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# Truth and Legitimacy (In Courts)

*Kenneth S. Klein\**

*This Article seeks to comprehensively articulate the meaning, role, and importance of truth in courts by drawing upon empirical and theoretical scholarship from philosophy, economics, social science, psychology, political science, ethics, and jurisprudence, in addition to more traditional legal sources such as United States Supreme Court decisions. It is frequently said that trials are a search for truth. But as insiders to the judicial system know, if this is so, then it is a meaning of truth that differs from what truth means in any other context. And exposing this definitional dissonance, in turn exposes that the legitimacy of the courts rests on an eroding foundation, as courts increasingly are not doing what the community believes courts are doing. This Article argues that when*

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\* Professor of Law, California Western School of Law. Because this work draws from so many fields of study, the Author could not have written it without knowledgeable “fact checkers”—in reality “thought checkers”—from many disciplines; in this regard the Author thanks Professor Scott Soames, Distinguished Professor and Director of the School of Philosophy at the University of Southern California; Professor Theodore Klastorin, Professor of Operations Management, Burlington Northern/Burlington Resources Professor in Manufacturing Management, Foster School of Business, University of Washington; Professor Jeffrey L. Yates, Professor of Political Science, Binghamton University, State University of New York; Professor Luke Meier, Baylor Law School; my colleagues, Professor Don Smythe, Professor Mario Conte, Professor Daniel Yeager, and Professor Tim Casey. The Author thanks Professor Lisa Black and Professor Greg Reilly for patiently being sounding boards and editors. The Author is grateful for the research support and assistance of Research Assistant, Shauna Guner, the Library staff of California Western School of Law, and Peter Roudik—Director of the Global Research Center of the Law Library of Congress. This Article was written as the Author’s sabbatical project—the Author thanks the Board of Trustees of California Western School of Law for approving this Article as the Author’s Sabbatical Project.

The Author acknowledges the unintended but undeniable inspiration of this Article from then-University of Texas School of Law student Lisa Black, who as a 1L in 1982 wrote the limerick:

*There once was a fine Texas youth,  
Who sought the world over for truth.  
But that’s not what he saw,  
So he turned to the law,  
Where truth’s just a matter of proof.*

The Author met Lisa Black two years later, has been her spouse since 1985, and has heard this limerick countless times over the past 30+ years. Finally, the Author thanks the student-editors of the *Loyola University Chicago Law Journal* who did their damndest to make this Article better. All errors in this Article are entirely the Author’s.

*courts do not account for lay perceptions of courts as institutions that primarily value accuracy in decision making, courts jeopardize the legitimacy of courts as public institutions.*

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## INTRODUCTION

This Article seeks to answer what the meaning of truth is in American trial courts,<sup>1</sup> and why one should care. As big as this inquiry sounds, it is tied up in equally large subsidiary questions—the meaning in courts of justification, of knowledge, and of belief, which in turn implicate the meaning in courts of fairness, due process, justice, accuracy, and fact. Only upon answering these questions can one explore the foundation of the courts’ legitimacy, and how both the meaning of truth in courts—and the public perception of the role of truth in courts—relate to the actual legitimacy of the courts.

This is no small task. There is scant academic literature studying the meaning of truth in courts. What has been written about the role of truth in legal systems largely exists in the ephemeral context of jurisprudence, rather than the concrete world of the truth-finding function of trials.

Part I of this Article adopts the multi-millennia work of philosophy in defining truth as a roadmap to isolating the nature of truth in courts. Part I.A of this Article attempts to very, very briefly summarize the philosophical literature on truth to isolate a construction of truth that can advance an understanding of truth in courts. Within epistemology, a court-like pragmatic construction of truth is the weak deflationism definition of truth within realism, which sees truth as a binomial property that a proposition has (or not). It is either true, or it is not. Court decisions about facts are similarly binomial: guilty/not guilty or liable/not liable. Weak deflationism sees truth as residing in a constellation of truth-related concepts—knowledge, certainty, and belief—each of which leans on the other to derive its meaning and role. Simply put, knowledge requires truth, justification, and belief.

This formulation of the role of truth facilitates isolating the meaning of truth in courts. Part I.B of this Article explores justification in trial courts. In trial courts, justification is defined by the Federal Rules of Evidence (“Rules”), which directly delineate what counts as a “fact” in front of a jury. Perhaps surprisingly, the Rules do not consider *all* pertinent information as facts in determining trials, but rather routinely discard facts for one of two reasons: (1) the facts presumptively are considered beyond the evaluative skillset of the decision maker; or (2) consideration of the facts, while advancing a trial decision, undermine a policy goal—external to the merits of the case—considered more

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1. The United States federal district courts created pursuant to Article III of the United States Constitution, and the trial courts of general civil and criminal jurisdiction of the various States of the United States. This Article sometimes collectively refers to these courts as the “American courts.”

important than the accuracy of trial outcomes. Part I.B concludes that, in justifying a trial judgment, not all facts matter.

Part I.C of this Article explores knowledge in courts. Knowledge is the degree of certainty that must be reached, in light of the goals of the process, to stop gathering information and move to taking action. Knowledge is a compromise or balance between certainty and finality, between perfection and adequacy. It is what one might call the necessary and sufficient degree of accuracy. This is a common balancing determination that exists in any information-gathering, decision-making endeavor: How much confidence does one need in gathered information to act? Justice systems articulate their balance of accuracy and finality through burdens of proof. The burdens of proof expose that knowledge in courts means reaching a “correct enough” resolution—biasing toward certainty when the stakes involve liberty—and staying near neutral when the stakes are the sort of private relationships courts resolve in civil litigation.

Part I.D of this Article explores belief in courts. Belief in courts is the “why” of the justice system: What is the role of courts in society, and what do we need from them? Exploration of these questions exposes fracture lines between procedural justice and substantive justice, between individual fairness and communal fairness, and between objective justice and subjective justice. In the end, belief in courts means the courts have procedures for dispute resolution that society generally perceives and accepts as a fair opportunity—or perhaps a *fair enough* opportunity—to present one’s position to a neutral decision maker.

Part I.E of this Article draws a conclusion about the meaning of truth in courts. Truth as used in the justice system is “accuracy enough,” meaning there has been an adequate procedural process to support a general, communal sense of systemic fairness without regard to the outcome of a particular case.

Part II of this Article examines the possible tension between the meaning of truth in courts on the one hand, and the basis of the legitimacy of courts as a societal institution on the other hand. What emerges from a formulation of the actual meaning of truth in courts is that the public perception of the truth-finding function of courts is at odds with the inside, systemic meaning of the truth-finding function of courts.

The social science construct of Legitimacy Theory studies why members of American society broadly accept the legitimacy of societal institutions. Legitimacy Theory has been brought to fruition as a way to understand why Americans generally accept the legitimacy of the United States Supreme Court, even in the face of decisions with which the individual disagrees. But there is little analytical work focusing on the

legitimacy of the trial courts. There is no work at all concentrating on whether a misperception of what courts do undermines the legitimacy of the trial courts.

Thus, the latter half of this Article begins to fill those gaps. A review of the extant Legitimacy Theory literature on the courts and an application of the lessons from identifying the meaning of truth in courts isolate reasons to be concerned that the misperception of what trial courts do might undermine trial court legitimacy. Finally, this Article draws a tentative conclusion that judges' unawareness of a "legitimacy" concern is driving jurisprudence in potentially problematic directions.

### I. TRUTH IN COURTS

The truth-finding function of trial courts begs for explication. Judges, lawyers, and academics often say that trials are a search for truth.<sup>2</sup> If so, then it would seem to be a different meaning of truth than the meaning of the word in any other context, because what actually reaches admissibility at the trial level is never the "whole truth" in any nuanced sense of those words. Yet there is little legal literature directly addressing the nature of the truth in the law generally, or in courts specifically.

That is perhaps understandable. Deconstructing the nature of truth in any context is a daunting challenge. Philosophy literally has dedicated millennia to the task.<sup>3</sup> But by doing so, philosophy provides a possible shortcut—an analytical base and map to the task.

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2. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) ("[T]he very nature of a trial [is] a search for truth."); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . ."); *United States v. Gray*, 897 F.2d 1428, 1429 (8th Cir. 1990) ("A trial is a search for truth . . ."); Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 567 (2013) ("We begin with a simple, but oft-neglected, observation: The coin of the legal realm is truth."). But see G. Kristian Miccio, *Giles v. California: Is Justice Scalia Hostile to Battered Women?*, 87 TEX. L. REV. 93, 95 (2009) ("[A]s currently structured, our adversarial process is many things, but it is not a search for truth."); accord Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) ("[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve."). Notably, even these critics appear to assume that the courts *should* be seeking truth.

3. Michael Glanzenberg, *Truth*, STAN. ENCYCLOPEDIA PHIL. (Jan. 22, 2013), <http://plato.stanford.edu/entries/truth/> ("Truth is one of the central subjects in philosophy. It is also one of the largest. Truth has been a topic of discussion in its own right for thousands of years.").

*A. Truth in Philosophy as a Template to Understanding Truth in Courts<sup>4</sup>*

Philosophy directly studies the nature of “truth.”<sup>5</sup> For as long as there has been philosophy, philosophers have pondered questions, stated in lay-like terms, such as: Can we define the truth?<sup>6</sup> What is real?<sup>7</sup> Is there a reality external to our ability to perceive it?<sup>8</sup> How can one know and test the truth?<sup>9</sup> Are moral propositions about the world verifiable?<sup>10</sup> Is truth paradoxical and therefore incoherent?<sup>11</sup> The debate over these, and many other transcendent philosophical questions about truth, is robust, ancient, and ongoing.<sup>12</sup>

The parallel academic debate about truth in law occurs within the study of “jurisprudence.”<sup>13</sup> Jurisprudence posits truth inquiries such as what it

4. This section of this Article carries an enormous caveat: the philosophical study of truth has been the focus of countless papers, dissertations, books, careers, and entire fields of study. The terminology and conceptual architecture of that work provides a useful conceptual frame for this Article. But there is no way to delve into the area without gross oversimplification both conceptually and in the way jargon and terminology are deployed. One simply cannot capture the breadth and richness of that work in a few pages. A reader sophisticated in the field will immediately spot the slippage that comes from simplification. It is unavoidable. That is why while I will—within in the confines of simplification—endeavor to be as precise as possible with how I am using particular terminology, I also will attempt to be clear when the terminology I am using is similar in meaning, but not identical to how it might be used in the academic literature of philosophy.

5. See, e.g., BARRY ALLEN, *TRUTH IN PHILOSOPHY* 1 (1993) (questioning assumptions made about truth in philosophical discourse).

6. See generally Gottlob Frege, *Der Gedanke. Ein logische Untersuchung*, in *BERITRAGE ZUR PHILOSOPHIE DES DEUTSCHEN IDEALISMUS* 1, 58–77 (1918), translated in *COLLECTED PAPERS ON MATHEMATICS, LOGIC, AND PHILOSOPHY* 351–72 (1984), reprinted in *PROPOSITIONS AND ATTITUDES* 33–55, (1988) (exploring the cognitive phenomenon of accepting something as true).

7. See D. M. ARMSTRONG, *TRUTH AND TRUTHMAKERS* 1 (2004) (examining counterfactuals and what makes truths true).

8. See generally CRISPIN WRIGHT, *TRUTH & OBJECTIVITY* (1992) (proposing a new framework for the discussion of realism in philosophical inquiry).

9. See ARMSTRONG, *supra* note 7, at 4 (exploring the theory of truth making and truth’s impact on one’s nature of mind).

10. See SCOTT SOAMES, *UNDERSTANDING TRUTH* 32–39 (1999) (studying whether one can verify truth and falsity).

11. See *id.* at 49–56 (questioning whether truth can be understood).

12. See ALLEN, *supra* note 5, at 178–79 (exploring the concept of truth in philosophy).

13. See, e.g., 15 *LAW AND LANGUAGE: CURRENT LEGAL ISSUES* 42 (Michael Freeman & Fiona Smith eds., 2013) (noting that jurisprudence and “theories about truth in law . . . create unique challenges” and that “[d]isputes about truth in law are tried to, and motivated by, other significant jurisprudential debates”); DENNIS PATTERSON, *LAW AND TRUTH* 169 (1996) (discussing assertions of truth in the context of jurisprudence); Jules L. Coleman, *Truth and Objectivity in Law*, 1 *LEGAL THEORY* 33 (1995) (noting “contemporary jurisprudences have not addressed a variety of issues regarding the semantics and metaphysics of legal disclosure”); see generally *THE PHILOSOPHY OF LAW* (R.M. Dworkin ed., 1977) (discussing important writings in major areas of philosophical

means to say that a legal proposition—for example, “murder is bad”—is true (ontology)<sup>14</sup>, and how the answer to that inquiry is determined (epistemology).<sup>15</sup> Both are classic philosophical inquiries about truth.<sup>16</sup>

The kind of truth inquiry that occurs in trial courts, however, is different from the truth inquiries of jurisprudence. It is more pragmatic and pedantic. Courts ask questions such as, “Did the accused do it?”; “Was the defense proportionate to the attack?”; “Which car had the green light?”; or “Did the person act as a reasonably prudent person would act?” Each of these questions is a variant of the underlying question, “What happened?”

There is essentially no academic literature on the nature of those truth inquiries, which one might shorthand as an attempt to understand the meaning of truth in courts. And yet understanding how to “truthfully” answer the pragmatic inquiry—“what happened?”—is as elusive as the more abstract jurisprudential inquiries about truth.<sup>17</sup>

Seeking a pragmatic definition of truth most closely approximates the epistemological theory of “weak deflationism,” which is a form of “realism.” Philosophical definitions of truth broadly can be divided into realism and anti-realism:

Realism involves at least the claim that there is reality independent of us and our minds, and that what we think, understand and recognize does not necessarily exhaust what that reality involves. The facts may go beyond anything we are capable of ascertaining, but the truth is so by virtue of those facts and that reality. . . . The question at issue, therefore, is whether what is to be understood in any proposition lies simply in what sort of fact makes it true—in other words in its truth-

inquiry).

14. Ontology is the branch of metaphysics concerned with the nature of being or existence. *Ontology*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ontology> (last visited Sept. 8, 2016).

15.

Defined narrowly, epistemology is the study of knowledge and justified belief. As the study of knowledge, epistemology is concerned with the following questions: What are the necessary and sufficient conditions of knowledge? What are its sources? What is its structure, and what are its limits? As the study of justified belief, epistemology aims to answer questions such as: How we are to understand the concept of justification? What makes justified beliefs justified? Is justification internal or external to one’s own mind?

Matthias Steup, *Epistemology*, STAN. ENCYCLOPEDIA PHIL. (Dec. 14, 2005), <https://plato.stanford.edu/entries/epistemology/>.

16. See ARMSTRONG, *supra* note 7, at 4 (discussing the truth-making theory).

17. Accord Brian H. Bix, *Linguistic Meaning and Legal Truth*, in 15 CURRENT LEGAL ISSUES: LAW AND LANGUAGE 34, 34–35 (Michael Freeman & Fiona Smith eds., 2013). Bix begins his essay on “legal truth” by quipping—paraphrasing Augustine—that truth is something we all know until we are asked to explain it. *Id.* at 34.



conditions. Anti-realism holds that . . . to understand a proposition we need also to know its verification-conditions; we need, that is, a recognition of when the truth-conditions apply, and when we are justified in holding that they do.<sup>18</sup>

Put another way—and admittedly perhaps *too* simply—realism posits that there is objective, external “truth,” while anti-realism asserts that truth is variable by context, meaning that a system contributes to create and define truth in that system. Within realism, the most concrete definition of truth comes from the “minimalism” version of “deflationism”—also known as “weak deflationism”—which defines truth as a property that a “proposition” has (or not). A proposition is either true or it is false.<sup>19</sup>

The truth formulation of realism—and within realism, of weak deflationism—is a close analog to the truth-finding function of trial courts. A system that self-describes itself as a “search for truth” is describing a realism understanding of truth—in other words, that truth is external to the system and potentially discernable. A system that bases actual judgments on the evaluation of competing versions of events is describing a weak deflationism understanding of truth. In other words, this system is concluding that each version of “what happened” is, in the end, either true or false.

The weak-deflationism formulation of truth is that truth is a component of knowledge.<sup>20</sup> More precisely, knowledge requires truth, belief, and justification.<sup>21</sup> Put more usefully for this Article’s purpose, an understanding of knowledge, justification, and belief advances an understanding of actual truth.<sup>22</sup>

18. D. W. HAMLYN, *METAPHYSICS* 28–29 (1984).

19. See Glen Hoffman, *The Minimalist Theory of Truth: Challenges and Concerns*, 5 *PHIL. COMPASS* 938, 938–49 (2010) (detailing minimalism’s role in the deflationary theory of truth); Scott Soames, *Understanding Deflationism*, 17 *PHIL. PERSP.* 369, 377–78 (2003) (discussing the deflationary theory of truth and why truth is deflationary).

20. See, e.g., Donald Davidson, *A Coherence Theory of Truth and Knowledge*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 307, 307–19 (Ernest LePore ed., 1986). Stated simply, we may or may not know whether a proposition is true (false)—its truth property is independent of our knowledge of it.

21. See Jason Stanley, *Knowledge and Certainty*, 18 *PHIL. ISSUES* 35, 35–57 (2008) (discussing the connection between knowledge and certainty). Accord KEITH LEHRER, *THEORY OF KNOWLEDGE* 20–21 (2d ed. 2000) (examining theories of knowledge and how claims of knowledge can be justified).

22. Whether a proposition *is* true is different from whether we *know* a proposition is true, whether we *can* know it, whether if we can know it then *how* we can know it, whether to know it must we be *certain* of it, whether certainty is *attainable*, how certainty differs from *belief*, and what *justifies* belief short of certainty.

How, then, are knowledge, justification, and belief defined within philosophy? Professor Keith Lehrer begins the second edition of his book, *A Theory of Knowledge*, by writing, “[a]ll agree that knowledge is valuable, but agreement about knowledge tends to end there. Philosophers disagree about what knowledge is, about how to get it, and even whether there is any to be gotten.”<sup>23</sup> Instinctively, one might say that to “know” something—to be justified in the belief of the truth of a proposition—corresponds to what, colloquially, one might think of as certainty.

Perhaps not surprisingly, there are robust and complex dialogues amongst gifted philosophers, spanning generations, over a proper definition of certainty.<sup>24</sup> This, in turn, obscures one’s ability to confidently define knowledge as certainty.<sup>25</sup> But for purposes of this Article, it is unnecessary to try to resolve these perhaps intractably opposing positions. One can define knowledge as an “intuitive” form of certainty—one that avoids the skeptical arguments against both epistemic and subjective definitions of certainty.<sup>26</sup>

An intuitive form of certainty can be described as the level of understanding or explanation that is achieved when all that is possible to be known is known, leaving no room for an alternative explanation. In other words, intuitive certainty is not subjective, but rather is based on the highest level of available justification; but intuitive certainty is not epistemic in that it acknowledges that there may be unavailable information that would support an alternative conclusion.<sup>27</sup> The weakness of subjective certainty should be apparent: one can be subjectively certain, and yet still wrong.<sup>28</sup> The weakness of epistemic (or “actual”) certainty is equally patent—actual certainty may be theoretically impossible, and even if actual certainty is theoretically possible, in any practical sense absolute certainty is unattainable.<sup>29</sup> Put

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23. LEHRER, *supra* note 21, at 1.

24. Baron Reed, *Certainty*, STAN. ENCYCLOPEDIA PHIL. (Feb. 2, 2008), <https://plato.stanford.edu/entries/certainty/>.

25. *Id.*; see also Stanley, *supra* note 21, at 35–57 (explaining the connection between knowledge and certainty).

26. Stanley, *supra* note 21, at 32, 37.

27. *Id.*

28. *Id.*

29. *Id.*; accord SOAMES, *supra* note 10, at 29–32 (questioning whether actual certainty is attainable); *Introduction to THE PHILOSOPHY OF LAW* 8–9 (R. M. Dworkin ed., 1977) (describing how a legal positivist—an anti-realist—believes that “no sense can be assigned to a proposition unless those who use that proposition are all agreed about how the proposition could, at least in theory, be proved conclusively.” Dworkin criticizes this view because it means that no controversial proposition of law can be true.).

another way, even if time and resources were unlimited, intuitive certainty describes how the closest one could come to actual certainty and therefore attainable knowledge.

In philosophy, a definition of justification is also elusive and contentious.<sup>30</sup> For purposes of this Article, a crude statement of the “foundationalism” theory of justification is sufficient. Meaning, a belief in the truth of a proposition is justified when it is derived from predicates external to the proposition and that are experienced through the senses.<sup>31</sup> In other words, justification is an evaluation of the strength of the available information.

Belief in philosophical jargon is “the attitude we have, roughly, whenever we take something to be the case or regard it as true.”<sup>32</sup> It is hard to succinctly describe this meaning of belief in a way that is both accessible to the non-philosopher and fits within a normal meaning of the word. Perhaps belief is best thought of as what separates wheat from chaff; it sorts random conclusions from conclusions that advance the purposes of the endeavor in which one is engaged.<sup>33</sup> Or put even another way, when gathering information one has a context—a system purpose—that identifies which data justifies a conclusion that a proposition is true (or false). H. L. A. Hart alluded to the same idea when he wrote that the inquiry “what is law” should be answered by considering which concerns motivated the question.<sup>34</sup> Crudely speaking, the consideration of “concerns motivating the question” describes the role of belief in knowledge.<sup>35</sup>

In sum, within weak deflationism, knowledge requires truth, justification, and belief. The inquiries of the nature of each of these concepts are the truth inquiries—the questions a particular construct of truth posits, emphasizes, and explores—of weak deflationists. These

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30. See, e.g., Erik Olsson, *Coherentist Theories of Epistemic Justification*, STAN. ENCYCLOPEDIA PHIL. (Nov. 15, 2012), <https://plato.stanford.edu/entries/justep-coherence/> (examining how the coherence theory of justification can be used to analyze knowledge).

31. See Richard Fumerton & Ali Hasan, *Foundationalist Theories of Epistemic Justification*, STAN. ENCYCLOPEDIA PHIL. (Oct. 24, 2016), <https://plato.stanford.edu/entries/justep-foundational/> (discussing noninferential justification and objections to classical foundationalism).

32. Eric Schwitzgebel, *Belief*, STAN. ENCYCLOPEDIA PHIL. (Mar. 24, 2015), <https://plato.stanford.edu/entries/belief/>.

33. See generally LEHRER, *supra* note 21, at 32–41, 72–76, 93, 124–25 (discussing the relationship between knowledge and belief).

34. See H. L. A. HART, *THE CONCEPT OF LAW* 5 (2d ed. 1994) (questioning how to explain law). There is some irony to quoting Hart in an Article that uses nonlegal disciplines as an analog, as Hart began his own book by contending that law is alone among disciplines in being introspective about what it is and why it is doing what it is doing. *Id.* at 1.

35. See LEHRER, *supra* note 21, at 12–14 (discussing the relationship between knowledge and belief).

truth inquiries suggest a template for how to formulate a meaning of truth in courts—one should isolate the role of truth in courts by first exploring the meaning of knowledge, belief, and justification in courts.

But one should not jump into this approach naively. While weak deflationism is an analog for the truth-finding function of trial courts, the truth inquiries of weak deflationism are not identical to the truth inquiries of the courts.

Most obviously, the truth inquiry in courts diverges from a philosophy that courts seek knowledge that is a step down—perhaps *many* steps down—from “intuitive certainty.” Yet this difference does not undermine the utility of using philosophical jargon and analysis to understand what courts mean by truth, because what courts do is still within the defined terminology of philosophy. In particular, an acceptable epistemological definition of “probability” is the likelihood that a proposition one believes to be true *is* true.<sup>36</sup> So in the philosophical jargon of “knowledge,” the knowledge courts seek is a systemically defined “probability” on a spectrum of knowledge, which is less than “intuitive certainty” but more than impossibility.

Put slightly differently, what courts are doing when they seek the truth is—and essentially must be—seeking an adequately justified belief about what happened in a case.<sup>37</sup> Disputes must have an end at some point, and knowledge in the philosophical sense requires the unattainable goal of absolute—or even intuitive—certainty.<sup>38</sup> Coarsely stated, courts settle for “knowledge enough,” based on a “justified enough” “belief enough” that a conclusion is “true enough”—meaning that for purposes of the courts, there is an acceptable likelihood that the courts’ perception and

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36. It should be apparent that essentially every single term or word in philosophy is more nuanced and debatable than the discussion of this Article can capture. For example, there are at least three definitions of “probability,” none of which are devoid of objections. See LEHRER, *supra* note 21, at 86–94 (detailing the advantages and objections of three formulations of “probability”). But for purposes of this Article, the above definition fits within all three, and will suffice.

37. See C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees*, 35 VAND. L. REV. 1293, 1295–97 (1982) (discussing the use of probabilities by factfinders); accord SOAMES, *supra* note 10, at 31 (analyzing the use of belief by courts to find truth).

38. See generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) (presenting an economic analysis of the value of accuracy in adjudication). See also Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 AM. J. JURIS. 43, 47–48 (2004) (“When we need the answer to some question in a hurry, we may be obliged to curtail our search for further evidence . . . [W]here some action must be taken now, . . . we have no choice but to decide what to do on the basis of whatever evidence we have . . .”).

judgment of what happened corresponds to what *actually* happened.<sup>39</sup>

So, one must recognize that the meaning of knowledge, justification, belief, and truth likely are analogous, but certainly differ between weak deflationists and the courts. It is within this caveat that the weak deflationism formulation of truth can overcome the otherwise apparently over-daunting task of enunciating a comprehensive formulation of truth in courts. Just as within weak deflationism, knowledge requires truth, justification, and belief, one can posit that knowledge in courts (a perhaps highly imperfect form of knowledge that is a degree of indeterminate probability materially below intuitive certainty) requires: (a perhaps imperfect form of) truth (truth in courts), (a perhaps imperfect form of) justification (justification in courts), and (a perhaps imperfect form of) belief (belief in courts).

One can then infer that to better understand<sup>40</sup> the nature and import of truth in courts, one must explore more deeply the meaning of justification in courts, the meaning of knowledge in courts, and the meaning of belief in courts.

### *B. Understanding Justification in Courts*

The philosophical definition of justification is “the predicates external to the proposition . . . which are experienced through the senses.”<sup>41</sup> This readily translates to trials. In trial, the proposition is guilty/not guilty, or liable/not liable; the predicates external to that proposition that are experienced through the senses are the various sources of information—witness accounts, records, physical proof—that bear on the understanding of that proposition. More simply, justification in courts is the set of data that counts as a fact—the admissible evidence. To better understand justification in courts, one can look at what counts as a fact in trials, and why.

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39. In this context, I am comfortable conflating two concepts—probability (an estimate as to the likelihood of a given fact being true) and confidence (how sure one can be about a probability estimate given the information available)—that in other legal, doctrinal contexts should not be conflated. See generally Luke Meier, *Probability, Confidence, and the Constitutionality of Summary Judgment*, 42 HASTINGS CONST. L.Q. 1 (2014) (discussing three types of judgment the court uses when entering summary judgment). Also, a court judgment, of course, not only determines “what happened,” but also what consequences append to that determination. This Article confines itself to the “what happened” function of judgments because the “consequences determination” function of judgments is not part of the truth inquiry of the courts (as this Article defines the truth inquiry aspect of trials).

40. I use the phrasing “better understand” as I am mindful of Keith Lehrer’s assertion (and explanation) that “a complete theory of truth is impossible.” LEHRER, *supra* note 21, at 29.

41. See Fumerton & Hasan, *supra* note 31 (discussing sense data).

## 1. The Rules of Evidence Define What Counts as a Fact in Courts

The Federal Rules of Evidence<sup>42</sup> provide a detailed source of the meaning of justification in courts.<sup>43</sup> Professor John Leubsdorf analyzes the Rules as a set of *ex ante* incentives for adversaries.<sup>44</sup> But for this Article’s purposes, the Rules serve a much more concrete function—the Rules themselves are where the American courts set forth an explicit delineation of what information is admissible evidence (i.e., what counts as a “fact”).<sup>45</sup>

“Relevant” evidence is what rises to the level of a “fact” in trials. Rule 401 of the Rules defines “relevant” evidence as any information that bears *even slightly* on anything of consequence in a trial.<sup>46</sup> Under Rule 401, all relevant evidence is presumed admissible, but Rule 402 defines “inadmissible” as any information that fails to meet the Rule 401 threshold.<sup>47</sup> The remainder of the Rules either set forth administrative matters concerning such things as who is competent to be a witness or the order of examination, or detail when otherwise relevant evidence nonetheless is not admissible. Most of the Rules fall into the latter category; in other words, the Rules set forth ways that relevant evidence still does not count as a trial fact, and thus cannot act as legal justification in a trial.

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42. This portion of the Article is based on the substantive content of the Federal Rules of Evidence. While each state has its own evidence code, in substance the content of the large majority of those codes is virtually identical to the content of the federal rules. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR UNITED STATES COURTS T-1* (Joseph M. McLaughlin et al. eds., 2016) (noting that forty-four states have adopted rules of evidence based on the Federal Rules of Evidence).

43. *But see* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1212 (2006) (detailing the tacit assumptions involved in evidence law and the resistance to innovations); *see also* Mark Cammack, *Evidence Rules and the Ritual Functions of Trials: “Saying Something of Something”*, 25 LOY. L.A. L. REV. 783, 783 (1992) (“[E]vidence law does not embrace its own substantive ends, the purposes of evidence law must be determined by reference to the trial which it is designed to regulate.”).

44. *See generally* John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621 (2010) (discussing the impact of evidence law on the parties involved in a case); Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423 (2015) (arguing that the Federal Rules of Evidence are motivated by efficiency decisions).

45. Because the text of the rules and of the Advisory Committee notes, as well as numerous court opinions, often explicitly describe the underlying rationales of the rules, I will not address in this Article alternative meta-explanations such as Alex Stein’s. *See generally* Stein, *supra* note 44 (describing these alternatives).

46. FED. R. EVID. 401.

47. FED. R. EVID. 402.

## 2. Procedural and Administrative Rules of Evidence

Some Rules are purely procedural or administrative. These Rules do not directly bear on what the courts count as a fact. And further, these Rules do not describe a mechanism either to advance or hinder the likelihood that a trial outcome will correspond to what actually happened, which is a description of what courts do that correlates to a justified knowledge of truth:

Rule Number	Name
<b>Rules that go beyond simply defining terminology, but set forth the scope of proceedings and describe how to apply and amend the Rules<sup>48</sup></b>	
Rule 101	Scope; Definitions
Rule 1101	Applicability of the Rules
Rule 1102	Amendments
Rule 1102	Title
<b>The Rule that broadly states the overall goals of the Rules (i.e., fairness, efficiency, truth, and justice)<sup>49</sup></b>	
Rule 102	Purpose
<b>Rules that set forth procedures for making and ruling on objections<sup>50</sup></b>	
Rule 103	Rulings on Evidence
Rule 104	Preliminary Questions
Rule 105	Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
<b>Rules that set forth the timing of considering evidence and how the jury is instructed about some evidence<sup>51</sup></b>	

48. FED. R. EVID. 101, 1101–1103.

49. FED. R. EVID. 102.

50. FED. R. EVID. 103–105.

51. FED. R. EVID. 106, 301–302, 612–613. Some evidence scholars argue that Rules 106 and 612 also are rules of admissibility. See Andrea N. Kochert, Note, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 IND. L. REV. 499, 500 (2013) (describing how Rule 106 is used in the context of admissibility at trial); Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825, 826–27 (1995) (endorsing the view that the most important function of the completeness rule is to trump otherwise applicable exclusionary rules); Thomas M. Tomlinson, Note, *Pattern-Based Memory and the Writing Used to Refresh*, 73 TEX. L. REV. 1462, 1481 (1995) (arguing that because a witness may transmit the contents of inadmissible evidence through Rule 612, the rule can lead to the effective admission of inadmissible evidence in powerful testimonial form); but see 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6183 (2d ed. 1993) (“Rule 612 is not an independent source of admissibility, but simply describes a procedure whereby a witness may be assisted in providing admissible testimony.”). Thought of this way, these two rules facilitate revealing to the fact finder evidence that otherwise would have been considered injurious to the accuracy of fact finding—in

Rule Number	Name
<b>Rules that go beyond simply defining terminology, but set forth the scope of proceedings and describe how to apply and amend the Rules<sup>48</sup></b>	
Rule 106	Remainder of or Related Writings or Recorded Statements
Rule 301	Presumptions in Civil Cases Generally” and “Applying State Law to Presumptions in Civil Cases
Rule 302	Applying State Law to Presumptions in Civil Cases
Rule 612	Writing Used to Refresh a Witness’s Memory
Rule 613	Witness’s Prior Statements
<b>The Rule that provides a method, external to the presentation of evidence, to put facts into the record<sup>52</sup></b>	
Rule 201	Judicial Notice of Adjudicative Facts
<b>Rules that define the parameters of what persons—<i>independent of the content of their testimony</i>—are competent to take the stand<sup>53</sup></b>	
Rule 601	Competency to Testify in General
Rule 603	Interpreter

The authentication rules<sup>54</sup> and the “Best Evidence Rules”<sup>55</sup> are cousins to the Rules defining persons who can testify as a witness—these rules define which documents are admissible evidence. In particular, the authentication rules and the “Best Evidence Rules” regulate forgeries, copies, and when a party can (or must) put a document into evidence, rather than simply describe what the document says.

Rules 611 (“Mode and Order of Examining Witnesses and Presenting Evidence”), 614 (“Court’s Calling or Examining Witnesses”), 615 (“Excluding Witnesses”), and 706 (“Court-Appointed Expert Witnesses”) address who may call a witness, when this can be done, how witnesses may be questioned, and when a witness can hear another witness testify.<sup>56</sup>

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other words, unwind the premise as to certain kinds of evidence that the evidence will be too confusing to or improperly weighted by the jury.

52. FED. R. EVID. 201. Within Rule 201 also is an interesting and rare acknowledgement of the fact-finding role of the jury. See Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1106–08 (2012–2013) (noting the fact-finding role of the jury in criminal and civil cases).

53. FED. R. EVID. 601, 603.

54. FED. R. EVID. 901–903.

55. FED. R. EVID. 1001–1008.

56. FED. R. EVID. 611, 614–615. One might also argue that each of these rules has a paternalistic component—a concern that absent these rules jurors will misapply or improperly weight particular evidence. John Leubsdorf describes how authentication rules can be thought of as rules predicated on a distrust of the cognitive abilities of judges and jurors. See John Leubsdorf, *supra* note 43, at 1234–41.



### 3. Evidence Rules Protecting the Jury

Most of the Rules *do* seek to advance the likelihood that a trial outcome will correspond to what actually happened, but many do so in a counterintuitive way. Intuitively, one might think that in a trial regarding a convenience store robbery, for example, the accused is more likely guilty if the accused has a past conviction for a convenience store robbery; or that if a trial must decide if the traffic light was red, it is helpful to hear from a witness who can recount that someone else told him or her that the light was red. Neither of the aforementioned is an example of conclusive proof, but both are examples of at least *some* proof. Yet, at least in trials, where the fact finder is a jury (as opposed to a judge), the Rules generally, and counterintuitively, treat both of these examples—and numerous similar examples—as *improperly* illustrating a correct determination of what happened. Therefore, the evidence is inadmissible.

The Rules codify the concern that juries will misunderstand, be confused by, or improperly weigh certain kinds of evidence.<sup>57</sup> The Rules simply do not trust—and actually come close to being openly derogatory of—the analytical and emotional abilities of jurors.<sup>58</sup> Thus, to maximize the likelihood that a jury verdict will accurately determine what happened in a case, the Rules keep arguably relevant evidence away from the jury based on the presumption that jurors are easily confused and bored.

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57. See, e.g., Leubsdorf, *supra* note 43, at 1210 (“[The land] is a realm founded on the untrustworthiness of jurors . . . a presupposition that underlies many evidentiary rules.”). One of these presuppositions can be described as distinctions “between the strengths and weakness of jurors.” *Id.* at 1212. “[T]he accepted view is that much of the law reflects judicial distrust of jurors.” *Id.* at 1248. And “[t]he usual manifestation of mistrust is the assertion that jurors will give too much weight to a given kind of evidence.” *Id.* at 1248. As a result, “[r]ules preventing juries from hearing large classes of evidence can best be justified by hypothesizing that their weaknesses will prevent them from appraising that evidence properly.” *Id.* at 1253. For a more charitable view of juries—arguing essentially that judges are no better than juries—see Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1494 (1999) (“The point is less that we need rules of evidence because we have juries than that we have no mechanism for enforcing rules of evidence against judges.”). At least one scholar argues that Rules 403, 408, 608, and 613 also rest on saving litigation time and money. Leubsdorf, *supra* note 43, at 1211 (“Efforts to limit the cost and delay of litigation may exclude relevant evidence.”). If so, then this rationale raises constitutional concerns. See generally Klein, *supra* note 52 (discussing why Rule 403 is unconstitutional).

58. As the American Law Institute (“ALI”) reported in promulgating its first Model Code of Evidence: “The low intellectual capacity of the jury is commonly put forward to justify some, if not all, of our exclusionary rules. . . . [J]urors are treated as if they were low grade morons.” Edmund M. Morgan, *Foreword* to AM. LAW INST., MODEL CODE OF EVIDENCE 1, 8 (1942). Accord GLANVILLE WILLIAMS, *THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL* 271 (3d ed. 1963) (“[I]t is an understatement to describe a jury . . . as a group of twelve people of average ignorance.”).

The “derogatory” view of jurors is most directly apparent in Rule 403 (“Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons”).<sup>59</sup> This Rule does exactly what its title suggests: it excludes relevant evidence that a judge believes the jury cannot properly evaluate. Perhaps a little less directly, that is also the underlying concern of character evidence rules, closely related impeachment rules, and rules for who can be a witness.

Rule Number	Name
<b>Character Evidence Rules<sup>60</sup></b>	
Rule 404 <sup>61</sup>	Character Evidence; Crimes or Other Acts
Rule 405 <sup>62</sup>	Methods of Proving Character
Rule 406 <sup>63</sup>	Habit; Routine Practice
<b>Closely Related Impeachment Rules<sup>64</sup></b>	
Rule 608 <sup>65</sup>	A Witness’s Character for Truthfulness or Untruthfulness

59. FED. R. EVID. 403.

60. FED. R. EVID. 404–406. See Posner, *supra* note 57, at 1525 (“The principal concern with this class of evidence . . . is the danger that a jury will give [it] too much weight . . .”). At common law, the use of character evidence was generally discouraged because of these concerns. See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (explaining that courts that follow common law traditions have almost unanimously come to disallow the prosecution to use any character evidence of the defendant to establish a likelihood of guilt). The Advisory Committee noted that character evidence:

[T]ends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man [and] to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

FED. R. EVID. 404 advisory committee’s note. The Advisory Committee recognized that evidence of specific instances of conduct to prove character “possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time,” and consequently, Rule 405 limits the use of this kind of evidence to cases in which character is an essential element of a charge, claim, or defense. FED. R. EVID. 405 advisory committee’s note.

61. FED. R. EVID. 404.

62. FED. R. EVID. 405.

63. FED. R. EVID. 406.

64. FED. R. EVID. 608–610, 806. The exceptions to the general rule against character evidence for propensity purposes are sharply drawn, both in terms of the type of evidence allowed and the manner in which such evidence may be introduced. For example, Rule 608(a), which allows for impeachment by reputation or opinion evidence, is “strictly limited to character for veracity” to “sharpen relevancy, to reduce surprise, waste of time, and confusion.” FED. R. EVID. 608 advisory committee’s note. Rules 608(b), 609, and 806 have similar safeguards, in addition to the “overriding protection of Rule 403.” *Id.* Rule 610 forecloses impeachment by an inquiry into religious beliefs, because “evidence of atheism is irrelevant to the question of credibility.” 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 46, at 218 (Kenneth S. Broun ed., 6th ed. 2006).

65. FED. R. EVID. 608.

Rule Number	Name
<b>Character Evidence Rules<sup>60</sup></b>	
Rule 609 <sup>66</sup>	Impeachment by Evidence of a Criminal Conviction
Rule 610 <sup>67</sup>	Religious Beliefs or Opinions
Rule 806 <sup>68</sup>	Attacking and Supporting the Declarant's Credibility
<b>Rules for Who Can Be a Witness<sup>69</sup></b>	
Rule 602 <sup>70</sup>	Need for Personal Knowledge
Rule 603 <sup>71</sup>	Oath or Affirmation to Testify Truthfully
Rule 605 <sup>72</sup>	Judge's Competency as a Witness
Rule 606 <sup>73</sup>	Juror's Competency as a Witness

Each abovementioned Rule either requires a predicate for witness testimony (believing the jury is incapable of seeing the weakness of the evidence in the absence of the predicate), or excludes evidence due to concerns that the jury will place too much stock in it. Rules 413 (“Similar Crimes in Sexual-Assault Cases”), 414 (“Similar Crimes in Child-Molestation Cases”), and 415 (“Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation”) also fall within this class of Rules because each Rule exists for the purpose of potentially reversing the function of Rule 404, in particular cases.<sup>74</sup>

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66. FED. R. EVID. 609.

67. FED. R. EVID. 610.

68. FED. R. EVID. 806.

69. FED. R. EVID. 602–603, 605–606. The requirements that a witness have first-hand knowledge of the matter to which he or she testifies and take an oath or affirmation to testify truthfully are the only express competency requirements provided by the Federal Rules of Evidence. DIX ET AL., *supra* note 64, § 62, at 305. Rule 602 reflects the common law's insistence on the most reliable source of information. FED. R. EVID. 602 advisory committee's note; DIX, *supra* note 64, § 10, at 47. Rule 603 goes hand-in-hand with the prohibition on inquiry into a witness's religious beliefs. See FED. R. EVID. 603 advisory committee's note. The presiding judge is deemed not competent to testify because of the concern that a testifying judge cannot “in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury.” FED. R. EVID. 605 advisory committee's note. Similar considerations justify precluding a juror from testifying as a witness before the other jurors. FED. R. EVID. 606 advisory committee's note.

70. FED. R. EVID. 602.

71. FED. R. EVID. 603.

72. FED. R. EVID. 605.

73. FED. R. EVID. 606.

74. FED. R. EVID. 413–415. Rules 413 through 415 were added as part of the Violent Crime Control and Law Enforcement Act of 1994, the largest crime bill in United States history. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 2135. In the early 1990s, media attention on perpetrators of sexual crimes escaping convictions on “technicalities” incited public outrage, which prompted Congress to respond by giving prosecutors the power to introduce evidence of past sexual crimes. Jeffrey Waller, Comment, *Federal Rules of*

Surprisingly, the same concern—that juries will misunderstand, be confused by, or improperly weigh certain kinds of evidence—animates the Rules on hearsay and opinion evidence. Hearsay rules<sup>75</sup> all codify the concern that juries will not properly weigh second-hand (or worse) information.<sup>76</sup> Rules on opinion evidence<sup>77</sup> all codify the concern that juries will either be unable to discern fact from opinion or will overweigh, or unfairly weigh, expert opinions.<sup>78</sup>

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*Evidence 413–415: “Laws are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil”*, 30 TEX. TECH. L. REV. 1503, 1506–07 (1999). The Rules’ supporters in Congress argued that Rule 404’s presumption against such evidence should be reversed in cases involving rape or child molestation, because the nature of such crimes made such evidence more probative and reliable. *See, e.g.* 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. McCollum) (arguing that the past conduct of a person with a history of sexual crime provides evidence that he or she has the unique combination of aggressive and sexual impulses that motivates the commission of such crimes, and the lack of inhibitions against acting on these impulses).

75. FED. R. EVID. 801–805, 807.

76. *See* Leubsdorf, *supra* note 43, at 1227–28, 1249 (discussing the generalizations about classes of evidence); Posner, *supra* note 57, at 1530 (discussing the exceptions to the hearsay rule that allow into evidence the forms of hearsay, or secondhand evidence, that have “probative value equivalent to that of first-hand evidence”); Justin Sevier, *Testing Tribe’s Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 890–93 (2015) (discussing the rationale for the rule barring hearsay); Laurence Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 969 n.42 (1974) (discussing the triangular analysis of hearsay). The rule against hearsay reflects the concern that the jury, which, historically, transformed from a group of persons with special knowledge of the facts to a group with no private information, should receive facts only from persons with first-hand knowledge of them. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 802.02 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2014). Thus, the rule and its exceptions keep from the jury evidence that lacks reliability. *See* FED. R. EVID. 803 advisory committee’s note (noting that the exception “proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial . . .”).

77. FED. R. EVID. 701–705.

78. *See* Posner, *supra* note 57, at 1536 (discussing the dissatisfaction with the use of expert witnesses). “The basic approach to opinions, law and expert, in these rules is to admit them when helpful to the trier of fact.” FED. R. EVID. 704 advisory committee’s note. Rules 703 and 704 allow experts to testify on matters of which they have no firsthand knowledge, base their testimony on facts or data that are otherwise inadmissible, and, except in criminal cases, opine on ultimate issues. In addition, the jury

may view an expert witness as an “objective authority figure more knowledgeable and credible than the typical lay witness,” and because an expert necessarily testifies about a subject that is beyond the common knowledge of the jury, the jury is not as well equipped to question the reliability of the expert’s opinion.

Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 HOUS. L. REV. 1, 3–4 (2015) (quoting *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007)); *see also* FED. R. EVID. 702 advisory committee’s note (“When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naïve to expect the jury to be capable of assessing the validity of dramatically opposed testimony.”). The Rules reflect these considerations in that they require the judge to play the role of a “gatekeeper” of expert opinion, to ensure that the jury is not presented with unreliable or misleading expert testimony.

The Rules of Evidence are not explicitly limited in applicability to jury trials. But one can be comfortable that, nonetheless, the Rules are a codified view of juror competencies. Courts allude to this very point.<sup>79</sup> Scholars report it.<sup>80</sup> Reference to this perspective is even made in the drafting history of the proposed Model Code of Evidence, the predecessor to the Rules.<sup>81</sup>

One can also look to whether the same exclusionary rules are present in administrative courts, which are non-jury adjudications. The set of exclusionary rules detailed above are not imposed on the administrative courts. In 1942, the iconic administrative law scholar, Professor Kenneth Culp Davis, published a piece in the *Harvard Law Review* that directly addressed the role of evidence rules in administrative hearings. He argued that such rules are largely unnecessary, primarily because administrative hearings are not jury trials.<sup>82</sup> Professor Davis did not go so far as to argue that the Rules excluding hearsay and opinion had no place in administrative hearings, but did argue that firsthand testimony should be preferred unless it was deemed “inconvenient.” He also contended that administrative hearing officers should not place “too much reliance” on opinion evidence, and administrative courts should “prefer” sworn instead of unsworn evidence.<sup>83</sup>

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Brown & Davis, *supra*, at 4. But for purposes of the thesis proposed here—that what counts as a fact in trials is different from what colloquially is a fact—is inescapably exemplified by Rule 703, which allows an expert opinion to rely on facts inadmissible as trial evidence.

79. *Williams v. Illinois*, 132 S. Ct. 2221, 2234–35 (2012) (“Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge[;] . . . Under both the Illinois and the Federal Rules of Evidence, an expert may base an opinion on facts that are ‘made known to the expert at or before the hearing,’ but such reliance does not constitute admissible evidence of this underlying information. Accordingly, *in jury trials*, both Illinois and federal law generally bar an expert from disclosing such inadmissible evidence. In bench trials, however, both the Illinois and the Federal Rules place no restriction on the revelation of such information to the fact finder. When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.” (citations omitted)).

80. *See, e.g.*, Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 724 (1964) (discussing the need for reform to evidence law).

81. The report of the ALI Proceedings considering the final draft of the Model Code of Evidence quoted the Honorable Augustus Hand as saying that he had “taken pride” that he had tried cases for thirteen years without knowing the technicalities of the rules of evidence. E.M. Morgan, *Discussion of Code of Evidence Proposed Final Draft*, in 19 A.L.I. PROC. 74, 225 (1943) (noting the remarks of Augustus Hand).

82. *See* Kenneth Culp Davis, *An Approach to Problems in the Administrative Process*, 55 HARV. L. REV. 364, 371–74, 416–23 (1942) (discussing the lack of effective laws concerning rules of evidence and their inapplicability in administrative processes).

83. *Id.* at 376–77. *Accord* Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L. J. 1, 5 (1971) (“Since many of the rules governing the

Expressed differently, administrative hearing officers should have the discretion to consider any evidence they want. The Administrative Procedures Act (first codified four years after Professor Davis's article) provides that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."<sup>84</sup> This is a codification of the position argued by Professor Davis—that in the absence of juries, there is no need to exclude weak, but still *relevant*, evidence from consideration.<sup>85</sup>

Finally, one can softly confirm the “derogatory” premise of the Rules by looking at other countries. Interestingly, countries with no jury trials, generally, do not exclude hearsay or character evidence.<sup>86</sup> Countries with a crimped scope of a right to a jury trial only exclude such evidence in the actual jury trials.<sup>87</sup>

So, one can have some confidence in the assertion that many of the Rules—and most dramatically all of the hearsay Rules, character

admission of proof in judicial trials are designed to protect the jury from unreliable and possibly confusing evidence, the rules need not be applied with the same vigor in proceedings solely before a judge or trial examiner.”)

84. 5 U.S.C. § 556(d) (1990).

85. Gellhorn, *supra* note 83, at 8.

86. The technical treatments of hearsay and character evidence vary. In most countries without a jury system, there are simply no rules addressing hearsay or character evidence at all. See Daniel Pulecio-Boek, *The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region*, 13 RICH. J. GLOBAL L. & BUS. 67, 100–01 (2015) (noting that virtually no Latin American evidence code includes rules regarding character or hearsay evidence); see generally Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55 (1995) (discussing the lack of doctrines regarding propensity evidence in continental Europe). Other codes express a preference for non-hearsay when it is available, but do not exclude hearsay. See, e.g., STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBl.] 1319, as amended, § 250 (Ger.); Decreto No. 189-84, Código de Procedimientos Penales [Code of Criminal Procedure], art. 199 (Hond.). Several countries have rules barring hearsay and/or character evidence, but the codified exceptions generally give the judge discretion to admit such evidence and thus swallow up the rule. See, e.g., Law of Evidence Amendment Act 45 of 1988 § 3 (S. Afr.); The Evidence Act 1967, §§ 34–39 (Tanz.). A handful of countries without jury systems limit hearsay and character evidence only in criminal trials. See Appendix to this Article (noting the jury system in other countries). But rules subjecting hearsay and/or character evidence to more scrutiny in criminal cases are probably “rooted as much in due process values as [they are] in the desire to project the adjudicator from unreliable information.” MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 15 (1997). Accord Stein, *supra* note 44, at 428 (arguing that many scholars have called for the “abolition of all admissibility and corroboration rules” of evidence law).

87. England, Scotland, and Jamaica are examples of this. See Appendix to this Article (noting the jury system in other countries). In the case of South Korea, the advent of the criminal jury in 2008 was accompanied by the introduction of rules excluding hearsay and other unfairly prejudicial evidence. Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, AM. J. COMP. L. 525, 554 (2010).

evidence Rules, and Rules on opinion testimony—are grounded in a derogatory view of juries.<sup>88</sup> While this set of Rules intuitively would seem to impair the accuracy of fact finding at trial, these Rules are an attempt to increase the likelihood that a trial outcome will correspond to what actually happened.

#### 4. Evidence Rules Intentionally Compromising the Likelihood of Accurate Results

Having dealt with procedural and administrative Rules and juror-capability Rules, what remains is a set of Rules intentionally excluding relevant evidence on the grounds that it will impair accurate determinations at trial. In other words, in contrast to hearsay and character evidence rules, these “exclusion of relevant evidence” Rules are *not* attempting to increase the likelihood that a trial outcome will correspond with what actually happened. Rather, these Rules make the exact opposite choice—these Rules keep out evidence that *does* bear on determining what happened, and they do so on the assumption that, while such evidence would be helpful, there nonetheless are valid reasons to ignore it.

The first collection of these Rules is found in Article IV of the Rules. The Article IV Rules alter the conduct and decisions of persons and/or entities external to the parties in trial.<sup>89</sup> Each of these Rules takes the same form: assume action “X” is considered a preferred choice, but if actor A does X, and if B sues A, then A’s trial opponent B might gain an advantage at trial by showing that A did X. The Article IV Rules, in order to encourage A to do X, prohibit B from introducing evidence that A did X at trial.

A concrete illustration is the Rule excluding settlement offers from evidence.<sup>90</sup> People want cases to settle—one does not wish to waste court resources or client money. We do not want people to hesitate to make settlement offers for fear that if the case does not settle, then the offer will be seen as a tacit admission of liability. Therefore, to incentivize people to make settlement offers, the Rules provide that, generally, a party

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88. There is growing empirical evidence that the derogatory view of juries is not supportable. *See, e.g.*, Sevier, *supra* note 76, at 890–93, 922–24 (discussing how the hearsay rule has had significant political and scholarly controversy).

89. Rules 407 through 411 each promote “a socially valuable activity . . . by protecting those who engage in that activity from evidence that might be used against them.” DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 88 (3rd ed. 2015).

90. FED. R. EVID. 408.

cannot argue at trial that their opponent's offer of settlement is a tacit admission. Rule 408 and its philosophical siblings are as followed:

Rule Number	Name
Rule 407 <sup>91</sup>	Subsequent Remedial Measures
Rule 408 <sup>92</sup>	Compromise Offers and Negotiations
Rule 409 <sup>93</sup>	Offers to Pay Medical and Similar Expenses
Rule 410 <sup>94</sup>	Pleas, Plea Discussions, and Related Statements
Rule 411 <sup>95</sup>	Liability Insurance
Rule 412 <sup>96</sup>	Sex-Offense Cases: The Victim's Sexual Behavior or Pre-Dispositions

A related set of doctrines is found in the law of privileges.<sup>97</sup> Privileges recognize certain relationships that society values that might not fully function except in an environment of trust, confidence, and privacy.<sup>98</sup> As a result, privileges work to keep out of evidence “extremely probative” and “reliable” information.<sup>99</sup> For reasons unrelated to evidence doctrine,<sup>100</sup> the Rules do not codify a comprehensive list of privileges, but nonetheless recognize the notion of privileges in Rules 501 (“Privilege in General”) and 502 (“Attorney-Client Privilege and Work-Product; Limitations on Waiver”).<sup>101</sup> The privileges currently and

91. FED. R. EVID. 407.

92. FED. R. EVID. 408.

93. FED. R. EVID. 409.

94. FED. R. EVID. 410.

95. FED. R. EVID. 411.

96. FED. R. EVID. 412.

97. See MERRITT & SIMMONS, *supra* note 89, at 88 (describing the various privileged relationships, such as attorney-client, spousal testimony and marital communications, psychotherapist-patient privilege, executive, clergy-communicant, and privilege against self-incrimination).

98. *Id.*

99. *Id.* at 826. Accord DIX, *supra* note 64, at 264 (“[R]ather than facilitating the illumination of the truth, [privileges] shut out the light.”); Davis, *supra* note 82, at 364, 384 (explaining that privileges “obstruct the search for truth in order to promote certain extrinsic policies”).

100. Congress considered the proposed Federal Rules of Evidence during the “Watergate” scandals, which soured Congress on codification of privileges. MERRITT & SIMMONS, *supra* note 89, at 289.

101. FED. R. EVID. 501–502. The original proposal by the Advisory Committee had thirteen privileges, but got caught up in the then broader controversy of Watergate and privilege; Congress did not adopt the original proposal on privileges. MERRITT & SIMMONS, *supra* note 89, at 829. The proposed Article V submitted to Congress contained thirteen rules: one provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the



unambiguously recognized in federal courts are the right against self-incrimination, attorney-client privilege, attorney work-product privilege, spousal-testimonial and spousal-confidences privileges, psychotherapist-patient privilege, executive privilege, and clergy-communicant privilege.<sup>102</sup> There is a recognized, but less defined, state-secrets privilege,<sup>103</sup> and some support for a journalist-source privilege.<sup>104</sup> Some states also recognize a physician-patient privilege and an intra-family privilege beyond spouses.<sup>105</sup> Each of these privileges represents a choice that evidence in a particular dispute will be excluded to affect the choices made by persons external to the dispute (the generic set of future clients, spouses, patients, journalist sources, penitents, etc.).<sup>106</sup>

A third set of exclusions of relevant evidence for nonaccuracy reasons are procedural exclusions. In these instances—such as exclusion of improperly gathered evidence in criminal cases<sup>107</sup> and exclusion due to discovery abuse in civil cases<sup>108</sup>—evidence is excluded not because the

federal courts, nine defined specific privileges, and three addressed issues of waiver. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230–61 (1972) (Proposed Rules 501–513). The Judiciary Committee amended Article V, eliminating all of the specific rules on privilege in favor of Rule 501, which provides that privilege is governed by the common law, the United States Constitution, federal law, and rules prescribed by the Supreme Court. The rationale underlying the amendment was that federal law should not supersede state law in substantive areas such as privilege absent a compelling reason. H.R. REP. NO. 93-650, at 8–9 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082–83. Some scholars suggest that the original proposal by the Advisory Committee got caught up in the then broader controversy of Watergate and privilege. MERRITT & SIMMONS, *supra* note 89, at 829. In 2008, the Advisory Committee proposed and Congress enacted Rule 502, which provides for limitations on waiver of the attorney-client privilege and work product protection, in response to longstanding disputes in the courts about the effect of certain disclosures of protected information and complaints about prohibitively high litigation costs necessary to protect against waiver. FED. R. EVID. 502 advisory committee’s note.

102. MERRITT & SIMMONS, *supra* note 89, at 830–31.

103. *See generally* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1913 (2006–2007) (giving a general overview of the state secrets privilege).

104. MERRITT & SIMMONS, *supra* note 89, at 831–32.

105. *Id.* at 832.

106. Posner, *supra* note 57, at 1530–32.

107. *See generally* Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 *AM. B. FOUND. RES. J.* 611 (1983) (arguing the “costs” of the exclusionary rule are lower than reported); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 *AM. B. FOUND. RES. J.* 585 (1983) (examining societal costs from lost prosecutions that result from this exclusionary rule).

108. *See* FED. R. CIV. P. 37(b)(2)(A) (“If a party or a party’s officer, director, or managing agent . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence . . .”).

admission of the evidence might distort the chances of reaching an accurate result, but rather despite the possibility that the exclusion might do so; the decision is made that, because of the way the police (mis)behaved, or because of the way the lawyer (mis)behaved, the Rules must incentivize better behavior in the future, even if the cost is the distorted outcome of the trial at hand.<sup>109</sup>

Finally, there is the exclusion of evidence for reasons of time and money.<sup>110</sup> Here, both Rules 403 and 611 allow the exclusion of relevant evidence when it is too time consuming or repetitive.<sup>111</sup>

As with jury derogation evidence Rules, excluding concededly relevant evidence for reasons unrelated to and independent of increasing the accuracy of trial fact finding is a counterintuitive definition of what counts as a fact in courts. And so, as a check that one is not too precipitously interpreting what American courts are doing, one can again look for at least soft confirmation from the courts of other countries. One can ask: Do other countries also recognize privileges and the like, thereby excluding concededly relevant evidence? And when one does so, the hypothesis again is confirmed: countries around the world routinely and intentionally exclude from evidence information that would advance the likelihood that a trial outcome will correspond with what actually happened.<sup>112</sup> Essentially, globally, courts are comfortable occasionally

109. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (“[T]he purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” (internal citations omitted)).

110. FED. R. EVID. 403, 622.

111. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: . . . undue delay, wasting time, or needlessly presenting cumulative evidence.”); FED. R. EVID. 611 (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . avoid wasting time.”).

112. Evidentiary privileges are examples of “[r]ules rejecting probative information for the sake of values unrelated to the pursuit of truth.” MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 12–13 (1997) (noting that testimonial privileges are widespread in continental Europe and often broader than the common law privileges). Some form of the attorney-client privilege exists in nearly every country examined in Appendix A of this Article. *See, e.g.*, CODE CRIMINAL PROCEDURE [C. CRIM. PROC.] [CRIMINAL PROCEDURE CODE] art. 159(b), (*Fletorja zyrtare* Nos. 5–7 1995) (Alb.); CODE CRIMINAL PROCEDURE [C. CRIM. PROC.] [CRIMINAL PROCEDURE CODE] art. 65(4) (Arm.); Commonwealth, *Evidence Act 1995* s 118–19 (Austl.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] §§ 246–247 (Chile); Civil Procedure Act, Act No. 9171, Dec. 26 2008, art. 315, (S. Kor.); RÄTTGÄNGSBALKEN [RB] [CODE OF JUDICIAL PROCEDURE], 36:3 (Swed.); The Evidence Act 1967, §§134–137 (Tanz.); CEZA MUHAKEMESI KANUNU [CMUK.] [CRIMINAL PROCEDURE CODE] art. 46 (Turk.); Civil Evidence Act, (Act No. 15/1999) § 8 (Zim.). The spousal/familial privileges is just as widespread. *E.g.*, Code CIVIL PROCEDURE [C. CIV. PROC.] [CIVIL PROCEDURE CODE] art. 566, (*Fletorja zyrtare* Nos. 9–11 1996) (Alb.); CODE CRIMINAL PROCEDURE [C. CRIM. PROC.] [CRIMINAL PROCEDURE CODE] art. 158, (*Fletorja zyrtare* Nos. 5–7 1995) (Alb.); CODE CRIMINAL

subjugating trial accuracy to other values. They do not see this as inconsistent with the public courts' role.

### 5. Conclusions About What Courts Count as Facts

What now can one conclude about what counts as a fact? Relevant evidence counts as a fact, subject to two limitations. First, a relevant fact must be within the evaluative skill set of preconceived notions of juror competence. Second, a relevant fact must not promote a defined set of undesirable behaviors external to the trial.

As Judge Richard Posner cautions, “it is important to note that the formal rules only codify a fraction of the law of evidence.”<sup>113</sup> But the other evidence rules Judge Posner has in mind—such as *res ipsa loquitur*—are not matters of defining facts, but rather are ways to resolve disputes by approaches other than the gathering of facts.<sup>114</sup> These other rules are, at most, tangential to the ideas of this Article.

So, what one can learn from better understanding justification in courts, or what counts as a fact, is that correct outcomes are *not* the end all and be all of public courts. Put another way, justification in courts means that the relevant facts are both within the evaluative skills of jurors' competence and do not promote defined undesirable behaviors external to the trial.

Finally, it bears at least brief acknowledgement and discussion that if one departs from the concrete settings of courtrooms and returns to the theoretical context of epistemology, then defining justification as dependent on external assumptions is philosophically problematic. Applying nuanced philosophical terminology somewhat crudely, the Rules are an example of an inferential justification that is an epistemic regression: knowledge formed from justified belief inferred from other

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PROCEDURE [C. CRIM. PROC.] [CRIMINAL PROCEDURE CODE] art. 20(1) (Arm.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BUNDESGESETZBLATT 3202, as amended, § 383(1)–(3) (Ger.); Civil Procedure Act, Act No. 9171, Dec. 26 2008, art. 314, (S. Kor.); RÄTTGÄNGSBALKEN [RB] [CODE OF JUDICIAL PROCEDURE], 36:3 (Swed.); The Evidence Act 1967, §§ 130–131 (Tanz.); CEZA MUHAKEMESI KANUNU [CMUK.] [CRIMINAL PROCEDURE CODE] art. 45 (Turk.); Civil Evidence Act, (Act No. 15/1999) § 6 (Zim.). In South Africa, judges have “wide discretion to permit [a witness] to refuse to disclose information where disclosure would be a breach of some ethical or social value and nondisclosure would be unlikely to result in serious injustice in the particular case in which it is claimed.” L. H. HOFFMAN & D. T. ZEFFERT, *THE SOUTH AFRICAN LAW OF EVIDENCE* 267 (4th ed. 1988). *But see* Jenia Iontcheva Turner, *The Exclusionary Rule As a Symbol of the Rule of Law*, 67 SMU L. REV. 821, 822–29 (2014) (reporting on the spread of the criminal exclusionary rule internationally in new democracies as a check on government abuse and a symbol of democracy).

113. Posner, *supra* note 57, at 1477, 1517.

114. *Id.*

knowledge formed from justified belief.<sup>115</sup> The Rules avoid the absurdity of an *infinite* epistemic regression by providing a foundation for this otherwise bottomless inquiry—the Rules define a set of information that a fact finder, by fiat, is empowered to believe as true, and thus is justified in inferring knowledge from this information.

But in doing so, the Rules create their own absurdity, because the foundation is defined as incomplete (because relevant evidence is excluded) and hence inaccurate. The Rules define a path to truth that intentionally is *not* the whole truth. This argument, in its most abstract form, is the basis of skepticism in philosophy of “foundationalism” and explanations of “justification.”<sup>116</sup>

That is a mouthful. For purposes of understanding justification in courts, the problem can be stated more accessibly: the Rules have to make assumptions about what *could* be true to evaluate what *is* true. That is epistemologically problematic. But in the more concrete context of justification in courts, this issue is less problematic in part due to the insight that correct trial judgments are not the *only* concern of the courts.

### C. Understanding Knowledge in Courts

This Article previously defined knowledge as an intuitive form of certainty.<sup>117</sup> In other words, it is when one has collected a sufficient quantum and quality of information that one feels comfortable ending the information-gathering function and is willing to now act.

Proceeding to trial is an information-gathering, decision-making endeavor. Any information-gathering, decision-making endeavor has rules for the quality of information it is willing to consider, and for the

115. See Fumerton, *supra* note 31 (“[T]he vast majority of the propositions we know or justifiably believe have that status only because we know or justifiably believe other different propositions.”).

116. *Accord id.* (“If all justification were inferential then for someone *S* to be justified in believing some proposition *P*, *S* must be in a position to legitimately infer it from some other proposition *E1*. But *E1* could justify *S* in believing *P* only if *S* were justified in believing *E1*, and if all justification were inferential the only way for *S* to do that would be to infer it from some other proposition justifiably believed, *E2*, a proposition which in turn would have to be inferred from some other proposition *E3* which is justifiably believed, and so on, *ad infinitum*. But finite beings cannot complete an infinitely long chain of reasoning and so if all justification were inferential no one would be justified in believing anything at all to any extent whatsoever. This most radical of all skepticisms is absurd (it entails that one couldn’t even be justified in believing it) and so there must be a kind of justification which is not inferential, i.e., there must be noninferentially justified beliefs which terminate regresses of justification.”). This is the coherentist attack on foundationalist theories of justification. See LEHRER, *supra* note 21, at 15–18 (discussing the coherence theory and foundationalist theory and how the two interact).

117. See *supra* text accompanying notes 26–28 (discussing “knowledge” as an intuitive form of certainty).

quantum of information collected such that collection can end and action can begin.

Consider, for example, the different approaches of a research physician and a treating physician. A research physician—or, for that matter, any bench scientist in any hard science discipline—primarily attempts to advance pure knowledge; it is paramount that a scientist designs an experiment rigorously.<sup>118</sup> Thus, a research scientist considers data that can be derived from a properly structured, double-blind experiment. A research scientist acts—meaning the scientist is willing to move on to the next task—only if the result can be replicated.

On the other hand, a treating physician, in response to the necessity of addressing patient health, has very different notions of what to consider as a basis to act, and when to act. Data worthy of consideration is any symptom, regardless of its vagueness, source, or likelihood. The decision-making metric is the “differential diagnosis,”<sup>119</sup> under which the physician may treat a more dangerous, albeit less probable, explanation first.<sup>120</sup>

Thought of this way, knowledge in courts—or the acceptable degree of probability—is a determination regarding the primacy of accuracy.

### 1. Knowledge as Accuracy

At the 2015 Annual Meeting of the American Association of Law Schools (“AALS”), the Criminal Justice Section presented a distinguished panel addressing the ways in which the criminal justice system fell short of being just or fair because of the system’s apparently insufficient devotion to discerning the truth with accuracy.<sup>121</sup> An underlying assumption of the entire panel was that guilt or innocence, at least in a serious criminal case, could—and should—be determined

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118. *Accord* John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 541–42 (1978) (arguing objective truth is best suited to scientific inquiries, while courts are better suited to distributive justice).

119. *Differential diagnosis*, GALE ENCYCLOPEDIA OF MEDICINE (2008).

120. Louis Kaplow uses the example of a treating doctor to rhetorically demonstrate why legal systems pay too little attention to decisional rules—he argues that in important medical decisions we would never use a preponderance of evidence standard. *See* Kaplow, *supra* note 38, at 738, 745 (explaining that the inference is that in medical decisions—where the stakes often can be higher than in civil litigation—the decisional rule would have to be more stringent. Under the differential diagnosis approach, however, the initial treatment may be addressing something even less likely than 50/50. And that is the point—different systems have different decision rules in response to different system needs).

121. *Criminal Justice — Reprioritizing Accuracy As The Primary Goal Of The Criminal Justice System*, AALS 2015 Annual Meeting (Jan. 5, 2015), <https://soundcloud.com/aals-2/criminal-justice-reprioritizing-accuracy-as-the-primary-goal-of-the-criminal-justice-system/s-YH7ve>.

accurately no matter the procedural burden or the stage of the litigation.<sup>122</sup>

The panelists all conceded that whatever they thought should be the primacy of accuracy, the United States Supreme Court unambiguously has promoted finality over accuracy.<sup>123</sup> Put simply, the jurisprudence of the Court plainly holds that if a trial has been procedurally sufficient, the fact that the verdict could be more accurate is not a reason to reopen the matter. Or phrased another way, even those who believe accuracy is attainable concede that the courts do not adopt this as a primary value.

The moderator of the AALS Panel, Professor Dan Simon, has written in detail on the value of accuracy in American courts.<sup>124</sup> In his book, Professor Simon puzzles over the Supreme Court jurisprudence: “One of the most bewildering and underappreciated features of the criminal justice process is the low value it assigns to the accuracy of its factual determinations or, in the legal parlance, to the discovery of truth.”<sup>125</sup> As Professor Simon details, the system regularly allows process to trump accuracy.

It is one thing to disagree with the Court. It is quite another to find it “bewildering.” If the Court’s opinions on accuracy are “bewildering,” then it bears revisiting whether the Court and Professor Simon mean the same thing by accuracy.

A quantum of information rule is the balancing point a system sets between its competing values of finality and certainty. As discussed *supra*, any information-gathering, decision-making endeavor has a set of rules for the quantum of information necessary to act.<sup>126</sup> This is the meaning of accuracy within an information-gathering, decision-making endeavor. It is what Professor Luke Meier describes as a “confidence principle:” the confidence one has in the probability of an event occurring is predictive of whether the event actually occurred.<sup>127</sup>

Because absolute certainty is not attainable, the endeavor must, at some point, conclude that it is “accurate enough,” colloquially speaking, before acting.<sup>128</sup> A complaint about the accuracy of an information-

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122. *Id.*

123. *Id.*

124. *See generally* DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012) (discussing how much emphasis courts place on accurate information).

125. *Id.* at 209.

126. *See supra* Part I.C (discussing knowledge in the courts).

127. *See* Meier, *Probability, Confidence, and the “Reasonable Jury” Standard*, 84 *MISS. L.J.* 747, 778–813 (2014–2015) (discussing the “confidence principle” through various hypotheticals).

128. *Accord* McCauliff, *supra* note 37, at 1295–96 (explaining because the trier of fact cannot know if a fact is true, he or she can only be persuaded to the degree required by the burden of proof).

seeking endeavor is a complaint that the system has not set the threshold for “accurate enough.” This threshold appears at the juncture that represents the end of information gathering and the start of action. Thus, the decisional rule—the rule for when gathering data can end and action can begin—defines a system’s value of accuracy.

## 2. Accuracy as Burdens of Proof

In the American courts, the rules describing the necessary production of a quantum of accurate information are the burden of production rules, which are one of two concepts incorporated within the familiar and broader burden of proof rules that are used as decisional rules: generally preponderance of the evidence in a civil case, and beyond a reasonable doubt in a criminal case.<sup>129</sup> Burdens of proof set a metric both for the acceptable probability that a decision will be correct, and how to make that decision (and avoid a “tie”).

The American courts are a binomial-decision system.<sup>130</sup> In a civil case over a claim between a pair of parties, a verdict can only be liable or not liable. In a criminal case, as to each charge against each defendant, a verdict can only be guilty or not guilty. American courts reach decisions almost every time.<sup>131</sup> But even in a binomial-decision system, it is possible that a decision is *not* reached; rather, there is a tie. Thus, this Part examines tie-breaking rules in binomial-decision systems.

129. *See, e.g., id.* at 1293–94 (discussing burdens of proof as various degrees of belief in the mind). If one probes more deeply than the general contexts of most civil cases and most criminal cases, there are other burdens of proof. Allen, *supra* note 2, at 557, 558–59. For purposes of this Article, these nuances do not matter. Further, the argument that some burdens of proof are constitutionally required, as discussed by Alex Stein, does not matter to this Article. Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 79–82 (2008).

130. Not all court systems are binomial decision systems. For example, a verdict in a criminal trial in Scotland gives three options: guilty, not guilty, and not proven. *See* Lorraine Hope et al., *A Third Verdict Option: Exploring the Option of the Not Proven Verdict on Mock Juror Decision Making*, 32 LAW & HUM. BEHAV. 241, 242 (2008) (discussing the not proven verdict). *See generally* Samuel Bray, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299 (2005) (explaining the not proven verdict).

131. Hung jury rates in the United States are approximately 5 percent to 7 percent. George C. Thomas, III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893, 918 (2006–2007). *See also* Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J. L. REFORM 569, 582–83 (2006–2007) (revealing roughly 2 percent of federal trials and 4–6 percent of state trials end in hung juries). *See generally* HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 56 (1966) (discussing the American jury system and hung juries); G. THOMAS MUNSTERMAN, NAT’L CTR. FOR STATE COURTS, *Executive Summary to HUNG JURIES: ARE THEY A PROBLEM?*, <http://www.ncsc-jurystudies.org/what-we-do/~media/microsites/files/cjs/jury%20news/hung%20juries%20are%20they%20a%20problem.a.shx> (discussing the NCSC study on hung juries in America).

While a true tie might be so unlikely as to essentially be impossible, if one defines a tie simply as a close question—one where the right decision is not yet sufficiently determinable—then how a system deals with ties is important.

Defining ties this way is not a matter of convenience, but rather of reality. Trials have never been, and never will be “Bayesian”<sup>132</sup>—judges and juries do not seek to quantify experiential data and risk of error to mathematically determine a verdict. The rules of courts structure a system that allows judges and juries to decide what probably happened in a case, and to be confident enough with that conclusion that a dispute can come to an end.<sup>133</sup> Until that point is reached, the trial is in stasis—it is a tie. Thus, the trial rules for when to move to a verdict represent the rules for when trials reach “knowledge.”

Now, one can comfortably see how the American courts act like any other information-gathering endeavor. Ties create a decision point: the point at which reaching the *right* decision is less important than reaching *some* decision. In information-gathering endeavors, as information is gathered there will be junctures where a decision is not yet considered readily determinable. Some of these junctures are simply moments where information gathering is early and incomplete. Others are junctures where the system has gathered enough information that a decision could be made. In these later instances, the system rules either will impose a decisional rule—a tie-breaking rule governing how to make a decision—or continue with the information-gathering process.<sup>134</sup>

In this way, decisions in trials (verdicts and judgments) are different from decisions described in classical studies of decision making (such as

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132. Bayes Theorem is “a theorem expressing the probability of one of a number of mutually exclusive events *H<sub>i</sub>*, given some other event *E*, in terms of the probabilities of all the *H<sub>i</sub>* independently of *E* and the probabilities of *E* given each *H<sub>i</sub>*.” *Bayes Theorem*, OXFORD ENGLISH DICTIONARY,

<http://www.oed.com/view/Entry/241646?redirectedFrom=Bayes+Theorem#eid12688130> (last visited Sept. 18, 2016).

133. See Meier, *supra* note 39, at 2 (“Stated simply, the probability inquiry requires an estimate as to the likelihood of a given fact being true; the confidence inquiry asks how sure one can be about a probability estimate given the information available.”). See also Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385, 395–97 (1985) (explaining why past efforts to have an accurate probabilistic approach to burdens of persuasion in court have failed).

134. See Michael Block & Jeffrey S. Parker, *Decision Making in the Absence of Successful Fact Finding: Theory and Experimental Evidence on Adversarial Versus Inquisitorial Systems of Adjudication*, 24 INT’L REV. L. & ECON. 89, 91 (2004) (noting that “burdens of proof . . . operate as default rules of decision for cases where revelation has failed”). A variant of this later version of a tie is when there is no further information to be gathered.



an economist using economic theory to analyze maximally efficient decision making). In trials, the decision maker (judge or jury) is different from the system participants controlling the quantum of information upon which the decision will be based (attorneys and litigants). Classic decision theory assumes decision making where the decision maker and the information gatherer are the same person/entity.<sup>135</sup>

Subject to this distinction, burdens of proof as decisional rules are not only probability rules, but also tie-breaking rules.<sup>136</sup> In trials, the attorneys—subject to the gatekeeping rulings of the judge—control the quantum of information.<sup>137</sup> Burdens of proof then regulate the way the decision maker manipulates this information. The decision maker does not usually—indeed, rarely can—send the case back to the lawyers and say, essentially, “I need to know more.”

The function of burdens of proof in trials is to force a decision, or to probabilistically take the possibility of a true tie off the table. It is a message to the parties: “Put into evidence whatever information you wish, but this is it; this dispute ends today.” So in trials the mere *fact* of imposing a tie-breaking rule imprecisely notes that, in the instance of close questions, at some point the system values finality more than the system fears error.<sup>138</sup> But the Rules do not quantify when information gathering will end, because it is in the control of the parties, not of the decision maker. Rather, the Rules provide that when information gathering has ended, the decision maker must decide.

Burdens of proof also teach something about courts’ views toward *particular kinds* of error. Errors can be one of two types: Type I error is a false positive; Type II error is a false negative. Binomial-decision

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135. Timothy Williamson argues that in the strictest construction, one “cannot use decision theory as a guide to evidential probability.” TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* 210 (2000). See Kaplow, *supra* note 38, at 738 (exploring a more detailed economic analysis of this phenomena and its implications). See generally Hillel J. Einhorn & Robert M. Hogarth, *Behavioral Decision Theory: Processes of Judgment and Choice*, 32 ANN. REV. PSYCHOL. 53 (1981) (discussing how humans make decisions).

136. See Jerome A. Hoffman & William A. Schroeder, *Burdens of Proof*, 38 ALA. L. REV. 31, 31 (1986–1987) (explaining burdens of proof in a trial do more than merely inform decisions).

137. See Justin Sevier, *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, 20 PSYCHOL. PUB. POL’Y & L. 212, 212–13 (2014) (describing an adversarial system—in contrast to an inquisitorial system—which places control of information outside the control of the decision maker and may be more poorly equipped to achieve objective accuracy).

138. A compelling criticism of the balance the American courts have struck between finality and accuracy can be found at Laurie L. Levenson, *Searching for Injustice: The Challenge of Post-Conviction Discovery, Investigation, and Litigation*, 87 S. CALIF. L. REV. 545, 547, 550, 552, 573, 582 (2014).

systems—in setting their decisional rules—express a choice between: (1) neutrality between Type I error and Type II error; and (2) preferring one type of error to the other.<sup>139</sup>

An example of near neutrality between Type I error and Type II error comes from baseball. Under the arguably apocryphal version of the rules of baseball, when a first baseman catches the ball at the apparent same moment that the runner's foot touches the base, the tie goes to the runner.<sup>140</sup> The likelihood is essentially zero that, if measured even in microseconds, there was an actual tie. If one assumes that instances of the runner beating the catch and instances of the catch beating the runner are equally distributed along a spectrum of which came first and by how much, then to impose a tie-breaking rule at exactly the point of the apparently true tie means baseball approaches the two types of error almost neutrally.<sup>141</sup> Baseball is as close as possible—while still making a decision—to being indifferent between a mistaken safe call and mistaken out call.

An example of a system that does *not* view both types of error neutrally is a pregnancy test. No over-the-counter pregnancy test is perfect. It is capable of giving a false positive or a false negative. But “[f]alse-positive results are not thought to be as significant a public health concern as false-negative results, as they should lead to a prenatal appointment and follow-up laboratory testing.”<sup>142</sup> For these reasons, a pregnancy test is intentionally biased to produce more false positives than false negatives.

As these examples illustrate, the nature of the tie-breaking rule of a system teaches us about that system's view toward particular types of error.<sup>143</sup> And, with this in mind, one can see something important about

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139. See Kaplow, *supra* note 120, at 738 (discussing the desire of courts to want both types of errors adjudicated because although Type I errors do not impose higher costs than Type II in civil cases, they do in criminal cases).

140. See *generally* *Tie Goes to the Runner*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tie\\_goes\\_to\\_the\\_runner](https://en.wikipedia.org/wiki/Tie_goes_to_the_runner) (last visited Aug. 26, 2016). I am aware that as video technology has advanced and as Major League Baseball has adopted video review, the likelihood and frequency of a true tie has almost been eliminated entirely. But the utility of baseball as an example serves the purposes of this Article, and it bears noting that there are vastly more baseball games played outside of Major League Baseball than within it.

141. Baseball does not approach the two types of error *exactly* neutrally, as that would require either randomizing the beneficiary of a true tie or doing something like the National Collegiate Athletic Association (“NCAA”) basketball does when two opposing team players simultaneously possess the ball—in the run of the game the two teams alternate the right to possession in the wake of a tie. But for purposes of this Article, baseball remains sufficiently illustrative.

142. Lori A. Bastian et al., *Diagnostic Efficiency of Home Pregnancy Test Kits*, 7 ARCHIVES FAM. MED. 5, 465–69 (1998).

143. See *generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 844–49 (Wolters

the American courts. The civil trial decisional rule—preponderance of the evidence—is like the baseball example (i.e., a near neutral rule).<sup>144</sup> In civil cases, the system essentially is indifferent to who wins.<sup>145</sup> The criminal trial decisional rule—beyond a reasonable doubt—is like the pregnancy tests (i.e., a strong preference rule). But a criminal trial, in contrast to a pregnancy test, prefers Type II error (a not guilty verdict setting a guilty person free) rather than Type I error (a guilty verdict convicting an innocent accused).<sup>146</sup>

One more observation can tentatively be made about burdens of proof.

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Kluwer Law & Business, 9th ed. 2014) (discussing various legal economic perspectives with a specific focus on burden of proof rules and errors).

144. While L. Jonathan Cohen does so in the course of developing a different point, in his work addressing burdens of proof, he posits an example of a case where the only evidence of who was a gatecrasher is that of 1000 attendees to a rodeo, only 499 paid to get in; his example illustrates the neutrality of the civil system between the two types of error—as to any particular person accused of being a gatecrasher, the likelihood of Type I error is .501 and the likelihood of Type II error is .499, yet the system is comfortable reaching a decision. L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 74–78 (1977). The civil justice system is not uniformly neutral between Type I and Type II error. See generally Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996) (balancing Type I against Type II error in securities litigation). Recent Supreme Court jurisprudence arguably broadly changes the balance point in civil cases between Type I and Type II error by empowering a civil trial judge to dismiss a case pre-discovery as a means of reducing the incidence of frivolous litigation. Mark Anderson & Max Huffman, Iqbal, Twombly, and the Expected Cost of False Positive Error, 20 CORNELL J.L. & PUB. POL’Y 1 (2010) (arguing that there is a higher risk of frivolous lawsuits when the plaintiff is favored in cost-disparity); James M. Beck & Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. 141, 146–47, 151–53 (2009) (citing a debate regarding the pleading rules after *Iqbal* and *Twombly*); Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437 (2013) (using cost shifting to create incentives for parties to either acquire or reveal information pertinent to a motion to dismiss); Kenneth S. Klein, *Removing the Blindfold and Tipping the Scales: The Unintended Lesson of Ashcroft v. Iqbal Is That Frivolous Lawsuits May Be Important to Our Nation*, 41 RUTGERS L.J. 593 (2010) (curbing frivolous lawsuits may undermine the core value of neutrality in justice). Because the Supreme Court did not discuss its rationale in the jargon of Type I and Type II error, the Court’s holdings are susceptible of at least two interpretations: the Court may be determining that the civil system no longer should be strictly neutral, but the Court also simply may be trying to correct for a system that should be neutral but that the Court believes has become out of balance.

145. Kaplow, *supra* note 120, at 742–44.

146. *Id.* at 744 n.10; Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 308 (2007). In other words, the criminal justice system is premised on a decision that as a society we are willing to live with more criminals on the street to minimize the instances of incarceration of the innocent. See, e.g., *In re Winship*, 397 U.S. 358, 361–64 (1970) (the reasonable doubt standard is “a prime instrument for reducing the risk of convictions resting on factual error”). The “beyond a reasonable doubt” standard is one place we can concretely see this decision in action. Cf. Matteo Rizzoli & Luca Stanca, *Judicial Error and Crime Deterrence: Theory and Experimental Evidence*, 55 J.L. & ECON. 311, 311, 316 (2012) (arguing that in criminal justice Type I error and Type II error might have an equal deterrence effect).

The intention of burdens may not be matched by the reality. As noted, the civil burden of proof is neutral between types of error. The criminal burden of proof is a strong preference rule. So, if the criminal burden of proof functions as intended, then in the set of not guilty verdicts, people would expect that a high percentage of acquittals are actually juries that conclude “not proven,” rather than “exoneration.”

But there is some weak data suggesting this is not what actually occurs. In Scotland, for example, the criminal verdict form has had three options for over 300 years: “Guilty,” “Not Guilty,” and “Not Proven.”<sup>147</sup> The verdict choice of Not Proven accounts for between one-fifth and one-third of all Scottish acquittals.<sup>148</sup> While a variety of factors could explain this experience, one explanation is that between 66 percent and 80 percent of acquittals in Scotland are actual exoneration.<sup>149</sup> And while Scotland is not the United States, and the differences systemically and culturally might matter for comparative purposes, Scotland’s experience is at least tentative evidence and raises a question as to how well the American burdens are achieving their architectural purpose.

This tentative conclusion reinforces an earlier point: trial judgments do not mirror precisely, either in structure or behavior, the kinds of decisions modeled in decision theory. It turns out that decision theory is a useful *analog* to what happens in trials, but is not a *description* of what happens in trials. And for this reason, one can draw broad, but not mathematically precise, conclusions about the role of burdens of proof in trials. Those

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147. See Lorraine Hope et al., *A Third Verdict Option: Exploring the Option of the Not Proven Verdict on Mock Juror Decision Making*, 32 LAW & HUM. BEHAV. 241, 242 (2008) (noting the Scottish legal system allows for an option of “not proven,” where the defendant is culpable, but the prosecution has not proven its case beyond a reasonable doubt).

148. *Id.*

149. I believe the true exoneration rate in Scotland is actually between somewhat and far lower than this rate. Here is why: envision a spectrum of confidence of guilt ranging from 0 percent certainty of guilt (100 percent certainty of innocence) to 100 percent certainty of guilt. We will somewhat arbitrarily, for these purposes, assign a value of 90 percent of certainty guilt to “guilt beyond a reasonable doubt”—the standard for conviction in a criminal trial. “Probably guilty” versus “probably innocent” would break right at 50 percent. So on this spectrum, “Guilty” would be the cases from 90 percent to 100 percent. “Probably Not Guilty” would be the cases from 0 percent to 50 percent. “Probably Guilty but Not Proven” would be the cases from 50 percent to 90 percent. This model would predict, then, that four-ninths of acquittals—44.44 percent—would be where the jury is actually concluding “Probably Guilty but Not Proven.” But Scotland’s experience is that the percentage of acquittals through a verdict of “Not Proven” is 20 percent to 33.33 percent. There are a variety of factors that could explain why juries in Scotland opt for a finding of “Not Proven.” See *generally id.* But all of these factors would vector toward the “Not Proven” rate being higher—not lower—than the incidence of a true conclusion of “Not Proven.” So I conclude that the true rate of acquittals because guilt was “Not Proven” “Beyond a Reasonable Doubt” is higher than 20 percent to 33.33 percent, and conversely the true exoneration rate is lower than 66.67 percent to 80 percent of all acquittals.

conclusions are that the rules of the American courts: (1) express a preference for finality over accuracy; (2) express a near neutral view of error in civil cases; and (3) express a strong preference for Type II error in criminal cases.<sup>150</sup>

It bears noting that some expert scholars, in their economic analysis of the law, reject the notion that mathematically precise conclusions about the role of burdens of proof in trials are unattainable. There is a lot of contemporary discussion in the legal literature—largely taking a Bayesian approach<sup>151</sup>—about refining burdens of proof either to function optimally or to serve system goals beyond simply being a decisional rule. Professors Bruce Hay and Kathryn Spier argue for burdens of proof as a means of limiting the costs of resolving a dispute.<sup>152</sup> Professor Louis Kaplow proposes modifying burdens of proof to better reflect statistical distributions of harms and benefits related to kinds of behavior.<sup>153</sup> Professor Edward Cheng calls for a pure (or at least more) numerical approach to burdens of proof as decisional rules.<sup>154</sup> Professors Ronald Allen and Alex Stein take on the economic analysis of Professor Kaplow and Professor Cheng, and use an economic analysis to conclude burdens of proof need no great revision.<sup>155</sup> Judge Richard Posner argues for reforms to burdens of proof to simultaneously maximize efficiency and protect noneconomic interests.<sup>156</sup>

The underlying assumption of all this scholarship is that it is possible to define burdens of proof with some mathematical precision. Perhaps so. But even if burdens of proof can, within academic literature, be defined with mathematical precision, it is doubtful that it is within the capabilities of most judges and juries to apply them in that manner.<sup>157</sup>

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150. I will not attempt to be any more precise in my description of the role of burdens of proof in fact finding. I agree with Ronald Allen and Alex Stein that it is impossible to assign anything like mathematical precision to the nature of fact finding. See Allen & Stein, *supra* note 2, at 600–02. But see Stein, *supra* note 44, at 423 (arguably presenting the opposite conclusion—that fact finding can be precisely economically modeled).

151. See, e.g., Anne W. Martin & David A. Schum, *Quantifying Burdens of Proof: A Likelihood Ration Approach*, 27 JURIMETRICS J. 383, 384–85 (1986–1987) (noting how it is possible to quantify a burden of proof standard).

152. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 413 (1997).

153. Kaplow, *supra* note 120, at 751.

154. See generally Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254 (2013) (arguing that the absolute standardization of the burden of proof is incorrect).

155. Allen & Stein, *supra* note 2, at 557.

156. Posner, *supra* note 57, at 1502–07, 1543.

157. Because of constitutional concerns, the majority of all trials carry a right to trial by jury. Without regard to one's evaluation of the capabilities of the "average" judge, surely no one would argue that the "average" juror would or could satisfactorily apply a statistical or mathematical construct of burdens of proof.

### 3. Conclusions About Knowledge in Courts

If accuracy in courts means something different than reaching a result that is verifiably “correct,” then what do courts mean by accuracy? Accuracy is an application of a confidence principle; it means that a quantum of evidence has been gathered sufficient to conclude that a probably correct determination of what happened can be reached. And this then gives us a better understanding of knowledge in courts. Knowledge in courts is reaching a “correct enough” resolution, biasing toward certainty when the stakes involve liberty and staying near neutral when the stakes are private relationships.

#### *D. Understanding Belief in Courts*

Belief is defined in an information-gathering, decision-making system as the point at which the system has concluded that it has made not just any determination, but rather a determination that advances the goals of the system. So to better understand belief in courts, one must understand why we have a publicly funded justice system.<sup>158</sup>

#### 1. Substantive Fairness and Procedural Sufficiency

Why *do* public courts exist? Why are people willing to devote enormous amounts of public time and money to resolving who started a fight, or who caused an automobile accident?

It might seem tautological that the goal of a justice system is, as the name of the system states, justice. An inscription on the walls of the United States Department of Justice states: “The United States wins its point whenever justice is done its citizens in the courts.”<sup>159</sup> But in the context of law, the word “justice” is imprecise. Justice can refer to one of two ideas: substantive fairness and procedural sufficiency.

Substantive fairness is an independently equitable result, one that meets a community’s sense of right and wrong.<sup>160</sup> It is, like the weak

158. Cf. Kaplow, *supra* note 120, at 738 (applying a similar sort of analytical approach—considering the “why”—by proposing that how to set a burden of proof and evidence threshold should account for a variety of societal and system interests, including considering the cost of error in fact finding). See also HART, *supra* note 34, at 1–17 (noting that the question, “what is law,” should be answered by considering what concerns motivated the inquiry).

159. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

160. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press ed., 10th ed. 1980). Rawlsian justice is, of course, but one formulation in a long philosophical dialogue—paralleling that of “what is truth?”—about “what is justice?” For our purposes, it is suffice to say that Rawls’ view is one seeking to define, and thus provide an example of, a construct of what is an objectively fair outcome. The jurist Roscoe Pound saw this idea of justice—substantive fairness—as precisely the goal of the American courts. See Roscoe Pound, *Justice According to Law*, *THE MID-WEST Q.*

deflationist understanding of truth, a singular matter (i.e., property) external to any particular dispute, and which a trial either has or does not.<sup>161</sup>

Procedural sufficiency is the fair opportunity to present one's position to a neutral decision maker.<sup>162</sup> It is what the Supreme Court has held is procedurally guaranteed by the due process clauses of the United States Constitution.<sup>163</sup>

Substantive fairness and procedural sufficiency, both broad notions of justice that comfortably fit within a definition of the word, describe different ideas of justice.<sup>164</sup> Yet while the nature of justice is an ongoing and intractable philosophical and jurisprudential debate, it is not a matter of doctrinal ambiguity in the American courts. The architecture of the justice system reinforces, at innumerable junctures, that the systemic goal is procedural sufficiency, which pejoratively means something akin to "fair enough."<sup>165</sup>

Examples of "justice only requires 'fair enough'" are easy to list. Civil

223, 223–35 (1913–1918) (noting how shifts in cultural attitudes define what is right and wrong). Cf. Allen Buchanan & Deborah Mathieu, *Philosophy and Justice*, in JUSTICE: VIEWS FROM THE SOCIAL SCIENCE 11, 11 (Ronald L. Cohen ed., 1986) ("Justice is usually said to exist when a person receives that to which he or she is entitled . . .").

161. *But see* Thibaut & Walker, *supra* note 118, at 541–42 (arguing that objective truth is best suited to scientific inquiries, while courts are better suited to distributive justice).

162. A detailed discussion of the nature of procedural sufficiency as an articulation of justice can be found in the work of Professor Tom Tyler. *See, e.g.*, Tom R. Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 107 (1988); *see generally* Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERS. SOC. PSYCHOL. BULL. 747 (2003) (testing the four-component model of procedural justice through hypothesis surrounding rules and fairness); Yuen J. Huo et. al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERS. & SOC. PSYCHOL. 767, 767, 769, 771, 775, 779 (1997). *Accord* LITA FURBY, PSYCHOLOGY AND JUSTICE, JUSTICE at 163–64 (Ronald L. Cohen ed., Plenum Press 1986) ("[P]erceived fairness of procedures affects satisfaction with those procedures, independent of outcomes.").

163. U.S. CONST. amend V; U.S. CONST. amend XIV, § 1; *see, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) (holding that the procedures in place were sufficient to satisfy due process).

164. In August of 2014, one of the dominant news stories in the United States was the civil unrest in Ferguson, Missouri after a white police officer shot and killed an apparently unarmed African American, Michael Brown, who witnesses claimed had his hands up at the moment of the shooting. On CNN, the mother of Michael Brown was asked: "What is justice to you?" She answered: "Being fair. Arresting this man and making him accountable for his actions." *CNN Newsroom with Carol Costello* (CNN television broadcast Aug. 18, 2014). That seems to be in a single answer an allusion to the two different concepts of judicial justice.

165. *Cf.* Haack, *supra* note 38, at 50–51 (discussing how courts seek an answer that is "tolerably good").

trials do not require unanimous verdicts.<sup>166</sup> Criminal trials can have as few as six jurors.<sup>167</sup> As previously mentioned, relevant evidence can be excluded for reasons of time consumption.<sup>168</sup> Judges can put absolute time limits—literally using chess clocks—on civil trials.<sup>169</sup> If, after the presentation of evidence at trial, the fact finder is completely uncertain of which narrative is correct, rules of decision are imposed for that uncertainty to define a verdict, rather than extend the inquiry.<sup>170</sup> Standards of review can tie the hands of a judge to reverse a jury verdict that is contrary to scientific evidence.<sup>171</sup> Appellate judges cannot overturn fact finding on the basis that the appellate judge believes the jury got it wrong.<sup>172</sup> Professor Dan Simon summarizes the Supreme Court’s jurisprudence as consistently affirming that “[d]efendants are [only] promised procedural rights, not reliable evidence or accurate verdicts.”<sup>173</sup> The system repeatedly and intentionally is set simply to be fair enough.<sup>174</sup>

This instinctively may seem wrong—or, put another way, out of sync with intuitive notions of what is justice, and what individuals in society

166. *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972).

167. *See Williams v. Florida*, 399 U.S. 78, 90–102 (1970) (holding that a twelve-person jury was not necessary for a trial by jury).

168. *See* FED. R. EVID. 403; *see supra* text accompanying notes 110–111 (discussing Federal Rule of Evidence of 403).

169. *See* FED. R. CIV. P. 16(c)(2)(O) (stating that “at any pretrial conference the court may consider and take any appropriate action on . . . establishing a reasonable time limit allowed to present evidence”).

170. *See Allen & Stein, supra* note 2, at 558–59 (explaining the standards for various burdens of proof to be used when judges and jurors must decide cases in the face of uncertainty).

171. *See* Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. REV. 1643, 1679–84 (2013) (mentioning cases where the verdicts were inconsistent with scientific evidence); *see generally* Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139 (2012) (suggesting the need to reconsider the trial as the center of gravity for innocence protection given the rapid escalation in the quality and quantity of scientific evidence which makes some forms of evidence more reliable with time).

172. *See, e.g., Stow v. Murashige*, 389 F.3d 880, 890–91 (9th Cir. 2004) (“Allowing an appellate court to look behind a jury’s verdict conflicts with the rule that appellate courts should not scrutinize jury verdicts. . . . [E]ven ‘egregiously erroneous’ jury verdicts are entitled to double jeopardy effect . . . .”); *accord Holland v. United States*, 348 U.S. 121, 140 (1954) (once a jury is convinced of guilt beyond a reasonable doubt, there is no further role for the appellate courts in determining guilt).

173. SIMON, *supra* note 124, at 209.

174. Another aspect of systemic architecture supporting the same conclusion is the system-wide view on jury nullification, which usually is hidden from the jury’s ken. *See, e.g.,* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 257 (1996) (“Current practice—with few exceptions—is not to instruct juries that they may nullify.”). A system that pursues subjective fairness either allows the jury to determine the law, or empowers a jury to nullify the law. A system that pursues procedural sufficiency either forbids or deeply discourages either approach.



want from their courts. After all, if one asked almost anyone to envision himself or herself in court and to ask—“What if *I* were the accused criminal?”; “What if *I* were the crime victim?”; “What if someone had not honored a contract they had with *me*?”; “What if someone got hurt while in *my* house?”—one would generally expect the instinctive answer to be: “We want the court to do the right thing.”

Some might assert that the “real” answer is, “I want to win,”<sup>175</sup> but even phrased this way, the wish to win is not the craven answer it might at first appear to be. One wants to win because one wants the courts “to be fair,” or “to reach the right answer.” It is natural that usually one correlates the fair or right position to that of his or her own position.<sup>176</sup> So under this construct, the “why” of American courts is substantive fairness.<sup>177</sup>

But that answer fails under even nominal introspection. Seeking a correct answer cannot be the goal of the courts, because as discussed *supra*, actually knowing with certainty what happened is not attainable.<sup>178</sup> And individually, even one’s most craven self quickly understands this when thought about.

What people want is the most justice they can afford. There would be a price people consider to be too much. Other than a major criminal case, it would be rare if there were a trial where a party took the position of “whatever I have is what I am willing to pay in order to win.” So what people actually want is not fair, but rather fair enough.<sup>179</sup> And as soon as one moves from fair to fair enough, one has moved to a notion of procedural sufficiency.

The scholarly work of those who study fairness can help in understanding what fair enough looks like—or, in other words, what

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175. THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT’S RIGHT* 3–4 (2004).

176. See Tyler, *supra* note 162, at 117 (“[A]s past studies have found, those receiving favorable outcomes think that those outcomes and the procedures used to arrive at them are fairer.”).

177. See Sevier, *supra* note 137, at 214–16 (explaining differences in what people seek in the justice system).

178. See *supra* Part I (alluding to the truth in court rooms).

179. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirement would entail.”); Kaplow, *supra* note 38, at 373–78 (“The regulation of lawyers in litigation . . . is appropriately viewed . . . as an aspect of procedural rules concerned with achieving accurate outcomes while not incurring excessive costs.”).

generically counts as procedural sufficiency. The work can be summarized (perhaps crudely) as requiring a reasonable opportunity to tell one's story to a neutral decision maker.<sup>180</sup>

To elaborate, procedural sufficiency requires, first, that all sides of a dispute perceive that they have the opportunity to prevail; it cannot be perceived as a rigged enterprise. Any other conclusion would be antithetical to any definition of fairness.<sup>181</sup>

This opportunity to prevail is a necessary, but not sufficient, aspect of any system that seeks to be fair enough. After all, flipping a coin is fair in the sense of an opportunity to prevail, yet inadequate in achieving the goal that the parties had a nonrigged chance to win *because they deserved to win*.<sup>182</sup> What is also necessary to get to this more fundamental sense of fairness is an opportunity to present one's side of the merits—to tell one's story—coupled with a belief that the decision was intended in good faith to be merit-based.<sup>183</sup> And, of course, a system that gives each side the opportunity to tell their story and leaves each side with the belief that they were heard by a decision maker who tried to do the right thing, fundamentally meets the first requirement of a system where each side perceives that it has the opportunity to prevail.

A dispute resolution system that has these aspects—or a fair shot in a nonrigged game<sup>184</sup>—is one that seeks an acceptable approximation of a

180. P. Christopher Earley et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERS. & SOC. PSYCHOL. 952, 957–58 (1990); Tyler, *supra* note 162, at 121–23, 128–31.

181. *See generally* Blader & Tyler, *supra* note 162 (examining two studies testing the four-component model of procedural fairness).

182. Conversation with Scott Soames, Professor and Director, The School of Philosophy, University of Southern California (Oct. 10, 2014).

183. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224–28 (2005) (considering what due process protections Ohio must afford inmates before assigning them to a maximum-security prison with highly restrictive conditions); *City of L.A. v. David*, 538 U.S. 715, 716–19 (2003) (holding that the city may tow an illegally parked automobile without a “prompt hearing”); *FDIC v. Mallen*, 486 U.S. 230, 242–46 (1988) (upholding a statute authorizing the FDIC to suspend an indicted bank official without a hearing); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 17–19 (1978) (holding public utility termination of services for nonpayment without affording customers an opportunity to dispute bills deprived customers of due process). *See* Tyler, *supra* note 162, at 125–31 (examining a study on the criteria citizens use to address the fairness of legal procedures). *See also Mathews*, 424 U.S. at 333 (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))). The Court has applied the *Mathews* framework to a wide variety of due process challenges.

184. In this context, “game” is not a diminutive term. Rather,

[g]ame theory concerns the behaviour [sic] of decision-makers whose decisions affect each other. Its analysis is from a rational rather than a psychological or sociological viewpoint. It is indeed a sort of umbrella theory for the rational side of social science,

fair result, and so can be said to be fair enough, or procedurally sufficient, from the perspective of a participant in a trial.<sup>185</sup> That would seem to be what a litigant will accept as enough when seeking fairness.

## 2. Individual Fairness and Collective Fairness

But now, perhaps one needs to briefly check himself or herself, because a further challenge is that fair enough may look and feel very different when one talks about *his or her* trial as opposed to talking about *someone else's* trial. Consider the question: “How much of *my* money am I willing to invest to be confident the court reached the right answer in *my* case?” Now consider the question: “How much of *my* money am I willing to pay (in taxes, typically) to be confident the court reached the right answer in *your* case?” One would expect that the answer to these two questions to differ.<sup>186</sup>

Put another way, it is the nature of public courts that such courts are, by definition, forums where the money of many (*our* money) funds a court used by few (*your* dispute). So can one have confidence that a fair shot in a nonrigged game is in harmony with a societal norm of fair enough across the cultural heterogeneity of the United States?<sup>187</sup> Or

where “social” is interpreted broadly, to include human as well as non-human players (computers, animals, plants). Its methodologies apply in principle to all interactive situations, especially in economics, political science, evolutionary biology, and computer science.

R.J. Aumann, *Game Theory*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

185. See Shari Siedman Diamond & Leslie Ellis, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1040–41 (2003) (explaining why people are more willing to accept and respect decisions when those decisions are produced by fair procedures).

186. See Kaplow, *supra* note 38, at 328–30, 382–99 (explaining that accuracy is very expensive and inefficient and that there are differences between an individual’s interests and societal interests).

187. Professor Tom Tyler, Professor of Law and Professor of Psychology at Yale University, interviewed 652 Chicagoans who had some sort of experience with the police and found that [s]even aspects of procedural justice make an independent contribution to assessments of process fairness: the effort of the authorities to be fair; their honesty; whether their behavior is consistent with ethical standards; whether opportunities for representation are given; the quality of the decisions made; whether opportunities to appeal decisions exist; and whether the behavior of the authorities shows bias.

Tyler, *supra* note 162, at 121. It is difficult to use these factors more specifically, as the factors in detail appear to be fluid from one culture to another. See Rebecca A. Anderson & Amy L. Otto, *Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison*, 31 SOC. BEHAV. & PERS. 557, 562–63 (2003) (explaining how legal systems are the product of a society’s culture and a reflection of that culture—which combats the idea that there are widely held preferences for procedures).

more simply, what is the precise role of *publicly* funded justice in American communal life?

The court system seeks sufficient closure to insure societal stability (i.e., peace in the streets).<sup>188</sup> Essentially, societies without just courts are more likely to be unstable and violent. One needs to look no further than the public responses to the verdict of acquittal in the O.J. Simpson multiple homicide trial, or the grand jury decision of whether to indict the police officers who shot Michael Brown or choked to death Eric Garner to understand the potency of the slogan, “No Justice, No Peace.”<sup>189</sup>

Communities that do not believe the justice system provides just resolution of righteous grievances take to the streets. The relationship between distrust of an institution and civil disobedience is the heart of defining an institution like the justice system as legitimate and will be discussed *infra* in detail.<sup>190</sup> But for the current juncture of this Article, it suffices to simply recognize that the relevant perspective of whether the courts are just is not only that of the litigant, but also, and perhaps primarily, that of the broader community in which the courts reside. So one must ask: What aspects of the courts support a *community* belief that the courts are just?

### 3. Perceptions of Justice and Actual Justice

Asking about community perspective exposes another nuance of the explication of justice—that belief in the courts is a meta-level<sup>191</sup> belief.

188. See Heather J. Smith & Tom R. Tyler, *Social Justice and Social Movements* 1 (Inst. of Indus. Relations, Working Paper No. 61, 1995), <http://www.irl.berkeley.edu/workingpapers/61-95.pdf> (“People’s actual behavior is . . . strongly linked to views about justice and injustice. A wide variety of studies link justice judgments to positive behaviors . . . . Conversely, other studies link the lack of justice to sabotage, theft, and on a collective level, to the willingness to rebel or protest.” (internal citations omitted)).

189. See *Latest Updates: Protests Nationwide as More Troops Are Called to Ferguson*, N.Y. TIMES (Nov. 25, 2014), <http://news.blogs.nytimes.com/2014/11/25/live-updates-grand-jury-decision-darren-wilson-ferguson/> (describing the protests and violence following the grand jury decision to not indict Darren Wilson); Andy Newman, *Reaction to Eric Garner Grand Jury Decision*, N.Y. TIMES (Dec. 3, 2014), <http://cityroom.blogs.nytimes.com/2014/12/03/the-death-of-eric-garner-the-grand-jury-decision/> (describing the protests following the grand jury decision to not indict the officers involved in Eric Garner’s death); *O.J. Simpson Verdict Ten Years Later*, PBS FRONTLINE (Oct. 4, 2005), [www.pbs.org/wgbh/pages/frontline/oj/view](http://www.pbs.org/wgbh/pages/frontline/oj/view) (examining the various racial groups’ reactions after the O.J. Simpson verdict).

190. See *infra* Part II (examining the possible tension between the meaning of truth in courts on the one hand, and the basis of the legitimacy of the courts as a societal institution on the other hand).

191. “A level or degree (of understanding, existence, etc.) which is higher and often more abstract than those levels at which a subject, etc., is normally understood or treated; a level which is above, beyond, or outside other levels, or which is inclusive of a series of lower levels.” *Metalevel*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/metalevel](http://www.oxforddictionaries.com/us/definition/american_english/metalevel) (last visited Oct. 9,

This is the belief that the courts are doing their jobs sufficiently. Two examples—one large and one small—help illustrate this point.

First, consider South Africa’s Truth and Reconciliation Commission (“TRC”).<sup>192</sup> The theoretical predicate for the TRC was that for “[a] country transitioning from authoritarian rule to democracy . . . [where] conventional institutions such as courts . . . [were] not viewed as being neutral enough.”<sup>193</sup> The TRC “set an international standard,” successfully bringing stability in an environment where there was a more important societal need than criminal punishment.<sup>194</sup> The lesson of the TRC is that the greatest value of expending public resources on determining what happened is not to achieve some morally acceptable outcome—appropriate retribution in a criminal matter or allocation of responsibility in a civil matter—but rather, to increase the likelihood of communal tranquility.<sup>195</sup>

Now, consider the anecdotal story of a cab driver in Washington D.C.<sup>196</sup> The driver—an immigrant from Eritrea—was frustrated that when he challenged traffic tickets, the courts promised him a presumption of innocence, but then informed him that he would have to pay the tickets unless he could produce proof that he had *not* committed a violation. He concluded that the system did not give him a presumption of innocence, but rather gave a pass to the City in proving his guilt when what was at

2016).

192. See generally Justice Albert L. Sachs, *Honoring the Truth in Post-Apartheid South Africa*, 26 N.C. J. INT’L L. & COM. REG. 799 (2001) (telling multiple stories about the South African Truth Commission); Justice Albie Sachs, *South Africa’s Truth and Reconciliation Commission*, 34 CONN. L. REV. 1037 (2002) (discussing Justice Albie Sachs’ experiences as a South African Freedom Fighter).

193. Daryl Balia, *Truth and Reconciliation Commission*, in 1 ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 295, 296 (Jack Rabin ed., 2005); accord Paul Van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 J. INT’L AFF. 647 (1999) (discussing the TRC’s final report).

194. Balia, *supra* note 193, at 297. South Africa raises reconciliation to such a high value that on January 30, 2015 the government granted parole to Eugene De Kock, described as “Prime Evil,” for his role as an apartheid era assassin “in the interests of nation building and reconciliation.” Grant Foster, *Apartheid’s Prime Evil, Eugene De Kock, to Go Free*, SA PROMO MAGAZINE (Jan. 30, 2015), <https://www.sapromo.com/apartheids-prime-evil-eugene-de-kock-to-go-free/7258>.

195. Trials as a search for truth and trials as a mechanism for tranquility are the two predominant explanations of the role of courts, but Mark Cammack offers a third explanation—trials as an attempt to “say something,” by which he means, “trials depict and thereby validate assumptions about the nature of fact and the authority of law on which the legitimacy of the practice depends. The process, in effect, proves its own premises.” Cammack, *supra* note 43, at 783–84, 789. A fourth interpretation is offered by Charles Nesson, who explains how trials can be understood as a statement to the community about how certain behavior will be judged. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1379 (1985).

196. Interview with Yonas Teseay, Cab Driver (Jan. 5, 2015).

issue was only a fifty-dollar ticket. Fifty dollars was a lot of money to him. Yet he did not appeal because it was too much time and paperwork to fight a fifty-dollar ticket; it cost him more than fifty dollars in lost time in his cab, and the fine doubled if he lost the appeal.

From these two examples one can see that individual and community meanings of justice may differ in specific trials, but broadly are the same. South Africa realized the importance of a process sacrificing fair individual retribution to the greater good of gaining closure through a collective, societal airing of what had happened. The cab driver, and arguably for good reason, does not believe his trials were even a fair process, much less a fair outcome. But his trials were fair enough in that he was not motivated to engage in social unrest, and to the broader community he had enough of a “fair shake.” To insure domestic tranquility and stability, a system must, at least almost always, give a fair enough process so that the loser, however grudgingly, will accept the result.

This formulation of justice—a concept that is to some a significant, but immeasurable, degree rooted in public perception and public confidence—is explicitly and repeatedly recognized by the Supreme Court. For example, in *Taylor v. Louisiana*, the Court wrote that “[c]ommunity participation in the administration of the criminal law . . . is . . . critical to public confidence in the criminal justice system.”<sup>197</sup> In his dissent in *Bush v. Gore*, Justice Stevens famously wrote that the majority opinion undermined the “public treasure” of “the public’s confidence in the Court itself,” and thus “was a wound that may harm . . . the Nation.”<sup>198</sup> In *Press-Enterprise Co. v. Superior Court*, the Court wrote:

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>199</sup>

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197. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). See also *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (prohibiting race-based peremptory strikes of jurors will strengthen “public respect for our criminal justice system”); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (“The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”).

198. *Bush v. Gore*, 531 U.S. 98, 157–58 (2000).

199. *Press Enter. Co. v. California*, 464 U.S. 501, 508 (1984).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice O'Connor wrote:

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.<sup>200</sup>

Similar conclusions are reached by scholars.<sup>201</sup> For example, Leslie Ellis and Shari Siedman Diamond—summarizing the work of several social scientists—wrote:

[T]he level of satisfaction people feel with the decision of a trier of fact is strongly influenced by their perceptions of fairness of the procedures used by the trier to reach that decision. That is, even when actual outcomes were held constant and even when those outcomes were negative, the perceived fairness of the procedures strongly influenced the party's satisfaction with the verdict and willingness to accept the legitimacy of the decision. These and more recent studies of procedural justice show that people are more willing to accept decisions and to adhere to agreements over time when they perceive those decisions as having been produced by fair procedures. Moreover, the authority and perceived legitimacy of the institutions that produce the decisions are enhanced when the procedures used to produce the decisions are viewed as fair, even when those decisions involved unfavorable outcomes. The comfort and positive reactions of litigants are of course important in and of themselves. But building perceptions of procedural justice has an additional important payoff: enhanced authority and legitimacy increase the likelihood that the parties will accept the jury's finding. The more legitimate the process is perceived to be, the more likely participants are to accept the outcome, positive or negative.<sup>202</sup>

Professor James Gibson has conducted extensive contemporary work studying the prevalence of, reasons for, and stability of acceptance of the legitimacy of a court decision or other governmental action without regard to whether one agrees or disagrees with it.<sup>203</sup> That work can be

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200. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

201. *See, e.g.*, Nesson, *supra* note 195, at 1367–68 (explaining why and how citizens and parties accept court verdicts).

202. Diamond & Ellis, *supra* note 185, at 1039–40.

203. *See, e.g.*, Gregory A. Caldeira et al., *Measuring Attitudes toward the United States*

summarized as concluding that public confidence not only is critical to the system, but verifiably exists and is robust in the courts.

#### 4. Conclusions About Belief in Courts

So what insights can one draw from this discussion of the meaning of justice in the American courts, and in turn better understand belief in courts? Justice in the American courts is a procedural notion more than a substantive notion; the idea is to have courts that are fair enough. Justice is based on procedural access to courts and neutrality of decisions. Justice may depend as much on perception as reality. And while the community at large may have a different notion of fair enough than the notions of individual participants in a trial, the two ideas are closely related. Because a system that is not usually perceived as fair enough can lead to mass unrest, the avoidance of which is a material, and arguably predominating, goal of the system.

What is belief in courts? It means the courts have procedures for dispute resolution that society, generally, perceives and accepts as a fair opportunity—or perhaps a fair enough opportunity—to present one’s position to a neutral decision maker.

#### *E. Understanding Truth in Courts*

Let us now return to this Article’s original formulation of “knowledge requires truth, justification, and belief.”<sup>204</sup> In the context of truth in courts, one can now restate this formulation as: Reaching a “correct enough” resolution, biasing toward certainty when the stakes involve liberty, and staying near neutral when the stakes are private relationships; relevant facts both within the evaluative skills of jurors’ competence and

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*Supreme Court*, 47 AM. J. POL. SCI. 354, 354–55 (2003) (examining why unfavorable Supreme Court decisions are still respected by citizens and politicians); Gregory A. Caldeira et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 187, 198 (2005) (explaining how institutional legitimacy allows citizens to accept decisions they do not agree with); James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 59 (2008) (discussing the effect that judicial elections have on court legitimacy); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 344–46 (1998) (introducing theories which might explain the perceived legitimacy of the court). See generally DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 278 (1965) (stating that legitimacy is that which “gives explicit consideration to the expectations of society . . . and whether an organization appears to be complying with the expectations of the societies within which it operates”); James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 LAW & CONTEMP. PROBS. 123 (2009) (examining the legitimacy of truth commissions); James L. Gibson & Michael J Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 ANN. REV. OF L. & SOC. SCI. 1 (2014) (discussing the institutional legitimacy of the Supreme Court).

204. See *supra* text accompanying notes 35–36 (discussing knowledge and “probability”).



that do not promote defined undesirable behaviors external to the trial; procedures for dispute resolution that society generally perceives and accepts as a fair opportunity—or perhaps a fair enough opportunity—to present one’s position to a neutral decision maker; and “truth.”

From this, one can isolate and formulate an understanding of truth in courts. At least since Plato’s shadows on the cave, philosophers have recognized the elusive nature of objective reality. A court system can never reach a conclusive determination of what actually happened in a dispute. Truth in courts is a sufficient—albeit intentionally incomplete—correspondence of judgments of what happened, to what actually happened. Put somewhat differently, truth in courts refers to the relative role a colloquial meaning of accuracy has in the family of other values courts seek to advance; meaning there has been adequate procedural process to support a general communal sense of systemic fairness without regard to the outcome in a particular case. This is because courts unquestionably compromise the likelihood of achieving colloquial accuracy to serve other concerns.

As this Article saw in its exploration of justification, this balancing of colloquial accuracy against other values sometimes emerges quite dramatically.<sup>205</sup> In response to the pattern of societally unacceptable treatment of rape victims in the courts, evidence codes were revised to provide rape shield laws.<sup>206</sup> These laws exclude evidence unquestionably relevant to the defense, for reasons external to achieving a correct trial verdict.<sup>207</sup>

In response to police misconduct, the Supreme Court has ruled to exclude evidence gathered during interrogation which occurs before “*Miranda* warnings” are given.<sup>208</sup> Court exclusion of this testimony is

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205. See *supra* Part I.B (exploring justification in trial courts).

206. See generally Anthony J. Bocchino & J. Alexander Tanford, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980) (describing state legislatures attempts to pass shield laws to protect rape victims by limiting a criminal defendant’s ability to present to the jury evidence of past sexual history); Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1247–50 (1989) (explaining various rape shield statutes).

207. Tuerkheimer, *supra* note 206, at 1249–50.

208. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”). See Thomas Y. Davies, *A Hard Look at What We Know (And Still Need to Learn) about the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 8 AM. B. FOUND. RES. J. 611, 617–19 (1983) (explaining how NIJ’s statistics regarding a study on the exclusionary rule are misleading); see generally Nardulli, *supra* note 107 (examining the costs of three exclusionary rules through data collected from multiple cases across nine countries criminal courts).

controversial precisely because it keeps out relevant evidence.<sup>209</sup>

In espionage and terrorism cases, obtaining a verdict is compromised by the security classification, which keeps some facts out of evidence.<sup>210</sup> Here, national security trumps accuracy.<sup>211</sup>

While this Article has separately explored justification in courts, belief in courts, and knowledge in courts, in many instances these phrases have overlapping themes that emerge in truth in courts. So while the Rules essentially define justification in courts, some Rules also serve as animating the related concept of truth in courts. For example, Rule 403 explicitly states: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: . . . undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>212</sup> In others words, colloquial accuracy can be subservient to some degree to concerns of time and efficiency.

There are similar overlaps between truth in courts and knowledge in courts. The explication of knowledge in courts relies heavily on burdens of proof as decisional rules. Burdens also function as evidence regulation rules: who presents evidence first, and how much they are able to present. In this way, burdens of proof are also integral to setting examples of, and thus understanding, truth in courts. For example, presumptions of discriminatory intent in employment actions shift the burden to the defendant to present evidence of nondiscriminatory intent,<sup>213</sup> and the *res ipsa loquitur* doctrine shifts the burden to the defendant to disprove negligence in settings of highly suspicious accidents.<sup>214</sup> Both instances set balance points between accuracy and finality in evidence regulation, and thus in discerning what is meant by truth in courts.

And one sees overlap between the concerns animating the meaning of truth in courts and of belief in courts. Is there too much frivolous litigation, or too many runaway juries, or both, or neither? Are there too

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209. *Miranda*, 384 U.S. at 444. See also Turner, *supra* note 112, at 829–31 (explaining the application and developing perception of the exclusionary rule in United States law).

210. See, e.g., Robert Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1263–66 (2007) (introducing the theoretical debate regarding the role of government secrecy and the tensions it has created).

211. *Id.*

212. FED. R. EVID. 403.

213. See R. Alexander Acosta & Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. L. & POL. 207, 210–14 (1997–1998) (discussing the evidentiary burdens employers and employees face in employee discrimination cases).

214. See William L. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 234 (1949) (noting situations of when the burden to disprove negligence shifts to the defendant).

few paths to recovery, or too strict evidentiary rules, or too little supervision of police practices? Concerns about these and other, similar belief questions spawn calls for reform in recurring patterns.<sup>215</sup>

The meaning of truth in courts is perhaps best illustrated by two Supreme Court opinions—one civil and one criminal—and each an unambiguous elevation of external concerns over colloquial accuracy.

In *Ashcroft v. Iqbal*,<sup>216</sup> the Supreme Court considered the case of Javid Iqbal, a Muslim Pakistani who had overstayed his student visa and was caught up in the post-9/11 security sweeps. Iqbal asserted that both the decision to detain him and the conditions of his confinement were based on his religion and/or national origin.<sup>217</sup> But his allegations became enmeshed in an earlier narrative about frivolous litigation, so the Court held, to reduce the frequency of frivolous litigation, that a trial judge could dismiss Iqbal's complaint at the pleading stage.<sup>218</sup> Simply put, the Court held that reducing the incidence of frivolous litigation was worth the price of some erroneous dismissals of meritorious cases.<sup>219</sup>

The Court even more dramatically rejected the primacy of colloquial accuracy in *Herrera v. Collins*, the second case.<sup>220</sup> Herrera was convicted of murder and sentenced to death. He filed a habeas petition, supported by affidavits showing his actual innocence.<sup>221</sup> The Court's opinion framed the issue not as whether the State could execute an innocent man, but whether a man who had been convicted of murder in accordance with due process is entitled to habeas relief based on new exculpatory evidence.<sup>222</sup> In a concurring opinion, Justice Sandra Day O'Connor wrote, "*Petitioner is not innocent, in any sense of the word. . . . He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion of that trial, the jury found petitioner guilty beyond a*

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215. See generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (examining the use of summary judgment and motions to dismiss in relation to the federal judicial system); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447 (2004) (describing cases and controversies around frivolous claims in lawsuits).

216. *Ashcroft v. Iqbal*, 556 U.S. 662 (2008).

217. *Id.* at 667–70.

218. Klein, *supra* note 144, at 593–94, 599–605.

219. *Id.*

220. *Herrera v. Collins*, 506 U.S. 390 (1993).

221. *Id.* at 393.

222. *Id.* at 399–400.

reasonable doubt.”<sup>223</sup>

Truth in courts is accuracy enough as balanced against other system values, such as the likelihood of truly new and controlling evidence, the reasons the evidence is so late forthcoming, and the adequacy and exhaustiveness of the process already afforded. None of these values would suffice to reject consideration of new evidence if colloquial accuracy was what was meant by truth in courts.<sup>224</sup>

So truth in courts means the balancing point the justice system draws as the boundary between complete accuracy, on the one hand, and competing societal values, both internal and external, to the courts, on the other hand, to have a sufficient correspondence of judgments of what happened and what *actually* happened.

## II. “LEGITIMACY,” OR WHY THE MEANING OF TRUTH IN COURTS MIGHT MATTER

While it is intellectually interesting to explore the meaning of truth in courts, the exploration leaves open the inquiry of whether the meaning matters in any meaningful way. It does, and the starting point of understanding that importance is to recognize a key conclusion from the explication of truth in courts. In seeking accurate enough, one would say that truth in courts describes what courts do differently from what the general public would suppose courts do. The reason that the meaning of truth in courts matters is because this dissonance can undermine the legitimacy of the courts as a social institution.

In David Easton’s third work, in his project on empirically oriented political theory, Easton describes “the inculcation of a sense of legitimacy” as “probably the most effective device for regulating the flow

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223. *Id.* at 419 (O’Connor, J., concurring) (emphasis added). Justice Blackmun dissented, framing the issue as “whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence.” *Id.* at 430 (Blackmun, J., dissenting). Herrera’s last words before he was executed four months later were, “I am an innocent man, and something very wrong is taking place tonight.” *Offender Information, TEX. DEP’T CRIM. JUST.*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/hererraleonellast.html](http://www.tdcj.state.tx.us/death_row/dr_info/hererraleonellast.html) (last visited Oct. 26, 2016); accord *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting) (“This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged “actual innocence” is constitutionally cognizable.” (citations omitted)).

224. When Dan Simon and Laurie Levinson write about accuracy concerns—they advocate for changing the priority of accuracy in the system, not for making it the only value on the list. See SIMON, *supra* note 124, at 217–22; Laurie L. Levinson, *Searching for Injustice: The Challenge of Post-Conviction Discovery, Investigation, and Litigation*, 87 S. CALIF. L. REV. 545, 572 (2015).

of diffuse support in favor both of the authorities and of the regime.”<sup>225</sup> Easton posits the question whether a political system could “survive without . . . feelings of legitimacy,” and answers that “such convictions” are “helpful and perhaps even necessary.”<sup>226</sup> To avoid disorder, authorities have a natural right to expect compliance with their devised regimes.<sup>227</sup> “Regardless of what the members may feel about the wisdom of the action of authorities, obedience may flow from some rudimentary convictions” that “the authorities . . . are legitimate.”<sup>228</sup>

Easton’s work introduced the concept of “Legitimacy Theory,” which Easton defined as that which “gives explicit consideration to the expectations of society . . . and whether an organization appears to be complying with the expectations of the societies within which it operates.”<sup>229</sup> Institutions with general, rather than specific, support are said to be legitimate, meaning the institution enjoys support even when society disagrees with the institution’s specific acts.<sup>230</sup>

As Easton’s definition highlights, it is potentially problematic when an institution is not acting within societal expectations of that institution. And so it bears understanding how Legitimacy Theory applies to the justice system and whether it predicts a concern from a dissonance between societal understandings of what courts do and what courts *actually* do.

### A. Legitimacy of the Justice System

Legitimacy of legal institutions is a concept familiar to international law.<sup>231</sup> This Part explores judicial legitimacy in a domestic context—or put another way, this Part questions what gives courts legitimacy and what role truth plays in that legitimacy. That is a notion that has received far less attention.

#### 1. Legitimacy of the United States Supreme Court

Almost all of the scholarly work applying Legitimacy Theory to the justice system focuses on the Supreme Court’s decisions, and concludes

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225. EASTON, *supra* note 203, at 278.

226. *Id.* at 278–79.

227. *Id.* at 279.

228. *Id.* at 279–80.

229. *Id.*

230. Craig Deegan, *Legitimacy Theory*, in *METHODOLOGICAL ISSUES IN ACCOUNTING RESEARCH: THEORIES, METHODS AND ISSUES* 161, 161 (Zahirui Hoque ed., 2006). *See also* EASTON, *supra* note 203, at 273 (explaining the Legitimacy Theory).

231. *See generally* THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (explaining why international law has compliance pull).

that the Court has a deep reservoir of legitimacy.<sup>232</sup> Despite Justice John Paul Stevens's poignantly expressed concerns in his dissent in *Bush v. Gore*,<sup>233</sup> "in the long run, public perceptions of the Court's legitimacy were not adversely affected" by that decision, nor any decision, and "public support for the Supreme Court does not appear to turn on citizens' ideological agreement with its specific policy decisions."<sup>234</sup> The Court enjoys broad legitimacy.

## 2. Legitimacy of the Trial Courts

"Despite the policy import of state courts, only a small number of studies have examined citizen support for state courts . . . and nearly all of these have analyzed only a single city or state's citizens' views towards its courts."<sup>235</sup> For this reason, in 2008, Professors Damon Cann and Jeff Yates identified and applied to state trial judges the metrics on which trial court legitimacy rests: diffuse (or general) support allowing an institution to persist and retain its authority without regard to agreement with specific decisions.<sup>236</sup> They identified four bases: (1) belief that judges are trustworthy and honest; (2) belief that judges are fair; (3) belief that courts provide equal justice; and (4) belief that decisions are based on fact and law.<sup>237</sup>

Professors Cann and Yates confined their focus to judges. But the institutional insiders positioned to influence the honesty, fairness, neutrality, and justification of trial court decisions are not just judges—they are also lawyers and juries. So to understand the nature—and the

232. See Damon Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for Their State Courts*, 36 AM. POL. RES. 297, 299 (2008) ("A wealth of scholarship exists on the topic of public support of and views toward the United States Supreme Court.").

233. See text accompanying *supra* note 173 (noting that Professor Dan Simon summarizes the Supreme Court's jurisprudence of defendants' procedural rights).

234. Cann & Yates, *supra* note 232, at 297. See also, James L. Gibson et al., *Losing, But Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 L. & SOC'Y REV. 837, 837–38 (2014) (referring to Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. OF PSYCHOL. 375 (2006)); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SC. (2014) (summarizing how symbols reinforce the legitimacy of Courts and how Legitimacy Theory supports this idea); James L. Gibson, *Legitimacy Is for Losers: The Role of Institutional Legitimacy and the Symbols of Judicial Authority in Inducing Acquiescence to Disagreeable Court Rulings*, Keynote Address at the 62nd Nebraska Symposium on Motivation (Apr. 24–25, 2014) (explaining broad legitimacy among courts).

235. Cann & Yates, *supra* note 232, at 300 (citations omitted). For the purpose of this Article, Cann and Yates' study of "state courts" can be equated to the focus on "American courts" or "trial courts."

236. *Id.* at 303–05.

237. *Id.*

fragility or resilience—of the legitimacy of the trial courts, this Article examines all three—judges, lawyers, and juries.

#### a. Judges and Legitimacy

To the extent that empirical work on the legitimacy of trial courts has been done, it has looked at legitimacy and judges. There is reason that researchers have engaged in this specific study. One 2013 poll found that 87 percent of voters in states where judges were elected believed that direct campaign donations and independent spending either had “some” or “a great deal” of influence on judges’ decisions.<sup>238</sup> Studying the state of Georgia, Damon Cann found that attorney “campaign contributions influence judicial decisionmaking” in the attorney’s cases before that judge.<sup>239</sup> Also, citizens seem aware of it—partisan elections eroded societal goodwill toward courts.<sup>240</sup> Yet, while undermined to some degree, “state courts enjoy the diffuse support of citizens, and thus citizens believe in the legitimacy of their state courts even when they do not agree with their policy outputs.”<sup>241</sup> When focusing on judges, Professors Cann and Yates—summarizing and extending the work of others—found, “on balance, Americans generally hold favorable attitudes toward their state courts.”<sup>242</sup> Concern about neutrality of judges does undermine, but does not overcome, a belief in trial court legitimacy.

#### b. Lawyers and Legitimacy

It is not hard to document the public disregard for lawyers.<sup>243</sup> And it

238. See Press Release, Justice at Stake, New Poll: Vast Majority of Voters Fear Campaign Cash Skews Judges’ Decisions (Oct. 29, 2013), [http://www.justiceatstake.org/newsroom/press-releases-16824/?new\\_poll\\_vast\\_majority\\_of\\_voters\\_fear\\_campaign\\_cash\\_skews\\_judges\\_decisions&show=news&newsID=17594](http://www.justiceatstake.org/newsroom/press-releases-16824/?new_poll_vast_majority_of_voters_fear_campaign_cash_skews_judges_decisions&show=news&newsID=17594) (measuring the fear of citizens regarding the perceived effect of campaign donations’ influence in courtrooms).

239. Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 3 ST. POL. & POL’Y Q. 281, 292 (2007).

240. Cann & Yates, *supra* note 232, at 313.

241. *Id.* at 316.

242. *Id.* at 304–05.

243. See, e.g., Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 533–49 (1999–2000) (investigating the connection between the negative portrayal of lawyers in film and public opinion of lawyers); Marc Galanter, *Robert S. Marx Lecture: The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 807–35 (1998) (theorizing how lawyer mistrust developed through history and pop culture); Bruce A. Green, “The Whole Truth?”: *How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699, 700–04 (1992) (explaining how following the rules of evidence can make lawyers appear deceitful to juries); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405–20 (1999) (discussing the public image problems lawyers face and how they developed); Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed*

is not hard to isolate what underlies this disregard. The public believes that the behavior of lawyers distorts the ability of courts to discern the truth.<sup>244</sup>

There is also a broad concern that the system advantages the litigant with the lawyer best skilled at manipulating the rules.<sup>245</sup> As the late Justice Antonin Scalia wrote in his dissent in *Caperton v. A.T. Massey Coal Co.*:

What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.<sup>246</sup>

But in the context of legitimacy, Justice Scalia's concern with "resourceful lawyers" could describe either of two circumstances, and the two circumstances are not of equal import to the legitimacy of the courts. Resourceful lawyers could be cheaters, players violating rules and thereby undermining an otherwise legitimate system architecture. Alternatively, resourceful lawyers could be lawyers who have seen that the rules of the system leave room to influence the likely outcome of trials, but this would suggest some illegitimacy in the system architecture itself. It seems to be the perception of the latter of these two descriptions that Ninth Circuit Justice Alec Kozinski lamented in a recent dissenting Opinion:

When we take the judicial oath of office, we swear to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . ." 28 U.S.C. § 453. I understand this to mean that we must not merely *be* impartial, but must *appear* to be impartial to a disinterested observer. . . . [Petitioner here would] have had a fairer shake in a tribunal run by marsupials. . . . How can a court committed to justice, as our court surely is, reach a result in which the litigant who can afford a lawyer is forgiven its multiple defaults while the poor, uneducated, un-counseled petitioner has his feet held to the fire?<sup>247</sup>

Therefore, in the absence of research on the impacts of lawyer

*Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 779–81 (2002) (noting that the public disregard also applies in the mediation context).

244. See, e.g., Bruce A. Green, *supra* note 243, at 700–04 (stating that following the rules of evidence can make lawyers appear deceitful to juries); Martin & Dees, *supra* note 243, at 779–81 (explaining the negative public perception of lawyers).

245. See, e.g., Frankel, *supra* note 2, at 1034–35 ("It becomes evident the search for truth fails too much of the time. The rules and devices accounting for the failures come to seem less agreeable and less clearly worthy than they once did. The skills of the advocate seem less noble . . . . The advocate's prime loyalty is to his client, not to truth as such.")

246. *Caperton v. AT Massey Coal Co.*, 556 U.S. 868, 903 (2009) (Scalia, J., dissenting).

247. *Alvarez v. Tracy*, 773 F.3d 1011, 1024–25 (9th Cir. 2014) (Kozinski, J., dissenting).



(mis)behavior on legitimacy—in other words, when the best one can do is formulate a reasonable, yet untested, hypothesis of the relationship of lawyers to legitimacy—it is important to better understand what resourceful lawyers do and how the system responds to it.

The justice system is defined by a set of rules that purport to be designed to promote certain outcomes. The justice system defines the generic, target outcome as a fair shot in a nonrigged game. If one thinks of this target in more economics-laden language, then one might call this target a degree of probability—or acceptable approximation or likelihood—of objective, substantive fairness (a correct result). But paradoxically, the same rules designed to promote this approximately objective, substantive fairness, provide opportunities for participants in the system—typically anyone with disproportionate wealth—to distort the likely outcome of the case.

Put simply, as Justice Alex Kozinski alluded,<sup>248</sup> without regard to the merits, money seems to increase one's chances of winning (and poverty makes it hard to win) even for a party staying within the rules. From the perspective of the system, the distortive power of a wealthy party is an actor playing within the letter, but not the spirit, of the rules. The system designs rules to promote one sort of behavior. The way the rules are written gives opportunities to engage in an inapposite—and from the system perspective, counterproductive—set of behavior.

A colorful way of capturing the concept of a player using the rules of the game, in a way that is counterproductive to the goals of the game, is to call the player a “manipulator.”<sup>249</sup> Because tactical manipulation

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248. See *supra* text accompanying note 247.

249. In the culture of some sports—golf is a prime example—the spirit of the rules is paramount and so a player is expected to self-report a rules violation. But the more usual approach in sports—for example, international soccer—is that the spirit of the game is not paramount, and so breaking the rules to gain advantage—if not caught—not only is acceptable but is expected. As the saying goes in NASCAR, “If you ain’t cheatin’ you ain’t tryin’.” The discordant tension common in sports between the rules and spirit of play is part of trial practice. The legal profession long has struggled with the tension between zealous advocacy within the rules and promoting the ultimate ends of justice. See, e.g., Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 565–78 (1996) (summarizing how “Rambo lawyers” overly zealous tactics hurt the legal process rather than help their clients); Frankel, *supra* note 2, at 1034–35 (noting the advocate’s duty is to his client not so much the truth); Monroe H. Freedman, *Judge Frankel’s Search For Truth*, 123 U.P.A. L. REV. 1060, 1065 (1975) (arguing the adversarial system is the best way to uncover the truth). See generally AM. BAR ASS’N, COMM’N ON PROFESSIONALISM, . . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, reprinted in 112 F.R.D. 243 (1986) [hereinafter ABA, BLUEPRINT] (providing guidance on professionalism requirements for attorneys). Comment 1 to Rule 1.3 (Diligence) of the ABA Model Rules seems to be of two minds, noting both that a lawyer must “take whatever lawful and ethical measures are required to vindicate a client’s cause” and that

arguably is both within, and outside of, the rules, it is paradoxical behavior.

A concrete example of a paradoxical manipulator in action is a recurring settlement strategy in a civil case between parties who have vastly different statuses of wealth. To promote the resolution of disputes without resort to the courts, all United States jurisdictions have a variant of the so-called “American Rule” that each side bear their own attorney’s fees and costs without regard to who wins a case.<sup>250</sup> Because of the American Rule, a well-heeled party can leverage their wealth to force a distorted result on a poorer party.<sup>251</sup> Essentially, the threat of “I am willing to spend disproportionately to the stakes of the matter”—often expressed as “I will take this all the way to the Supreme Court!” or “I will paper you under”—is a bluff the poorer party cannot afford to call.<sup>252</sup> It is the threat by a party with wealth to act apparently economically irrationally, thus imposing an unbearable transaction cost on an opponent. If the opponent believes the threat, then the opponent should abandon the transaction or settle the case.<sup>253</sup>

This Article characterizes the wealthy actor’s behavior as “*apparently economically irrational*” because there are at least two ways to describe the behavior as rational. One is the instance where the wealthy actor’s decision is irrational if contrasting the particular transaction costs with

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a “lawyer is not bound . . . to press for every advantage that might be realized for a client.” Yet Federal Rule of Civil Procedure 11 empowers a court to punish and rectify lawyer behavior that while potentially advancing a client’s likelihood of success has no possible grounding in the substantive legal or factual merits of the case. In light of the inconsistency of law on the question, I am comfortable—albeit intentionally provocative and arguably overly pejorative—calling a wealthy tactician a “manipulator” for the purposes of this Article.

250. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010). *See generally* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & CONTEMP. PROBS. 9, 27–36 (1984) (describing the American Rule and how it has developed).

251. *See* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Models for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 69–73 (1982) (adopting the English Rule rather than the American Rule may increase likelihood of settlement).

252. The settlement strategy of a “litigate or capitulate” offer is an ultimatum in a bilateral negotiation involving asymmetrical information. For an economic analysis of such strategies, see Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 404–15 (1984).

253. This is a variant of the problem economist Richard Selten labeled, “the chain-store paradox.” Reinhard Selten, *The Chain-Store Paradox*, 9 THEORY & DECISION 127, 127–59 (1978). *See generally* David M. Kreps & Robert Wilson, *On the Chain-Store Paradox and Predation: Reputation for Toughness* (Stanford Univ. Graduate Sch. of Bus., Working Paper No. 551, June 1980) (describing the importance of acting tough and using threats to gain respect with the Chain-Store paradox); David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253, 254–55 (1982) (summarizing that the more powerful party often influences the reaction of the less powerful party).

the size of the transaction, but rational when considered within a broader context.<sup>254</sup> For example, the Mattel Toy Company—whose flagship product is the Barbie doll—might decide that to discourage all potential infringers of its protected intellectual property in Barbie, it is willing to spend a disproportionate amount to shut down a single infringer.<sup>255</sup> This is loosely conceptually related to the antitrust-prohibited behavior described as “tying,” which is defined as using one’s larger economic footprint to obtain competitive advantage in a submarket against niche competitors.<sup>256</sup>

A second theory of rationality might be that the wealthy actor understands that its opponent cannot sustain the transaction costs, and so the actor will never actually call the bluff; in this instance the rational choice is to make the threat.<sup>257</sup> This is loosely conceptually related to the antitrust-prohibited behavior described as creating unlawful barriers to entry, which means that one variant that uses economic power to create unacceptable transaction costs to potential competitors thereby dissuades competitors from ever even entering a market.<sup>258</sup>

In their work focusing on judges, Professors Cann and Yates found legitimacy conclusions persisted even though—among other factors—there was a deep perception that justice favored wealthy and powerful individuals.<sup>259</sup> If the perception that judges favor the wealthy and powerful does not undermine legitimacy, then perhaps the perception that the wealthy and powerful can hire a lawyer more skilled at manipulating the rules also does not undermine legitimacy; indeed, these may equate to the *same* perception (that the wealthy and powerful hire skilled lawyers who influence judges to dispense unequal justice).

But for the purposes of this Article, whether the well-heeled actor is

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254. See Kreps & Wilson, *supra* note 253, at 256–66 (explaining how the “monopolists” payoffs are more complex).

255. In the opening line of the opinion in *Mattel, Inc. v. MCA Records, Inc.*, Justice Kozinski refers to Mattel as “Trademark Kong.” 296 F.3d 894, 898 (9th Cir. 2002).

256. See, e.g., *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1411 (9th Cir.) (“Tying exists when a seller refuses to sell one product unless the buyer also purchases another. To prove an illegal tie, a party must show 1) a tying of two distinct products or services, 2) sufficient economic power in the tying product market to affect the tied market, and 3) an effect on a substantial amount of commerce in the tied market.”), *cert. denied* 502 U.S. 994 (1991).

257. See Kreps & Wilson, *supra* note 253, at 256–66 (describing how the “monopolists” payoffs are more complex).

258. See, e.g., *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975) (“[T]he competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.”), *cert. denied* 424 U.S. 943 (1976).

259. Cann & Yates, *supra* note 232, at 304–05.

rational or irrational does not matter, because under either scenario, the other party should settle for an undervalued amount, or otherwise abandon the litigation.<sup>260</sup> In other words, a rational party acting apparently irrationally can force a rational opponent to accept an irrational outcome.<sup>261</sup> Or as my wife puts it, “you cannot negotiate with a three-year-old.”<sup>262</sup>

This is but one concrete example of the manipulator’s paradox, but others abound. To name a few, the liberal rules of civil discovery routinely offer the opportunity to impose expansive litigation costs on an opponent.<sup>263</sup> The multitude of possible pretrial motions presents a similar opportunity,<sup>264</sup> as does a strategic lawsuit against public participation (“SLAPP”).<sup>265</sup>

260. *Accord* Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 267 (1979) (“[L]itigants taking advantage of superior financial resources to bury their opponents in an unending barrage of motions that make capitulation to unfair settlements the only sensible alternative to continued litigation.”).

261. In the language of game theory by forcing one litigant into a position with no good choices the game is an “iterated elimination of strictly dominated strategy” solution of a two-player “cheap-talk” version of a “dynamic game of incomplete information.” See ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 2-7, 173–253 (Princeton Univ. Press ed., 1972). That solution is incongruous for a game theorist because an “iterated elimination of strictly dominated strategy” solution of a game-theoretic problem assumes that it is common knowledge that all players are acting rationally. *Id.* at 7. A key insight of the chain-store paradox is the incentive of an actor to make a series of short-term irrational decisions to realize a long-term gain. See Kreps & Wilson, *supra* note 253, at 1–2 (discussing the potential gains tenuous threats provide).

262. My spouse, Professor Lisa M. Black (too many times to count).

263. See generally Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989), quoted and cited with approval in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (discussing how discovery abuse can push parties to settle and how this abuse is difficult for courts to catch). *But cf.* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (finding that discovery abuse is rare using methodological studies of the discovery process).

264. See, e.g., ABA, *BLUEPRINT*, *supra* note 249, at 290 (“The filing of frivolous motions and complaints, asserting unfounded defenses, pursuing abusive discovery, and taking unwarranted appeals glut our system of justice.”); Renfrew, *supra* note 260, at 267 (“The enormous reluctance in the American court system to evaluate the merits of a case prior to trial . . . make [discovery] abuse particularly costly. These problems are compounded by litigants taking advantage of superior financial resources to bury their opponents in an unending barrage of motions that make capitulation to unfair settlements the only sensible alternative to continued litigation.”).

265. See, e.g., *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1055–56 (2006) (“A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances. . . . The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.”); *accord* CAL. CIV. P. CODE §425.16(a) (West 2015) (“The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage

Apparent structural loopholes—cheating opportunities—are in no way unique to the civil dispute side of the aisle. The Supreme Court decisions of *Brady v. Maryland*<sup>266</sup> and *Kyles v. Whitley*<sup>267</sup> require a prosecutor to turn over all information favorable to a defendant. *Brady* and *Kyles* create an opportunity for the prosecutor, within the rules, to “cheat.” As the Supreme Court recognized in *Kyles*, “the prosecution . . . alone can know what is undisclosed.”<sup>268</sup> Because the doctrine is not phrased as “turn over all information,” but rather is phrased in reference to evidence “material either to guilt or punishment,”<sup>269</sup> the prosecutor has an incentive to characterize information as neutral, and thus never turn it over—a decision that only the prosecutor will know.<sup>270</sup>

So lawyers may act within the rules in a way that distorts accuracy. Nonetheless, one can see in court rules a slow, but nonetheless steady, system response. While the justice system is rife with examples of the manipulator’s paradox, many examples can be matched with a system attempt to eliminate, or just ameliorate, the “bad” conduct.

For example, one can leverage the “American Rule” to extort a settlement. In response to this dynamic, civil procedure rules around the country have added devices such as California Code of Civil Procedure section 998,<sup>271</sup> or Federal Rule of Civil Procedure 68,<sup>272</sup> which enable any litigant party to make a settlement offer that, if rejected and bettered at trial, will result in “loser pays.” These rules impose a modified cost shifting by requiring the litigant who rejected the settlement offer to pay his or her opponent’s fees and costs in whole or in part. In other words, the rule makers recognized the manipulator’s paradox promoted by the

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continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”). “SLAPP” is the acronym for Strategic Litigation Against Public Policy—meaning a lawsuit that is used to bully or embarrass an opponent and furthers no goal on the merits of substantive law.

266. *Brady v. Maryland*, 373 U.S. 83, 83–87 (1963).

267. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

268. *Id.* at 437.

269. *Brady*, 373 U.S. at 86 (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

270. *See, e.g., Connick v. Thompson*, 563 U.S. 51, 58–71 (2011) (holding a district attorney’s office may not be held liable under § 1983 for failure to train its prosecutors based on a single *Brady* violation); Bennett L. Gersham, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (“*Brady* actually invites prosecutors to bend, if not break, the rules,’ and many prosecutors have become adept at *Brady* gamesmanship to avoid compliance.”).

271. CAL. CIV. PROC. CODE § 998

272. FED. R. CIV. P. 68.

American Rule and sought to ameliorate the distortive effect of the rule.<sup>273</sup>

Similarly, Federal Rule of Civil Procedure 11<sup>274</sup> was first inserted into the Code and then repeatedly revised to make it increasingly harder for a party to get away with tactics motivated by improper motives, which are defined as any motive other than a merit-based motive.<sup>275</sup> A variety of state codes mimic Rule 11.<sup>276</sup> Similar rule revisions curtail the opportunity for discovery abuse.<sup>277</sup> For example, California has adopted an anti-SLAPP statute.<sup>278</sup> Even revisions in criminal procedure are often justified as deterring misbehavior or sharp practices by inside players to the criminal justice system.<sup>279</sup>

What then can one conclude about lawyers and legitimacy? There

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273. Kathryn Spier argues that the American rule facilitates settlement instances of asymmetrical damage evaluations, and hinders settlement in instances of asymmetrical liability assessments; she argues for a modified FRCP 68 rule of fee-shifting against a judge-set metric. Kathryn Spier, *Pretrial Bargaining and the Design of Fee-Shifting Rules*, 25 RAND J. ECON. 197, 200–10 (1994); see, e.g., Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 25–26 (1990) (arguing that requiring a losing litigant to pay the opponent's expenses does not remedy the problem of the "American rule," but that requiring the posting of a refundable deposit does). For our purposes, the point is not whether Rule 68 is the best solution, but rather that as Spier confirms, fee-shifting rules can influence settlement behaviors in profound ways, and that the system can influence litigant choices to promote particular outcomes.

274. FED. R. CIV. P. 11.

275. See, e.g., Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149, 1165 (1986–1987) ("[T]he Commission endorses Rule 11 . . . Everyone hopefully now recognizes that lawyers should not file frivolous motions.").

276. See Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1094–1111 (1993–1994) (summarizing the various approaches the states take to applying Rule 11).

277. See, e.g., FED. R. CIV. P. 37 (describing the sanctions for failure to make disclosures or cooperate during discovery).

278. CAL. CODE CIV. P. § 425.16.

279. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'") (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)); Katherine Sheridan, Comment, *Excluding Coerced Witness Testimony to Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct*, 38 FORDHAM URB. L.J. 1221, 1224 (2011) (discussing Supreme Court limitations on coercive interrogation techniques by police officers). See generally Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019 (1986–1987) (discussing when state practices infringe on the fundamental, trial-related rights of the accused); Sabine Gless, *Truth or Due Process? The Use of Illegally Gathered Evidence in Criminal Trials—Germany* (2010), <http://ssrn.com/abstract=1743530> (discussing German exclusionary rules). For a fuller discussion by the United States Supreme Court (in majority, concurring, and dissenting opinions) of various views on the balancing of criminal exclusionary rules of probative evidence with fair trial rights, see *Stone v. Powell*, 428 U.S. 465, 482–89, 496–502, 508–15, 537–42 (1976).

seems to be a push and pull between lawyers seeing opportunities to “cheat” and rule responses that close those loopholes in whole or in part. System rules routinely either encourage or passively allow lawyer (mis)behavior, which decreases the likelihood that court judgments of what happened will correspond to what *actually* happened. While the system steadily tries to identify and crimp down on these opportunities, the prevalence of them is robust. This prevalence plays into a preexisting narrative of public perceptions of lawyers.<sup>280</sup> And that, in turn, suggests an unexplored vector of possible fragility in the legitimacy of trial courts.

### c. Juries and Legitimacy

Just as there is a preexisting narrative of public perception of lawyers that suggests an unexplored vector of possible fragility in the legitimacy of trial courts, so too is the interplay of perception and legitimacy with juries. It is not hard to find a robust critique of the American jury.<sup>281</sup> The often unstated, but apparent, commonality of jury criticism is the underlying suspicion that juries get cases wrong a disturbing amount of

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280. The “public perception” may also be the perception of lawyers themselves. *See generally* Douglass N. Frenkel et al., *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 *FORDHAM L. REV.* 697 (1998) (discussing concern within the legal community over a decline of civility within the profession). If internal players actually and routinely are manipulating accuracy either maliciously or through passive complicity, that is a further indicator of fragile systemic legitimacy. *See generally* Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *VAND. L. REV.* 871, 915–20 (1999) (describing the precarious line between ethical and unethical legal practice).

281. *See, e.g.*, IRWIN GRISWOLD, HARVARD LAW SCHOOL DEAN’S REPORT 5–6 (1962–1963) (statement of Dean Irwin Griswold) (arguing that if the goal is justice, juries should be abolished); Warren E. Burger, *The State of the Federal Judiciary*, 57 *A.B.A. J.* 855, 858 (1971) (expressing a readiness to eliminate civil juries); Edward J. Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 *A.B.A. J.* 570 (1974) (arguing, as the title describes, that federal civil jury trials should be abolished). *See generally* Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 *L. & CONTEMP. PROBS.* 269 (1989) (discussing critiques of civil juries). In just one three-month period in 2013, national criticism erupted over acquittal verdicts in two Florida criminal homicide trials. *See* Scott Stump, *Casey Anthony Judge Felt ‘Shock, Disbelief’ at Not Guilty Verdict*, TODAY NEWS (May 6, 2013, 6:28 AM), <http://www.today.com/news/casey-anthony-judge-felt-shock-disbelief-not-guilty-verdict-6C9791042> (reporting on criticism of the not-guilty verdict in the Casey Anthony trial); *see also* Carol D. Leonnig & Jenna Johnson, *Anger Flows at Acquittal of George Zimmerman in Death of Trayvon Martin*, WASH. POST (July 14, 2013), [http://www.washingtonpost.com/national/anger-flows-at-acquittal-of-george-zimmerman-in-death-of-trayvon-martin/2013/07/14/e1a1216a-ec98-11e2-bed3-b9b6fe264871\\_story.html](http://www.washingtonpost.com/national/anger-flows-at-acquittal-of-george-zimmerman-in-death-of-trayvon-martin/2013/07/14/e1a1216a-ec98-11e2-bed3-b9b6fe264871_story.html) (discussing criticism over the jury verdict in the death of Trayvon Martin). On January 27, 2015, I performed a search on “Bing” for “Outrageous Jury Verdicts.” The database reported 1,240 results. I then searched on “Bing” for “Abolish jury system”—a Bing-suggested search that therefore resulted in relevant results without needing to filter by putting the search terms in quotation marks—had 637,000 results.

the time.<sup>282</sup>

Juries do get things wrong, albeit not with the frequency one might suppose. As Professor Bruce Spencer notes: “[D]irect assessments of accuracy are not possible on a wide scale because only atypically is the correct verdict known, and it is difficult to generalize from those cases to the more typical cases where the correct verdict is not knowable.”<sup>283</sup> But Spencer nonetheless uses accuracy as a starting point to estimate a statistically defensible model of jury accuracy, and concludes that jury error rates are roughly 10 percent.<sup>284</sup> This is in accord with the work of many researchers who conclude that juries typically reach reasoned and informed decisions.<sup>285</sup> A broad review of the statistical and other social science research concludes that jurors are competent decision makers.<sup>286</sup>

Without regard to the accuracy of public perception regarding the frequency of jury error, the presence of public perception of jury error is empirically verifiable. In one study, 320 individuals were given descriptions of the same trial and verdict, with the only variables being a homogenous or heterogeneous jury, and a guilty or not guilty verdict. The study found a material increase in the perception of an inaccurate verdict when all-white juries found a defendant guilty.<sup>287</sup> For a social scientist, what is of interest here are the reasons for community perceptions of inaccurate jury verdicts; for this Article’s purposes, this study confirms the prevalence of community perceptions that juries get things wrong.<sup>288</sup>

What is unclear—in the absence of legitimacy research—is the relationship of the perception of jury error to legitimacy. Americans have long perceived juries as deeply flawed. In the ratification debates of the proposed Constitution of the United States, it was suggested that juries

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282. See Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 742–43 (1990–1991) (discussing the influences on the perception of juror inadequacy). This is far from a new criticism. At the time the early Americans were considering juries for inclusion in the proposed Constitution, jurors were described as decision-makers “by chance,” “stupid,” “unprincipled,” and potentially imposing injustice by “ignorance or knavery.” See Klein, *supra* note 52, at 1096 (discussing the Federalists and Anti-Federalists view of juries).

283. Spencer, *supra* note 146, at 306.

284. *Id.* at 310–15, 326–28.

285. Cecil, *supra* note 282, at 745–46.

286. *Id.* at 745–64.

287. Ellis, *supra* note 185, at 1043–50.

288. See generally Daniels, *supra* note 281 (discussing the prevalence of the perception that juries render incorrect verdicts).



were not “fair.”<sup>289</sup> Jurors were characterized as “ignorant”<sup>290</sup> and said to be unable to “distinguish between right and wrong.”<sup>291</sup> Jurors were also described as decision makers “by chance,”<sup>292</sup> “stupid,”<sup>293</sup> “unprincipled,”<sup>294</sup> and potentially imposing injustice by “ignorance or knavery.”<sup>295</sup> Yet these concerns did not cause the framers to eliminate trial by jury to have a legitimate justice system; to the contrary, trial by jury is enshrined in the Constitution *three times*.<sup>296</sup>

The justice system intentionally and consistently reflects a preference for jurors over judge as decision makers.<sup>297</sup> Contemporary reform of the role and scope of jury trials, however, suggests that public trust in juries has turned. Legislative reform, such as increasing burdens of proof to recover punitive damages,<sup>298</sup> eliminating or capping the right to recover some forms of damages,<sup>299</sup> or increasing the thresholds to find some forms of liability,<sup>300</sup> are all examples of dissatisfaction with jury verdicts resulting in what has now been called “the vanishing trial.”<sup>301</sup>

So, in the absence of empirical research, it is hard to formulate a reasonable hypothesis about the expected relationship of juries to legitimacy. There is ample evidence of dissatisfaction with the accuracy of dispute resolution through trial by jury, but there is ambiguity about whether judges are perceived as any better, and one likely knows that concern regarding judges has not undermined their legitimacy.

289. REMARKS OF JOHN MARSHALL ON JUNE 20, 1788, DURING THE VIRGINIA STATE CONVENTION CONCERNING RATIFICATION OF THE CONSTITUTION, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 540, 543 (Neil H. Cogan ed., 1997).

290. A FARMER, NO. 4, MARCH 21, 1788, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 579, 581 (Neil H. Cogan ed., 1997).

291. *Id.*

292. *Id.*

293. ARISTOCROTIS, APRIL 1788, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 582, 582 (Neil H. Cogan ed., 1997).

294. A [NEW HAMPSHIRE] FARMER, NO. 3, JUNE 6, 1788, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 586, 586 (Neil H. Cogan ed., 1997).

295. *Id.*

296. U.S. CONST. art. III; U.S. CONST. amends. VI, VII.

297. Klein, *supra* note 52, at 1098.

298. CAL. CIV. CODE § 3294.

299. See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 412–15 (2005) (exploring the effect of medical malpractice damages caps).

300. See, e.g., Brian S. Sommer, Note, *The PSLRA Decade of Decadence: Improving Balance in the Private Securities Litigation Arena with a Screening Panel Approach*, 44 WASHBURN L.J. 413, 420–425 (2004–2005) (describing congressional attempts to impair securities class actions).

301. See, e.g., Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD., at v (2004), (publishing fifteen articles addressing the vanishing trial phenomena).

#### d. Conclusions About Fragility of Trial Court Legitimacy

As noted above, there is thin extant scholarship on the resiliency or fragility of trial court legitimacy. That work focuses on judges, and suggests that because of concerns with judge neutrality, there is some fragility to perceptions of legitimacy. One can formulate a tentative hypothesis that perceptions of lawyers may add to that fragility, but one should be more hesitant to formulate a similar hypothesis about juries. One theme that emerges from all of these contexts is that whatever legitimacy the courts do have, it rests on a premise that the courts are trying to get to a just, fair, and accurate result, colloquially speaking, pretty much all of the time.

#### *B. Truth in Courts and Legitimacy Fragility*

As the explication of the meaning of truth in courts developed, courts tempered fairness with the need for finality, and intentionally delimited fact-based decisions in deference to other, external values. In another way, two of the four legitimacy factors identified by Professors Cann and Yates—belief that courts provide equal justice and belief that decisions are based on fact and law—are undermined if the public becomes aware of what courts do.<sup>302</sup> Professors Cann and Yates found that “greater knowledge regarding one’s state courts actually decreases their perceptions of court legitimacy.”<sup>303</sup>

That is particularly troubling if there is reason to be concerned that unfamiliarity is eroding. There is a variety of indicators that the community is becoming increasingly more aware of what happens in trial courts. Most directly, there is surprisingly more personal experience with the courts across the nation’s population. More than one-third of eligible Americans will serve as a juror at least once in their lifetime.<sup>304</sup>

Beyond this direct personal experience, the public has at least surface level awareness of a variety of court cases through media reports. Trials with ironic frequency gain sufficient boosts in public perception to become, at least for a time, part of the public lexicon as the “trial of the century.” Just a few of the cases labeled “trial of the century” in the last one hundred years (as of the writing of this Article) are the trial of Sacco

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302. The other two are: (1) belief that judges are trustworthy and honest, and (2) belief that judges are fair. Cann & Yates, *supra* note 232, at 305.

303. *Id.* at 314. In more recent work, Cann and Yates have found inopposite results. Email from Jeff Yates, Professor, Binghamton Univ., to author (May 29, 2015) (on file with author).

304. HON. GREGORY E. MIZE ET AL., NAT’L CTR. FOR STATE COURTS, THE STATE-OF-THE STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 8 (2007), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>.

and Vanzetti,<sup>305</sup> the trial of Leopold and Loeb,<sup>306</sup> the “Scopes Monkey Trial,”<sup>307</sup> the Lindbergh baby kidnapping trial,<sup>308</sup> the Nuremberg trials,<sup>309</sup> the Sam Sheppard murder trial,<sup>310</sup> the O.J. Simpson murder trial,<sup>311</sup> the impeachment trial of President Clinton,<sup>312</sup> the antitrust trial of Microsoft,<sup>313</sup> and the trial of Michael Jackson.<sup>314</sup> As attorney F. Lee Bailey quipped in 1999, “every time I turn around, there’s a new trial of the century.”<sup>315</sup>

But the work of the justice system can become part of the public lexicon even short of sensationalist tags. In a forty-six-month period, the murder trials of Casey Anthony,<sup>316</sup> Jody Arias,<sup>317</sup> and the so-called “American Sniper” killer<sup>318</sup> all dominated the news cycle in quick succession. Less prurient, but nonetheless generally followed, civil trials of recent vintage include the intellectual property battles between Apple and Samsung,<sup>319</sup> the trial concerning Research in Motion’s (“RIM”) patent rights to the Blackberry electronic device,<sup>320</sup> as well as a personal-injury lawsuit known as the “McDonalds coffee case.”<sup>321</sup>

305. JOHN DAVIS, *SACCO AND VANZETTI: REBEL LIVES 1* (2004) (“Within a year it was going to become the ‘trial of the century.’”).

306. Douglas O. Linder, *The Leopold and Loeb Trial: A Brief Account*, U. MO.-KAN. CITY (1997), <http://law2.umkc.edu/faculty/projects/ftrials/leoploeb/Accountoftrial.html> (“[T]he Leopold and Loeb trial has the elements to justify its billing as the first ‘trial of the century.’”).

307. Peter Carlson, *(The Last) Trial of the Century*, WASH. POST, Jan. 4, 1999, at C01.

308. *Id.*

309. Joseph Canon, *The Real Trial of the Century*, N.Y. TIMES (June 9, 2002), <http://www.nytimes.com/2002/06/09/books/the-real-trial-of-the-century.html>.

310. Carlson, *supra* note 307.

311. *Id.*

312. *Id.*

313. *Id.*

314. Michael Ventre, *O.J. Case Will Pale in Comparison to Jackson Trial*, TODAY (Jan. 30, 2005, 1:17 PM), <http://www.today.com/id/6877844/ns/today-entertainment/t/oj-case-will-pale-comparison-jackson-trial/>.

315. Carlson, *supra* note 307, at C01.

316. *Casey Anthony Trial Fast Facts*, CNN LIBR. (June 29, 2016, 10:13 AM), <http://www.cnn.com/2013/11/04/us/casey-anthony-trial-fast-facts/index.html>.

317. *Jodi Arias News*, ABC NEWS, <http://abcnews.go.com/topics/news/jodi-arias.htm>.

318. Tasha Tsiaperas, *Trial for Man Accused of Killing ‘American Sniper’ Chris Kyle Begins in Stephenville*, DALL. MORNING NEWS (Feb. 11, 2015, 8:10 AM), <http://crimeblog.dallasnews.com/2015/02/testimony-begins-wednesday-morning-in-american-sniper-trial.html/>.

319. *Apple. Samsung Electronics Agree to Drop Patent Lawsuits Outside U.S.*, HUFFINGTON POST (Aug. 5, 2014, 11:00 PM), [http://www.huffingtonpost.com/2014/08/05/apple-samsung-drop-lawsuit\\_n\\_5653206.html](http://www.huffingtonpost.com/2014/08/05/apple-samsung-drop-lawsuit_n_5653206.html).

320. Rob Kelley, *BlackBerry Maker, NTP Ink \$612 Million Settlement*, CNN MONEY (Mar. 3, 2006, 7:29 PM), [http://money.cnn.com/2006/03/03/technology/rimm\\_ntp/](http://money.cnn.com/2006/03/03/technology/rimm_ntp/).

321. Andrea Gerlin, *Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9*

Technology nurtures and grows this general communal awareness of what happens in courts. By 2008 (still relatively early days in the context of ubiquitous access to the Internet), trial strategy consultants observed, “[v]irtually every trial is newsworthy to someone and can therefore end up on the Internet . . . .”<sup>322</sup> Indeed, this very concern has led to a host of academic and judicial introspection about a proper procedural response to the impact of the Internet on jurors—both pretrial and during trial.<sup>323</sup> The courts provide a seemingly endless source of public fascination, and as a consequence there is broad—albeit potentially shallow—general public awareness of what happens in courts.

And then, of course, there is the impact of electronic media. Popular television series such as *CSI* have caused enormous angst among lawyers and judges about the impact of popular media on the expectations of trial jurors.<sup>324</sup> This angst is grounded in the understanding that the public has an awareness, and a general set of preconceptions, about what it believes, rightly or wrongly, happens in courts.

There is even research suggesting that this broad awareness of what happens in courts is not entirely shallow. There is some evidence of people fashioning their specific behavior in response to how that behavior *might* be evaluated in a future trial. Professors Gideon Parchomovsky and Alex Stein discuss and analyze instances when potential future litigants have the opportunity—assuming they are aware of what happens in courts—to create beneficial potential evidence.<sup>325</sup> Professors

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*Million—McDonald’s Callousness Was Real Issue, Jurors Say, In Case of Burned Woman—How Hot Do You Like It*, WALL ST. J., Sept. 1, 1994, at A1.

322. Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 292 (2008).

323. See generally Daniel William Bell, Comment, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81 (2010–2011) (suggesting that the proper way to prevent juries from conducting outside research is by providing daily judicial instructions); Steven Wallace, *The Internet Infects the Courtroom*, 93 JUDICATURE 138 (2010) (recommending several methods of minimizing juror Internet use including repeated jury instructions, questions about Internet use during voir dire and juror penalties); Amanda McGee, Comment, *Juror Misconduct in The Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301 (2009–2010) (recommending a variety of court-imposed solutions and juror peer monitoring); Marcy Zora, Note, *The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577 (2012) (advocating that courts should establish punishments for jurors who conduct outside Internet research or post about confidential information on social media).

324. See Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1336 (2009) (discussing the impact the television program *CSI* has on jury deliberations and outcomes).

325. See Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 530–42 (2010) (analyzing the distortionary effect of evidentiary

Parchomovsky and Stein detail examples of persons from a variety of legal contexts (i.e., property law, patent law, criminal law, and tort law) with sufficient awareness of the evidentiary treatment of actions that they modify their behavior to maximize future trial outcomes.<sup>326</sup> Professors Parchomovsky and Stein conclude that people in the general community make choices—indeed, sometimes economically “suboptimal” choices—based on their fear of how those choices might be used in a trial.<sup>327</sup> In other words, at a level far more consequential than amusement with *telenovela*-like courtroom dramas, there is increasing societal awareness of what happens in courts.

Are there presently concrete examples of this awareness eroding legitimacy? Arguably, there is exactly the opposite.

Legitimacy Theory would predict that if the community accepts the courts as legitimate, then when there is a perception that the courts are getting things wrong, the community either will do nothing, or will work within normal institutional channels (as opposed to acts of civil disobedience) to recalibrate the system.<sup>328</sup> And it appears that Legitimacy Theory predictions of behavior actualize in reality: a community that accepts courts as legitimate either will do nothing, or will work within normal institutional channels (as opposed to acts of civil disobedience) to recalibrate the system. Indeed, it ubiquitously reads like an Old Testament list of who begat whom.

In civil litigation, the assertion that the system is out of balance is usually expressed by the pejorative phrasing of a “litigation crisis,” or a concern with rampant “frivolous litigation.” These concerns often emerge through advocacy for “reform” to reign in a runaway system. Concerns with an explosion of inmate litigation begat the Prison Litigation Reform Act.<sup>329</sup> Concerns with patent “trolls” triggered calls for procedural reform of patent laws.<sup>330</sup> Concerns with the abuse of antitrust litigation caused its own procedural reform.<sup>331</sup> A perceived explosion in asbestos litigation inspired calls to take all such claims out

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motivations).

326. *Id.* at 532–34.

327. *Id.* at 518.

328. EASTON, *supra* note 203, at 278–80, 285–86.

329. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558–59 (2003) (describing the purpose and method of passage of the Prison Litigation Reform Act).

330. *See, e.g.*, Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 510–11 (2003) (“IP law probably needs to follow the same path as antitrust law by taking stronger substantive and procedural steps to mitigate the harm from rent-seeking through litigation.”).

331. *Id.*

of Article III courts.<sup>332</sup> Asserted extortive securities litigation prompted the Private Securities Litigation Reform Act.<sup>333</sup> The generic assertion of frivolous litigation<sup>334</sup> generated calls for massive tort reform,<sup>335</sup> procedural reform,<sup>336</sup> increased burdens of proof to recover punitive damages,<sup>337</sup> the elimination or capping of the right to recover some forms of damages,<sup>338</sup> and the increasing of thresholds to find some forms of liability.<sup>339</sup>

Persistent recalibration of the courts in response to accuracy concerns is a pattern on the criminal side as well. The perceived erratic sentencing patterns of judges prompted mandatory sentencing guidelines.<sup>340</sup> The perceived inability of the traditional legal system to handle terrorism

332. See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1821 (1991–1992) (discussing possible administrative alternatives to the tort system).

333. See Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1058 (1999) (analyzing the purpose of the Securities Litigation Reform Act of 1995).

334. See generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986–1987) (discussing the dramatic increase in frivolous litigation).

335. See Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40, 40 (1986–1987) (detailing tort reform and how to efficiently handle claims); Thomas A. Eaton, *Of Frivolous Litigation and Runaway Juries: A View from the Bench*, 41 GA. L. REV. 431, 432 (2006–2007) (examining tort reform from the perspective of trial judges).

336. See Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1068 (1993–1994) (analyzing the use of sanctions to combat frivolous litigation); John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 492 (1985–1986) (describing the development of procedural law and its relation to frivolous litigation).

337. CAL. CIV. CODE § 3294 (1992).

338. Sharkey, *supra* note 299, at 412–15; David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2032 (2006).

339. See, e.g., Sommer, *supra* note 300, at 420–25 (describing judicial and congressional attempts to impair securities class actions). See also David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 907–14 (2014–2015) (discussing legislative and executive efforts to limit class action lawsuits in personal injury cases).

340. See, e.g., Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 906 (1991) (“The principal argument for sentencing guidelines is . . . they limit the play of judicial personality and inhibit discrimination on racial and other grounds.”). See generally KATE SMITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998) (discussing sentencing reform and the subsequent sentencing guidelines). The guidelines worked—under the mandatory minimum guidelines variation in sentencing materially shrunk; when the federal courts returned to advisory sentencing guidelines, variance in judicial sentencing doubled. See Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1271–75 (2014) (detailing how the implementation of guidelines reduced sentencing disparities).

evoked Guantanamo and military tribunals.<sup>341</sup> The perceived inability of normal criminal procedure to resolve childhood sexual abuse claims motivated revised statutes of limitation.<sup>342</sup> The “insanity” acquittal of John Hinckley inspired the reform of the Federal Rule of Evidence 704(b).<sup>343</sup>

This is not to say that there are *no* instances of civil disobedience in response to concerns of how the law is implemented or interpreted. The Civil Rights movement of the 1960s is a stark example.<sup>344</sup> Another example comes from the annual protests against the Supreme Court because of the *Roe v. Wade*<sup>345</sup> decision.<sup>346</sup> Yet the broad sweep of American history all stands for the resilient institutional legitimacy of the trial courts.

So what can one conclude about the relationship between legitimacy and truth in courts? If, as this Article posits, truth in courts means something different from colloquial understandings of accuracy, then does the dissonance between what the public believes courts do and what courts actually do expose a weakness in the legitimacy of the courts?<sup>347</sup> One can at least seek to validate or refute that hypothesis anecdotally.

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341. See generally Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CALIF. L. REV. 1407 (2001–2002) (cautioning against the use of military tribunals for trying suspected terrorists); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635 (2001–2002) (discussing issues with the use of military tribunals for terrorists); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (discussing the Constitutional consequences of military tribunals for the trial of terrorists); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L. & COMP. L.Q. 1 (2004) (discussing whether the military tribunals meet the minimum international standards for a fair trial).

342. See generally Jorge L. Carro & Joseph V. Hatala, *Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239 (1995–1996) (discussing extended statutes of limitations in childhood sexual abuse cases).

343. See, e.g., Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 620 (1986–1987) (“Prompted by public reaction to the jury’s not guilty by reason of insanity verdict of would-be presidential assassin John Hinckley, Jr., Congress amended Federal Rule of Evidence 704 in 1984.”).

344. See generally Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005) (discussing civil disobedience during the Civil Rights Movement).

345. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have a fundamental right to abortion).

346. See MARCH FOR LIFE, <https://marchforlife.org> (last visited Sept. 10, 2016) (discussing the pro-life movement and opportunities to organize and demonstrate).

347. See Nesson, *supra* note 195, at 1379 (arguing the public will not defer to a judge’s decision that amounts to a probability based bet on what happened).

Much has been, and will be, written on the shooting of Michael Brown and the aftermath, but in short form, Michael Brown's death lit a firestorm of public attention on police encounters with persons of color, which led to weeks of protests in Ferguson, Missouri, resulting in protests nationwide, in turn leading to attention on other apparently similar police encounters (most notably, the choking death of Eric Garner in New York City) and protests concerning those encounters, leading to focus and protests concerning the grand jury evaluations of the encounters, and culminating serious discussion at high institutional levels of reform regarding grand juries and their processes.<sup>348</sup> The essential allegation was that when the actor was a police officer and the victim was a person of color, the likelihood that criminal charges would be brought was remote—much less there being a conviction and sentence.<sup>349</sup> Or, similarly, there was civil discord in response to the perception that values other than “a search for the truth” distorted the likelihood of reaching a correct outcome.<sup>350</sup>

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348. See, e.g., Audio tape: Webinar on Grand Jury Reform, Post-Ferguson, held by the Young Lawyers Division, American Bar Association (Mar. 17, 2015); see generally Robert Gavin, *Grand Jury Reform Call: Top Judge Asks Judicial Role in Cases of Death or Near-death of Civilians by Cops*, TIMESUNION (Feb. 17, 2015, 1:25 PM), <http://www.timesunion.com/news/article/Top-judge-wants-big-grand-jury-changes-in-police-6085342.php> (“In the wake of polarizing grand jury decisions in the police-related deaths of Michael Brown and Eric Garner, New York’s top judge wants judges to oversee the grand jury process in cases involving deadly and near-deadly incidents involving police and civilians.”); Ben Kesling, *Missouri Governor Announces Creation of ‘Ferguson Commission’*, WALL ST. J. (Oct. 21, 2014), <http://www.wsj.com/articles/missouri-governor-announces-creation-of-ferguson-commission-1413914495> (reporting on the Missouri governor creating a regional commission to study systemic inequality in the wake of the Ferguson protests); Lee Van Der Voo, *Grand Jury Reform Propelled by Ferguson*, INVESTIGATEWEST (Dec. 29, 2014), <http://www.invw.org/article/grand-jury-reform-propell-1490> (discussing the grand jury proceeding relating to the police officer shooting of Aaron Campbell).

349. See, e.g., David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=0.r=0](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.r=0) (discussing the aftermath of a grand jury finding there was not enough evidence to charge police officer Daniel Pantaleo in the death of Eric Garner).

350. That perception largely was affirmed when on March 4, 2015, the United States Department of Justice Civil Rights Division released its *Investigation of the Ferguson Police Department*, which included among its findings:

Ferguson has allowed its focus on revenue generation to fundamentally compromise the role of Ferguson’s municipal court. The municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City’s financial interests. This has led to court practices that violate the Fourteenth Amendment’s due process and equal protection requirements. The court’s practices also impose unnecessary harm, overwhelmingly on African-American individuals, and run counter to public safety.



The Brown/Garner rounds of public protest echo the reaction to the verdict in the murder trial of O.J. Simpson.<sup>351</sup> A common explanation of the verdict—and the reaction to the verdict—is the possibility that a murderer was let free not because he was innocent, but rather to send a message to the Los Angeles Police Department about police practices.<sup>352</sup>

The Simpson protests and the Brown/Garner protests were a more muted version of the protests after the state court acquittal of police officers for the beating of Rodney King.<sup>353</sup> Those were dramatic examples of a nontrivial percentage of public disagreement with compromising the likelihood of accurate verdicts in response to arguably broader racial dynamics; in other words, that the jury intentionally eschewed finding O.J. Simpson guilty to send a message to the Los Angeles Police Department.

One can identify examples of civil discord in response to the perception of the system factoring nonaccuracy values into the decision process. But are there also examples of passive acceptance of the system factoring nonaccuracy values into the decision-making process?

An example of passive acceptance of the system factoring nonaccuracy values into the decision process is criminal exclusionary rules. One feature of the criminal justice system is the set of doctrines excluding evidence improperly gathered, such as a failure to give *Miranda* warnings.<sup>354</sup> One can postulate that there is broad, shallow public awareness of these doctrines through the colloquial phrasing, “got off on a technicality.”<sup>355</sup> But the primary reaction to these doctrines, outside of

U.S. DEP'T. OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (Mar. 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf).

351. See generally JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED (1996) (discussing protests after the Rodney King and O.J. Simpson Trials); John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917 (1995–1996) (analyzing the relationship between popular culture and the courtroom in the Rodney King and O.J. Simpson trials).

352. Craig M. Bradley & Joseph L. Hoffman, *Public Perception, Justice, and “The Search for Truth” in Criminal Cases*, 69 S. CALIF. L. REV. 1267, 1267–68 (1995–1996).

353. *Id.* at 1270.

354. See Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 157–79 (2003) (discussing the negative impacts of exclusionary rules of evidence); Nardulli, *supra* note 107, at 585–609 (discussing the societal cost of search and seizure exclusionary rules). See generally William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981–1982) (discussing the Fourth Amendment exclusion of improperly gathered evidence).

355. See, e.g., *Off on a Technicality*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/OffOnATechnicality> (examining how the media

legal academics and courts, is media-driven grousing, instead of anything approaching deep concerns for legitimacy. Further, even the grousing arguably is a tool for other agendas, rather than an indicator of legitimacy concerns. Technicality acquittals only seem troublesome when they drive accuracy outcomes with which the complainer disagrees. Put another way, the same person who complains that an accused arms trafficker “got off on a technicality” may express no concern when Oliver North—charged with being a central figure in the “arms for hostages” “Iran-Contra Affair”<sup>356</sup>—got off on a technicality<sup>357</sup> (North was indicted, tried, and convicted of three criminal counts; his conviction was reversed based on findings of Fifth Amendment violations and improper jury instructions).<sup>358</sup>

None of these examples supports drawing definitive conclusions. It is a profound logical fallacy to draw conclusions from retrospective anecdotal events. Consider a person who buys a lottery ticket every day from the same local convenience store, and never wins. Then, two days in a row, the same person buys a ticket from a gas station in another town. Both tickets win. This is not evidence that the gas station sells winning tickets and the convenience store does not. At best, it is a suggestion of something that bears exploration through collection of good data in a properly structured study.

But what all of this *does* expose is a dissonance between the judicial system’s self-articulation of the system’s commitment to accuracy, and the public’s perception of the courts. The work of “Innocence Projects” might best illustrate this phenomenon. According to the *National Registry of Exonerations*, a project of the University of Michigan, the year 2014 had a record number of exonerations (125), continuing a broad year-to-year upward trend since 1989.<sup>359</sup> Surely, the primary motivation behind Innocence Projects is the chance to save an innocent convict on death row. But secondarily, the motivation behind Innocence Projects is to demonstrate to the public—in a way that cannot be denied—the

depicts criminal exclusionary rules).

356. See American Experience, *General Article: The Iran Contra Affair*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/general-article/reagan-iran/> (last visited Oct. 27, 2016) (providing background on the Iran-Contra Affair).

357. See *Oliver North*, SOURCEWATCH, [http://www.sourcewatch.org/index.php?title=Oliver\\_North](http://www.sourcewatch.org/index.php?title=Oliver_North) (last updated June 27, 20109) (summarizing the life of Oliver North).

358. *United States v. North*, 910 F.2d 843 (D.C. Cir.), *amended by* 920 F.2d 940 (1990).

359. The National Registrar of Exonerations, *Exonerations by Year: DNA and Non-DNA*, U. MICH. L. SCH. (Aug 29, 2016), <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx>.

possible horrors of capital punishment. That secondary goal only resonates because of the premise that the public perception of the role of the courts is one seeking just, fair, and accurate results (in a colloquial sense of those words). It is hard to imagine that the public sentiment would be, while faced with post-conviction affidavits showing an accused's actual innocence, that the convict was (in the words of the Supreme Court) “*not innocent, in any sense of the word.*”<sup>360</sup>

#### CONCLUSION

In Chief Justice John Roberts's *2015 Year-End Report on the Federal Judiciary*, he described the recent amendments to the Federal Rules of Civil Procedure as predicated on the idea that cost-efficient, speedy dispute resolution is necessary to justice:

Our Nation's courts are today's guarantors of justice. . . . [L]awyers . . . have an affirmative duty . . . with the court, to achieve prompt and efficient resolutions of disputes. . . . [W]e must engineer a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice.<sup>361</sup>

This notion—equating efficiency, affordability, and finality with justice—underlies the strong affinity of the courts for procedural streamlining. Courts are animating a view that it serves justice to—within constitutional constraints—deploy every available tool to maximize litigation as an efficient and affordable direct line to finality. Hence, the system encounters, among many other “reforms,” reduction in jury size, pressure to settle or arbitrate, compression of open discovery rights, crimping of habeas corpus justifications, dismissal of factually sufficient claims as “implausible,” strict preservation of error standards to support appellate reversal, and heightened thresholds for conviction-reversal based on prosecutorial misconduct.

But each of these incremental steps toward justice is an incremental step away from the probability that a judgment of what occurred in a case corresponds to what actually occurred. For example, the amendment to Federal Rule of Civil Procedure 26(b)(1) to “crystallize[] . . . the common-

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360. *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (emphasis added). *Herrera v. Collins*, and the view of innocence the Court enunciated in *Herrera*, is not an idiosyncratic instance. See *Bhardia v. State*, 774 S.E. 2d 90, 96 (Ga. 2015) (holding that the trial court properly denied the extraordinary motion for new trial to introduce DNA evidence of innocence of rape because defendant's inadequate showing of newly discovered evidence could not have been found with due diligence).

361. CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3, 6, 11, <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

sense concept of proportionality [which will] eliminate unnecessary or wasteful discovery . . . [which] may require the active involvement of a neutral arbiter—the federal judge,<sup>362</sup> but inevitably *also* will foreclose discovery of an indeterminate body of apparently wasteful but actually insightful discovery that would have advanced the accurate determination of what objectively happened in a dispute.

Is this a step away from or toward discerning, in any individual case, the truth?” Well, that depends on what is meant by truth. And therein lies the point. What this Article proposes is that refinements in procedural justice move cases closer to what courts mean by truth but move cases further away from what, colloquially, truth generally means. Or alternatively, system insiders equate truth with justice, but for system outsiders, the two terms have different meanings.

The move toward more procedural justice at the expense of some colloquial truth might prove sound public policy. But so long as it is not *transparent* public policy garnering large public support, it can come at an enormous cost. That cost is the erosion of judicial legitimacy—of judicial *truth*. And that is a cost that has yet to be accounted for in the consideration of further procedural streamlining of the judicial process.

#### APPENDIX A

Country	Jury System <sup>363</sup>	Hearsay Evidence	Character Evidence
Armenia	None. <sup>364</sup>	No ban.	No ban.
Australia	Only used when the charge is a serious crime. <sup>365</sup>	Ban with exceptions. <sup>366</sup>	Admissible if probative value substantially outweighs prejudicial effect. <sup>367</sup>

362. *Id.* at 6–7.

363. For our purposes, “jury system” means a system where lay jurors act as fact finders, deliberate, and issue verdicts. This table does not distinguish between “mixed systems” (where lay assessors serve with professional judges or where laypersons deliberate with professional judges), and systems with no lay participation. For a discussion on variations of lay participation around the world, see Steven J. Colby, Note, *A Jury for Israel?: Determining When a Lay Jury System is Ideal in a Heterogeneous Country*, 47 CORNELL INT’L L.J. 121, 124–25 (2014).

364. MARIJKA MALSCHE, DEMOCRACY IN THE COURTS: LAY PARTICIPATION IN EUROPEAN CRIMINAL JUSTICE SYSTEMS 57 (2009).

365. Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 635 (2008).

366. *Commonwealth Evidence Act 1995* s 63, 65 (Austl.).

367. *Id.* at s 49.

Country	Jury System <sup>363</sup>	Hearsay Evidence	Character Evidence
Chile	None. <sup>368</sup>	No ban.	No ban.
China	None. <sup>369</sup>	Ban, <sup>370</sup> but judges have discretion to admit. <sup>371</sup>	Ban on propensity evidence, modeled after Federal Rules of Evidence. <sup>372</sup>
Czech Republic	None. <sup>373</sup>	No ban.	No ban.
England	Only used in a small percentage of criminal trials. <sup>374</sup>	Explicitly admissible in civil trials. <sup>375</sup> Ban with exceptions in criminal trials. <sup>376</sup>	No ban in civil trials. Ban with exceptions in criminal trials. <sup>377</sup>
Germany	None. <sup>378</sup>	No ban.	No ban.
Honduras	None. <sup>379</sup>	No ban, but in criminal trials there is a preference for non-hearsay evidence. <sup>380</sup>	No ban.

368. U.S. DEP'T OF STATE, CHILE 2013: HUMAN RIGHTS REPORT 7 (2014), [www.state.gov/documents/organization/220640.pdf](http://www.state.gov/documents/organization/220640.pdf).

369. John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L.J. 455, 471 (2012).

370. Uniform Provisions of Evidence of the People's Court (promulgated by Inst. of Evidence Law and Forensic Sci., CUPL, Oct. 8, 2007) art. 28 (China).

371. *Id.* art. 32.

372. *Id.* arts. 33–34. See generally Capowski, *supra* note 369 (discussing why China, a civil law country with no jury system, has modeled its first evidentiary code after the United States' Federal Rules of Evidence).

373. Ivana Borzova, *Scheme for Evaluating Judicial Systems 2013: Czech Republic*, EUR. COMM'N FOR THE EFFICIENCY OF JUST. 13 (Sept. 10, 2014), [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Czech%20Rep\\_2014.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Czech%20Rep_2014.pdf).

374. Leib, *supra* note 365, at 636.

375. Civil Evidence Act 1995, c. 38, § 1 (Eng.).

376. Criminal Justice Act 2003, c. 44, § 114 (Eng.).

377. *Id.* at § 101.

378. Colby, *supra* note 363, at 125.

379. U.S. DEP'T OF STATE, HONDURAS 2013: HUMAN RIGHTS REPORT 9 (2013), [www.state.gov/documents/organization/220663.pdf](http://www.state.gov/documents/organization/220663.pdf).

380. Decreto No. 189-84, CÓDIGO PENAL [Criminal Code] [CÓD. PEN.] art. 199 (Chile). Most other Latin American evidence codes do not even recognize hearsay or character as evidentiary issues. KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 52 (1975); Daniel Pulecio-Boek, *The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region*, 13 RICHMOND J. GLOBAL L. & BUS. 67, 101 (2014).

Country	Jury System <sup>363</sup>	Hearsay Evidence	Character Evidence
Iran	None. <sup>381</sup>	Explicitly admissible in criminal trials. <sup>382</sup>	No ban. Explicitly admissible in determining punishment in criminal cases. <sup>383</sup>
Jamaica	For serious crimes only. <sup>384</sup>	Explicitly admissible, except in criminal trials, oral hearsay is inadmissible if the declarant is available to testify. <sup>385</sup>	No ban.
Korea	In criminal trials, juries render “advisory opinions” which judges are not bound to follow. <sup>386</sup>	Prior to the advent of the criminal jury, there were no exclusionary rules. Now, there are some per se rules barring hearsay and other types of unfairly prejudicial evidence. <sup>387</sup>	No ban.
New Zealand	Only used in a small percentage of	Ban with exceptions. <sup>389</sup>	Explicitly admissible, except in criminal trials, the prosecution may offer such evidence only where

381. U.S. DEP’T OF STATE, IRAN 2013: HUMAN RIGHTS REPORT 12, (2013), [www.state.gov/documents/organization/220564.pdf](http://www.state.gov/documents/organization/220564.pdf).

382. ISLAMIC PENAL CODE [2012], arts. 162, 171, 176, 187, 188 (Iran).

383. *Id.* arts. 38(e), 60, 64.

384. U.S. DEP’T OF STATE, JAMAICA 2013: HUMAN RIGHTS REPORT 10 (2013), [www.state.gov/documents/organization/220666.pdf](http://www.state.gov/documents/organization/220666.pdf).

385. Evidence Act, §§ 31C–31E (Jam.).

386. Hon. Antoinette Plogstedt, *E-Jurors: A View from the Bench*, 61 CLEV. ST. L. REV. 597, 601 (2013).

387. See Eric Ilhyung Lee, *Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT’L & COMP. L. REV. 585, 601 (1997) (noting “the absence of provisions on issues such as relevance and hearsay” in the Korean rules of evidence); Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58 AM J. INT’L L. 525, 554 (2010) (“The advent of jury trials was accompanied by more stringent per se rules on issues such as hearsay.”).

389. Evidence Act 2006, § 18 (N.Z.).

Country	Jury System <sup>363</sup>	Hearsay Evidence	Character Evidence
	trials. <sup>388</sup>		its probative value outweighs the risk of unfair prejudice. <sup>390</sup>
Poland	None. <sup>391</sup>	No ban.	No ban.
Scotland	Only used in a small percentage of criminal trials. <sup>392</sup>	Explicitly admissible in civil trials. <sup>393</sup> Ban with exceptions in criminal trials. <sup>394</sup>	No ban in civil trials. Broadly allowed in criminal trials. <sup>395</sup>
Slovenia	None. <sup>396</sup>	Explicitly admissible in civil trials. <sup>397</sup> No ban in criminal trials.	No ban.
South Africa	None. <sup>398</sup>	Ban with exceptions giving judge discretion. <sup>399</sup>	No ban.
Sweden	None. <sup>400</sup>	No ban.	No ban.
Tanzania	None. <sup>401</sup>	Ban with exceptions. <sup>402</sup>	Ban, except admissible for determining damages

388. Neil Cameron, Susan Potter, & Warren Young, *The New Zealand Jury*, 62 L. & CONTEMP. PROBS. 103, 138 (1999).

390. *Id.* at §§ 40(2), 43(1).

391. Colby, *supra* note 363, at 125.

392. Leib, *supra* note 365, at 637.

393. Civil Evidence (Scotland) Act 1988, § 2(1).

394. Criminal Procedure (Scotland) Act 1995, § 259.

395. *Id.* at § 270.

396. Jasa Vrabc (Head of the Office for Court Management), *Scheme for Evaluating Judicial Systems 2013: Slovenia*, EUR. COMM'N FOR THE EFFICIENCY OF JUST. (CEPEJ), 20–21, (Sept. 10, 2014), [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Slovenia\\_2014.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Slovenia_2014.pdf).

397. Civil Procedure Act of 2004 art. 4 (ZPP-UPB2) (Slov.).

398. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 173 (2006).

399. Law of Evidence Amendment Act 45 of 1988 § 3 (S. Afr.).

400. Malin Kall (Legal Advisor) et al., *Scheme for Evaluating Judicial Systems 2013: Sweden*, EUR. COMM'N FOR THE EFFICIENCY OF JUST. (CEPEJ), 16, (Sept. 10, 2014), [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Sweden\\_2014.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Sweden_2014.pdf).

401. WORLD JURY SYSTEMS 424 (Neil Vidmar, ed., 2000).

402. The Evidence Act 1967, §§ 34–39 (Tanz.). The Evidence Act fails to distinguish relevancy from hearsay; several provisions referring to “relevant” evidence are actually categories of admissible hearsay. Ronald J. Allen et al., *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 B.U. INT'L L.J. 1, 37 (2014).

Country	Jury System <sup>363</sup>	Hearsay Evidence	Character Evidence
			in civil trials. <sup>403</sup>
Turkey	None. <sup>404</sup>	No ban.	No ban.
Zimbabwe	None. <sup>405</sup>	Explicitly admissible in civil cases. <sup>406</sup> Ban with exceptions in criminal cases. <sup>407</sup>	Broadly admissible. <sup>408</sup>

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403. The Evidence Act 1967, § 54 (Tanz.).

404. Ibrahim Cetin (Judge), *Scheme for Evaluating Judicial Systems 2013: Turkey*, EUR, COMM'N FOR THE EFFICIENCY OF JUST. (CEPEJ), 18, (Sept. 10, 2014) [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Sweden\\_2014.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Sweden_2014.pdf).

405. ZIMBABWE: INJUSTICE AND POLITICAL RECONCILIATION 110 (Brian Raftopoulos & Tyrone Savage eds., 2004).

406. Civil Evidence Act, (Act No. 22/2001) § 27 (Zim.).

407. Hearsay evidence is admissible in criminal trials if it would be in England. Criminal Procedure & Evidence Act, (Act No. 67/1938) § 253 (Zim.).

408. Civil Evidence Act, (Act No. 22/2001) § 33 (Zim.); Criminal Procedure & Evidence Act, (Act No. 67/1938) § 260 (Zim.).