of life partner he wants, or (2) learn how to act on his feelings for her in without violence. The procedure may even give David and Lila a more solid foundation for working together to raise their child. Both David and Lila would have a better understanding of the violent relationship they lived through, perhaps enough to help them avoid violence in their future relationships.

David used a different standard than the legal system to define what level or type of violence is acceptable in the home. Under a procedure designed to achieve joinder on the level of fact and concept (here a norm), the state would have a direct way to let David know that his standard does not conform with law, and could do so while still acknowledging his right to hold a patriarchal normative system. Because of the structure of the trial that took place, David did not get the message he needed to get from the prosecution and neither did various people in his community. David has never had his conceptual frame expanded sufficiently to take account of the differences between the way he and Lila reason about their relationship, or between the way he reasons about violence and what the state accepts. The truth relevant to all these better social outcomes is quite literally not evident to him.

There is a widely-held belief that a conviction under the existing legal process, coupled with a stiff sentence, will convince both a given defendant and others in the community not to batter again. Although this belief is clearly false with respect to David, it does hold at least a

measure of truth. Even though David may never get the message, if the state keeps prosecuting such cases using the existing rules of evidence, other members of the community will get it. On the other hand, a revised trial format could convey the message much more effectively, able to communicate directly to an individual defendant like David, and through the public proceeding to that person's family and friends. A revised procedure would also be a much more effective way to reach the community at large. For instance, it might reduce or even eliminate troublesome messages such as that drawn by the Latino community, that the case was further evidence of ongoing discrimination against Latinos in the criminal justice system.

At this point, we can already see one difference between this article and one that is more traditional. In a traditional article, the normal move at this point would be to propose revisions to one or two rules of evidence and speak to the kind of evidentiary concerns that might arise if the rules were to manage differences of conceptual frame as advocated here. For example, in this case it might seem natural to question whether the use of David's conceptual frame would violate the ban against character evidence, or would increase the risk of jury nullification. While we will address both issues in the last section of this article, we need to innovate with respect to our format. The need for format innovation will be articulated more fully in the next section, but we can already see it here. It is not possible to achieve joinder on the level of both fact and concept by revising only a small number of the rules of evidence. Instead, we will need to revise a significant number of rules, and both evidentiary and procedural rules will be affected. Thus, rather than propose specific replacement rules, the last sections of this article will speak to the general parameters that must guide the development of such rules.

Our revised format must equip us to deal appropriately with a related problem that lies beyond the number of rules that need to be changed and the fact that both evidence and procedure would be affected. We do not yet know enough about differences of conceptual frame to develop a full set of proposed new rules. This article has been able to consider only the limited number of

issues visible in one case. That case provided enough raw material to examine one frame difference (a difference in norms) between the defendant, the chief prosecuting witness, and the state, but many more such differences could conceivably exist. Differences of conceptual frame have become pervasive in American society. Such differences readily could, and no doubt regularly do, appear among other participants (i.e., lawyers, judges, jurors, other witnesses) in a vast number of trials taking place today. *People v. Lopez* has not provided, for example, sufficient raw material to consider the effect of differences of conceptual frame between a witness and one or more jurors who must find the truth of a given case. The same kind of diametric opposition in reasoning processes that we saw between Lila and David could easily occur between a defendant and a member of the jury. Although in *People v. Lopez* there was not sufficient raw material to question the verdict, we may find that in other cases the verdict itself is wrong. Thus, we need to keep in mind that the unacceptable outcomes visible in *People v. Lopez* are not exhaustive of all those that might be possible.

Another related difference between this article and the traditional evidence article must also shape the material covered in the remaining two sections. Differences of conceptual frame can and do exist *within the legal profession itself*. There are many sources of such differences beyond those that might initially spring to mind: race, gender, ethnicity, and political beliefs. Factors such as professional specialization, the fragmentation of the profession's jurisprudential base, and our differing personal and educational backgrounds each make their own contribution. This article introduces one more difference, noted in the introduction: the shift in the intellectual foundation of the litigation system. Actually, that shift has already been employed in this article although it has yet to be defined. The new intellectual foundation produced the explicit focus on differences of conceptual frame, and it enabled us to uncover our credibility problem. Those who have already made the shift to the new intellectual foundation will inherently hold a different conceptual frame than those who have not. To hold a fruitful discussion within the profession concerning our

credibility question, all of us will need to increase our capacity to manage generic differences of conceptual frame.¹⁰⁰ The proposed shift in the litigation system's intellectual foundation affects the way we draw inferences and communicate them.¹⁰¹ As a result, evidence professionals who accept the New Reason need to play a key role in preparing both the rest of the legal profession and the general public for the shift. To do so, we need to understand its basic nature in more detail, so it is to that topic that we now turn.

¹⁰⁰ ADOR, *supra* n. 2 Chapter 3, uses a published exchange between two evidence professors, William Twining and Kenneth Graham, to illustrate that the ability to manage differences of conceptual frames does not already exist among legal professors. Profs. Twining and Graham are leading figures in the field. If professors of their caliber were not doing it successfully, it seems safe to conclude that the skill is not already present. Many professors believe they do manage differences in points of view because they use the insights of legal pragmatism which was equipped to manage some differences. However, managing differences of conceptual frame is a new skill. I could have chosen published exchanges between any number of law professors, in any field of law, for the demonstration.

¹⁰¹ The basic difference concerns both how we draw inferences and how we interact with one another. When drawing inferences, we must distinguish between our own conceptual frame and that of the person about whom that inference is drawn. When communicating about an issue, we similarly need to take such differences into account. If an objective fact is interpreted differently by different people, those differences must be actively and appropriately managed if the communication is to be successful. Finally, when we act with respect to a person with a different frame, we need to account of relevant differences. See *infra*, n. 141 and accompanying text.

IV. The New Intellectual Foundation: The New Reason and Systemic Reform¹⁰²

It might seem that the next step should be to more fully define the nature of the shift in the intellectual foundation of the legal system. Because of the need to manage differences of conceptual frame within the legal academy during its introduction, we will hold that definition until the end of this section. When people consider new information, it is common for them to simultaneously think about what action, if any, they might take with respect to that information. Making the shift from the existing intellectual foundation to the requisite new one will also require re-thinking which actions are necessary and appropriate, so we begin there.

When the existing rules of evidence are fundamentally inadequate to deal with the kind of real-world situations which lawyers must litigate, the profession needs to act. Its action must be suited to the nature of the problem confronting the profession. The problem with credibility identified here has its root in the theory of reason which currently grounds the legal system, and the requisite new intellectual foundation consists of a new theory of reason. Before we define our two theories of reason (universal reason and the New Reason) and link them to our credibility problem, we need to clarify who has responsibility for these issues and what kind of responsibility is involved. Because of its source, our credibility problem is a systems problem with a number of different systemic dimensions. We can define a systems problem as one which extends beyond the normal domain of a specific field's scholars. This happens when, as here, a problem that arises in

¹⁰² This section illustrates the work of systems development in several ways. One is that the inquiry is conducted using the profession as a whole as its frame of reference. Generally speaking, system is a whole. For a more detailed formal definition, see TBOR, *supra* n. 2, Introduction. Further, as is characteristic of systems inquiry and practice, the interrelationships between the parts of that whole are explicitly recognized and managed.

one field of law finds its source and/or remedy either partly or wholly outside that field, and/or it holds major substantive implications for another field.

A systems problem raises both conceptual and organizational considerations. These need to be addressed simultaneously since they are deeply interrelated. We can see the interrelationships when we consider that very elementary question of responsibility. Of course, credibility is an evidence issue so evidence professors have responsibility for it, but our particular credibility issue is larger than what evidence professors normally address. Its very nature does not fit well within the profession's usual operating procedures. Naturally, changes in rules of evidence, whether from new Supreme Court decisions or from rules changes, often have some impacts on the operations in other fields of law and the profession is quite accustomed to dealing with such matters. For example, when *Daubert v. Merrill Dow Pharmaceuticals, Inc.*¹⁰³ was decided, it affected the kinds of scientific evidence which could be introduced in a wide array of cases. No doubt, as it was further interpreted and applied, it produced corresponding adjustments in rules in the various fields of law where it was applied.¹⁰⁴ When Federal Rules of Evidence 413 and 414 were adopted, allowing the introduction of evidence of prior sexual misconduct by the defendant in rape or child molestation cases, courts changed how they handled such evidence. Correspondingly, the criminal case law began to reflect the new rules. Thus even though fields of law are interconnected in this way, the impacts tend not to be major substantive ones.

¹⁰³ 509 U. S. 579 (1993).

¹⁰⁴ See Richard J. Leighton, *Using Daubert-Kumho Gatekeeping to Admit and Exclude Surveys in Lanham Act Advertising and Trademark Cases*, 92 Trademark Rep. 743 (2002).

Systems issues are different. In general, the profession is not currently accustomed to undertaking systems inquiries, working with systemic issues, or remedying systemic problems.¹⁰⁵ The profession has no professors of systems development, and no established methods for coping with various systemic interconnections that exist. Several general operating practices currently employed in the nation's law schools erect troublesome barriers to working with systems problems. We will speak to two of them here and a third will be addressed at the end of this section. The first is that our work is compartmentalized into the many different fields of scholarship and practice that make up the profession as a whole. Second, the scholarly enterprise tends to be highly individualized. Law professors usually work alone. Admittedly, each law school's faculty is organized and works together to deal with issues facing the school. Also, there are organizations such as the Association of American Law Schools with its sections grouped according to the various fields of law and special interests. These organizations offer a few avenues for coordinated or collaborative endeavors. Yet the general rule is still that, beyond these formal organizational avenues, law professors work as individuals, and their work lies within fairly narrowly-defined boundaries.

Compartmentalization works by delegating a problem to one particular part of the profession and then assuming that this one part is the only one that needs to act. This practice functions quite well much of the time. It works well with the kinds of issues usually being considered within the various narrow fields of law including evidence. If the problem with credibility identified here found both its source and its remedy solely within the field of evidence, and had only minor or non-substantive impacts on other fields, this method of handling the problem would be satisfactory. However, because the source of the problem and part of its remedy lie

¹⁰⁵ For a consideration of the extent to which the profession has begun to take systems issues into account, see TBOR, *supra* n. 2, Introduction.

outside evidence, and the problem has major substantive impacts on other fields, this operating practice is a profoundly dysfunctional approach to our question of credibility.

If the profession is to successfully conduct an adequate inquiry into systemic issues such as our credibility problem, and institute appropriate reforms for it, the various parts of the profession will need to develop procedures for cooperating and collaborating more effectively. The field of evidence will serve as our example since a problem with credibility would normally be seen as solely an evidentiary concern. Currently, evidence is often taught and practiced as if it is entirely separate and apart from the fields of scholarship on which it inevitably rests: jurisprudence and the philosophy of science. While this division is useful and perhaps even necessary for pedagogy and practice, it can severely hamper the process of inquiry and reform needed when the profession faces a systemic problem. To equip the profession to remedy our credibility problem, evidence needs to be both taught and practiced in a way that recognizes and actively manages its links with its underlying fields. The first step in doing so is to import our two terms, universal reason and the New Reason, from an underlying field into the field of evidence proper. Before we define them, we need to consider what is involved in taking ideas developed in one field and using them in another.

Rules of evidence are always grounded in a set of assumptions about the nature of law and the type of inquiry undertaken in courts of law. This is the territory covered by jurisprudence. At an even deeper level, rules of evidence are also always grounded in assumptions about the nature of human reason. This is the territory of the philosophy of science, the field concerned with how humans can claim to know what is true. Although any reforms to the rules must be solidly grounded in evidence's underlying fields, the fields of jurisprudence and philosophy of science are too esoteric for most of the people whose help is needed if the profession is to successfully undertake either an adequate inquiry into a systemic problem or a successful campaign for reform. Few people study these fields and even fewer can claim much expertise in them. Although many law schools offer at least a limited introduction to one or more schools of jurisprudence, what law

school offers a course in the philosophy of science? Neither field is a prerequisite for a student taking an evidence class or for a judge issuing a judicial ruling on an evidence issue. Beyond these difficulties lie others. The scope of the fields of jurisprudence and philosophy of science are too limited, in and of themselves, to adequately explore all the issues relevant to remedying our credibility problem. For example, it is not within the usual province of a jurisprudence professor to develop proposals for new rules of evidence. That work usually belongs to evidence professors. Thus our credibility problem cannot be delegated exclusively to the members of either of these fields.¹⁰⁶ Moreover, while evidence professors may write about the evidentiary issues in a domestic violence case¹⁰⁷, it is ordinarily not within their province to write about the substantive meaning of domestic violence as is done in this article's companion piece. At present, the responsibility for exploring and developing the systemic links between these various fields is not assigned to any member of the legal academy. As a result, these systemic links are all too easily ignored or overlooked.

Instead of this disjointed situation, we need to explicitly manage the links between fields. Issues developed and explored in evidence's underlying fields must be translated into terms that are meaningful and useful to people who have no training in either field. Whether we practice law or

¹⁰⁶ Since I am a systems specialist, my professional goal is to become a systems development professor, and since this is a systemic problem, some might be tempted to delegate it exclusively to someone like me. However, it is in the very nature of systems issues to recognize the linkages or relationships between fields. A systems problem *by definition* does not belong to any one field of law, including systems. Systems has its own proprietary field of study just as every other field of law, but a systems problem belongs to the system *as a whole*. Right now, these problems fall between the cracks of the existing system.

¹⁰⁷ *I.e.*, see Raeder, *supra* n. 12.

teach it, whether we are experts in jurisprudence and philosophy of science or have no training in them whatsoever, the effort to adequately remedy the defects in the rules of evidence identified here must draw on these underlying fields. The reason is simple – these underlying fields are the source of the problem with law’s actual practices, and therefore they must provide key parts of the remedy. They cannot provide all of the remedy – the whole remedy is beyond their scope. They provide just one part of it, but it is an important part.

We can now begin to see how the isolated nature of the individual law professor’s work hampers the exploration and resolution of a systemic problem. For example, it is not normal for evidence professors and jurisprudence or domestic violence professors to collaborate, working together to articulate and remedy a problem that crosses the boundaries of their respective fields, or to work together to evaluate a remedy proposed by others. Many law professors who specialize in one field rarely even read the literature of other fields, and when they do, they tend to defer to the expertise of professors who specialize in those other fields. These operating practices are certainly understandable, but they leave the profession as a whole helpless when it faces a systemic problem. Law professors tend to be very responsible people, willingly accepting responsibility for their part of the profession. When the profession is facing a systems issue, though, we all need to expand the scope of our responsibility to include any steps necessary to equip the profession to effectively manage the links or interrelationships between our own part of the profession and other parts of it.¹⁰⁸

To solve our credibility problem, we need to change the theory of reason on which the litigation system is grounded. The type of inquiry and other professional action necessary to change

¹⁰⁸ Of course, the administrative structures used in law schools also need to be adjusted to support this work. The incentive structures, allocation of scarce law school resources, and career paths of law professors need to accommodate systemic work.

a theory of reason is far more extensive than that which is necessary to remedy a problem narrowly confined to the field of evidence. Changing the theory of reason used in the profession is the biggest and most important enterprise our profession can undertake, both conceptually and organizationally. No organization within the profession currently has the responsibility for this type of work.¹⁰⁹ Because law is grounded in reason, such a change will affect all lawyers, no matter what our substantive specialty or the type of work we do. Reason defines our domain, and we all are responsible for that domain. We all need to be involved in the process of deciding whether and how to change the theory of reason the profession uses – which means the theory of reason that each of us uses every day as we engage in our work.

Because the root of our credibility problem lies in the profession’s theory of reason, the inquiry and other action necessary to develop and implement its remedy will necessitate a major effort from all parts of the profession: the academy, the judiciary, and the organized bar. It will also require input and support from the public and advocacy groups that work with the type of cases most affected by related defects in the rules. Obviously, many more linkages or relationships need to be recognized and managed than those between evidence and its underlying fields. Just as the relevant issues need to be translated from philosophy of science and jurisprudence into terms meaningful to those lawyers who teach and practice evidence, the issues need to be further translated into terms useful to the rest of the profession and the public. Members of the profession

¹⁰⁹ I have examined the missions or purposes of various professional organizations, including the American Law Institute, the American Bar Association, the ABA Foundation, and others. Most have charters which could be interpreted or stretched a little to be broad enough to include the systemic dimensions of legal work, but none are currently being interpreted in that way, and it would probably take considerable work to re-orient these organizations so that they are equipped to work with systemic issues.

from various fields, including evidence, must actively undertake this work of translation and foster the process of inquiry and reform. A good first step would be for our law schools to add positions for professors of systems development, people who are specifically trained both to identify systems issues and to initiate and foster the necessary collaboration and cross-field interaction necessary to work with them.

We need to undertake this work now. If the profession continues as it usually operates, the inquiry and translation may eventually take place although the process will be very slow and gradual. It will be initiated by individuals working as individuals rather than as a coordinated effort by the profession as a whole.¹¹⁰ Business as usual is certainly far more comfortable and convenient for members of the profession than undertaking the additional work necessary to deal with difficult systemic reforms, but what about the public? Don't the American people deserve our best efforts? If we allow things to proceed in the usual way, are we not letting them down? The reform efforts need to be guided by the realization that every day that goes by, more cases with issues like those found in *People v. Lopez* are litigated in this country, producing various kinds of unacceptable results. While working on the underlying jurisprudence and philosophy of science questions, I have read and heard news stories that, for someone trained to recognize the issues, identified similar kinds of problems in cases ranging from employment discrimination to environmental litigation, from constitutional litigation on civil rights issues to trademark, antitrust, and other commercial litigation. The public has to live with shortcomings in the professional practices for which we are responsible. Thousands of people are being negatively affected by this type of problem as they go

¹¹⁰ The work of coordinating and at times even initiating this type of reform is the work of systems development professionals. The need for it is triggered when an existing legal practice is not adequate to capture a real-world situation because of problems with theory.

through litigation today. The profession needs to act now, and it needs to act as a profession, not as a congeries of isolated individuals.

The underlying work in jurisprudence and philosophy of science is already fairly well advanced.¹¹¹ Both this article and its companion are adaptations of Chapter 2 of THE BRIDGE OF REASON, the second in a trilogy of books that deal with the relevant questions of jurisprudence and philosophy of science. Two terms developed in this trilogy articulate the exact nature of the defect in the existing rules that produced the difficulties in *People v. Lopez*. We can borrow those terms from the philosophy of science and import them into evidence. The terms are *universal reason* and the *New Reason*.¹¹² Each refers to a theory of reason. The distinction between the two is quite simple. Universal reason assumes that all humans reason alike, that the conceptual element of human reason operates the same way in each of us.¹¹³ Universal reason is an old form of reason, and has been the standard used in law for centuries. For those who care about such issues, ADOR details its history and pedigree.¹¹⁴ The New Reason assumes that when humans reason, each has the capacity to use conceptual standards (including norms, beliefs, and theories) which differ from the

¹¹¹ See generally, ADOR and TBOR, *supra* n. 2. Unfortunately, ADOR has not been reviewed since its publication and TBOR has yet to be published. I welcome scrutiny of these efforts by others in the field, and I welcome any independent inquiries that may be undertaken on these subjects. The more who undertake serious inquiry into these issues, the stronger will be the ground on which any reforms will rest.

¹¹² *Supra* n. 21.

¹¹³ ADOR, *supra* n. 2 at 33-6.

¹¹⁴ *Id.* at 36 (perspectivist reason is an element of the New Reason, *supra* n. 112).

standards used by others with whom that person may be interacting.¹¹⁵ The use of the New Reason, while examining *People v. Lopez*, enabled us to uncover the credibility problem identified in this article.

A new theory of reason has become essential because changes in American society, particularly over the course of the 20th century, make differences of conceptual frame pervasive in our nation. ADOR details the social changes that have made differences of conceptual frames so widespread that they are now characteristic of our society.¹¹⁶ The law needs to be grounded in a theory of reason that matches the nation's current social reality. The New Reason matches that reality. Universal reason does not.

In the next section, we will see that universal reason grounds the rules of evidence used in the *Lopez* case. We will use our terms, universal reason and the New Reason, as we look at the

¹¹⁵ The New Reason is also distinguishable from pragmatism, the first philosophy intentionally designed to take account of differences in the way people think. Pragmatism was brought into law by sociological jurists and legal realists ranging from Oliver Wendell Holmes, Jr. and Roscoe Pound to Karl Llewellyn and Felix Frankfurter. Thus many in law may mistakenly believe that the profession is already doing a good job managing differences of view. Nevertheless, pragmatism is not structurally capable of fully taking account of differences of conceptual frame while the New Reason is. ADOR, *supra* n. 2, repeatedly addresses the distinctions, particularly with respect to the philosophy of science, between pragmatism and the perspectivist element of the New Reason. This article should debunk the idea that the profession is already dealing with differences of conceptual frame during the trial. Chapter 5 and 6 of TBOR, *id.*, trace the philosophical issues into Supreme Court decision-making. An article based on these two chapters, tentatively titled *Politics on the Bench: The Constitution and the New Reason*, is in the planning stages and will be written shortly.

¹¹⁶ ADOR, *supra* n. 2 at 144-46.

rules of evidence actually in play in *People v. Lopez* to consider whether those rules need to be changed and if so how. We will also briefly examine our traditional evidentiary considerations, the ban on character evidence and the risk of jury nullification. When doing so, we need to keep in mind that our subject matter inherently involves matters that are conceptually large. Just as a systems problem is too large to fit within the confines of existing organizational structures used in the profession (i.e., the various existing fields of law), it is also conceptually too large to fit within the framework of any single article. The usual format for law review articles is the third of our current operating practices that present troublesome barriers to dealing with systems issues. We will conclude this section by examining it in a little more detail.

The profession needs to consider systems issues and take action with respect to them, and once again, the action that we need to take must be suited to the problem facing us. Section V needs to articulate some of the standards that characterize the New Reason, but must do so without having the opportunity to expound on those standards in the depth that readers (or authors) would like. The purpose of doing so, besides the elementary problem that a beginning must be made somewhere, is to inform readers of the general parameters which need to guide the development of appropriate replacement rules. The New Reason's standards will differ, often in intriguing ways, from what is currently the norm in the profession. Ed Imwinkelried, an evidence professor, has been gracious enough to help me, a systems development specialist, to write this article using the language and conventions of the field of evidence and in doing so has helped to illustrate one type of cross-field collaboration that needs to be fostered if the profession is to work effectively with systems issues. In the process, we have also had to confront the limitations of the existing article format. In the course of raising format questions, he has accused me of frustrating readers by dropping tantalizing tidbits without providing sufficient detail to satisfy. I plead guilty as charged while concurrently raising the defense of necessity and urging readers to adjust their expectations to fit the nature of systems issues.

The new standards implicated by our credibility problem cannot possibly be spelled out here in the depth necessary for readers to fully grasp their many implications. There are too many standards, the standards are conceptually large, and we lack the raw material that would be needed to adequately explore them.¹¹⁷ Nevertheless, these new standards can and must be spelled out here to the extent possible. In addition to their primary purpose of providing general parameters to guide future development, introducing these new standards serves other important functions. They are necessary to help readers avoid drawing flawed inferences, for example, with regard to the traditional evidentiary considerations to be discussed in the next section, the ban on character evidence and the risk of jury nullification. Further, despite the limitations of the format being used, the issues can hopefully be spelled out sufficiently to induce readers to take some small steps that may currently be within their power to foster the process of inquiry which must necessarily precede any reform of the magnitude proposed here – that of changing the legal system’s theory of reason. A few suggestions are made in the conclusion to this article. This is the best we can do in an article that must speak to issues as large as those inherent in our credibility problem.

We now move on to our discussion of rules of evidence, nullification, and character.

V. On the Rules of Evidence, Nullification, and Character

Since *People v. Lopez* was a California case, that state’s rules of evidence will be discussed here, but similar problems arise under the evidence codes of other states and at the federal level.¹¹⁸

¹¹⁷ An example is the addition of a whole new category of evidence noted *infra* nn. 128 - 129 and accompanying text.

¹¹⁸ The Federal Rules of Evidence finesse many of the issues that are raised far more explicitly in the California Evidence Code. There are no equivalent federal rules, for example, for the

The California Evidence Code reflects universal reason. Rules of evidence built on the basic premise of the New Reason will need to look considerably different than do current rules. One of the most important changes lies in the current assumption that facts are the only inputs that the law needs to determine the truth relevant to its work. This assumption inevitably produces rules that embody universal reason. The New Reason holds that the law needs two inputs, both facts and concepts, to determine the whole truth. A judge or jury cannot reach an accurate verdict, or know the whole truth about an issue such as whether Lila provoked the abuse, without knowing both a broad set of facts and the conceptual frames employed by both Lila and David. Beyond reaching accurate verdicts, the legal system cannot end the violence without helping David understand the differences both between how he and Lila reason about their relationship and how he and the state reason about what behavior is legally acceptable. To do these things, lawyers and judges need to work with both facts and concepts.

Sections of the California Evidence Code that reflect the facts-only assumption include those that specify that questions of law are for the court while questions of fact are for the trier of fact, whether judge or jury.¹¹⁹ Of course, this is the traditional division of labor, found in all legal systems across the country. It is even found in Article III of the Constitution.¹²⁰ Under the New Reason, judges and juries would still need to make decisions about fact and law, so this division of

definitional sections discussed here. Yet the things that are spelled out specifically in the California code are frequently assumed by the federal rules.

¹¹⁹ CAL. EVIDENCE CODE § 235 (1965) (West 1995) (trier of fact defined); CAL. EVIDENCE CODE § 310 (1965) (West 1995) (questions of law specified as being for court); CAL. EVIDENCE CODE § 312 (1965) (West 1995) (when jury is trier of fact, all questions of fact are for the jury).

¹²⁰ U. S. CONST. art III, § 2, cl. 2: “. . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

labor would remain. However, several additional important considerations will be added because the New Reason will change how these decisions are reached. Our new input, concepts, will primarily affect how decisions are made. Completely absent from the entire California Evidence Code is any rule specifying the need to pay any attention at all, or do anything at all, with the conceptual standards – the beliefs, theories and/or norms – held by any witness or party, including the state. Although *People v. Lopez* was not a suitable case to illustrate the issues, judges and jurors have conceptual frames as well, frames that may differ from that of each and every other participant in the case, whether judge, juror, party, or witness.¹²¹ A full set of new rules must set out how to manage all differences of conceptual standards that might exist.

The major failure of universal reason is its assumption that we all reason alike.¹²² This assumption permeates the California Evidence Code. One way it makes its appearance is through the assumption that the only minds that matter to finding the truth are the minds of judge and jury. For example, the California Evidence Code section defining “proof” states that “[p]roof is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier

¹²¹ Chapters 5-7 of TBOR, *supra* n. 2, deal with differences of conceptual frames among members of the Supreme Court. Those differences currently shape constitutional law, but would be better managed under the dictates of the New Reason.

¹²² Other scholars are also beginning to discover this problem with universal reason, see, e.g., Goldman, *supra* n. 18; SHAWN W. ROSENBERG, *THE NOT SO COMMON SENSE: DIFFERENCES IN HOW PEOPLE JUDGE SOCIAL AND POLITICAL LIFE*, 2002. Rosenberg argues that people reason differently although the differences he recognizes and studies are not those discussed here. He argues that his position “contradicts the dominant view in social psychology that all people think in basically the same way.” (at 80).

of fact or the court [emphasis added].”¹²³ The section on the jury as trier of fact states that “[s]ubject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants [emphasis added].”¹²⁴ These rules are completely silent about how the evidence might be interpreted in the minds of the parties, the witnesses, and the community in which the trial is taking place, even though as we have seen, they are essential to the work of the law. This is universal reason in operation.

In philosophy, universal reason has a companion theory or assumption which holds that truth compels. When applied in law, this leads to the assumption that the truth as found by judge and jury is or should be compelling to all. This assumption is wrong. As we saw in the *Lopez* case, the facts found by the jury may have been entirely true, but the truth in those facts was not compelling to all alike. The jury’s truth was not even entirely *comprehensible* to the defendant or to others in the local community. David used different conceptual standards than either Lila or the jury. He reasoned differently both about the facts of the case and about Lila’s credibility. This difference is the cause of the unacceptable outcomes in this case. Once we recognize that the way these people reason matters to the outcomes the legal system is able to generate, the universalistic premise of the current rules no longer makes any sense.

Universal reason also makes its appearance in other sections of the California Evidence Code. Consider the provision defining “inference.” It states “[a]n inference is a deduction of fact that may logically and reasonably be drawn from another fact . . . [emphasis added]”¹²⁵ The section does not specify whose logic or reason is to determine what deduction is drawn. Indeed, it seems to assume that logic or reason either does or should work the same way in all of us. Another section

¹²³ CAL. EVIDENCE CODE § 190 (1965) (West 1995).

¹²⁴ CAL. EVIDENCE CODE § 312 (1965) (West 1995)

¹²⁵ CAL. EVIDENCE CODE § 600 (1965) (West 1995).

defines “relevant evidence” as follows: “[r]elevant evidence means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action [emphasis added].”¹²⁶ Again, the section does not specify in whose reason this tendency needs to be produced. Indeed, it seems to assume that each person’s reason is the equivalent of everyone else’s – that there is one right reason, and we all need to reason in that way. In other words, it assumes we all do or should reason alike. Yet on a question as central to the work of the law as whether Lila did anything to cause the violence, we have seen that the logics or processes of reason employed by the defendant and the prosecutrix work in diametrically opposing ways. The facts that matter to the question of causation are different for each, and the concepts (here norms) determining which facts are relevant similarly differ. And this difference also appears in the broader community in which the parties lived and in which this case was tried.

The jury probably focused on a different, third set of facts and used a legal concept in determining David’s guilt. Facts relevant to David or Lila may not strike the jury as relevant. For example, the facts that David worked hard, was faithful to Lila and supported her and Ariela are irrelevant to the jury’s determination of whether the criminal charges against him were proved. Thus it is possible that under the existing system, facts such as these would not be admitted during his trial. Even if these facts were admitted, the differences in meaning that these facts hold for David and Lila respectively would certainly not be spelled out. Nevertheless, these facts are directly relevant to David’s understanding of the situation, so they are highly relevant to doing justice with respect to him. These facts are directly relevant to ensuring that David is not misled by the legal proceedings, either about Lila’s testimony or about his conviction. Because these facts are so relevant to David, they are also relevant to ensuring Lila’s future safety as well as the safety of

¹²⁶ CAL. EVIDENCE CODE § 210 (1965) (West 1995)

other women with whom David may be involved. These facts are directly relevant to ensuring that the courts communicate clearly with the general public. These facts are also likely to be important to members of the local community who share David's patriarchal normative system and beliefs about the acceptability of corporal punishment in the family.

We now need to introduce one of those conceptually large standards that distinguish the intellectual foundation provided by the New Reason from that of universal reason. ADOR argues that the law has historically undergone two great waves of rationalizing effort, the first in the Middle Ages and the second at the time of the Enlightenment.¹²⁷ Taken together, they rationalized the decision-making function of the judge and/or jury, and gave us a trial process grounded in reason. Unfortunately, this history *only* gave us a trial process rationalized with respect to judge and jury. The law remains to be rationalized from the perspective of those who are subject to law. If we were to structure the trial process using the assumptions of the New Reason, we would concurrently rationalize the trial from the perspective of those who are subject to law. This would be a huge change, one we are beginning to glimpse using *People v. Lopez* as our vehicle.

In a revised trial format, facts such as the ones that matter to David would be admissible because they manifest a key part of the understanding of the situation held by one of the agents in litigation. In *People v. Lopez*, the purpose of admitting them would have little to do with persuading a jury of anything, let alone resolving the legal charges against David.¹²⁸ Instead, the purpose of admitting them has to do with: (1) ensuring that a defendant like David accurately understands his conviction and has the sense that he has been heard and treated fairly; (2) producing better social outcomes; and (3) ensuring that the general public gets accurate messages

¹²⁷ ADOR, *supra* n. 2, at 21, 246-68.

¹²⁸ Obviously, in a different case, one in which differences of conceptual frame exist between a party and a juror, admitting such facts would be critical to reaching an accurate verdict.

from the courts. These facts should be admitted to give the parties the sense that justice has been done, even when one of them loses. In the final analysis, the purpose of admitting these facts is so that when we lawyers talk about the legal system doing justice for all, we mean what we say.

Facts such as the ones that matter to David would not be admitted at random or in an unconnected way. The procedures used in court must be designed to achieve joinder both on the level of fact and concept. Joinder was illustrated in Section III as we articulated the norms held by Lila and David respectively and explained the facts that mattered to each in light of those norms. This is the essential process – identifying any parallel concepts in play in an interaction, bringing both to light while identifying and interpreting facts in light of those parallel concepts. David’s facts would be admitted into evidence in light of new rules that required that concepts (including norms) used by agents in litigation, such as the defendant, the prosecutrix, and the state, be identified and addressed. Facts such as David’s faithfulness and efforts to support his family would be admitted because David’s normative system gives them a meaning relevant to the charges filed in the case. These facts need to be admitted as part of the process of reaching the whole truth of the situation. That whole truth must be broad enough to include the facts and concepts or norms that matter to David, to Lila, and to the state. Only by developing this kind of whole truth can we identify and remedy inferences that embody flaws which may be found in the reasoning of parties or key witnesses. Unless remedied, these flawed inferences may preclude the kind of outcomes we want from our courts.

We have previously had another hint of what it means to rationalize the trial process from the perspective of those who are subject to law. In Section III, reference was made to action science’s insight that humans are self-interpreting beings and that our interpretations enter into our actions.¹²⁹ Indeed, this insight was used as we explored the role played by the respective conceptual

¹²⁹ *Supra* n. 84 and 85 and accompanying text.

frames of David and Lila in producing the violence that occurred in their relationship. By coupling that insight with the New Reason's attention to differences of conceptual frame and rationalizing the trial process from the perspective of those who are subject to law, we have essentially added a new category of information to the trial process.¹³⁰ We equip the trial process to engage directly with a party's self-interpretation instead of the current situation in which we are very limited. As Mirjan Damaska once noted, the "most frequently traveled cognitive route" we currently take to identify "aspects of the defendant's knowledge and volition" is through "inductive inference from external facts."¹³¹ This process is fraught with inferential difficulties, the most important being the presence of differences of conceptual frame.¹³² Of course, under either the existing trial process or one structured under the New Reason, a criminal defendant need not testify unless he so chooses. Regardless of whether he testifies or not, his self-interpretation cannot currently be identified with the precision made possible by our proposed new rules. Similarly, neither his self-interpretation nor his agency can currently be engaged with in the way made possible using appropriate new rules.

¹³⁰ This new category affects both the information-gathering aspects of the trial and the action outcomes. With respect to the former, we gain the capacity to reach the self-interpretation of a party or witness. With respect to the latter, we gain the capacity to reach the agency of each.

¹³¹ Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1085 (1975).

¹³² *Supra* n. 2 at 57, citing the philosopher E. A. Singer, Jr., who identified the major failure of this route. Inductive inference from external facts is a process that inherently relies on the internal experience of one person (the inference-drawer—the witness, judge or juror) as being the same as that of the person (usually the defendant) about whom the inference is drawn. The experience of the first is not the same as that of the second, and no experience can make it so.

Before we leave our discussion of the rules, we need to briefly address the rules of procedure. The relevant procedural rule in the *Lopez* case is no doubt similar to rules in most states.¹³³ It provides for the order of procedure in the trial. After the introductory reading of the charge, prosecution and defense each may make an opening statement in turn. Next, the prosecution presents its evidence followed by the defense. After presentation of the evidence, the parties each have an opportunity to present rebuttal. After closing arguments, the case is submitted to the jury. This order will need to be adjusted to allow for joinder of fact and concept between all relevant participants in the trial, and to ensure that the agents in litigation adequately understand the proceedings.

Our last task for this section is to consider our traditional evidentiary issues. How would rules recognizing and managing conceptual frames affect the ban on character evidence or the risk of jury nullification? Let us begin with the latter since there is fairly widespread agreement among evidence professionals as to what it means.¹³⁴ One article sums up the primary definition found in the literature thus: “[j]ury nullification . . . occurs when a jury acquits a defendant despite finding facts that leave no reasonable doubt as to guilt.”¹³⁵ On initial reading, it might seem that a trial that addressed David’s conceptual frame would increase the risk that a jury would acquit despite finding proof of guilt.

¹³³ WEST’S ANN.CAL.PENAL CODE § 1093 (2004).

¹³⁴ “Widespread agreement” is not the same as complete unanimity. A sample of the variation in meanings of jury nullification can be found in Teresa L. Conaway, Carol L. Mutz, and Joann M. Ross, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004).

¹³⁵ Kaimipono David Wenger and David A. Hoffman, *Nullificatory Juries*, 2003 WISC. L. REV. 1115, 1116 (2003). The literature is reviewed at 1116 n.10.

Of course, this initial reading overlooks the New Reason's insight about the nature of what is reasonable. Who determines whether doubt is reasonable? It is entirely possible that a case defined by legal commentators as an instance of jury nullification may look to the lay jurors who decided the case like an instance of reasonable doubt. On the other hand, in some cases of nullification, jurors may either affirmatively believe the defendant is guilty or may be so concerned about some other aspect of the trial that they don't care about his guilt.

The New Reason would retain, in modified form, one old way of managing this issue while concurrently giving the courts three new ways. The old method is that the judge would instruct the jury with respect to the law. The modification would include a process to manage any relevant differences of conceptual frame between the defendant, the jurors and the law. As to the three new ways, the first is that a trial under the New Reason should also include enough of Lila's conceptual frame and the state's norms to balance or counter the focus on David's conceptual frame. Second, a trial structured under the New Reason would be capable of managing differences of conceptual frame not only among witnesses and parties but also with respect to jurors. Differences of conceptual frame can and no doubt do exist between jurors and witnesses and/or parties as well as between various members of the jury. The process of managing such differences should significantly reduce the risk that jurors will reach decisions that are inappropriate under the law and facts of cases. Flawed inferences among jurors would have a chance of being caught and corrected before any verdict is issued. The third factor is related to the second. Just as the court would have new ways to communicate with the defendant and the public at large in a trial structured under the New Reason, jurors would also have new avenues to communicate their concerns.¹³⁶ This should

¹³⁶ Chapter 3 of TBOR, *supra* n. 2, calls for the addition of systems development professionals in local court systems. These professionals would be federal employees in federal court, or employees of the state or county in local courts. Under a proper procedure, they could take an undeveloped but

enable them to voice their concerns without frustrating the purposes of the trial as currently happens when they nullify. Since we have neither the space nor the raw material to further explore this tantalizing tidbit, we now move on to the ban on character evidence.

The question of how the New Reason's handling of conceptual frames might relate to the ban on character evidence is more complicated for two reasons. First, there is less consensus within the field of evidence respect to the definition of character.¹³⁷ Obviously, determining the relationship between differences of conceptual frame and the ban on character evidence is critically dependent upon the definition of character.¹³⁸ The second set of complications arises from the basic

important concern raised by a juror in a case and ensure that the legal system responds to it appropriately. Thus jurors would have a way to directly affect the operation of the legal system, an avenue that would be much more socially responsible and more certain of having the desired impact than nullification.

¹³⁷ David P. Leonard summarizes the variation in *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 451, citing 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 52, at 1148 (Peter Tillers, ed., rev. ed. 1983); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 162, at 340-41 (1954); and Fed. R. Evid. 405 advisory committee's note:

Wigmore, for example, defined character as "the actual moral or psychical disposition or sum of traits" In an often quoted passage, McCormick defined it as "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness." The Advisory Committee on the Federal Rules of Evidence suggested that "character is defined as the kind of person one is," and distinguished it from habit, which is . . . a form of propensity evidence.

¹³⁸ Anyone who accepts a definition of character such as those provided by Wigmore or McCormick, *id.*, might be tempted to conclude that the ban on character evidence would entirely preclude the use of David's conceptual frame. In *People v. Lopez*, the aspect of David's frame that

nature of domestic violence as a phenomenon. It can be difficult to identify an abuser's character with any precision.¹³⁹ The general rule is that evidence of character cannot be introduced as

mattered most involved his normative beliefs – specifically, how he reasoned about what is morally acceptable. Is that the same as his “actual moral or psychological disposition” or a “propensity” that embraces his moral aspects? David may be similar to many abusers. The way he reasons about using physical force against Lila may say little or nothing about his general disposition toward violence. He may have a violent disposition generally or he may not. The information available to us does not indicate one way or the other. Evidence of his general character may say little or nothing about whether he used violence against Lila. Further, evidence as to his conceptual frame says nothing at all about whether he hit Lila with the crowbar in that one incident he contested. All we can safely conclude from the material available to us is that when he uses physical force against Lila, he reasons about it in a certain way because he holds a particular normative belief. His general reputation, whether for violence or not, has little bearing on how he reasons about it. And how he reasons about violence may say little or nothing about whether he performed any single specific act of violence.

¹³⁹ Those who are not particularly familiar with the field might believe that David's reasoning about the acceptability of using force against Lila was a manifestation of his character, evidence of his disposition to violence. Those who work in the field would recognize a problem with that assumption. Many abusive men have aptly been compared to Jekyll and Hyde, Bancroft, *supra* n. 35, 3; Mary Susan Miller, NO VISIBLE WOUNDS: IDENTIFYING NONPHYSICAL ABUSE OF WOMEN BY THEIR MEN 115, 207 (1995); Mateer, *supra* n. 96. They generally exhibit very peaceful personalities but have a dark side that comes out in episodes of violence in the home. Those episodes are always kept private so friends, neighbors, and other acquaintances never see that side of the abuser. This is one reason why women who are battered sometimes have great difficulty

circumstantial proof of conduct on a particular occasion.¹⁴⁰ Thus the ban would come into application if, for example, the state in *People v. Lopez* sought to introduce evidence of David's character as circumstantial proof of any of the counts against him.

The New Reason's impact on the analysis of character reaches a little deeper than the questions about character raised to this point. The very act of defining David's behavior as "violence" may embody a two-frame flaw. It may be to impose our conceptual frame on his behavior. If we use his conceptual frame, we may need to label his behavior "discipline" or some other such term. In his mind, his character may be very different than what it is in ours. Both character and behavior are interpretive phenomena. Human interpretation inevitably enters into the choice of terms to be applied, so conceptual frames are inherently involved. Of course, under the New Reason, we are not compelled to accept David's conceptual frame.¹⁴¹ We are not bound by his definitions, either of his behavior or of his character. By the same token, he is not compelled to accept ours. Instead, the New Reason requires two things of us. The first is that when we speak about his behavior or his character, we do so in a way that recognizes the difference between the two conceptual frames. The second is that, when we take official action with respect to him, we do so in a way that manages those differences. Thus we may initially use his language (his definitions of his behavior and character) as a way of letting him know we recognize and understand how he sees the world, and then go on to perform a legal task. In the trial, one such task is to help him understand how both Lila and the state see his behavior. Another is to introduce him to the law's requirements with respect to that behavior.

getting anyone to believe their descriptions of the abuse. There could be considerable debate about which behavior constitutes such a man's character or general disposition with respect to violence.

¹⁴⁰ Sanchirico, *supra* n. 93 at 1232; Fed. R. Evid. 404 (a).

¹⁴¹ See *supra* n. 101.

The use of conceptual frames will have the same impact on the ban on character evidence as on the risk of jury nullification. Despite the lack of agreement about the definition of character, there is widespread consensus about the rationale behind the ban on character evidence. Character evidence is restricted because of “the danger of unfair prejudice it engenders.”¹⁴² Admitting character evidence is thought to invite the finder of fact to judge the person rather than the charged acts. A fair trial is one in which only the charged acts are judged, and only as to their accordance with law. As was true of the question of nullification, it is entirely possible that the use of the New Reason would offer courts a better method for avoiding unfair prejudice than the ban on character evidence. The process of identifying and managing differences of conceptual frame will give the courts a direct way to identify and manage prejudice so that it does not subvert the work of the law.

Readers who want more detail on these issues should consider the action suggested below.

VI. Conclusion

Our understanding of the nature of credibility has been far too limited. The traditional focus is on the jury’s determination as to who is telling the objective truth.¹⁴³ We examined *People v. Lopez* and saw that an apparent conflict in testimony, as to whether the victim caused the abuse she endured, disappeared when we control for the differences between the conceptual frame of the chief prosecuting witness and the defendant. In its place, we saw a new kind of “whole truth” of the case, in which each participant was seen as telling the truth as she and he knew it because each was viewing the situation from their own conceptual frame. We developed a perspective capable of

¹⁴² Leonard, *supra* n. 137 at 450.

¹⁴³ The very term “objective” requires re-definition under the New Reason, see ADOR, *supra* n. 2 at 40-44. The re-definition concerns how one manages differences of points of view in the process of claiming objectivity.

taking account of both frames. This new kind of whole truth has the capacity to significantly increase the legal system's ability to produce both more accurate verdicts and more socially desirable outcomes. For the jury, the broader perspective entirely eliminated some of the conflicts in testimony. For key participants in the trial, namely the victim and defendant, the broader perspective offered a deeper understanding of the violent dynamic they both experienced, hopefully one sufficient to help them break the cycle of violence. We need to expand the legal system's existing terminology to work with differences of conceptual frames, adding fact-based and concept-based partiality to the existing understanding of interest-based partiality.

Although credibility is a traditional evidentiary problem, the issues raised here go far beyond the scope of the field of evidence. Our credibility problem is a systemic problem because its roots and remedy lie in different fields (jurisprudence and philosophy of science) than the field in which it problem arises (evidence). Also, it has major substantive implications for at least one other field (domestic violence). The root of the problem, and a key part of its remedy, lie in the theory of reason institutionalized in law. The problem with credibility arises out of universal reason, the deep assumption that human reason does or should work the same way in each of us – that we all reason alike. That assumption has broken down. The legal system needs to be grounded in the New Reason, the competing assumption that we each have the capacity to reason using a conceptual frame that differs from those with whom we interact. Because law is grounded in reason, changing the theory of reason institutionalized in law is the largest and most important task the profession can undertake. To convert the rules of evidence and procedure from universal reason to the New Reason will require a major effort from many different parts of the profession, involving many more people than evidence professors and practitioners.

The current organizational structure and operating practices of the profession are not adequate to take account of systemic linkages between fields of law which can be found in the *Lopez* case, and that case is just one small example of a phenomenon that affects many different

fields of law. Significant benefits would flow to both the profession and the public if these systemic linkages could be identified and managed wherever and whenever they exist.

We end this piece by describing a few small steps that readers may want to consider as a way of moving forward with the large process of inquiry and reform proposed in this article. An obvious first step was mentioned in the article: law schools need to add systems development professionals to their faculty. This would both increase the legal academy's ability to manage systems issues and allow for training law students to do the same.

Another important early step is for readers to further familiarize themselves with the New Reason so they can decide whether to adopt it themselves, and learn how to use it. As part of that process, evidence professors who want more detail on the issues considered in Section V are invited to take the initiative in the inquiry. Such an evidence professor could identify a suitable case to explore either jury nullification or character evidence questions and undertake the inquiry in collaboration with a systems specialist.

Also, it is critically important to explore more cases, in more fields of law, to examine more of the implications of identifying and managing differences of conceptual frame. Readers could play an important role in identifying cases that could be examined, finding the extra raw material necessary to identify the differences of conceptual frame present in each case, and arranging for the case to be examined. The examination needs to be conducted as a collaboration between substantive specialists in any relevant fields and someone trained to deal with systems issues and the New Reason. There are a number of issues that need to be explored which could not be addressed in this article. We particularly need to find a case in which differences of conceptual frame exist between, for example, a witness and a juror (jury trial) or a judge (bench trial). Readers could similarly watch for cases in which there is a conflict in testimony between two experts in which the conflict arises from a difference in their professional frames, such as in the scientific method each employs. Such differences present special challenges beyond what could be addressed

here. Differences of conceptual frames are everywhere. We need to learn how to recognize them and work with them.

Finally, readers could undertake one or more works of translation, translating relevant issues from one field of law into another, or into other communities (the practicing bar, special interest groups, the general public).

The American people deserve the best legal system we can give them. In this new century, that means a legal system grounded in the New Reason.