

Community Reliance on Adjudicatory Outcomes: The effect of court rulings on knowledge.

By F. Jason Seibert*

Willamette University College of Law
Science, Technology and the Law, Professor Chiappetta
F. Jason Seibert
April 10, 2008

* JD Candidate - 2009

Table of Contents

Section I: Introduction.....	1
Section II: The Judicial Process.....	3
What’s the big deal?.....	3
Theories of Community Justice.....	4
Knowledge Gained by the Court from the Community.....	5
Traditional Notions of Fair Play and Substantive Justice.....	6
What role does evidence play in the adversarial system?.....	10
A simple example of evidence and the power of judicial notice:	12
Changing what we actually know?.....	14
How Does Science Affect the Outcome of Law: defining what we know.....	16
Should we rely on the court to provide knowledge?.....	18
.....	18
Section II Summary.....	23
Section III: Untangling the Problem	26
What Does the Media Do?.....	26
Clear Context and Reporting Rules.....	29
Plain Language Reporting.....	30
Summary.....	32

Section I: Introduction

Where does knowledge come from? Where does society as a whole get its knowledge? Of the possible sources of information that surround Western culture on a daily basis, it may seem unlikely that the judiciary would provide knowledge; however, the following pages will articulate how important the judicial branch of government has become to the West for validation, confirmation and determination of what is accepted as truth and what is not.

Doesn't it seem strange that at any given moment the world as we know it can change, or that other worlds can change? One day, Pluto is a planet, the next day it is not. The following day, the State of New Mexico declares that Pluto is a planet when above the State. The debate will continue until it goes before a court of law, and only at that time will society know whether Pluto is a planet. That is the view of society, and it is frighteningly that simple. Western (U.S.) culture depends on the court to declare what is real, what is fact, what is allowable, or what rights are enforceable in society. We encourage people to relinquish their individuality to the State in exchange for the guarantees of economic and transactional efficiencies.

The efficient process used by the judicial system to resolve controversies and determine issues of fact has led to a spillover of the related "knowledge" into the surrounding community. This occurs when a controversy goes before a court, and the court must decide the outcome; however, some of the court's determinations are misunderstood by the non-legal community and are accepted as validated truth. For example, can the community trust a lie detector test? The court must make a determination as to the test's reliability to promote efficiency and economy in the court system and to provide the best evidence in the court room to resolve the dispute today, but the result is the "spillover" of information. The community at large learns that the court does not accept a lie detector test as evidence and confuses this determination with whether or not the

test's validity. This tension between people accepting knowledge versus allowing a court to dictate "knowledge" results in consequences.

Courts of law are set up to solve problems and narrowly define issues within the community. Sometimes people take that the wrong way. For example, the Oregon Supreme Court recently took certiorari on a case involving an investor and a brokerage firm. If the plaintiff investor wins their appeal, it would send shock waves through the investment community because brokerage firms may owe a duty to investors to protect investors' money (exposing brokerage firms to huge liability). However, the case has never gone to trial. Here lies the distinction between the legal world and the non-legal world. The non-legal world views this case from the perspective of the underlying fight (does an investment firm have to be careful with people's money); however the court system has not even heard the merits of the case. What is at issue before the court is whether or not the plaintiff has sufficiently alleged negligence in their initial complaint. The Supreme Court of the State of Oregon is being asked whether or not a procedural issue of a well-plead complaint has been placed before the court as to survive the trial court's decision of summary judgment. In short, the issue before the Court is one that decides a procedural issue and not the underlying fight.¹

This paper is about the judicial process in the community it serves, how the court makes determinations of fact, and how those decisions can be misconstrued by the community as validated knowledge. After the process has been discussed, and how the confusion is created, there may be a few things that the community can do to ensure that decisions of the court are not misunderstood going into the future. More importantly, the community needs a way to decide for itself what is knowledge without reliance on the court.

¹ *Boyer v. Barney*, 213 Or.App. 560 (Or.App., 2007) cert granted by Oregon Supreme Court and heard February, 2008 (pending decision).

Section II: The Judicial Process

What's the big deal?

Ideas, ideals and great conceptions are vital to a system of justice, but it must have more than that – there must be delivery and execution. Concepts of justice must have hands and feet or they remain sterile abstractions. The hands and feet we need are efficient means and methods to carry out justice in every case in the shortest possible time and at the lowest possible cost. This is the challenge to every lawyer and judge in America.

- Warren E. Burger, *Address*, American Bar Association, October 1, 1972²

The adversarial legal system is based on centuries of conflict between those who seek justice. There is an inherent battle between those who choose to create a set of rules by which the community should live and those that do not want to be subject to the rule of their community. Underlying the battle between the majority and the minority is the legal struggle to decide between what is right and what is fair. Within that struggle, to be efficient the legal community understands that the court must decide the current controversy before the court. However, the legal profession may sometimes forget the ultimate ramification of the decision on society, or society may make a overemphasize something that bears little significance to the legal profession.

For the purposes of this discussion, “community” may be limited to citizens of the United States, the judicial system to include state and federal courts, as well as the legislative body of government, the people living within the United States, and those that enter or exit its borders. Within this “community”, there has been a constant struggle within our culture to decide theories of legal decision making: Utilitarian or Retributive?

² Taken from Shrager and Frost, *The Quotable Lawyer*, New England Publishing, New York, 1986.

Theories of Community Justice

The Utilitarian system focuses on the betterment of the community, and sometimes allows harms to go unpunished. Conversely, the Utilitarian system may burden someone with great harm who may not be guilty, again, under the theory of the betterment of the community. Take for example the case of *People v. Superior Court (Du)*.³ Mrs. Du was found guilty of killing a young girl; however, her ten-year prison sentence was replaced by probation. The court decided that the punishment was limited to that which was necessary for Mrs. Du to rejoin the community. The community in which Mrs. Du lived was South Central Los Angeles, and the girl that Mrs. Du shot was a young African American girl. The latter community cried out for a stiffer punishment but did not get it. The legislature had passed laws that mandated stiff punishment and sentencing requirements because of the use of a firearm; however, the court set those aside and only gave Mrs. Du probation. Later, when Rodney King's assailing police officers were acquitted, the same community had had enough of the law, and the community self destructed, resulting in the Los Angeles Riots of 1992. Sometimes, Utilitarian theories backfire. Perhaps if Mrs. Du had gone to prison instead of walking free on parole, the LA Riots might never have happened.

The Retributive system is more rigid than Utilitarian. Retributivist theory is based on a more simplistic method: no crime goes unpunished, and no one is punished that does not commit a crime. This theory is similar to the Biblical form of "an eye for an eye." Under a Retributivist theory, Mrs. Du would have gone to jail and, in some jurisdictions, would have been put to death.

There are different uses of both theories throughout the United States, and in many cases there is a mixture of the two. In either system, or within the mixture, courts rely on evidence to

³ 7 Cal.Rptr.2d 177 (Cal.App. 2, 1992).

decide the outcome. Evidence is limited to direct testimony of witnesses, exhibits that are introduced to the judge or jury for consideration, and may include evidence from common knowledge. The entire body of evidence is to be weighed by the judge or jury to determine the outcome of the controversy before the court. In criminal contexts, the weight of the evidence must be very high against the defendant, emphasizing the Retributive theory of not punishing the innocent. In civil contexts, controversies between two people, the weight of the evidence may only slightly favor one or the other, emphasizing the theory of Utilitarianism – that the community is served by having a resolution to the conflict. A decision is worth more than whether or not the evidence is accurate or even fact.

Knowledge Gained by the Court from the Community

In either system, criminal or civil, when evidence comes from general knowledge it is said to have been given “judicial notice.”⁴ That is powerful stuff. When the Federal Rules of Evidence were enacted in 1975, one element of the codified rules was to give deference to the brevity of life. This means that a court can declare certain things to be true without a showing of proof. That calls into question what we know or, more specifically, what a court can really know.

Traditional ideas of ‘notice’ stem from the concept that the court may accept as fact that John the Farmer lives down the road without needing to call several experts and the county recorder to testify to that fact. So long as it is known within the community that John the Farmer lives down the road, the court accepts that knowledge prior to any controversy coming before the court. However, there have been times when the court thought it knew something (gave notice to community based knowledge), enforced laws based on that knowledge, and later turned out to be wrong. For example, Galileo screamed from the roof tops that the Earth traveled around the Sun.

⁴ A more in depth look at judicial notice and its definition is yet to come, be patient.

He was right, but the community had not accepted that information as truth, and ultimately Galileo was admonished by the court.⁵ This raises the questions of what the community really knows, and how much the community relies on its judicially determined knowledge? A community may obtain a form of validation because the court chooses to assume community knowledge as fact (or at least fact that is good enough to decide the case before the court).

Traditional Notions of Fair Play and Substantive Justice

When does a person become subject to the imposition of the law? What right does a community have to impose its rules on someone? The landmark case of *Pennoyer v. Neff*⁶ and its progeny of jurisdictional cases helped courts decide who and where a person would be subject to the reach of the court. In *International Shoe Co. v. State of Washington*⁷ the court held that a state would have jurisdiction over a person if that person “had sufficient minimum contacts as not to offend traditional notions of fair play and substantive justice”. The shoe company was headquartered outside the state of Washington; however, they sold shoes there, hired salesmen there, and generally transacted business within the State of Washington. All of that knowledge came from evidence presented before the court. The court had to decide if the company existed within its borders (its community) enough as to subject it to the rule of law within the state. The idea of a company existing was a complex issue. The court held that a company could exist in

⁵ Galileo Galilei was an Italian astronomer and physicist (1564-1642) who was the first to use the telescope for serious astronomical study. Using his homemade telescopes, he discovered the four large moons of Jupiter, demonstrating for the first time that bodies in motion could themselves be centers of motion. This contradicted common teaching of the time that all celestial bodies went around the Earth. – *excerpt from the Nasa-JPL website on the Galileo Spacecraft*. Further: In 1614, from the pulpit of Santa Maria Novella, Father Tommaso Caccini (1574-1648) denounced Galileo's opinions on the motion of the Earth, judging them dangerous and close to heresy. Later, Cardinal Bellarmino personally admonished Galileo, forbidding him to teach Copernican Astronomy, as it was contrary to the Holy Scriptures. – *information from the Italian Museum of the History of Science web site*.

⁶ 95 US 714 (1877) – The Court in *Pennoyer v. Neff* coined the phrase ‘tag jurisdiction’, stating that as long as a person is within the borders of a jurisdiction, that person is subject to its laws.

⁷ 326 US 310 (1945) – The Court applied notions of corporate personhood to jurisdiction within a state, expanding the ability of a corporation to be located in their place of incorporation, but also where they do business, if they meet certain criteria that do not offend.

multiple places, and they decided it based on what they thought was fair. Fairness has a tendency to generally guide decisions, and that may come from the U.S. Constitution's 4th Amendment.

The law is generally concerned with fair outcomes, and in order for the rule of law to be enforced, it must rule according to the greater standard of policies and statutes that have been submitted to it. The court holds favor within the community so long as the community agrees to abide by its decision. If that decision comports to fair play and substantive justice, there is a greater likelihood of compliance with its rule.

In contrast to the rule of law and its enforceability is the tragedy of the *Trail of Tears*.⁸ The Supreme Court ruled that a Georgia law taking property from the Cherokee tribes was outside the power granted to the state (the power was vested only in the Federal Government, not Georgia) and in violation of certain treaties; however, the Supreme Court's decision was met with President Jackson's famous quote referring to Supreme Court Chief Justice Marshall: "John Marshall has made his decision, now let him enforce it." The point being; just because the legal system rules one way, the community may not chose to follow the decision.⁹ The community trusts the law to make the right decision, and sometimes the court must choose between what is right and what is fair, and to that end one might ask what purpose does the law serve?

Underlying the judicial guidelines that allow evidence in or not (when making determinations of fact) is a value judgment based on fairness. Fairness comes from several different places within the community.

For example, the Constitution of the United States guarantees defendants in criminal cases the right to be confronted by their accuser. Justice Scalia, in his opinion in *Crawford v.*

⁸ The *Trail of Tears* is chronicled throughout US History as a dark moment; Native Americans were forced from their land against their will while several died on the way to their new home.

⁹ 31 US 515 (1832); and further information taken from the Boston Globe's article, *About our Dictator*, by Jeff Jacoby on July 5, 2006.

Washington (2003), gave a history lesson on fairness and evidence that serves as a tutorial for issues surrounding fact finding.

From Justice Scalia's majority opinion:

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, *Criminal Trials* 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face" 2 How. St. Tr., at 15-16. The judges refused, *id.*, at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.*, at 15, the jury convicted, and Raleigh was sentenced to death.¹⁰

Scalia continued, "One of Raleigh's trial judges later lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' "

Justice Scalia recounts the trial of Sir Walter Raleigh who was tried and convicted of treason. At no point in time was Raleigh confronted by a direct accuser, instead, the witnesses allegedly made statements to the court, and the court accepted their statements without question which denied Raleigh any ability to defend against their statements. To be charged and convicted under English justice in the 1600 was not fair (within the context of today's standards of accuracy). Such evidence, as was used to convict Raleigh, is deemed inefficient and untrustworthy by today's judicial standards because there is no way to verify the accuracy of the statements sufficient to the point of convicting a person of a crime (Retributive theory of convicting the person on the most accurate evidence possible).

Part of the issue with evidence (on a larger scale), is that it has the ability to change (when the majority of the community accepts that the world is round and the Earth revolves

¹⁰ 541 US 36 (2004)

around the sun), but there may be a tendency for the law to not change (slow response by the courts). How can evidence change? Evidence can be anything that exists or doesn't exist.

Evidence can be as simple as a person stating their name, or it can be as complicated as a formula for nuclear cold fusion. As science and technology evolve, evidence and the ability to know things and what we "know" evolves. That presents a difficult issue for courts.

The drafters of the Federal Rules of Evidence (FRE) foresaw this scenario when they created FRE 807, the residual exception. Put simply, if there is another good reason why the evidence put before the court should not be heard, or should be heard that isn't already covered, the court will entertain the idea under 807.¹¹ Brilliant. Although generally used as a last resort, 807 imparts the ability for a court to be fair in its decisions to allow or deny evidence. Further, one of the first provisions of the rules, Rule 102 states specifically:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.¹²

However, there are times when judicial outcomes entrusted to the courts to decide are trumped by the majority (community). For example, three strikes criminal rules have the effect of trying a person for the same crime multiple times, or when the taking of a person's property without compensation is justified for the greater good, or when immunity is granted to government for injury to individuals. No manner of evidence is considered in these instances.

¹¹ FRE 807: A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that A) the statement is offered as evidence of a material fact; B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

¹² Federal Rules of Evidence: Public Law 93-595; 88 STAT. 1926, Approved Jan. 2, 1975 [H.R. 5463]; revised 2007-2008 edition.

However, the individual is not without recourse, they can modify the majority view through legislative processes; effectively changing the majority rule.

What role does evidence play in the adversarial system?

What is Notice? Under the Federal Rules of Evidence section 201:

Judicially noticed facts must be one not subject to reasonable dispute in that it is either 1) generally known within the territorial jurisdiction of the trial court or 2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Further, a court may take judicial notice, whether requested or not, and a court must take judicial notice if requested by a party and supplied with the necessary information. Judicial notice may be taken at any stage of a proceeding.¹³

Notice is a form of evidence that leads to efficient (time/economic) outcomes when making determinations of fact. Is it fair to give notice? Is it fair for the court to accept that a radar gun works and gives accurate information every time? Is it fair for a court to blindly accept the results of a blood alcohol test? Is it fair for the court to accept the Pythagorean theorem without question? Is it fair for the court to accept the value of a dollar bill?

There are some things that we are willing to let the court to accept, for the purposes of efficiency, without having to offer proof of the matter on every occasion. The value of a dollar, for example, is something that the community accepts and the court accepts because the value is generally known. Imagine what it would be like in a civil case between two counterparties to a contract if they had to put experts on the stand to testify as to the value of the dollar, or if we had to put a mathematician on the stand to explain the underlying proof of the Pythagorean theorem, or if we had to prove that $a^2 + b^2 = c^2$ really does equal c^2 ? It would be costly and take far too much time, so there is a need for notice.

¹³ Id.

Particularly problematic areas of knowledge include advances in science and technology. To provide acceptable outcomes for the community (Utilitarian), while ensuring that individuals are properly punished or not punished for the breach of society's norms (Retributive), new knowledge is added by science and technology, and the court must deal with uncertainty in deciding what evidence to accept while trying to decide what is right and what is fair.

What about a radar gun? Is the community truly willing to rely on a piece of technology that may be subject to error as truth of the matter asserted in the courtroom?

What about a breathalyzer? It is one thing to take notice in the courtroom that the world is round and that the planets revolve around the sun (wouldn't Galileo be happy about that), but it is another to say that a machine is infallible and that because the machine said so we are going to believe it. Can the community truly rely on technology to give the court notice of fact?

So why grant notice? Again, the brevity of life issues raised under FRE Rule 102 dictate that the community, as a whole, has determined that court proceedings be held in an efficient and fair manner (both according to time and money).

In *Ohio v. Roberts*¹⁴ (some parts have been updated by *Crawford v. Washington*), the court held that an "indicia of reliability" was "good enough" for evidence. The Court was trying to decide if evidence, that would otherwise be hearsay (just like evidence against Sir Walter Ralieggh), should be allowed or denied. The reliability the Court spoke of involved statements against pecuniary interests (a man's wife had made statements prior to trial, on the record against herself and her husband); however, because of the state laws of marital privilege, a spouse can not be forced to testify against the other (similar to Sir Walter Ralieggh's accusers). Generally, the reason we do not allow hearsay statements into evidence involves issues of trustworthiness and

¹⁴ 448 US 56 (1980)

reliability. The Court admitted the statements of the wife against the husband over constitutional confrontation clause objections.

The “indicia of reliability” test was later over turned by *Crawford v. Washington*. As a community, we want more (reliable statements or evidence) in our courts in order to ensure the fair and right outcome. That calls for accurate information, and accuracy is largely determined by whether or not the information is sufficiently trusted. But even in 1980, the court was willing to go down a slippery path.

A simple example of evidence and the power of judicial notice:

Imagine two parties standing opposite each other in court. Party A (a traffic police officer) has proof that Party B was traveling at one hundred and fifty miles per hour. Party B has proof that he/she was only traveling at fifty miles per hour. What evidence do we believe? Neither party is willing to accept the results of the other. The court must decide which information is accurate and trustworthy. To the extent that the court has granted notice to Party A’s measurement device, Party A wins. That is powerful stuff, but it doesn’t make it “true”.

To understand the complexity of the issue, the rules of evidence are clear that the information being admitted is called hearsay.¹⁵ The report of speed is an out of court statement being used to prove the truth of the matter asserted. The matter being that Party A has a device that says that Party B was going one hundred fifty miles per hour, and there is a law that Party B has broken for going over the speed limit of fifty five. Generally, hearsay is not admitted into evidence because it lacks trustworthiness. However, reports of officials (Party A is a police officer and considered an official) acting in their capacity are admitted because the majority of

¹⁵ Federal Rule 801(c): “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. 801(a): A “statement” is 1) an oral or written assertion or 2) nonverbal conduct of a person, if it is intended by the person as an assertion.

the community has chosen to trust Party A's statements over those of a regular citizen like Party B. It avoids the struggle of my word against yours, and the majority has given the trump card to Party A. Party B must show an overwhelming amount of evidence to refute Party A's device and report and, at the same time, prove that Party B's device is accurate. Party B must call experts to testify as to the operation of Party B's device as accurate and trustworthy, that the device on that day was operating properly and accurately, and the measurement that Party B's device gave was taken at the same time and instance as Party A's measurement. Party B has an insurmountable burden to overcome the notice given to Party A's radar gun. Judicial notice is powerful stuff, and gives an almost per se decision to the court. Whatever Party A's device says is accurate, regardless of what Party B says.¹⁶

What other options are there for the community to find the answers in controversy to the extent that the community will abide by the decision of the court? If the majority of the community is willing to accept the results of the radar gun as the truth, then the truth of the matter, just as the truth in Galileo's time was that the sun revolved around the Earth, is left to alter through complex proofs.

The judiciary must decide what is accurate and reliable enough to make determinations of fact at that very moment, and those determinations are not designed to explain truth. There is a tendency for the community to form a connection between what is good enough for the court and what is absolutely true, and it is in that connection where the community may not understand the outcomes of legal decisions to the extent the decision is misunderstood as truth. Further, as new ideas are brought before the court that are difficult to understand or hard to ascertain a level of

¹⁶ Federal Rule 201 on notice gives an exception in criminal cases where it should be noted, the jury is instructed that it may give notice, but it is not required to.

reliability to make a determination of fact the court must look outside the judiciary for reliable information. Where can the court look to understand new ideas? Science.

Changing what we actually know?

Author and educator, Joe Moran, describes personal knowledge and science (related to normal people, not trained scientist) as follows:

Most people, even if they are not trained scientists, will be familiar with the scientific method inherited from Baconian inductivism and Cartesian reductionism, from writing up laboratory experiments at school. This method is based on empirical observation to discover the fundamental laws of cause and effect: ‘The litmus paper turned blue when placed in the alkaline liquid’.¹⁷

Moran explains that knowledge through the scientific method originated in the year 1620 when Francis Bacon’s *Novum Organum Scientiarum* proposed a model of inductive reasoning.

Building on the works of Bacon, Rene Descartes refined the process in 1637 with his offering of *Discourse on Method*. Ever since then, Science (as a community) has sought to explore questions, ever eager to disprove itself as Karl Popper, author of *The Logic of Scientific Discovery* (1934), is quoted:

The empirical basis of objective science has thus nothing ‘absolute’ about it. Science does not rest upon solid bedrock. The bold structure of its theories rises, as it were, above a swamp. It is like a building erected on piles. The piles are driven down from above into the swamp, but not down to any natural or ‘given’ base; and if we stop driving the piles deeper, it is not because we have reached firm ground. We simply stop when we are satisfied that the piles are firm enough to carry the structure, at least for the time being.¹⁸

However, even Science has doubts about its own knowledge. Moran continues his exploration of knowledge with Thomas Kuhn and *The Structure of Scientific Revolutions* (1962).

¹⁷ Moran, *Interdisciplinarity*, Routledge, New York, 2002: Moran’s discussion on Science, Space and Nature in chapter 5 chronicles several different examples of how knowledge has been obtained throughout history.

¹⁸ *Id.* at 152-153.

Kuhn is said to speak of Science as a realm of paradigms in which inconvenient discoveries that challenge dominant ways of thinking may tend to be disregarded or devalued.¹⁹ Perhaps Galileo is a perfect example of Kuhn's message.

Is our community any different? How much convincing does it take to change an established belief? Benjamin Franklin once said, "He that would live in peace and at ease must not speak all that he knows or all he sees."²⁰ What does it take to change knowledge in a courtroom? In an evidentiary courtroom model, it is a human being that is to be convinced, not a scientist. The scientist is only present to explain the complex issues surrounding the evidence in terms that normal (non-science) folks can understand.

Federal Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case.²¹

The Federal Rules are designed to help the court 'know' what the evidence is and, in certain circumstances when the court has heard the same expert opinion enough so that the court can understand how or why something works or is, then that is granted notice.

¹⁹ *Id.* at 154.

²⁰ Benjamin Franklin, historic US Statesman, inventor lived from 1706 to 1790: quotation found in *Quotations of Benjamin Franklin*, Applewood Books, Bedford, 2003.

²¹ FRE Rule 702. 2007-2008 edition.

How Does Science Affect the Outcome of Law: defining what we know.

The Federal Judicial Center publishes the *Reference Manual on Scientific Evidence* to aid lawyers and judges in determining how and when scientific evidence may be admitted.²² Much of the discussion previously noted from Joe Moran's book *Interdisciplinarity* can be found in his reference manual under the section titled "How Science Works." The book includes a good introduction to the history and theories of science, some of the issues of professional scientists, myths, and finally a scientist's view on the Supreme Court Daubert Trilogy of Cases on Scientific Expertise.²³

Before *Daubert*,²⁴ expert testimony before a trier of fact (judge or jury) was allowed if the expert used generally accepted techniques for the field, and the court used the *Frye* test to evaluate evidence.²⁵ Meaning, that if you were an expert psychic medium using established techniques and methods for communing with Elvis Presley, and you were writing a new album based on those methods, then the evidence would be presented to the jury.²⁶ The court in *Daubert* asked the question: what is science? Or more specifically, how can we tell when the information is based on *junk*²⁷ Science? In a sweeping decision, the court ruled that under the

²² An entire version of the *Reference Manual* can be downloaded electronically from <http://air.fjc.gov/public/fjweb.nsf/pages/16>

²³ *Id.* generally presented information through the introduction to the reference manual starting at pg. 67 through 82.

²⁴ *Daubert v. Merrell Dow Pharmaceutical, Inc.* 509US 579 (1993).

²⁵ The *Frye* 'general acceptance' test was developed through the common law system and started with *Frye v. United States* 293 F. 1013 (D.C. Cir. 1923) and was followed by state and federal courts until 1975 with the passage of the Federal Rules of Evidence, when it was first called into question.

²⁶ This is an extreme example, but the point is that under *Frye*, the test to get evidence before a jury was based on reliable practices of the field in which you were an expert. The general consideration under *Frye* was that expert testimony was quite limiting.

²⁷ What is junk science? Science used to promote special agendas or interests that may not be based on traditional scientific methods.

new FRE 702 rules less was required than *Frye* and, in order to limit evidence, the judges must be the gatekeepers of the evidence to insulate the jury from junk science.

After *Daubert, General Electric v. Joiner*, 522 US 136 (1997), determined what level of deference an appellate or reviewing court should give to the trial court's decision to include or exclude evidence. In *Joiner*, the plaintiff's expert planned to testify that because PCBs caused cancer in rats, PCBs caused cancer in the plaintiff. The trial court excluded the evidence. The process of determining whether or not evidence comes in has become known as a trial within a trial, or a 104 hearing, or more aptly – *The Daubert Hearing*. The appellate court reversed the trial court's decision, determining that the evidence should be admitted under FRE 702 (interpreting 702 to encourage evidence not to limit it). The Supreme Court of the United States did two remarkable things in *Joiner*: first, they reversed the appellate court's decision while creating great deference to the trial judge's decision on the evidence issue and second, instead of remanding the case with instructions to conform to the decision, the Supreme Court opened up the record of the *Daubert Hearing*, determined that the evidence that the plaintiff expert was going to present was not based on sufficient grounds, and held for the defendant. The result is that you only get one shot with your experts!²⁸

After *Joiner* came *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). *Daubert* and *Joiner* forced counterparties to examine what evidence they may try to bring before the court very carefully. The reliance on experts in the past under *Frye* empowered the court with the ability to hear ideas from the community, but it lacked the kind of trustworthiness that the community mandated with the passage of the Federal Rules in 1975. No longer could any person walk into court and give the court advice on what is happening in the world with relation to the particular conflict before its bar. The expert had to be an expert, with training and experience,

²⁸ 522 US 136 (1997)

and that expert must have used standard methods that are recognized as subjectively accurate and testable. *Kumho Tire* solidified how the court was to gain knowledge.

In *Kumho*, a tire blew out and presented a simple product liability case where damage was done, and the plaintiff's expert wanted to testify that the tire was the cause of the accident. The expert, by ***visual inspection*** of the tire, claimed that the failure was based on a design defect. The defendant wanted the testimony excluded because the expert did not form his opinion based on a method, but based it only on experience. The four *Daubert* factors of reliability are: the theory's testability, whether it was the subject of peer review or publication, its known or potential rate of error, and its general acceptance within the relevant scientific community.

The *Kumho* trial court excluded the evidence. The appellate court chose to apply a different standard for reviewing the lower court's decision than what the Supreme Court in said was allowed in *Joiner* (the appellate court looked at all the evidence without giving any deference to the lower court: *De Novo* review). The appellate court reversed the trial court; holding that the plaintiff's expert's testimony, that was based on long experience and knowledge, was good enough to be expert testimony for the court. The Supreme Court reversed the appellate court, admonishing the use of a different standard of review as was laid out in *Joiner*, and holding that expert testimony that is not based on an application of expertise and methods performed on the exact evidence that is presented in the case would not be allowed.²⁹ The Supreme Court changed the way that science and technology are to be used within the court.

Should we rely on the court to provide knowledge?

In 1984, Jean-François Lyotard (French Philosopher, 1924 – 1998) reflected on a general skepticism about what can be known and believed in contemporary culture:

²⁹ *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

Postmodern science – by concerning itself with things such as undecidables, the limits of precise control, conflicts characterized by incomplete information, ‘fracta’, catastrophes, and pragmatic paradoxes – is theorizing its own evolution as discontinuous, catastrophic, nonrectifiable, and paradoxical. It is changing the meaning of the word *knowledge*, while expressing how such a change can take place. It is producing not the known, but the unknown.³⁰

Perhaps the better question should be: *How does Law affect the Outcome of Science?* In its decision, the Supreme Court in *Daubert* determined that the Federal Rules of Evidence, Rules 104(a)³¹ and 702³² directed such a determination to be made; not just that the court could make the decision, it was *obligated* to.³³ What is even more distinctive is that gatekeeping of evidence is done without the presence of a jury. Further, rule 104(a) allows the judge to hear any evidence, even evidence that would not be allowed before any jury, to make a determination on whether or not the evidence that is being offered shall be weighed. How powerful is that? How powerful is it that a judge can determine what is science or technology that may or may not be used before a court? What would Galileo say about that? Is it fair that an elected official in the community should be the bearer of such great responsibility? Should a judge decide what evidence the jury should hear? Should a jury decide what evidence it wants to hear, or more specifically, shouldn't the jury be allowed to weigh the evidence as a whole? Did the law get it wrong when it decided *Daubert*? Did the appellate court get it right in *Joiner*? Or has the legal system, by requiring an expert to testify as to the specifics of what they have learned, what they know, how they know it,

³⁰ Excerpt from *Interdisciplinarity*, p. 157.

³¹ FRE Rule 104(a): Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

³² FRE Rule 702: Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case.

³³ *Id* at 589.

and what they have done with the evidence in the case at hand, crafted the ultimate compromise that Galileo would have requested?

People in the West have acquired considerable skill in using, interpreting and manipulating law. ..Every conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required; nobody may mention that one could still not be entirely right, call for sacrifice and selfless risk – this would simply sound absurd. Voluntary self-restraint is almost unheard of; every body strives toward further expansion to the extreme limit of the legal frames. ...I have spent all my life under a Communist regime, and I will tell you that a society without any object legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worth of man. – Alexandr I. Solzhenitsyn³⁴

Solzhenitsyn speaks of the court validating actions, but the quote is important to understand the mindset of the community when it looks to the court for permission or knowledge. Put simply, if the court says so, then it is so, and that is good enough for the community. That can lead to unintentional shifts in community doctrine that the court unwittingly caused or, more often, raises questions in the community about fairness of outcomes.

“The Polygraph Paradox”

First, polygraph tests, or any of the results, are not recognized as evidence in a majority of courts of law. The Wall Street Journal, on March 22, 2008, reported that the technology “has long been derided as voodoo science.”³⁵ According to the Wall Street Journal, the National Academy of Science says that the test is not even accurate enough for pre-employment screening. However, the polygraphs are used in countless criminal probation systems as

³⁴ Alexandr I. Solzhenitsyn, awarded the Nobel Prize in Literature in 1970, gave the speech cited at an address to Harvard University on September 1, 1983; Shrager and Frost, *The Quotable Lawyer*, New England Publishing Associates, 1986.

³⁵ Cohen, *The Polygraph Paradox*, Wall Street Journal, CCLI No. 68, March 22, 2008.

mandatory conditions for parole. In the discussion of what is right and what is fair, it may seem that the judicial system is no longer concerned with fairness after the trial is over.³⁶

A witness can volunteer to submit to a polygraph test to prove the truth of his or her testimony, but that evidence will never enter the court; however, after the person is convicted, he could be sent back to jail for violations of parole if a mandatory polygraph test detects any deception. Wow.

A polygraph machine measures changes in breathing, the pulse, sweat, and shifting of weight, and all factors are combined to give an indication of whether or not a person is truthful.³⁷

Paul Duncan is a convicted sex offender and on probation in Klamath Falls, Oregon. Paul Duncan failed a polygraph test that was mandatory per the terms of his parole. He was asked if he had sexual contact with a minor. He answered that he had not; however, he failed the test. Paul admitted later that he was not lying but that he had looked at child pornography on the internet. Even though he did not lie, he had a guilty conscience because looking at child pornography is a violation of his parole; however, he was never asked if he had looked at child pornography. “Don’t believe anyone who tells you polygraph doesn’t work,” says Paul Duncan...the accused and the imprisoned for violation of his probation.³⁸

The judicial system is not willing to admit the polygraph into evidence as acceptable technology to give knowledge of the reliability of the witness’ statements because the National Academy of Science (and others) does not accept the test as valid. Science has affected the law, but that has not kept the community as a whole from using the science and technology to enforce its punishment. Sometimes the community goes outside the courtroom and science for its results, and the polygraph is an excellent example of that. It is important to note that while the polygraph

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

may be accurate and reliable enough for organizations outside the judicial system, the judicial system has thus far determined that the test is not reliable enough to determine the truth or reliability of the information being presented in court. That has nothing to do with whether or not the person is telling the truth, or if the person actually lied.

Why rely on the National Academy of Science? The Academy was created by President Lincoln in 1863 to “investigate, examine, experiment, and report on any subject of science or art” upon request by any department of the government. The Academy was formed by the majority in the community and is tasked by the majority to create knowledge to help the government understand new developments in science and technology. However, is such an organization dedicated to differing views? Is Academy engaged in science or policy? To what extent does the Academy have a responsibility to initiate policy, as it has done by declaring that climate change requires action?³⁹ What role does science play: to give knowledge or to suggest action? Is global warming caused by people, or is it caused by something else? There are people that are absolutely convinced that mankind is the cause; just as convinced as people were that the world was flat.

The confusion does not stop with the polygraph test, or with issues of evidence being allowed in court; confusion is created when the court analyzes agencies who rely on scientific data and the community thinks that the court is validating the data.

If the EPA were to pass a regulation to eliminate carbon based emissions based on data used to determine the effects of global warming by the National Academy of Science, and was later sued by a company challenging the EPA regulation under theories of administrative law for failure to follow proper notice and comment hearings, what would the community say was the issue before the court? Perhaps the community would think that the EPA had declared that

³⁹ 2005 G8 Science Academies’ statement on climate change: <http://royalsociety.org/displaypagedoc.asp?id=20742>

carbon emissions were the cause of global warming, and has passed laws in an effort to stop those effects.

The community may think the issue before the court is whether or not carbon is the cause of global warming. However, the true case before the court is a challenge to the statute itself and whether or not the EPA used proper procedures in forming its opinion. A decision by the Court to uphold the law would appear as if the EPA and Court had decided that global warming exists and that human produced carbon emissions are the cause. If the statute was defeated by the court, such a conclusion may imply that human produced carbon emissions were not the cause of global warming. This kind of confusion is at the heart of understanding the difference between the legal world and the non-legal world.

Section II Summary

Galileo stood in a world defined by knowledge that the Sun revolved around the Earth, and yet he knew different. When does an individual's knowledge leak out and become the knowledge of the majority of the community to the extent that the majority is willing to accept the new idea as the knowledge? Or more specifically in the legal context, what must take place for knowledge to be accepted by the court, and then how is that knowledge delivered back to the community?

The Federal Rules of Evidence and the Supreme Court's interpretation of those rules has created a construct wherein new information and ideas are introduced to the court. However, those ideas are limited by the gatekeeping function of judges to keep junk science from the jury. The court admits only scientific evidence that has conformed to the scientific method and information that was obtained using a scientific method via experts. But Kuhn, a member of the scientific community, thinks that information restricted by this method only increases knowledge

that we do not know. However, the court's function is only to only make determinations of fact for the current matter at bar, and the rules are used to ensure that decisions are made in the most efficient and economic manner possible. The evidence may not be true, but it is reliable enough to apply law given the goals of the judicial system.

As a community, by restricting knowledge to that which is obtained by the scientific method (or limiting what we know to that which the court tells us), we decrease the potential to know and, in doing so, we become stuck. Popper understood the idea of being stuck, but used a more pragmatic description of driving piles into a swamp – only deep enough for the community to understand its immediate need to know.

In the discussion of what is fair and what is right, the community uses Utilitarian and Retributive theories in its legal systems to craft solutions to controversies that the majority will accept as enforceable; however, over the years, what is fair and what is right have been modified by science and technology.

When science and technology inform to the court, the court can give judicial notice (as with a radar gun) or deny evidence (as with the polygraph), but that does not mean the community must abide by the decision of the court. Alexandr I. Solzhenitsyn described a society that seeks its answers only from the judiciary as not being worthy of man. He may have it right, but should the court restrict itself to knowing only what the community is willing to accept as knowledge? Should the law seek more than what the community knows?

The questions remain: Should the court seek out knowledge in the interest of what is fair and right? Does the court have the capacity to understand more than what the community knows? And finally, is the law the right place for the debate of knowledge?

The legal system is set up through the Rules of Evidence, through the Constitution of the United States, through centuries of jurisprudence, and through statutory mandates by legislators to provide outcomes to conflicts. The system works because the community is willing to abide by its decisions, and for the most part, the system seeks out fair and correct decision. However, sometimes the court is not asked to decide an issue that is at the heart of the conflict, or sometimes the rules prohibit the court from answering the problem because the persons before the court are not in conflict (see constitutional rules on party standing). When the court makes a determination, the community may not see that answer for the actual underlying legal meaning. Is that the fault of the court? Is that the fault of the community? Is that really a misunderstanding? Perhaps it is more of a difference of understanding.

For the legal community, it may be easier to break a controversy down to the mechanical parts (evidence, procedure, timely motions, preserving the record, appeals, etc), but for the community, there is a potential to see the controversy only as what it means at the end of the day; and any ruling in either direction becomes a definitive statement either for or against the controversy. That is a difference in understanding. The legal world understands the issues in one way (and their interpretation is correct), while the non-legal world understands the issues in another way (and their interpretation is correct). Both perspectives are correct, but for broken reasons.

Section III: Untangling the Problem

Can the community truly distinguish between what is right and what is fair, or does the media hold too much influence over the way the community thinks, acts, or behaves? A common question is whether the media shapes or reflects society, and the conclusion must be examined in the context of knowledge leaking out of the courtroom into the community and being used for unintended purposes. Does the media play a role in creating its own knowledge? Should the media be responsible for presenting a clear and concise account of the issues before the court, or should the community be responsible? The answer may be that the media are responsible, to the extent the media are a member of the community with a serving the public interest.⁴⁰

It can be said that the human difference engine (the human brain) can determine what is real or not real, that we have the ability to choose. Choice is at the very core of this question. To what extent does the media shape or reflect society when it reports on decisions pending or decided by the court? In our choices to believe, accept, object, integrate, laugh at, enjoy or deny, we enable the media to help shape and reflect our lives.

What Does the Media Do?

Books, music, television, newspapers, radio and cinema are all forms of mass communication. We choose to participate. We choose to read, listen, watch or believe. To say that Superman can fly does not mean that I'm going to attempt the same thing. Strange lizards are not going to attack in the middle of the night as Hunter S. Thompson would have us believe, and NO, Middle Earth DOES NOT EXIST outside "The Hobbit." Yet these authors help us reflect upon ourselves and our fears, and perhaps, they allow us to project ourselves into the roles

⁴⁰ § 309(a) Communications Act of 1934.

with which we would not normally associate ourselves, as Freud suggests. It is unclear whether that projection is escapism, fantasy, active participation or passive association.⁴¹

In this reflection (or projection), we can not help but be affected by the exposure. For in that moment of suggestion that there is a world such as “CSI: Miami,” a forensics cop drama where scientists examine crime scene evidence to prove that outlandish crimes were committed, we are affected by the possibility of this world’s existence. We may change our language. We may change our vernacular. We are included. We are shaped.

Music is an outstanding example of how a Media can reflect and shape society at the same time. “Feed the World-Do they Know its Christmas” was a musical effort brought about by Midge Ure and Bob Geldof to gather a large group of British artists including Paul McCartney, Phil Collins, Boy George, Sting, David Bowie and many others. A single song was created to promote the efforts to end hunger in Africa (1984). The song they wrote stated the issue, was presented in a mass distribution, and resulted in a huge effort to fund the needy. The song (media) both reflected and shaped our actions as a society. No American artists were included in the Band-Aid effort. Not to be outdone, USA for Africa was formed, and ‘We are the World’ was released featuring some of the same British artists. The point being, it took the media to bring forward the issue for the community to respond. Without the media, the knowledge of hunger in Africa would not have been spread as effectively or quickly.

The very text books we read in school help us to reflect upon and, then, shape our lives. Choice is at the center of each distribution of information we obtain from whatever form of media it is that we are exposed to. But when the subject matter is something we don’t understand, we may have a tendency to trust the media outlet that is delivering the message instead of doing the research ourselves. And sometimes, the very sources we get our media from

⁴¹ See Generally, Freud. *General Psychological Theory*. Touchstone. NY. 1963.

dictate the kind of information to dispense and the format. In 2004, a Pew research poll discovered that twenty one percent of people between the age of 18 and 29 get their news from “The Daily Show with Jon Stewart” and “Saturday Night Live.” Both shows are comedic satire programs that deliver a highly contextual version of the news for purposes of entertainment. Who does Jon Stewart think his audience is?⁴² “A lot of them are probably high,” Stewart cracked. “I’m not sure, coming off of robots fighting and into our show, what we’re dealing with out there...”⁴³ A similar study conducted by Pew in 2007 showed that the most knowledgeable Americans were those that watched “The Daily Show.”⁴⁴

Semiotics⁴⁵ suggests that communication symbols instill a reaction of recognition designed for cognitive response. For instance, why did US television stations upon play “The Star Spangled Banner” with images of the American Flag upon signing off at the end of their broadcast? Is this reflecting that the US General Public at 3:30 in the morning is feeling particularly patriotic? Or is it a reflection of the knowledge that sleep deprivation combined with audible and visual stimuli can affect a response? Yet, television is only one form of media.

Media and its forms have the ability to shape society and the community. Whether or not media is reflecting a portion of society, the community as a whole has no choice but to be affected by communication through the reflection and reproduction across wide channels of communication (spilling over into other communities). Ultimately, the general knowledge that the media imparts becomes the knowledge of the community. What duty does the media have to

⁴² Associated Press. *Young America’s News Source: Jon Stewart*. CNN.com. posted March 2, 2004.

⁴³ *Id.*

⁴⁴ Pew Research Center. *Public Knowledge of Current Affairs Little Changed by News and Information Revolutions: What Americans Know 1989-2007*. The Pew Research Center for the People and the Press. Online at peoplepress.org/reports/display.php3?ReportID=319.

⁴⁵ **semiotics** - (philosophy) a philosophical theory of the functions of signs and symbols – from thefreedictionary.com.

ensure a factual representation of a court decision, or to distinguish between a decision applying law from other contexts?

Clear Context and Reporting Rules

If the media is part of the same community as those who do not understand the results or issue before a court, then to what extent can the media be expected to understand or report accurately the mechanics of the court room?

In 2007, the Supreme Court made its decision on partial birth abortions in the case of *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007). The court was asked to determine the constitutionality of a statute signed into law by President Bush in 2003. At issue was whether the statute was too vague to be enforced, whether the act imposed a significant burden on women when seeking late-term pre-viability abortions, if the act furthered a legitimate congressional purpose, and if the absence of a health exception was facially unconstitutional.

To the legal world, those issues are easy to understand. Nothing in those issues requires the court to consider whether or not the decisions will overturn *Roe v. Wade* and take away a woman's right to chose an abortion, but that is how the media billed the decision and how it was understood by abortion activists (for and against). Complex dissection of the court's choice of words focuses on its reference to a fetus as a "fetus" and not a "child", versus its reference to the child as a "child" and not a "fetus." The communities for or against abortion hung on every word from the court; however, they did not understand that the ruling by the Court was mechanical, methodical, efficient, and fair to the extent that the processes of the Court considered the information at bar was sufficient to make a decision right now.⁴⁶

⁴⁶ See Generally <http://supremecourtdecisions.us/GonzalesVsCarhart.pdf>, and thousands of other posts and sources that examined the *Gonzales v. Carhart* decision.

What if the Supreme Court wrote a plain language version of their decision for the media? A plainly stated, official press release from the Supreme Court, in terms understandable by the non-legal community, would be invaluable. Like plain language requirements in statutory construction, the court should be held to the same plain language requirements when issuing its decision to the public.

Plain Language Reporting

What value does plain language reporting have to the community? The value lies in the judiciary bestowing its clear interpretation upon the public. For the legal-world, the court would continue to issue its decisions in legal reporters for interpretation of legal constructs, but the public would get a different view; similar to the legislative comment sections of the Federal Rules of Civil Procedure or the Federal Rules of Evidence.

An example: *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 128 S.Ct. 761 (2008). The facts in *Stoneridge* are quite complicated. Stoneridge Investment Partners, LLC are shareholders of Charter Communication. Charter did business with Scientific-Atlanta and Motorola for the purchase of set-top boxes to deliver cable television signals to customers. In short, Charter bought cable boxes from Motorola and Scientific-Atlanta. Charter was having some issues with its overall economic position and tried to improve its bottom line by working out deals with Scientific-Atlanta and Motorola to increase the prices of the set top boxes in exchange for Charter receiving additional income for advertisements. In short, Charter fraudulently represented its financial position to investors by manipulating the value of its economic positions, and Charter got sued by Stoneridge. In addition, for their part in the fraud, Stoneridge brought an action against Motorola and Scientific-Atlanta as aiders and abettors for the underlying fraud that caused Stoneridge to lose a great deal of money. The Supreme Court

held that there was no private right of action against aiders and abettors under the Securities and Exchange Act of 1934, section 10(b)(5). That is all the Supreme Court decided. What does it mean?

The non-law translation:

“The Supreme Court today decided a case involving fraud. The investors of Charter Communications have already settled with Charter, and they are not a part of this decision. The question before us today was whether or not the Securities and Exchange Commission act of 1933 allows for a private person to bring an action against an aider and abettor for fraud that hurt the private person. There are several ways an action can be brought before a court, and one of them is if a statute grants a right of action. Today, we hold that the statute itself was not designed to allow private parties to bring these cases using the statute. There are other methods by which the private party may seek recovery, but as of today and further, only the Federal Government or State Governments are allowed to bring these types of actions under the statute. We have not come to any conclusion as to whether any party in this action was liable to anyone, nor have we decided the level of innocence or guilt. We have only determined that the statute is not designed to give a non-governmental plaintiff a right to sue an aider or abettor under the terms of the Federal Statute.”

That is what the ruling means. The legal world understands the meaning of Stoneridge, and they continue to discuss it today. However, the business community (particularly Motorola or Scientific-Atlanta) and others doing business may have interpreted the Supreme Court’s rejection

of Stoneridge as a sign that fraudulent business practices are okay! The court made no statement about a value judgment in the decision; however, the community assumes that value judgments have been made by the court (Motorola was right, and Stoneridge was wrong).

Why? Why take time out of the Supreme Court's schedule to issue such plain language opinions? Wouldn't that put lawyers out of a job? Isn't it the job of the attorney to interpret the Supreme Court and what the law says?

'Why not?' is the better question. The court is mandated to conduct itself in the administration of evidence to be efficient with time and money. The same frugal requirements should be applied to issuing a decision that the public can understand, in the language of the community that supports the court. The community gives the court leave to exist, and the court's decisions are valid only to the extent of the willingness of the people to abide by them.

Summary

There is a fundamental disconnect between the community and the court. The court makes decisions based on rules of efficiency and fairness that underlie theories of Utilitarian and Retributive constructs of law. As the court is asked to make determinations on issues of fact, the court applies rules that ensure the most reliable and trustworthy, current and available, information is presented to the trier of fact (whether that be judge or jury). The court makes a decision and publishes it for all to see and, further, has the power of the executive to enforce its rule. The community then takes the decision and may confuse the rule of the court with its own interpretation of what the court has said, thereby creating a different view of the court's ruling that generate, new or differing knowledge.

The court's ruling is generally dispersed through the media, and the role of the media in society is a complex combination of shaping and reflecting. The very delivery of a message from

one corner of the community to another corner of the community causes an individual to decide what is “fact” or what is not, and to some extent, the individual chooses to accept the ideas.

However, when the majority chooses to accept the knowledge bestowed by the media upon the community, that knowledge has the weight of law.

The media, as a member of the non-legal community, generally does not have a duty to interpret what the court is saying. The duty to ensure that the rule of the court is properly delivered in unambiguous terms that are understood by the community rests with the court and the judiciary. There is an old phrase: “garbage in – garbage out.” That is to say, if the information that the community gets from the court is garbage (knowledge in a form that the community has no ability to understand), then the only result can be garbage out - the information received is subject to misinterpretation and a difference of understanding that has ramifications outside the scope of the intended result.

The shift of the court to plain language delivery of rulings would enable the community to make value decisions on its own terms, in its own language and develop its knowledge base on ideas from the community instead of those deemed valid at law. The shift would expand the realm of knowledge sought by Kuhn, drive the piling of foundation deeper for Popper, and ensure that Alexandr Solzhenitsyn’s world of knowledge continues to be one worthy of man.