3-2024

Proof: The Rule of Law’s Most Essential Element

VICTOR A. BOLDEN

Follow this and additional works at: https://digitalcommons.lib.uconn.edu/law_review

Part of the Rule of Law Commons
Feature

Proof: The Rule of Law’s Most Essential Element

VICTOR A. BOLDEN

In this seemingly apocalyptic age, when the rule of law appears under siege, the way forward should involve reaffirming our belief in the rule of law, through reaffirming the importance of proof to the rule of law. Indeed, proof is the rule of law’s most essential element, a significance codified in legal rules, exemplified by legal theory, and reflected in the main source of belief in the rule of law, its effectiveness.
FEATURE CONTENTS

INTRODUCTION ........................................................................................................... 915

I. THE AMERICAN LEGAL SYSTEM AND ITS ORGANIZATION
   AROUND PRINCIPLES OF PROOF................................................................. 918

II. APPRECIATING LEGAL THEORIES AND JUDICIAL
    PHILOSOPHIES AS PRINCIPLES OF PROOF............................................ 926

III. A BELIEF IN PROOF, AND THE PROOF OF THIS BELIEF ............. 931

CONCLUSION........................................................................................................... 942
INTRODUCTION

These last few years have been rather tumultuous. In the midst of a global pandemic, which has resulted in more than 100 million cases of COVID-19 in the United States, and over a million deaths, this nation also has literally played witness to the death of George Floyd on May 25, 2020, and an attack on the United States Capitol on January 6, 2021. The nation has also experienced landmark rulings from the United States Supreme Court on the challenging issues of guns, abortion, and race. All of this occurred in less than half a decade.

Two of these events, the death of George Floyd and the Supreme Court’s decision in Dobbs, have tested the American public’s faith in the rule of law. That is, the notion that this nation is governed by orderly processes,
first promulgated in the United States Constitution and further defined by other bodies of law, and that these laws are faithfully and appropriately executed and followed by those given authority to govern, and those who are to be governed. A third event, the January 6th attack on the Capitol, directly threatened the rule of law itself.\(^6\)

As the saying goes, or at least a paraphrased version of that saying goes, “[t]hese are times that try [one’s] soul[].”\(^7\) The rule of law and America’s belief in it seems to be under constant attack. Whether it is the use of force to challenge election results, or growing dissatisfaction with the legal process or lawyers because of court rulings or legal filings, there is reason to worry about this country’s ability to sustain a widespread belief in and commitment to the rule of law.

Indeed, these are the times when people resort to William Butler Yeats’s words from last century in the poem, The Second Coming:

\[
\begin{align*}
\text{Turning and turning in the widening gyre} \\
\text{The falcon cannot hear the falconer;} \\
\text{Things fall apart; the centre cannot hold;} \\
\text{Mere anarchy is loosed upon the world,} \\
\text{The blood-dimmed tide is loosed, and everywhere} \\
\text{The ceremony of innocence is drowned;} \\
\text{The best lack all conviction, while the worst} \\
\text{Are full of passionate intensity.}\end{align*}
\]

Later in the twentieth century, during a similar time of seemingly unending challenge and deep and abiding despair—1967—the Reverend Dr. Martin Luther King, Jr.—just a year before his assassination—wrote his last book, Where Do We Go from Here: Chaos or Community?\(^9\) In that book, he confronted the quandary of a nation engaged with violence abroad while also struggling to prevent social unrest at home.\(^10\) The nation’s capacity to engage

\(^6\) Trump v. Thompson, 573 F. Supp. 3d 1, 27–28 (D.D.C.), aff’d, 20 F.4th 10 (D.C. Cir. 2021) (noting that “discovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance because such information relates to our core democratic institutions and the public’s confidence in them.”).

\(^7\) W.B. YEATS, THE SECOND COMING, in COLLECTED POEMS 186 (1956). See Ambassador Mulhall, Remarks at the National Library of Ireland on the Centenary of the Publication of WB Yeats’s “The Second Coming,” (Nov. 19, 2020), https://www.dfa.ie/irish-embassy/usa/news-and-events/news-archive/the-second-coming-yeats-greatest-history-poem.html (“Notwithstanding its mystical provenance, for me ‘The Second Coming’ is a poem of its time. Furthermore, ever since its publication, it has shown a remarkable capacity to relate to the preoccupations of other times including our own.”). See also Dorian Lynskey, Things Fall Apart: The Apocalyptic Appeal of WB Yeats’s The Second Coming, THE GUARDIAN (May 30, 2020, 6:00 AM), https://www.theguardian.com/books/2020/may/30/things-fall-apart-the-apocalyptic-appeal-of-wb-yeats-the-second-coming (“As the world is wrenched out of joint by the coronavirus pandemic, many people are turning to poetry for wisdom and consolation, but ‘The Second Coming’ fulfills a different role, as it has done in crisis after crisis . . . an opportunity to confront chaos and dread, rather than to escape it.”).


\(^{10}\) Id.
thoughtfully and productively through legal means, or even engage in protests or discussions non-violently, was sorely tested then, as it very well may be now.

As the title of his book suggested, Dr. King sought to provide a choice for a better tomorrow; he did not seek to simply lament the challenges of that day, or any yesterday. Instead, he placed the challenges of the moment in context:

[T]he line of progress is never straight. For a period a movement may follow a straight line and then it encounters obstacles and the path bends. It is like curving around a mountain when you are approaching a city. Often it feels as though you were moving backward, and you lose sight of your goal; but in fact you are moving ahead, and soon you will see the city again, closer by.11

I want to offer a similar choice about the rule of law. I want to reaffirm what I believe must be the rule of law’s most essential element: proof.

We live in a world now where what is not real—what is clearly quite fictional—can sometimes be passed off as the truth. And with modern technology, in particular, the rise of means of electronic communication capable of creating and sending out just about any message to anybody and everybody, some people have come to believe things that are demonstrably false.

And then the people, who have accepted these demonstrably false things, share this false belief with others because what they have heard conforms with, and confirms, their own beliefs, and suggests that they are in on something that nobody else knows. So, they tell others, in hopes that they too will believe it. Then, they are not alone; it is a building of a community of sorts. And then, because someone, somewhere, said something, everyone else should believe it too.

In the world outside of the law, proof appears less important, and in some cases, to be irrelevant. Instead, what matters is belief, and we may be living in an age of belief. It is not necessarily a belief in an actual God, or in a specific religion. It also is not necessarily a belief measured by participation in traditional institutions. It is not even a belief measured by traditional participation in partisan politics. Instead, this age of belief is a time when people have come to adopt beliefs, for whatever reason, and once adopted, often believe it necessary to hold onto these beliefs rather fervently, despite any proof to the contrary. In other words, people increasingly want to believe what they believe and do not care if there is evidence suggesting that they should believe something different.

11 Id. at 12.
Once formed, there is a tendency to hold on to that belief, even if new evidence emerges that requires an adjustment or a total course correction. In short, consistent with the theory of confirmation bias, once people have formed their belief about something, they continue to hold onto these views.

I, and all of you—whatever we decide to believe or accept as truth in our private lives—are challenged to measure up to a different standard when it comes to the law. In the law, proof—not just proof we like, not just proof regardless of how irrelevant, and baseless it is—but proof of a high enough quality, and sufficient enough in quantity, is what has been needed, is needed, and will forever be needed. It is this sort of proof that is required if we are to sustain the rule of law and be one country indivisible with liberty and justice for all.

Proof therefore is the most essential element to the rule of law. Why? There are three main reasons. First, the American legal system is organized around principles of proof. Second, in the law, even what might be described as beliefs, legal theories, and judicial philosophies, are actually another way of iterating the significance of proof in the American legal system. Third and finally, American belief in the rule of law, and our best hope for sustaining it—as well as the rest of the world—lies in proof that the American legal system works. It is not enough to have a belief that it works, or to espouse a belief that it works. It is to have a system that works in reality.

I. THE AMERICAN LEGAL SYSTEM AND ITS ORGANIZATION AROUND PRINCIPLES OF PROOF

Perhaps, without fully realizing or appreciating it, the linchpin of American law is proof. Our legal system is organized around principles of proof, two basic principles, in fact: admissibility and sufficiency, or put another way, quality and quantity.

As a threshold matter, the first issue to resolve is whether a particular piece of proof or evidence, is admissible. Then, even if it is evidence that is admissible, or more pointedly, evidence that can be considered, the amount of evidence provided must be enough to satisfy a specific burden of proof—

---

12 See, e.g., Mireille Jacobson, Tom Y. Chang, Manisha Shah, Rajiv Pramanik & Samir B. Shah, Can Financial Incentives and Other Nudges Increase COVID-19 Vaccinations Among the Vaccine Hesitant? A Randomized Trial, 40 VACCINE 6235, 6235 (2022) (“The sources of vaccine hesitancy are varied and may include factors such as knowledge gaps about vaccine safety and effectiveness, concerns about side-effects, mistrust of the medical system, and perceptions of low disease risk.”).

13 See, e.g., Maggie Astor, How Partisanship Affects Pandemic Thinking, N.Y. TIMES (Aug. 19, 2021), https://www.nytimes.com/2021/08/19/us/politics/covid-democrats-republicans.html (discussing research showing that that “highly partisan Republicans took their initial cues from leaders like Trump and then stuck to them no matter what—even if Covid cases and deaths surged in their state, even if people around them got sick”); Eugene Malthouse, Confirmation Bias and Vaccine-Related Beliefs in the Time of COVID-19, 45 J. PUB. HEALTH 523, 527 (Nov. 19, 2022) (“[P]eople who already believed that they knew the answer to the question of whether vaccines were effective did not invest the cognitive effort required to scrutinize the data in front of them.”).
sufficient quality and quantity. In order to be worthy of consideration, the evidence must be of a certain quality. And in order to prevail, there must be enough of it.

The first standard—the admissibility or quality of evidence standard—is mainly governed by the Federal Rules of Evidence (FRE),\(^1\) or the relevant state law analog, that helps guide what constitutes evidence allowed for consideration by a finder of fact. Critically, proof in the legal context, proof to be relied on to sustain the rule of law, must go through a vetting process. Just because you have evidence of something does not mean you have evidence of something relevant to the legal issue at hand.\(^2\) And even if the evidence is relevant, whether this evidence is proper to consider given the legal issue at hand is a separate inquiry. In a particular case, there may be something about that otherwise relevant evidence that may distract from the resolution of that issue. There might be a concern that this distraction may guide the decision-making process disrupting the finder of fact’s ability to decide the issue for the reasons it is supposed to decide it—a concern codified in Rule 403 of the Federal Rules of Evidence.\(^3\)

The Federal Rules of Evidence have codified specific rules to address particular types of distracting evidence beyond Rule 403. That is the purpose of Rule 404 about character evidence generally, and past criminal

---

1. Fed. R. Evid. 402 (providing that evidence is generally admissible if it is relevant and is not precluded by another authoritative source).
2. Fed. R. Evid. 401 (establishing that evidence is relevant if it has “any tendency” to make a fact of consequence more or less probable). See also United States v. Higgins, 362 F.2d 462, 464 (7th Cir. 1966) (“Evidence which has no probative value with respect to any issue, including credibility, is not admissible and the trial judge has the function and duty to exclude such evidence from the consideration of the jury.”); Nesbitt v. Sears, Roebuck & Co., 415 F. Supp. 2d 530, 540 (E.D. Pa. 2005) (finding that, in a products liability action, a 24-year-old plaintiff’s decade-old burglary conviction and placement in a detention center for hitting a teacher are irrelevant to his mental health status at the time of the accident); United States v. Fuesting, 845 F.2d 664, 673 (7th Cir. 1988) (finding that evidence of defendant’s “financial transactions and general financial status were not relevant to whether [defendant] was in possession of, attempting to manufacture, or intending to distribute marijuana . . . the offenses with which he was charged”).
3. Fed. R. Evid. 403 (excluding evidence when “its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”). See also Old Chief v. United States, 519 U.S. 172, 182 (1997) (“Rule 403 prejudice may occur, for example, when ‘evidence of convictions for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case.’”) (citing J. STRONG, MCCORMICK ON EVIDENCE 780 (4th ed.1992)); United States v. Libby, 453 F. Supp. 2d 35, 44 n.8 (D.D.C. 2006) (“[T]he fact that evidence may be classified and thus impact important national security interests is not, by itself, sufficient to exclude the evidence. Rather, there must be some indication that the evidence will improperly impact the jury’s decision making process . . . for example, if the evidence is of a nature as to divert the jury’s attention to unimportant peripheral issues, it might be proper to exclude it.”) (citation omitted); United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) (“Although . . . ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.”).
wrongdoing specifically.17 Or even Rule 405, which addresses the permissible methods of introducing character evidence,18 or Rule 406, about evidence of a habit.19 It is even why a very specific rule, Rule 412, was adopted to govern evidence about a sexual crime victim’s past sexual history.20 We do not want the finder of fact to be distracted by other things, even though arguably relevant, when a decision has to be made about something far more significant.

17 Fed. R. Evid. 404. See also United States v. Averello, 592 F.2d 1339, 1346 (5th Cir. 1979) (“The danger inherent in evidence of prior convictions is that juries may convict a defendant because he is a ‘bad man’ rather than because evidence of the crime of which he is charged has proved him guilty.”). Pfaff v. Mankiewicz, 111 F.3d 1332, 1339–40 (7th Cir. 1997) (finding that the magistrate judge properly excluded evidence of decedent’s prior “death wish” statements in a civil rights action brought by his estate after he was shot by police officers during a confrontation, because “[t]he excluded evidence would have shifted the jury’s attention from [decedent’s] behavior at the scene . . . to information not possessed by [defendant], such as [decedent’s] mental state and his physical behavior before the encounter.”); Reyes v. Mo. Pac. R.R., 589 F.2d 791, 793–94 (5th Cir. 1979) (holding that defendant’s prior convictions for intoxication were inadmissible character evidence under Rule 404 when offered “for the sole purpose of showing that he had a character trait of drinking to excess and that he acted in conformity with his character on the night of the accident by becoming intoxicated” because such propensity evidence is “of slight probative value yet very prejudicial.”).

18 Fed. R. Evid. 405. See also United States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992) (quoting Fed. R. Evid. 405 advisory committee’s note) (“Under Rule 405, a party may present testimony concerning specific instances of conduct only when ‘character is in issue in the strict sense.’ . . . When character evidence is used circumstantially to create an inference that a person acted in conformity with his or her character, Rule 405 allows proof of character only by reputation and opinion.”); Gov’t of Virgin Islands v. Carino, 631 F.2d 226, 229 (3d Cir. 1980) (finding no error in excluding evidence of a manslaughter conviction to show the character of a witness because the nature of evidence permitted for proof of character is limited to opinion and reputation testimony).

19 Fed. R. Evid. 406. See also Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 511 (4th Cir. 1977) (“It is only when the examples offered to establish such pattern of conduct or habit ‘are numerous enough to base an inference of systematic conduct’ and to establish ‘one’s regular response to a repeated specific situation’ or, to use the language of a leading text, where they are ‘sufficiently regular or the circumstances sufficiently similar to outweigh the danger, if any of prejudice and confusion’ that they are admissible to establish pattern or habit.”); Wasik v. Wash. Metro. Area Transit Auth., 821 F. Supp. 125, 144 (D.D.C. 2011) (holding that the defendant’s testimony that “she looked to her left before crossing the street in accordance with her habit of doing so . . . would be admissible under Rule 406, and provide relevant context and explanation for her actions just before the accident, in a manner that is not so unfairly prejudicial as to outweigh its probative value”); Weil ex rel. v. Seltzer, 873 F.2d 1453, 1460 (D.C. Cir. 1989) (explaining that Rule 406 allows otherwise inadmissible evidence if it rises to the level of habit on the type of nonvolitional activity that occurs with invariable regularity. It is the nonvolitional character of habit evidence that makes it probative . . . [Habit is a consistent method or manner of responding to a particular stimulus. Habits have a reflexive, almost instinctive quality.”). 20 Fed. R. Evid. 412 (generally excluding evidence of a victim’s other sexual behavior in civil or criminal proceedings involving alleged sexual misconduct); United States v. Pumpkin Seed, 572 F.3d 552, 558 (8th Cir. 2009) (district court properly excluded evidence under Rule 412 that complainant had consensual sex with two other men within days of the sexual abuse incident in question because “the argument that consensual sex with a third person may have caused the injuries to the victim is too weak to justify the admission of this highly prejudicial evidence.”); United States v. Haines, 918 F.3d 694, 697–98 (9th Cir. 2019) (explaining that, in cases involving adult victims forced or coerced into prostitution, courts have concluded that “evidence of other prostitution activity has little or no relevance . . . [on the grounds] that just because a victim agreed to engage in sex for money on other occasions does not mean she consented to, e.g., being beaten or having her earnings confiscated by the defendant.”); Equal Emp. Opportunity Comm’n v. Donohue, 746 F. Supp. 2d 662, 665 (W.D. Pa. 2010) (“In a sexual harassment case, evidence offered to prove the plaintiff’s sexual predisposition or sexual behavior generally is inadmissible unless its probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party.”).
As to the quality of evidence, there is a concern about where the proof came from. Just because someone somewhere said something does not make it evidence. Instead, unless it fits within a fairly narrow—although arguably lengthy—list of exceptions,21 evidence of an out of court statement will be considered hearsay.22 Likewise, even if testimony can come straight from a source, there is still a concern about whether, if the source is a lay witness, there is personal knowledge about the evidence being offered.23 Similarly, if the person is an expert witness, there is concern that the basis behind any evidence offered is sufficiently sound, given that person’s alleged area of expertise.24 Indeed, any offer of proof, whether from a live witness or an

---

21 Fed. R. Evid. 803 (providing twenty-three specific exceptions, and makes reference to a twenty-fourth, now referred to as the residual exception under FRE 807); United States v. Williams, 571 F.2d 344, 350 (6th Cir. 1978) (“The touchstone for admission of evidence as an [803] exception to the hearsay rule has been the existence of circumstances which attest to its trustworthiness.”); United States v. Smith, 521 F.2d 957, 963 (D.C. Cir. 1975) (“The [business record] exception is intended to allow introduction of reliable and accurate records without the necessity of calling every person who made or contributed to the record.”); Parsons v. Honeywell, Inc., 929 F.2d 901, 907 (2d Cir. 1991) (“To be admissible pursuant to the [807] residual exception, the evidence must fulfill five requirements: trustworthiness, materiality, probative importance, the interests of justice and notice.”).

22 Fed. R. Evid. 802 (explaining that hearsay is generally not admissible unless it meets an exclusion).

23 Fed. R. Evid. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). See also United States v. Lyon, 567 F.2d 777, 783–84 (8th Cir. 1977) (explaining that Rule 602 “excludes testimony concerning matter the witness did not observe or had no opportunity to observe”); Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1200 (10th Cir. 2006) (quoting United States v. Sinclair, 109 F.3d 1527, 1536 (10th Cir. 1997)) (“Under the personal knowledge standard, an affidavit is inadmissible if ‘the witness could not have actually perceived or observed that which he testifies to.’”); Fed. R. Evid. 701 (permitting a lay witness to testify in the form of opinions or inferences if testimony is based on firsthand knowledge or observation, is helpful in resolving issues, and is not based on scientific or specialized knowledge covered by Rule 702); Fed. R. Evid. 701 advisory committee’s note to the 1972 proposed rules (“The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event. Limitation [based on the witness’s perception] is the familiar requirement of first-hand knowledge or observation.”); Freedom Wireless, Inc. v. Bos. Comm’ns Grps., Inc., 369 F. Supp. 2d 155, 157 (D. Mass. 2005) (holding that a witness in a patent suit was barred from giving lay opinion deposition testimony based on his “highly technical and specialized knowledge of telecommunications”).

24 Fed. R. Evid. 702. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 580 (1993) (setting forth five factors that a trial court ordinarily ought to consider when assessing the reliability of scientific expert testimony, including “whether the theory or technique is scientific knowledge that ‘can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation,’ and whether it is a known technique attracting ‘widespread acceptance within a relevant scientific community’”). See also Bollom v. Brunswick Corp., 453 F. Supp. 3d 1206, 1218–19 (D. Minn. 2020) (explaining that “[f]or an expert witness to be qualified based on experience, that experience must bear a close relationship to the expert’s opinion.” Thus, for example, a fire investigator’s experience opining on ‘fire cause and origin’ does not qualify him as an electrical expert able to testify regarding whether a particular electrical system malfunctioned and caused the fire”); Fed. R. Evid. 703 (“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.”); Robinson v. Union Carbide Corp., 805 F. Supp. 514, 523 (E.D. Tenn. 1991) (“Under the Federal Rules of Evidence, this Court has an obligation to determine, before admitting expert testimony, whether the expert’s opinion rests upon a foundation so unreliable that it should be excluded from consideration.”); Porter v. Whitehall Lab’ys, Inc., 791 F. Supp. 1335, 1344 (S.D. Ind. 1992), aff’d, 9 F.3d 607 (7th Cir. 1993) (holding that a physician’s expert testimony that ibuprofen caused the patient’s disease which, in turn, caused his acute renal failure was inadmissible because he was “not familiar with this particular area of renal pathology and . . . his opinion [was] merely conjecture.”).
exhibit, must have a sufficient foundation before it can be worthy of consideration in deciding a matter.\textsuperscript{25}

So, what we consider proof in the legal world—what is necessary to uphold the rule of law—is far different from what people do in their ordinary lives, in terms of the quality of proof necessary to make a monumental decision. And as I noted at the outset, the quality of the proof is not the only metric. The law also is concerned about the quantity of the evidence.

---

\textsuperscript{25} See e.g., Fed. R. Evid. 901 ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding of the existence of that which the proponent claims it is"); United States v. Brown, 482 F.2d 1226, 1228 (8th Cir. 1973) ("Factors to be considered in making the determination of admissibility include the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of others tampering with it. If upon the consideration of such factors, the trial judge is satisfied that in reasonable probability the article has not been changed in any important respect, he may permit its introduction in evidence."); United States v. Robinson, 367 F. Supp. 1108, 1109 (E.D. Tenn. 1973) (holding that the proposed exhibit of a firearm was not admissible evidence because the prosecution "failed to establish a complete chain of evidence, tracing the possession of the weapon seized to the final custodian"); United States v. Biggins, 551 F.2d 64, 66 (5th Cir. 1977) (finding that, as a general rule in a criminal trial, laying a proper foundation demonstrating that a sound recording, as played, is an accurate reproduction of relevant sounds "requires the prosecution to go forward with respect to the competency of the operator, the fidelity of the recording equipment, the absence of material deletions, additions, or alterations in the relevant portions of the recording, and the identification of the relevant speakers"); United States v. Paulino, 13 F.3d 20, 23 (1st Cir. 1994) ("If the court discerns enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be, then Rule 901(a) is satisfied and the weight to be given to the evidence is left to the jury."); Fed. R. Evid. 902 (identifying several types of "self-authenticating" evidence that requires "no extrinsic evidence of authenticity in order to be admitted"); Fed. R. Evid. 902 advisory committee’s notes to Rule 902(1)-(8) ("Case law and statutes have . . . developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect . . . because practical considerations reduce the possibility of unauthenticity to a very small dimension."); United States v. Bisbee, 245 F.3d 1001, 1006 (8th Cir. 2001) ([a] document bearing a seal purporting to be that of the United States and a signature purporting to be an attestation requires no extrinsic evidence of authenticity as a condition precedent to admission"); Rambus, Inc. v. Infineon Techs. AG, 348 F. Supp. 2d 698, 702 (E.D. Va. 2004) (noting that, pursuant to the requirements of Rule 902(11), the certification necessary for self-authentication of business record must be "executed by a person who would be qualified to testify as a custodial or other foundation witness"). See also Fed. R. Evid. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules provide otherwise."); Robertson v. M’S/Sawura Mera, 374 F.2d 463, 465 (5th Cir. 1967) (citation omitted) ("The very purpose for the rules requiring ‘production of original writings’ or excuses for their non-production ‘is to secure the most reliable information as to the contents of documents when those terms are disputed."); Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214, 220 (5th Cir. 1975) (holding that where egg producers were seeking to prove that a flock of chickens was diseased using the lab report of a veterinarian, “the best evidence rule required that the lab report itself be introduced unless its unavailability could be satisfactorily explained"); Fed. R. Evid. 1003 (‘A duplicate is admissible to the same extent as the original unless a genuine question is raised about its authenticity or the circumstances make it unfair to admit the duplicate.’). See Fed. R. Evid. 1003 advisory committee’s note (‘When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness.’); United States v. Mulinelli-Navas, 111 F.3d 983, 989–90 (1st Cir. 1997) (affirming the district court’s finding that a microform copy of a check was admissible duplicate evidence in bank fraud prosecution absent any showing that “original had been tampered with or altered in any way and that the copy was not what it purported to be”); United States v. Smith, 893 F.2d 1573, 1576–79 (9th Cir. 1990) (holding that photostatic copy of coconspirator’s calendar/drug ledger was admissible under Rule 1003 where the court found no genuine issue as to authenticity of original based on the testimony of nine witnesses).
To prevail at trial, you must satisfy the applicable burden of proof. But before you even get to the trial, within the federal rules adopted for both civil and criminal cases, there are guideposts along the way about how quantum matters, with respect to proof. In some ways, this mirrors the obligation with respect to quality.\(^{26}\)

Before a trial in a civil case, there are two procedural hurdles to climb over, one codified in the motion to dismiss standard and the other in the summary judgment standard. Indeed, in recent years, the Supreme Court’s rulings in \textit{Iqbal}\(^{27}\) and \textit{Twombly}\(^{28}\) have highlighted this issue, and even before the civil lawsuit is filed, there is an increased expectation that your lawsuit have some evidentiary heft behind it.\(^{29}\) Likewise, with the summary judgment standard, after the discovery process has ended, you not only need to provide proof that there is a genuine issue of material fact in dispute; your proof has to be organized in specific and explicit ways.\(^{30}\) In fact, it is routine for federal courts, like mine, to grant summary judgment in a case before trial, in the absence of sufficient clarity about the proof giving rise to the dispute.\(^{31}\)

In criminal cases, although treated differently from civil ones, there are also procedural hurdles to climb over before any trial. For a felony, before you can even charge the person with a crime, at least in any federal court in this country, you need an indictment from a grand jury.\(^{32}\) There must be evidence of probable cause that a crime has been committed, and that the person proposed to be charged was the one who committed the crime.\(^{33}\) There are circumstances, where even if charged, the charge could be dismissed and the


\(^{27}\) Ashcroft v. Iqbal, 556 U.S. 662 (2009).


\(^{29}\) \textit{See} \textit{Iqbal}, 556 U.S. at 678 (quoting \textit{Twombly}), 550 U.S. at 570 (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”).

\(^{30}\) \textit{See} Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (“Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.”) (quotations omitted); Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (“[The party opposing summary judgment] must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation.”) (quotations omitted) (citation omitted).

\(^{31}\) \textit{See}, \textit{e.g.}, Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1075 (2d Cir. 1993) (affirming summary judgment when “aside from rather vague and general references to appellee’s alleged misdeeds, [the plaintiff] ha[d] failed to advance any credible proof of wrongful actions on the part of [the defendants].”).

\(^{32}\) \textit{See} FED. R. CRIM. P. 7(a)(1) (“An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (a) by death; or (b) by imprisonment for more than one year.”).

\(^{33}\) \textit{See} United States v. Calandra, 414 U.S. 338, 343 (1974) (“A grand jury’s] responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.”).
matter may never reach a jury.\textsuperscript{34} For example, if the evidence used to support the charge has been improperly obtained, or more precisely, illegally seized, then the charge could be dismissed. Even if the case makes it to a trial, if there is not enough evidence for a jury to sustain a conviction after presentation of the prosecutor’s case, the case can be dismissed before it even gets to the jury.\textsuperscript{35}

To illustrate this point, I like to use the following example. If a prosecutor comes into my court, and says, “I believe the defendant is guilty,” that does not mean anything, unless there is proof sufficient to support it. In other words, I should not let that case go to a jury. And it does not add anything if the prosecutor says, “No, judge, you do not understand, I really believe this defendant is guilty.” Without proof, and not just proof, but enough proof that a jury could conclude that there is guilt beyond a reasonable doubt, that case is still not getting to a jury, nor should it.\textsuperscript{36}

Then, at trial, whether it is a civil case or a criminal case as suggested above, the Federal Rules of Evidence governs what constitutes evidence that can be submitted for a jury’s consideration.\textsuperscript{37} So, even before trial, there may be motions \textit{in limine} filed to exclude evidence believed not proper for a host of reasons. These may include whether it is irrelevant, whether its prejudicial value substantially outweighs its probative value, or the questionable reliability of the source of this evidence, such as hearsay or proffered expert testimony, and whether it is lacking in a proper foundation.\textsuperscript{38} During trial, there may be objections about proffered evidence as well.

And just because proof is admitted into evidence in a case does not mean it cannot be challenged. There are many reasons that proof, sufficient for admissibility purposes, may be challenged. For example, if it is eyewitness testimony, there may be questions about the lighting at the time, the person’s distance from the allegedly observed event, or the quality of a person’s eyesight. Those of you who have seen the movie, “My Cousin Vinny,” will remember his cross-examination of the woman who claimed to have seen something, only to have her account questioned, given her limited vision.\textsuperscript{39}

Finally, at the end of the trial, when all of the evidence deemed proper to go to the jury is in, just having some evidence is not enough. In order to

\textsuperscript{34} See, e.g., Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that the warrantless use of thermal imaging technology to gather information about the interior of a home was an unlawful search, resulting in reversal of the judgment); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (“[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”).

\textsuperscript{35} See Fed. R. Crim. P. 29(a) (“After the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.”).

\textsuperscript{36} Id. See also Thomas P. Gallanis, Reasonable Doubt and the History of the Criminal Trial, 76 U. Chi. L. Rev 941, 942–49 (2009) (discussing the origins of the reasonable doubt standard).

\textsuperscript{37} See, e.g., Fed. R. Evid. 103(d) (“To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.”).

\textsuperscript{38} See, e.g., Luce v. United States, 469 U.S. 38 (1984) (discussing the function of motions \textit{in limine}).

\textsuperscript{39} MY COUSIN VINNY (Twentieth Century Fox 1992).
prevail at trial, in either a civil or criminal case, that evidence must be enough—by a preponderance of the evidence in civil cases,40 and beyond a reasonable doubt in criminal cases41—to convince everyone on that jury, that is, unanimously—that the evidence meets that standard. If it is a criminal trial with twelve jurors, you cannot obtain a criminal conviction if there is only enough evidence to convince ten of the twelve jurors.42 If you do not have all twelve jurors unanimously agreeing to a verdict, you do not have a true and just verdict.

For just a moment, let me dwell a little bit more on the jury, or the finder of fact. Because even before someone is allowed to be a juror, there needs to be some demonstration—or proof—that this person can fairly serve; that the prospective juror is not biased in some way about the specific case to be heard, such that the parties will not receive a fair hearing.43 So, we question or have a voir dire process for the jurors. We want to know whether there is something in this person’s background or their views of the world that might prevent them from focusing on the proof and the law when deciding a case.

For example, in picking a jury a few years ago, I had a prospective juror state that she followed a biblical view of justice and would have to view cases through the lens of these beliefs. In probing a little further—I generally would do such follow-up in a setting away from the hearing of the other jurors—it was clear that her biblical views would conflict with her service, and that she felt compelled to follow what she believed to be God’s law, rather than anything the Court would instruct. As a result, I had to excuse that person from serving, not because her religious beliefs were not valuable, but because I was concerned about whether her views would limit her ability to see the proof as it really was and follow the law as it had to be followed.

As another example, because of a specific experience in a juror’s life, that person may not be right for the specific case being tried. For example, the jury selection process in drug conspiracy cases has been complicated by the number of prospective jurors who know someone who has been affected by the opioid crisis. In these individual voir dire follow-up sessions with jurors, whether it was recent or somewhat distant, I have seen the impact that a serious addiction of a loved one, or a loved one’s serious injury or death from an overdose, has on people. And just having to discuss the experience makes clear their inability to serve. This experience has rendered them incapable of objectively viewing evidence, and so they believe—and I have

---

42 See Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (noting the Supreme Court’s recognition of a requirement for unanimity in a conviction in both federal and state court).
to accept that belief—that they could not be impartial jurors in cases involving alleged drug crimes.

The role of the jury is part of the process of helping the American legal system determine how these burdens of proof, in any case, will be weighed, and what the outcome will be.44 And we do not want the evaluation of proof to be compromised by some personal bias or personal agenda.

These burdens of proof, and these evidentiary standards, ones codified in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, as well as the Federal Rules of Evidence, are the essence of the American legal system, at least at the federal level.45 Of course, even at the state level, some, if not all, of these various principles have been codified into law there as well.

Given the significance of proof in the American legal system, and this recitation merely affirms what all of us already know, it raises the question of whether beliefs even matter, or should even matter, in the American legal system. The answer, of course, is yes.

But beliefs, as expressed in legal theories or judicial philosophies, are best understood as different means for expressing what proof should matter, rather than as an indication that proof does not matter, or that any specific legal theory or judicial philosophy should be a substitute for the significance of proof, or that any particular legal theory or judicial philosophy should matter more than proof. Indeed, as I will discuss further below, belief and proof should be viewed as part of a seamless whole, rather than disparate, or even conflicting, parts.

Just as importantly, as I will explain shortly, you can view the various legal theories, or judicial philosophies through the same lens as you do the burdens and standards with respect to proof discussed above. In essence, they address the quality and quantity of proof necessary.

So, let’s turn to it.

II. APPRECIATING LEGAL THEORIES AND JUDICIAL PHILOSOPHIES AS PRINCIPLES OF PROOF

Notions of justice, and particular concepts within the system of justice, such as equal protection and due process, are beliefs. And the proof of these beliefs and many others are enshrined in founding documents, such as the Declaration of Independence and the United States Constitution. Similarly, the various measures of proof, in terms of burdens of proof, pretrial and trial

44 See ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 100–03 (2017) (discussing the role of the jury in litigation).
45 FED R. CIV. P. 12(b)(6); FED R. CIV. P. 56; FED. R. EVID. 301; FED R. CRIM. PROC. 29.
procedures, as well as the Federal Rules of Evidence, are enshrined in statutes and rules, and have been further clarified through caselaw.46

There is also a variety of legal theories and judicial philosophies that help explain these beliefs, and how they should be put into effect in the American legal system. There is no shortage of legal theories and judicial philosophies out there. I will not try to discuss all of them, but I do want to discuss some of the major ones that illustrate my point.

Also, to be clear, I understand that there are various ways to define all of these various terms, and that within legal academic circles, and even among judicial adherents of one judicial philosophy or legal theory or another, there are various definitions, and significant differences and small nuances in approach. My interest, however, is far more limited. I just want to have a basic working definition for illustrative purposes.

I will start with textualism. Under this theory, legal texts should be interpreted based on the text’s ordinary meaning.47 The focus is on the language in the text, not external sources. While touted as a belief, it really is better described as a belief in a very specific kind of proof. From a quality standpoint, it is a notion that if I want to know how to interpret a provision of the United States Constitution, or a statute, the text provides all of the proof that you need.

For example, Article II, Section 1 of the Constitution requires that the office of the President be held by someone thirty-five years of age.48 From a textualist perspective—and in this case, likely under just about every legal theory or judicial philosophy—this very clear language should mean only one thing: the person who becomes president must have a date of birth of at least thirty-five years of age, before taking the oath of office.

Under this perspective, it does not make sense to permit evidence that the Office of the President could be held by someone younger than thirty-five, but otherwise possessing the maturity of someone who is at least thirty-five years of age. Put another way, the relevant proof of what this provision means is contained in the plain language of the constitutional provision itself, and there is no need to permit extrinsic evidence to interpret it. In this example, the text of the language provides both a check on the quality of the evidence considered permissible, and the quantity necessary to sustain the

46 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.”); U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); U.S. CONST. amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).


48 U.S. CONST. art. II, § 1.
relevant burden. In this case, there must be proof that the person is at least thirty-five years of age.

The fact that the clear language of this constitutional provision defines what proof is needed does not definitively resolve what specific proof will satisfy this standard. But it clarifies who should hold office, and what evidence will be required to prove it. Our willingness to accept whether someone is of sufficient age to be the president is an intrinsic part of why this interpretation makes sense. To be clear, the issue is not whether someone could make an argument for a different interpretation. The issue is instead whether that interpretation could bring enough support for the American public to accept it as a viable legal principle.

Originalism is another prominent legal theory, one which some say is or should be the dominant judicial philosophy. The focus in originalism, to the extent it is distinct from textualism, is that the meaning of a constitutional provision should be interpreted consistent with the meaning the provision’s drafters intended.

One of the more recent and prominent examples of originalism is reflected in the Supreme Court’s 2022 decision in Dobbs v. Jackson Women’s Health Organization. In Dobbs, as described by Justice Alito’s majority opinion, the interpretation of the Fourteenth Amendment’s Due Process Clause as it relates to the issue of abortion required a “historical inquiry.” As he wrote: “Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the ‘liberty’ protected by the Due Process Clause because the term ‘liberty’ alone provides little guidance.” Justice Alito then goes on to rely on legal treatises and other historical materials from that time period and discusses the treatment of abortion at common law and within the United States to


50 See Amy Coney Barrett, Originalism and Stare Decisis, 92 NOTRE DAME L. REV. 1921, 1924 (2017) (“Originalism rests on two basic claims. First, the meaning of constitutional text is fixed at the time of its ratification. Second, the original meaning of the text controls because ‘it and it alone is law.’”); Lawrence B. Solum, Originalist Methodology, 84 U. CHI. L. REV. 269, 269–70 (2017) (outlining the two basic tenets of originalism: (1) "the constitutional text is fixed at the time each provision is framed and ratified;" and (2) constitutional practice should be constrained by the "original public meaning"); Bethany R. Berger, Eliding Original Understanding in Cedar Point Nursery v. Hassid, 33 YALE J.L. & HUMS. 307, 308 (2022) ("Although originalism takes many forms, at a minimum it means that original meaning should constrain personal preference in constitutional interpretation.").

51 142 S. Ct. 2228 (2022).

52 Id. at 2247.

53 Id.
conclude that “a right to abortion is not deeply rooted in the Nation’s history and traditions.”

Significantly, for purposes of my analysis, the most salient aspect of originalism is its reliance on proof, and then applying that proof to the topic at hand, the legality of a statutory provision severely limiting the right of women to obtain an abortion. Indeed, if you translated this analysis into terms consistent with the Federal Rules of Evidence, this distillation of originalism amounts to a Rule 401 analysis, in terms of relevance, the only relevant evidence is proof from the time of the adoption of the Fourteenth Amendment, and how the law treated the subject of abortion at that particular time. All other evidence is not relevant to resolving this legal question, or to use another provision of the Federal Rules of Evidence, Rule 403, its probative value is substantially outweighed by its prejudicial effect.

In this case, the prejudicial effect comes from relying on anything other than what the framers of the Fourteenth Amendment could have considered at the time. The reason behind this limitation of the relevant body of evidence is grounded in the basic principles underlying the Federal Rules of Evidence: whether evidence beyond this time period is sufficiently reliable.

Similar to, but quite different from textualism or originalism, are other legal theories, such as judicial restraint. Judicial restraint is a phrase most popularly coined by famed nineteenth century Harvard Law School Professor James Bradley Thayer. As outlined by Professor Thayer in a 1893 Harvard Law Review note, The Origin and Scope of the American Doctrine of Constitutional Law, federal judges should defer to the actions of Congress and the president, and legislation or executive action should be declared unconstitutional only in cases of “very clear” mistakes, or “beyond a reasonable doubt.” The most prominent proponent of this judicial philosophy on the Supreme Court was likely Justice Felix Frankfurter, who revered Thayer’s approach to the law, and sought to apply it faithfully.

Justice Frankfurter most famously laid out the concept of judicial restraint in his dissent in Baker v. Carr. In Baker, the Supreme Court permitted litigants, and then courts, to find legislative apportionments of a certain magnitude to be unconstitutional.

54 Id. at 2249–53.
55 FED. R. EVID. 403.
57 Id. at 20. See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 144, 151 (1893) (outlining the scope of judicial review).
58 See SNYDER, supra note 56, at 20–21 (“Frankfurter embraced Thayer’s theory of limited judicial review and deference to elected officials in all but the most extreme circumstances.”).
60 See, e.g., Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (“Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the
Again, just like with other legal theories and judicial philosophies, the legal battle, while ideological in nature, boiled down to a struggle over proof: what type of proof and how much proof is needed to find a statute or executive action unconstitutional.

Of course, for just about every legal theory or judicial philosophy, there is a competing one that sees the law differently. But more importantly, it sees the quality and quantity of proof differently. For example, in response to Justice Alito’s originalism in Dobbs, there is the approach taken by the dissenting justices, Justice Stephen Breyer, Justice Sonia Sotomayor, and Justice Elena Kagan. In their view:

As a matter of constitutional method, the majority’s commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation’s history and traditions, and the step-by-step evolution of the Court’s precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.  

The dissent in Dobbs goes on to say:

According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman’s choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in Lawrence and Obergefell to same-sex intimacy and marriage. It did not protect the right recognized in Loving to marry across racial lines. It did not protect the right recognized in Griswold to contraceptive use. For that matter, it did not protect the right recognized in Skinner . . . not to be sterilized without consent. So, if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly question is entrusted to one of the political branches or involves no judicially enforceable rights. In such a case the claim is said to present a ‘political question’ and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. Among the political question cases the Court has identified are those that lack ‘judicially discoverable and manageable standards for resolving them.’”) (first quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004), and then quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

belong to the States too—whatever the particular state interests involved.\footnote{Id. at 2331–32. See also id. at 2331 (quoting Thomas, J., concurring) (citation omitted) (‘‘[I]n future cases,’ [Justice Thomas] says, ‘we should reconsider all of this Court’s substantive due process precedents, including Griswold, Lawrence, and Obergefell.’ And when we reconsider them? Then ‘we have a duty’ to ‘overrule[e] these demonstrably erroneous decisions.’’).}

Put another way, while the majority in \textit{Dobbs} does not see proof beyond any thought contemporaneous to the time of the adoption of the Fourteenth Amendment’s Due Process Clause, the dissent is saying that the quantum of evidence should extend far beyond that, even to the present time. Indeed, in raising questions about the limitations on the quantum of evidence, the dissent in \textit{Dobbs} is also saying something about the quality of the evidence without permitting a broader scope of proof to resolve the issue. In this case, because the issue involves the health of women, in their view, there is something bizarre about limiting the relevant evidence to a time when women had no input, meaningful or otherwise, into whether there was a right to an abortion in the nineteenth century.

I say this not for purposes of rehashing the various perspectives of one of society’s most contentious issues, but instead to iterate that this contentious issue is not just about ideology. It is also about different perspectives of proof.

\section*{III. A Belief in Proof, and the Proof of this Belief}

Having discussed how the significance of proof is codified in law, and how even discussions of belief or legal theory actually reflect differing views on and about proof, I turn to the third and final reason for suggesting that proof is the rule of law’s most essential element: our own hunger and desire to have proof that our legal system works, a desire reflected both historically and in the present day.

Even before the nation’s founding, the struggle to forge this nation apart from its British roots entailed a struggle through proof. The most compelling example is in the Declaration of Independence itself. An extraordinary document by any measure, its power very well may lie in its specificity. It is not merely a general or even a theoretical explanation of the need for independence and the importance of self-government, or at least, government not controlled by the British. It is a detailed explanation of how British rule is unfair, and implicitly what would constitute just rule.

Indeed, in the text of the Declaration of Independence, after a general statement of the issue, the document expressly notes the facts or proof it considers relevant to the cause. It then lists twenty-seven specific grievances.\footnote{\textsc{The Declaration of Independence} paras. 3–29 (U.S. 1776).}

Here is the language from the text of the Declaration of Independence:
To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.
He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.
He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

This litany reinforces the notion that America in general, and the American legal system in particular, is not intended simply to be an idea. But it is a place where these ideas, and the ideals underlying them, are put

---

64 Id. at paras. 2–32 (original punctuation, spelling, and capitalization maintained).
into practice. In other words, these ideals are real and actually transform the lives of those who live in this country.

Significantly, the United States Constitution, at the time of its original adoption and through the addition of the Bill of Rights’ first ten amendments, further reflected this commitment of putting into words, or providing proof, that what we mean is what we intend to do. In many ways, the Constitution is proof of an intent to address the litany of issues raised in the Declaration of Independence.

Take, for example, “[h]e has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.” You look at the United States Constitution and you see Article I, Sections 1 and 2: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” And so, there was a response to this need and these specific grievances that manifest themselves as specific language. “For Quartering large bodies of armed troops among us,” of course that is the Third Amendment. The judicial power Article, which is obviously near and dear to my heart, is similar. Article III, Section 1 establishes the courts and allows that judges “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

This commitment to making these ideals real, or to providing proof that they will be real, reflects a relentlessness to ensuring the rule of law in this country. It is not just stated as a theory but is manifested as fact.

In 1776, the Declaration of Independence famously declared that: “[A]ll men are created equal.” While the Constitution expressly addressed many of the concerns in the Declaration of Independence in its text, it permitted, among other things, Africans to be enslaved. As made clear by the text of the United States Constitution, at the time of this nation’s founding and subsequent Supreme Court decisions, the Preamble of the United States Constitution’s pronouncement of “We the People” did not “secure the Blessings of Liberty” to enslaved Africans, Native Americans, or women.

---

65 Id. at para. 7.
67 THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).
68 U.S. CONST. amend. III.
69 THE DECLARATION OF INDEPENDENCE paras. 10, 11 (U.S. 1776).
70 U.S. CONST. art. III, § 1.
71 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
72 See U.S. CONST. art. I, § 9 (forbidding the United States from outlawing “the [m]igration or [i]mportation of such [p]ersons” until 1808). Although the Constitution does not explicitly say “slave” in any section, the aforementioned section undoubtedly endorsed the practice at the time the Constitution was adopted.
73 U.S. CONST. pmbl. See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party) (holding an enslaved individual was not a United States citizen and therefore could not sue in
And while this expression in the law may have been proof of how legal issues on such matters as slavery needed to be resolved, without further amendment of the Constitution, the Constitution, as written and adopted at the outset of this nation, was not enough to keep us together as a nation. The dissonance between professed notions of freedom and equality and the unmistakable inequality in American life, reflected in the institution of slavery, threatened and ultimately undermined the rule of law. We could not stay together as one nation without having to undergo what became the Civil War. Put another way, the relentless nature of the American people meant that theories of freedom and equality are not enough; there has to be real and convincing proof of freedom and equality, too.

So, we endured a Civil War.\footnote{See \textit{generally} \textit{Drew Gilpin Faust, This Republic of Suffering: Death and the American Civil War} (2008) (discussing the high number of casualties in the American Civil War).} After the Civil War, we began to reframe our notion of freedom and equality through the adoption of the Reconstruction Amendments, the 13th, 14th, and 15th Amendments, and then later the 19th Amendment.\footnote{U.S. Const. amend. XIII, XIV, XV, XIX. \textit{See generally} \textit{Eric Foner, The Second Founding: How the Civil War Reconstruction Remade the Constitution} (2019) (discussing the role of the American Civil War in reshaping the Constitution).} (An argument also can be made that the adoption of the 16th and 17th Amendments, which empowered Congress to levy an income tax, and allowed for the direct election of members of the United States Senators, rather than through appointment of state legislatures, also furthered this notion of freedom and equality.\footnote{U.S. Const. amend. XVI, XVII. \textit{See, e.g.}, Jason Mazzone, \textit{Unamendments}, 90 IOWA L. REV. 1747, 1810 (2005) (“The amendments ratified after the Civil War comport with this reconstructed Article V. Each of these amendments enhances the status of individuals and protects that status at the national level or, at least, enhances the workings of democratic government. The Fifteenth Amendment, which originated as a means to solidify Republican power following the election of 1868, prohibits the states from denying voting rights on the basis of race and empowers Congress to enforce the prohibition. The Sixteenth Amendment, by authorizing the federal government to collect income taxes, gives citizens a direct financial incentive to monitor federal governmental operations. The Seventeenth Amendment enhances individual political power by giving voters the right to elect Senators directly, removing senatorial choices from possibly unresponsive or corrupt state legislatures. The Nineteenth Amendment extends voting rights to women and authorizes Congress to enforce the requirement.”) (footnotes omitted).} But I will leave that more nuanced argument to those who have spent more time thinking about it.\footnote{\textit{See} Mazzone, \textit{supra} note 76, at 1810 (examining the ways in which the 16th and 17th Amendments furthered freedom and equality).}

This relentlessness, however, could not be satisfied merely by words in the Constitution. Put another way, although these words are a powerful and appropriate expression of our nation’s intent, and as discussed earlier, an appropriate starting point for any legal analysis, further proof of this nation’s
intentions is necessary. This expanded notion of freedom and equality had to, and has to, be real in the lives of Americans.

A gap persisted—and arguably still persists—between the belief of freedom and equality, as expressed in the law, and the proof of freedom and equality, as reflected in people’s lives. Simply put, as but one example, the permissibility of segregation between Plessy and Brown undermined the nation’s professed belief in, and reality of, the guarantee of equal protection.78

It also is why the road from Plessy to Brown was paved not just with legal theory, but a carefully orchestrated legal campaign built on proof. Proof that the doctrine of separate but equal did not ensure equality, but instead enshrined the nation further in racial inequality. In the higher education cases aimed at desegregating graduate schools—primarily law schools, such as the University of Maryland Law School, the University of Missouri Law School, the University of Oklahoma Law School, and the University of Texas Law School—there was not just discussion of racial inequality, but evidence concerning libraries, faculties, classrooms, and other facilities, as well as social science evidence from sociologists, psychologists, psychiatrists, educators, and other expert witnesses.79

Similarly, just as Charles Hamilton Houston, Thurgood Marshall, Robert Carter, Jack Greenberg, Constance Baker Motley, and countless others did the legal work to undermine Plessy, Ruth Bader Ginsberg and countless others worked to address the issue of gender inequality.80 They too focused on proof to do so.81 The same can be said of legal efforts to create

---

79 Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 62–67 (1994). See also Sweatt v. Painter, 339 U.S. 629, 632–33 (1950) (“The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors . . . . Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation.”); McLaurin v. Okla. State Regents for Higher Ed., 339 U.S. 637, 641 (1950) (“[T]he State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (“To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.”), modified, 349 U.S. 294 (1955).
80 See generally Greenberg, supra note 79 (discussing the legal work underpinning the fight for racial equality in the United States); Philippa Strum, On Account of Sex: Ruth Bader Ginsburg and the Making of Gender Equality Law (2022) (discussing Ruth Bader Ginsburg’s role in pushing toward gender equality).
81 See, e.g., Reed v. Reed, 404 U.S. 71, 75 (1971) (emphasizing that statutory classifications distinguishing between males and females are “subject to scrutiny under the Equal Protection Clause”
legal protections for same-sex marriages, and broader rights with respect to sexual orientation, or even on the road from Roe v. Wade to the Supreme Court’s ruling in Dobbs.

The struggle for freedom and equality—however one characterizes it—still challenges the ability of people to believe in and follow the rule of law. Thus, it is no coincidence that the response to a seeming lack of freedom or equality has been to test the rule of law.

That is what we begin to see to with great effect in the mid-1950s—where the power of protest challenged the rule of law. You can go back to the Montgomery Bus Boycott, although that is not as clear an example of what I mean. There, you had citizens making a decision to abstain from doing something they did not have to do—ride a municipal bus. They did

and taking judicial notice of the fact that “presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows” to support the conclusion that an Idaho statute providing that males must be preferred to equally qualified females as potential estate administrators is an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment; Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (holding that “statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased [allowances and benefits], but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support” violates the Due Process Clause and explaining that “statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members”); Weinberger v. Wiesenfeld, 420 U.S. 636, 637 n.1, 645 (1975) (declaring unconstitutional a provision of the Social Security Act depriving a widower of “Mother’s insurance benefits,” and concluding that a gender-based generalization that “men are more likely than women to be the primary supporters of their spouses and children . . . cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families’ support”); Craig v. Boren, 429 U.S. 190, 208-10 (1976) (holding that an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18 invidiously discriminates against males 18-20 years of age, highlighting that “the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups”.


83 Lawrence v. Texas, 539 U.S. 558, 562 (2003). See also Diana Hassel, Lawrence v. Texas: Evolution of Constitutional Doctrine, 9 ROGER WILLIAMS U. L. REV. 565, 574-75 (2004) (explaining why the Court’s view on anti-sodomy law changed with Lawrence); Romer v. Evans, 517 U.S. 620, 632 (1996) (rejecting an amendment to Colorado Constitution prohibiting all legislative, executive, or judicial action designed to protect gay, lesbian, and bisexual individuals from discrimination under the rational basis test because it “has the peculiar property of imposing a broad and undifferentiated disability on a single named group . . . [and] its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . .”).

84 410 U.S. 113 (1973).


87 See generally id. (describing the Montgomery Bus Boycott, which was a political mass protest against racial segregation).
so to provide further proof that segregation was wrong, and not just in the nation’s public schools.

There was not a serious issue of civil disobedience, although there were issues about whether some of the private car services, developed to get people around, violated some laws.\footnote{See id. at 440–45.} But there is the issue of civil disobedience as reflected in marches in public streets, or the decision to disobey orders to disperse as a means of drawing attention to perceived inequalities.\footnote{See MARTIN LUTHER KING, JR., WHY WE CAN’T WAIT (1964), reprinted in A TESTAMENT OF HOPE, supra note 86, at 540–45.}

Of course, and as a judge, I would be remiss, if I did not note that the fact that perceived inequalities prompted civil disobedience does not and cannot mean that the law can and should not be obeyed. Those who are true to these principles know that they cannot use the perceived righteousness of the cause to engage in violence, or even avoid appropriate criminal sanctions for violating the law.

As Dr. King said long ago: “Violence as a strategy for social change in America is nonexistent. All the sound and fury seems but the posturing of cowards whose bold talk produces no action and signifies nothing.”\footnote{MARTIN LUTHER KING, JR., NONVIOLENCE: THE ONLY ROAD TO FREEDOM (1966), reprinted in A TESTAMENT OF HOPE, supra note 86, at 55.} Moreover, even in engaging in acts of civil disobedience, he argued that it had to be done in such a way as to show respect for the law. As Dr. King said in his famous “Letter from Birmingham City Jail”:

> In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it openly, lovingly . . . and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.\footnote{MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL (1963), reprinted in A TESTAMENT OF HOPE, supra note 86, at 294.}

In any event, my overall point is not to emphasize, or glorify civil disobedience or any disrespect for the law, as a means of moving society forward. Instead, my point is to underscore that whether the law works as intended—proof of justice, or a just society—is essential to preserving the rule of law. Somewhat paradoxically, or perhaps not, when you really think about it, people believe in the rule of law, when there is proof that this belief will bear fruit. If they do not believe it, they act differently.

For example, some people, perhaps a lot of people, will always drive at or below the speed limit, regardless of whether there is the presence of law
enforcement monitoring their speed. But certainly, if there is the constant presence of law enforcement monitoring speeding, or even evidence that speeding results in being stopped and ticketed, just about everybody will follow the speed limit. Of course, it will never be everyone. The preservation of the rule of law is not contingent on everybody always following the law. Instead, it is preserved when nearly everyone understands there is a reason to follow the law, and believes that their lives will be better off, if they do.

To this point, the numerous protests and outcries for change following the death of George Floyd in 2020 are a great example. The videotape of that scene on a Minneapolis street challenged the notion of effective law enforcement, at least in that one instance. The actions seen could not be squared with the public’s expectations of fair treatment of citizens by law enforcement. The incident threatened the rule of law by undermining confidence in law enforcement, even by those who normally were inclined to accept the account of law enforcement about how an incident like that one happened.

And while there were those who cynically suggested that their accounts of racially disparate treatment by law enforcement should have been taken at face value, even without the videotape, in my view, a more salient point is this: the more evidence you have, the more likely you are to change minds. And that rather than simply rely on beliefs, or accounts that may support one’s beliefs, let’s figure out ways to increase the proof available on an issue, and push people to keep an open mind until all of the proof has been developed.

As the few years since the death of George Floyd have shown, just as there is proof that some law enforcement officials might have failed to live up to their oaths, there also will be proof of law enforcement officials living up to their oaths.

---

93 Id. at 595 (noting that fewer people broke the speed limit during a police intervention).
94 Id. at 592.
96 Id.
98 *How George Floyd Died, and What Happened Next*, supra note 2 (“The disturbing video incited large protests against police brutality and systemic racism in Minneapolis and across the United States in the months that followed, leading to a racial justice movement not seen since the civil rights protests of the 1960s.”).
99 See id. (discussing the public outcry that arose after the death of George Floyd).
In other words, civil disobedience to highlight perceived injustices are effective, and perhaps only worthwhile, to the extent that they actually highlight demonstrable issues—provide proof—grounded in facts, and a sensible strategy for change. To use another example of Dr. King’s wisdom from many decades ago—showing how prescient he really was—here is what Dr. King said about protests, even protests about alleged police misconduct:

When marches are carefully organized around well-defined issues, they represent the power which Victor Hugo phrased as the most powerful force in the world, “an idea whose time has come.” Marching feet announce that time has come for a given idea. When the idea is a sound one, the cause a just one, and the demonstration a righteous one, change will be forthcoming. But if any of these conditions are not present, the power for change is missing also. A thousand people demonstrating for the right to use heroin would have little effect. By the same token, a group of ten thousand marching in anger against a police station and cussing out the chief of police will do very little to bring respect, dignity and unbiased law enforcement. Such a demonstration would only produce fear and bring about an addition of forces to the station and more oppressive methods by the police.101

Dr. King’s point has even greater force when we place it in context with the attacks on the United States Capitol on January 6, 2021. Those who participated may, in some part, have been so dissatisfied with the American political process that, rather than accept its results, they decided to use brute force to change them. But there has been nothing produced so far to suggest that their actions had any basis in provable facts, i.e., that there was any evidence, significant or otherwise, to suggest that the 2020 presidential elections were so riddled with fraud that the wrong person was declared the winner or had been sworn into office on January 20, 2021.102

Significantly, if there is any more potent symbol of the significance of proof to the preservation of the rule of law, it is in the response by a majority of America to this act: revulsion. And the need to accept facts, or proof, as a means for deciding who wins elections, and how the transfer of power in

102 See Nick Corasaniti, Reid J. Epstein & Jim Rutenberg, The Times Called Officials in Every State: No Evidence of Voter Fraud, N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html (noting that election officials maintained that there was no evidence that fraud played a part in the outcome of the 2020 presidential race). See generally Andrew C. Eggers, Haritz Garro & Justin Grimmer, No Evidence for Systematic Voter Fraud: A Guide to Statistical Claims About the 2020 Election, 118 PROC. NAT’L ACADEMY SCI. 2103619118 (2021) (finding that “there is no evidence that turnout was unusually high . . . let alone that turnout was inflated” due to fraud).
this country should happen. While America has been and must always be a
safe haven for people to hold any and every belief, when we decide
important legal questions—and believe me, when there is a matter in court,
every legal question that has to be resolved is important to someone involved
in the case—these beliefs are not enough.

Our concern, however, for having proof that the rule of law works,
extends beyond the lawless. I understand, as Dr. King said, that a riot is the
language of the unheard. But there are those on the brink of utter despair
from the absence of justice in their lives, and whose pain is not on public
display; they suffer far more privately. Their pain and its depths, as
experienced by this character in Jesmyn Ward’s book, Salvage the Bones, is
expressed this way:

And then I get up because it is the only thing I can do. I step
out of the ditch and brush the ants off because it is the only
thing I can do. I follow Randall around the house because it is
the only thing I can do; if this is strength; if this is weakness,
this is what I do. I hiccup, but tears still run down my face.
After Mama died, Daddy said, What are you crying for? Stop
crying. Crying ain’t going to change anything. We never
stopped crying. We just did it quieter. We hid it. I learned how
to cry so that almost no tears leaked out of my eyes, so that I
swallowed the hot salty water of them and felt them running
down my throat. This was the only thing we could do. I
swallow and squint through the tears, and I run.

To this third and last point, proof is the most essential element to the
rule of law because people need to have proof to believe in the rule of law
at all. Now, we know that not everyone will accept the type of proof that the
legal system demands. We do need to get everyone focused on accepting
and acting as if proof matters.

CONCLUSION

Beliefs alone, however noble they may be, or well thought out they are,
will not keep us together. In my view, that is a misguided endeavor. We are
a diverse nation and we always have been. We are becoming more and more
diverse every day, and within this diverse nation are people with all kinds of
beliefs in all kinds of things.

103 MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1967),
reprinted in A TESTAMENT OF HOPE, supra note 86, at 248 (“There is something painfully sad about a
riot. One sees screaming youngsters and angry adults fighting hopelessly and aimlessly against
impossible odds. . . . [D]eep down within them, you perceive a desire for self-destruction, a kind of
suicidal longing.”).

As a result, in my view, it will be hard to survive as a nation simply by exalting a specific set of beliefs, where there is a legal theory or a judicial philosophy to be exalted above and over all of the others. That is a system where only people who only believe very specific things can thrive, much less survive. In other words, there will not be a place for everyone, just those who hold or are willing to convert and hold certain specific beliefs.

You can do that in a religion; you can do that in a political party; you can do that in a social organization; you can do that with your neighbors; and maybe, you can do that within your family. But you should not do that to and with the American legal system.

To be clear, while I am not a theologian or a political scientist, I suspect—but do not have proof just yet—that proof matters in sustaining one’s faith or one’s political beliefs. Only the most fervent can go day in and day out believing in something without seeing some tangible benefit in one’s life. Instead, for most believers of a faith, they have seen real change and real support in their lives, whether it is commemorating a special moment, or helping them survive a tragic event. And most people who participate in the political process have seen some demonstrable change in their lives for the better. Even if it was not everything they wanted, there were things that brought them back to the political process, time and time again.

So, in the law, instead of just uniting around specific beliefs, let us unite first around a common belief in proof. With that firmer foundation, one undergirded by proof, we can more fairly discuss and evaluate any specific belief. No idea would be off the table, and any idea that remained on it would be one proven to work. With that kind of unity, one in a common belief in the primacy and essentialness of proof, we can fight over what should be proof; we can struggle over whether a specific type of proof is of sufficient quality, or available enough in sufficient quantity. Now, that is a struggle worth having.

Indeed, that is the struggle that is going on in my courtroom, and courtrooms around the country, day in and day out. After all, just like hospitals are not there to heal the well, courtrooms are not places to come if you could otherwise resolve the problem. Instead, they are places with a clear structure for how to resolve disagreements that people have, and that perhaps can only be resolved in a courtroom.

And during this same time period, far away from the momentous events I noted at the outset, in my courtroom and courtrooms around this country, in cases both known and unheard of, justice was quietly carried out, day in and day out. Where I work, and where many other trial judges work, we have seen and overseen the administration of justice, and bit by bit, at least from my view, therein lies the hope in sustaining a robust belief in the rule of law. And the currency of that realm is proof.

During this same time period, I have presided over numerous trials, nearly all of them jury trials. And from each case, and the many others I have
presided over while on the bench, I am not discouraged about the American justice system, but encouraged by this emphasis on proof through trials in America. Jury trials, specifically, provide a path forward from a nation reeling from the effects that the dual crises in public health and a public confidence in the rule of law have spawned.

During this same time period, when people lament that the American public cannot unite over anything, time and time again, people from different walks of life, races, genders, economic statuses, and so forth have come together and unanimously rendered verdicts. In jury trials, it is not a majority rule proposition. Everyone on that jury has to agree, or there is no true and just verdict. Maybe, they are able to come together because, in a court of law, the nonsense is kept out, and only what truly matters, and what can be truly supported, comes in. I do not know. But it is a sign that people can come together around proof and a common goal, render a verdict, and not simply be guided by their own specific beliefs.

It is this proof—and not just any kind of proof—but proof of a certain quality, and of a sufficient quantity, that convinces people to render a favorable decision for someone. It is this proof, which we have codified in our laws, exemplified in our legal theories, and valued through our actions, along with our beliefs, that has and will sustain us as a nation, not notions of ideological supremacy, or moral superiority. It is proof that people do not just believe in the rule of law but have been sustaining it.