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# THE DEATH OF INFERENCE

ANDREW S. POLLIS\*

**Abstract:** This Article examines a disturbing trend in civil litigation: the demise of the jury's historic prerogative to draw inferences from circumstantial evidence. Judges have arrogated to themselves the power to dismiss cases if they find the proffered inferences factually implausible. They have increasingly dismissed cases under the "equal-inference rule" by finding the proffered inferences no more plausible than other available inferences. And they have severely limited the powerful inferences jurors can draw when they conclude that a witness has lied. Commentators have bemoaned the heightened-pleading standard of the 2007 and 2009 U.S. Supreme Court cases, *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, but that heightened standard is only one slice of a larger pattern of power reallocation that has diminished the jury's role in evaluating circumstantial evidence. The problem is particularly acute in cases involving defendants' subjective states of mind, where defendants typically have both exclusive control over the direct evidence and a motive to conceal the truth. Instead of testifying live before a diverse group of factfinders, defendants can avoid liability by hiding their demeanor in a paper record submitted only to a judge. This Article proposes a three-tiered solution that would revest juries with inference-drawing power in state-of-mind cases while simultaneously instilling protections against the perceived costs of jury trials. The proposed solution ensures that state-of-mind cases may always proceed to discovery and trial. But it also allows for fee shifting to dissuade plaintiffs and their attorneys from pursuing weak cases and encourages judges to invoke more frequently their existing power to order retrial of cases in which verdicts appear to be incorrect.

## INTRODUCTION

When people do bad things, they have a motive to avoid getting caught. So sometimes they lie. This is such a familiar concept that we have common cultural reference points. Think of the child who denies stealing from the cookie jar (popularized by a children's song game) or the cliché of the teenager who

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denies responsibility for a new dent on the car. The wrongdoer in these situations hopes that the lie—a direct denial of the accusation—will stymie any effort to uncover the truth of the wrongdoing.

But the liar's demeanor and inconsistent explanations may expose the lie, especially when the accuser has an opportunity to probe. And when the cover-up fails, the natural inference is that the accusation was true. In other words, the circumstantial evidence exposing the lie leads to the inference, based on our human experience,<sup>1</sup> that the truth is in fact the opposite of the lie.<sup>2</sup>

The ability to draw that type of inference is a critical tool in our quest to form judgments about our interactions as we go about our everyday lives. Do I believe this politician? Can I trust that salesperson? Should I hire this job applicant? These interactions do not necessarily involve lie detection, but they do implicate more general notions of trustworthiness that are integral to our routine decision making. Daily life often requires us to determine what we believe is going on in someone else's head.<sup>3</sup>

One might therefore expect that similar inference-drawing tasks would be integral to our judicial system, which ostensibly prides itself on the role of jurors, as ordinary citizens with a diversity of human experiences, to resolve disputes.<sup>4</sup> Indeed, under the Seventh Amendment,<sup>5</sup> civil jury trials are a fundamental right.<sup>6</sup> To be sure, jurors are still routinely vested with the task of determining witness credibility in cases that go to trial<sup>7</sup> and are generally given

<sup>1</sup> See, e.g., *Paulino v. Harrison*, 542 F.3d 692, 700 n.6 (9th Cir. 2008) (“We have defined ‘circumstantial evidence’ as ‘that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present.’” (quoting *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950))).

<sup>2</sup> See, e.g., *Dyer v. MacDougall*, 201 F.2d 265, 268–69 (2d Cir. 1952) (reasoning that it is logical to assume the opposite of the defendant's testimony if it appears to be fabricated).

<sup>3</sup> Cf. Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 272 (“Credibility evaluations are probably the most common way in which we evaluate the intentions and knowledge of others.”).

<sup>4</sup> See *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944) (explaining that it is the jury's role to weigh evidence, draw inferences, and reach conclusions); *Standard Oil Co. v. Brown*, 218 U.S. 78, 86 (1910) (“But what the facts were . . . and what conclusions were to be drawn from them were for the jury and cannot be reviewed here.”); see also Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 293 (2013) (proposing that jurors be instructed on the value of jury service, including an admonition to remain tolerant toward fellow jurors' diverse opinions because each juror has a unique life experience).

<sup>5</sup> U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

<sup>6</sup> E.g., *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (“[T]he trial by jury is a fundamental guarantee of the rights and liberties of the people.”).

<sup>7</sup> See, e.g., *Banks v. Dretke*, 540 U.S. 668, 702 (2004) (“We have . . . counseled submission of the credibility issue to the jury . . .”).

instructions about the value of circumstantial evidence.<sup>8</sup> But judges now enjoy ever-greater power to dispose of cases—and thus to draw their own inferences—instead of honoring the historic tradition of permitting juries to evaluate competing inferences. And they do so based on paper records instead of live-witness trials.

The expansion of judges' power is a recent trend. The erosion of the historic right to a jury in civil cases is tied to modern concerns about both the costs of litigation<sup>9</sup> and the greater complexities of civil disputes.<sup>10</sup> If these considerations have warranted a reexamination of the right to a jury trial, then perhaps we might have expected an explicit cost-benefit analysis addressing the competing interests.<sup>11</sup> But that is not what we got.

Instead, the judiciary has systematically undermined the powerful tool of inference drawing, which was once a hallmark of the factfinder's evaluation of evidence, without grappling with the attendant Seventh Amendment problem. The trend is particularly onerous for plaintiffs alleging a defendant's nefarious state of mind, such as claims of discrimination, fraud, or conspiracy, where defendants may have exclusive access to the facts surrounding plaintiffs' claims.<sup>12</sup> This usurpation of the jury's role has recently led to a remarkable

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<sup>8</sup> *E.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (“[J]uries are routinely instructed that ‘[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.’” (second alteration in original) (quoting 1A KEVIN F. O’MALLEY ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL* § 12.04 (5th ed. 2000))).

<sup>9</sup> *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (justifying heightened-pleading requirements by observing that “proceeding to antitrust discovery can be expensive”). *But see* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 *passim* (2003) (taking issue with the premise that litigation has grown both too voluminous and too expensive).

<sup>10</sup> *See, e.g.*, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474 (1993) (O’Connor, J., dissenting) (arguing that jurors are “ordinary citizens” who “are more susceptible to [impermissible] influences than judges”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (*In re Japanese Elec. Prods. Antitrust Litig.*), 631 F.2d 1069, 1088 (3d Cir. 1980) (noting the various difficulties for juries tasked with deciding complex cases); *Fabrikant v. Bache & Co.* (*In re U.S. Fin. Sec. Litig.*), 609 F.2d 411, 429–30 (9th Cir. 1979) (“The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters.”).

<sup>11</sup> Whether a traditional cost-benefit analysis is appropriate in the face of a fundamental constitutional right is a separate question. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 207 (2004) (exploring this issue). Weighing the costs of protecting the right to a jury trial against the value it provides may be impossible because “important categories of benefits are priceless.” *See id.* Such an analysis requires accountable costs to be measured alongside intangible benefits, an inherently “unbalanced comparison.” *See id.*

<sup>12</sup> Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 52 (2010) [hereinafter Dodson, *Federal Pleading*] (noting that “facts may be solely in the hands of the defendants or hostile third parties” in these types of cases); *see also* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 66 (2010) [hereinafter Dodson, *New Pleading*] (same). Thus, because “mental states are notoriously hard to prove,” a plaintiff’s only opportunity for success may be in persuading the jury to draw an inference from ambiguous information. *See* Robert G. Bone,

movement away from the once-venerated civil trial.<sup>13</sup> One commentator conservatively estimates that recent changes in pleading standards alone have had a negative impact on plaintiffs in about one out of every five cases.<sup>14</sup> And changes in pleading standards are only part of the story. The slow but steady eradication of the jury's inference-drawing domain over the last several decades has led us to a quiet acceptance of a devastating reality that infects not only our system for resolving disputes, but also the important role that diverse jurors play in reaching verdicts that reflect our values and shape our norms. Thus, the notion that our judicial system openly allows plaintiffs to resolve their disputes fairly is false.<sup>15</sup>

This Article explores, and argues for the restoration of, the jury's role as inference drawer, while simultaneously recommending protections to avoid letting plaintiffs and juries run amok. It proceeds in four parts. Part I briefly describes the concerns that animated the jury-trial right embodied in the Seventh Amendment and discusses signs, first emerging in the late 1970s, that we have lost some of the impetus for preserving that historic right.<sup>16</sup>

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*Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 877 (2010).

<sup>13</sup> John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (describing the "virtual abandonment of the centuries-old institution of trial" as a "striking trend in the administration of civil justice in the United States in recent decades").

<sup>14</sup> See Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2334 (2012). In addition, "nearly two-fifths . . . of cases with [motions to dismiss] granted . . . as to some claims would not have had [these motions] granted had the pleading regime not changed." *Id.* at 2334–35. To be sure, there is no consensus as to how the changed pleading standards have affected plaintiffs despite "[s]ome twenty published and unpublished studies [that] now offer systematic empirical analysis" of their impact. See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 n.7 (2013). One recent study, for example, concluded that the heightened-pleading standard did not engender "a major change in how district courts have applied the law of pleading." William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35, 59 (2013). This Article focuses on doctrinal integrity and makes no effort to refute empirical work, but I note that the statistics underlying Professor Hubbard's analysis included only "cases filed from May 2005 to May 2008," *id.* at 49–50, and therefore did not consider the important implications of the Supreme Court's subsequent pleading-standard decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), discussed *infra* notes 97–107 and accompanying text. A more recent examination of the empirical evidence concluded "that anti-plaintiff pronouncements have observable anti-plaintiff effects, just as one would expect." Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Supreme Court*, 162 U. PA. L. REV. (forthcoming 2014) (manuscript at 2), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2347360](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347360), archived at <http://perma.cc/V7PW-CMGX>.

<sup>15</sup> Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 147 (2010) ("[T]he common perception of our judicial system as open and accessible—a place for people to go to actually have their disputes adjudicated on their merits—is something of a farce."). Instead, procedural developments have resulted in litigation being too frequently foreclosed at a premature stage. See *infra* notes 82–261 and accompanying text (exploring this assertion).

<sup>16</sup> See *infra* notes 23–70 and accompanying text.

Part II, the heart of the Article, focuses on three problem areas where courts have failed to respect the jury's historic domain to resolve competing inferences.<sup>17</sup> The case law demonstrates a continuing trend toward reducing the jury's inference-drawing power in three particular ways: (1) by characterizing inferences as implausible; (2) by negating the jury's right to select between two inferences when both are equally plausible; and (3) by disregarding the powerful inferences available when a jury concludes that a witness has offered false testimony. In each of these areas, courts have dealt fatal blows to the historically important jury function of evaluating and selecting among competing inferences.

Part III explains the fallout of this trend.<sup>18</sup> It demonstrates the falsity of the assumption that judges are better equipped than juries to discard dubious inferences and highlights the sociopolitical consequences of labeling jurors as unreasonable based on heuristics that judges conclude are outside the mainstream. The prevailing case law ultimately disaffects entire populations of potential jurors by deeming them unsuitable to resolve competing inferences. In doing so, it undermines the founding values that inspired our jury system in the first place.

Finally, in Part IV, I propose an alternative designed both to reinvigorate the jury's historic role and to meet the concerns of those who distrust the jury system.<sup>19</sup> My suggestion involves three interwoven components: (1) drastically reducing pretrial disposition of civil cases that involve a defendant's state of mind; (2) shifting fees to the losing party if a jury finds that the factual inferences supporting that party's position are extremely weak; and (3) expanding the grant of new trials in cases where the judge believes a verdict is against the manifest weight of the evidence. In conjunction, these reforms would restore the jury's rightful place to draw inferences, encourage plaintiffs to think carefully before going forward with cases in which the jury is not likely to return a favorable verdict, and offer a measure of protection against the perception that juries are too plaintiff-friendly. To be sure, these reforms would not come without costs, including to plaintiffs who risk paying their adversaries' legal expenses if they choose to proceed to trial in cases where the available inferences supporting their claims are extremely weak. But the opportunity to incur that risk is far better than the current system, in which those same plaintiffs' cases are dismissed outright.

Many commentators have written about the vanishing trial<sup>20</sup> and the Supreme Court's recent "gatekeeping" decisions,<sup>21</sup> and some have discussed in-

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<sup>17</sup> See *infra* notes 71–261 and accompanying text.

<sup>18</sup> See *infra* notes 262–309 and accompanying text.

<sup>19</sup> See *infra* notes 310–378 and accompanying text.

<sup>20</sup> See, e.g., Langbein, *supra* note 13, at 524; Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2–4 (1996); Margo

dividual elements of the solution I propose.<sup>22</sup> But this is the first Article to categorize and explore the three specific types of inferences that juries, over time, have lost the power to evaluate. And it is the first to offer a three-part package designed both to resurrect the inference and to inoculate it against the attacks of those responsible for its untimely demise.

## I. THE FOUNDATIONAL PRINCIPLES BEHIND THE DEFERENCE TO JURIES

Before turning specifically to the judicial assault on juries' inference-drawing powers, Section A of this Part briefly explains that the foundational principles underlying those powers are deeply rooted in our political history,<sup>23</sup> and Section B discusses the particular historical importance of juries' inference-drawing power with respect to demeanor evidence.<sup>24</sup> Nevertheless, as described in Section C, an erosion of these foundational principles began in the late 1970s,<sup>25</sup> setting the stage for the current crisis.<sup>26</sup>

### A. *The Jury as Democratic Ideal*

A century ago, the Supreme Court confirmed "that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, *no matter what the state of the evidence*."<sup>27</sup> That broad pronouncement was in keeping with the general understanding, framed by the Seventh Amendment, that the civil jury was "a bastion of liberty"<sup>28</sup> and "a critical component of a representative government."<sup>29</sup> Alexander Hamilton noted that the right to a jury trial was one of the few areas of consensus among the Framers.<sup>30</sup> Thus, a

Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 36–37.

<sup>21</sup> See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824–31 (2010); Levin, *supra* note 15, at 148; Miller, *supra* note 9, *passim*.

<sup>22</sup> See Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1033–37 (1998) (proposing fee shifting); Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 162–163 (2008) (proposing greater resort to new trials based on the manifest weight of evidence).

<sup>23</sup> See *infra* notes 27–38 and accompanying text.

<sup>24</sup> See *infra* notes 39–48 and accompanying text.

<sup>25</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338–39 (1979) (Rehnquist, J., dissenting) (lamenting that the right of a jury trial had fallen victim to the Court's "erosive process").

<sup>26</sup> See *infra* notes 49–70 and accompanying text.

<sup>27</sup> *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 387 (1913) (emphasis added).

<sup>28</sup> *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1412 (1997).

<sup>29</sup> Nancy Gertner, *From "Rites" to "Rights": The Decline of the Criminal Jury Trial*, 24 YALE J.L. & HUMAN. 433, 434 (2012); see also William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1697 n.9 (2001) (collecting other commentators' similar views).

<sup>30</sup> THE FEDERALIST NO. 83, at 421 (Alexander Hamilton) (Ian Shapiro ed., 2009) (noting that the Framers "concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government").

key purpose behind the right of a jury trial was to protect against government encroachment upon the rights of citizens in civil and criminal actions.<sup>31</sup> This right directly restrains judicial officers from enforcing government tyranny through elitist decision making.<sup>32</sup> The desire “to protect citizens from tyrannical government” was so strong that American juries originally decided not only issues of fact, but issues of law as well.<sup>33</sup>

But protection from tyranny was not the only purpose; there was also a political one. Alexis de Toqueville suggested that “[t]he institution of the jury . . . really puts the direction of society into the hands of the people.”<sup>34</sup> In that sense, the jury “is, before everything[,] a political institution” with “a republican character.”<sup>35</sup> De Tocqueville celebrated jury service as a means not only of “making the people reign,” but also of “teaching them to reign.”<sup>36</sup> The Supreme Court has expressed a similar sentiment: “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”<sup>37</sup> One scholar has thus noted that jury service, like suffrage, is a fundamental political right.<sup>38</sup>

### *B. The Historic Deference to Jury Evaluation of Demeanor Evidence*

A secondary foundational principle of the jury system is that “the jury is the lie detector.”<sup>39</sup> The roots of that maxim lie in the confrontation

<sup>31</sup> Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (noting that the jury’s function in “both civil and criminal proceedings . . . was to protect ordinary individuals against governmental overreaching”).

<sup>32</sup> R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by “Evolving” Standards of Appellate Review*, 60 BAYLOR L. REV. 337, 342 (2008) (arguing that the jury right “is a direct protection against the tyranny of potential elitism or aristocratic decision making by the judicial officers of the government itself”); see also Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 451 (2013) (noting that around 1791, “major figures in the American legal world lauded the power of civil juries as a bulwark against tyranny”).

<sup>33</sup> *Developments in the Law—The Civil Jury*, *supra* note 28, at 1418.

<sup>34</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 260 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 264.

<sup>37</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004); see also *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”); *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975) (“[T]he jury plays a political function in the administration of the law . . .”). Justice David Souter, however, has pointed out the “important” differences “between jury decisionmaking and political decisionmaking.” See *Bush v. Vera*, 517 U.S. 952, 1051 n.5 (1996) (Souter, J., dissenting). For example, political decision making is motivated by subjective demands and values, whereas jury decision making should be a neutral analysis. See *id.*

<sup>38</sup> Vikram David Amar, *Jury Service As Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 205 (1995).

<sup>39</sup> *United States v. Scheffer*, 523 U.S. 303, 313 (1997) (internal quotations marks omitted).

clause,<sup>40</sup> which in criminal cases requires a witness against the defendant “to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”<sup>41</sup> But the maxim carries equal weight in civil cases, as reflected in evidentiary rules that impose strict limits on the right to introduce testimony in a form other than a live witness.<sup>42</sup> Put simply, “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify.”<sup>43</sup>

One of the critical reasons for requiring live testimony is to permit the fact finder to observe the witness’s demeanor, including the witness’s appearance and behavior.<sup>44</sup> These attributes are often apparent from the witness’s direct testimony and are perhaps even more important on cross-examination, which is a key method for evaluating the witness’s veracity.<sup>45</sup> Cross-examination presents the opportunity not only to elicit helpful testimony, but also to impeach a witness through demeanor.<sup>46</sup> Clarence Darrow famously confronted an exceptionally dirty and disheveled man by doing nothing but “request that the witness stand up and turn around.”<sup>47</sup> Decisions through the 1970s frequently emphasized the importance of resolving cases through live testimony, rather than paper motions, precisely because of the role that demeanor evidence plays in credibility determinations.<sup>48</sup>

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<sup>40</sup> See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

<sup>41</sup> *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

<sup>42</sup> See FED. R. CIV. P. 32(a)(4) (authorizing the use of a nonparty’s deposition in a civil proceeding only when the witness is unavailable to testify live, noting “the importance of live testimony in open court”); FED. R. EVID. 804 (authorizing the admission of certain kinds of hearsay only if the declarant is not available to testify live).

<sup>43</sup> *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

<sup>44</sup> *Mattox*, 156 U.S. at 242–43; James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 907 (2000) (noting that demeanor is evaluated based on characteristics such as “the witness’s dress, attitude, behavior, manner, tone of voice, grimaces, gestures, and appearance”).

<sup>45</sup> *California v. Green*, 399 U.S. 149, 158 (1970) (describing cross-examination as the “greatest legal engine ever invented for the discovery of truth” (quoting 5 J. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourne rev. 1970)) (internal quotation marks omitted)).

<sup>46</sup> *E.g.*, *Colby v. Klune*, 178 F.2d 872, 874 (2d Cir. 1949) (reasoning that “demeanor may be the most effective impeachment”).

<sup>47</sup> Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183, 226–27 (1985) (citing 3 FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS § 409, at 751 (encyclopedic ed. 1960)). The witness was described as appearing to be a “habitual drunkard” whose hair was “tangled and matted,” whose clothes were “covered with dirt and grease,” and whose “huge hands . . . were covered with grime.” BUSCH, *supra*, at 751. Darrow’s approach left quite an impression, prompting one scholar to note that “[n]o conceivable cross-examination could have been more effective.” *Id.*

<sup>48</sup> See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring) (“The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases.”); *Sartor v.*

### C. The Seeds of Change

These foundational principles underlying the right to a jury trial are perhaps responsible for the wide latitude that juries historically enjoyed in resolving disputes.<sup>49</sup> A jury trial was considered the best mechanism for doing so.<sup>50</sup> It served as the “guarantor of fairness, a bulwark against tyranny, and a source of civic values.”<sup>51</sup>

But somewhere along the way, something changed. Two hundred and twenty-five years removed from the environment that informed the Constitutional Convention,<sup>52</sup> most Americans have grown relatively unconcerned with governmental tyranny and disenfranchisement.<sup>53</sup> For example, Americans accepted, however begrudgingly, a judicial decree rendered by Republican-appointed Supreme Court justices resolving the 2000 presidential election in favor of the Re-

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Ark. Natural Gas Corp., 321 U.S. 620, 628–29 (1944) (noting that defendants “may not withdraw [their] witnesses from cross-examination,” that cross-examination is “the best method yet devised for testing trustworthiness of testimony,” and that witness “credibility and the weight given to their opinions is to be determined, after trial, in the regular manner”); *Cedillo v. Int’l Ass’n of Bridge & Structural Iron Workers, Local Union No. 1*, 603 F.2d 7, 11 (7th Cir. 1979) (“[A]s a general principle, questions of motive and intent are particularly inappropriate for summary adjudication.”); *Dyer*, 201 F.2d at 269 (“The course of procedural reform has all indeed been towards bringing witnesses before the tribunal when it is possible . . . because only so can the ‘demeanor’ evidence be brought before the tribunal.”); *Colby*, 178 F.2d at 873 (“For only in [a trial on oral testimony] can the trier of the facts (trial judge or jury) observe the witnesses’ demeanor; and that demeanor—absent, of course, when trial is by affidavit or deposition—is recognized as an important clue to witness’ credibility.”). Courts widely held that a movant for summary judgment in a state-of-mind case “must submit himself to cross-examination in open court” without regard to the evidence; otherwise, because the nonmovant may not be able to proffer much controverting evidence, the movant could prevail solely based on bare denials. John A. Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467, 492–93 (1958); see *Peckham v. Ronrico Corp.*, 171 F.2d 653, 658 (1st Cir. 1948); *Hatfield v. Barnes*, 168 P.2d 552, 553 (Colo. 1946). But some commentators attacked this approach, arguing that it allows a plaintiff to avoid its burden of “offer[ing] affirmative evidence supporting each element of its claim in order to get to the jury.” David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 797 (1983). Under this view, enabling plaintiffs to reach trial “merely by suggesting that the defendant’s affidavits may be false” would “make a mockery of the summary judgment procedure under Rule 56.” *Id.* (quoting *Topp-Cola Co. v. Coca-Cola Co.*, 185 F. Supp. 700, 708 (S.D.N.Y. 1960) (internal quotation marks omitted)).

<sup>49</sup> See *Developments in the Law—The Civil Jury*, *supra* note 28, at 1412 (characterizing the jury as exercising “wild and untamed discretion”).

<sup>50</sup> Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 588 (2011) (noting that the jury trial was considered the “gold resolution standard”).

<sup>51</sup> *TXO Prod.*, 509 U.S. at 473 (O’Connor, J., dissenting).

<sup>52</sup> Congress adopted the Bill of Rights, and submitted it to the states for ratification, in 1789. 1 Stat. 97 (1789).

<sup>53</sup> Cf. Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 896 (“To rail against central tyranny today is to be considerably more paranoid than were the Founders, given the general track record of the United States since 1787.”).

publican candidate.<sup>54</sup> And they reacted nonchalantly to the revelation that the U.S. government has been spying on its own citizens.<sup>55</sup> Concerns that individual citizens are the safeguards of liberty no longer animate the American populace. Some commentators have thus suggested that our reverence for civil juries is misguided.<sup>56</sup> Although some continue to embrace the jury system as a check on executive and legislative power,<sup>57</sup> the average citizen has become largely apathetic to the values underpinning the jury trial, just as many have become apathetic to the political process generally.<sup>58</sup>

Courts, in turn, began to encroach on the absolute right of a jury trial, at least in complex cases. In 1970, in *Ross v. Bernhard*, the Supreme Court obliquely suggested that the right to a jury under the Seventh Amendment can be tempered by considerations of “the practical abilities and limitations of juries.”<sup>59</sup> In 1980, the Third Circuit went a step further, articulating a complexity exception to the Seventh Amendment for cases in which a jury trial would compromise a party’s right to due process under the Fifth Amendment.<sup>60</sup> The retreat was not uniform; the Ninth Circuit expressed offense at any suggestion that jurors were incapable of deciding even complex cases,<sup>61</sup> and the Federal

<sup>54</sup> See Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy*, 86 TUL. L. REV. 181, 210 (2011) (“With [Gore’s] popular vote victory and the presidency at stake, it is telling that . . . the nation . . . accepted the Supreme Court’s verdict on the election as final with barely a whimper.”).

<sup>55</sup> See, e.g., Adam Nagourney, *In U.S., News of Surveillance Effort Is Met with Some Concern but Little Surprise*, N.Y. TIMES, June 8, 2013, at A12.

<sup>56</sup> *Developments in the Law—The Civil Jury*, *supra* note 28, at 1422 (arguing that Americans’ “devotion to the civil jury” has become “nothing more than fetishism”); see also *id.* at 1426 (“[O]pponents of the jury claim that it has become a sacred cow, and demand an end to America’s ‘almost superstitious reverence for the jury as an institution.’” (quoting Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 302 (1915))).

<sup>57</sup> E.g., Samuel H. Pillsbury, *Fear and Trembling in Criminal Judgment*, 7 OHIO ST. J. CRIM. L. 827, 845 (2010) (book review); see also Amar, *supra* note 31, at 1183 (describing the jury’s role in thwarting overreach by government officials).

<sup>58</sup> Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 946 (2008) (noting “general apathy toward jury service, and even toward voting”).

<sup>59</sup> 396 U.S. 531, 538 n.10 (1970).

<sup>60</sup> *In re Antitrust Litig.*, 631 F.2d at 1088 (noting that due process precludes a trial by jury when the jury is unable to make a rational decision because it cannot fairly and reasonably assess evidence or apply the relevant legal rules); accord *Cotten v. Witco Chem. Corp.*, 651 F.2d 274, 276 (5th Cir. Unit A July 1981) (noting the very high standard required to preclude jury trial). See generally U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

<sup>61</sup> *Fabrikant*, 609 F.2d at 429–30 (arguing that the notion that “jurors are incapable of understanding complicated matters . . . improperly demeans the intelligence of the citizens of this Nation”); accord *Cotten*, 651 F.2d at 277 (Tate, J., concurring) (opining that the Seventh Amendment leaves no room for an “uncharted exception” to the right of a jury trial, even in complex cases).

Circuit suggested that it would be improper to determine whether a case was suitable for a complexity exception.<sup>62</sup>

If the costs and complexities of modern litigation have created a tension between the Fifth Amendment due process right and the Seventh Amendment jury-trial right, one might have expected a robust debate about how to strike the right balance between them.<sup>63</sup> Although a few scholars have considered the wisdom of a complexity exception,<sup>64</sup> wide discussion about the constitutionality of that solution has faded.<sup>65</sup> And despite a circuit split that has existed for over thirty years, the Supreme Court has never directly taken up the question, and few in the legal community expect it to do so.<sup>66</sup> Nor has there been any meaningful, thorough debate about whether the financial burdens of litigation outweigh the benefits of the Seventh Amendment.<sup>67</sup> Such a debate would be

<sup>62</sup> *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1130 (Fed. Cir. 1985) (noting that such a determination would be “at best an unseemly judicial exercise”).

<sup>63</sup> Cf. William R. Long, Note, *Requiem for Robertson: The Life and Death of a Free-Speech Framework in Oregon*, 34 WILLAMETTE L. REV. 101, 107 (1998) (“A balancing approach arises when a court believes that two constitutional rights are in conflict requiring the weighing of various factors in order to determine which right should prevail.”). Only one court has suggested a balancing test to weigh the competing interests of the Fifth and Seventh Amendments. See *In re Antitrust Litig.*, 631 F.2d at 1084. According to the Third Circuit:

If a particular lawsuit is so complex that a jury cannot satisfy this requirement of due process . . . , we face a conflict between the requirements of the fifth and seventh amendments. In this situation, we must balance the constitutionally protected interest, as they are implicated in this particular context, and reach the most reasonable accommodation between the two constitutional provisions.

*Id.*

<sup>64</sup> See, e.g., Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 79–81 (2006) (collecting and describing scholarship); Joseph A. Miron, Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865, 865 n.1 (1998) (collecting scholarship). Judge Richard Posner observed that jurors evaluate evidence more effectively than judges in injury, simple contracts, and criminal cases, but “are at sea” in complex commercial cases. Jeffrey Cole, *Economics of Law: An Interview with Judge Posner*, 22 LITIG. 23, 66–67 (1995).

<sup>65</sup> See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 196 (2006) (acknowledging that debate over the complexity exception has not gained traction).

<sup>66</sup> N.J. Schweitzer & Michael J. Saks, *Jurors and Scientific Causation: What Don't They Know, and What Can Be Done About It?*, 52 JURIMETRICS J. 433, 438 (2012) (observing that most commentators are doubtful that the Court will resolve the constitutionality of a complexity exception).

<sup>67</sup> Of course, there are criticisms of the costs of the jury system. See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 3 (1988); Edward J. Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A. J. 570, 571 (1974) (arguing that the jury system creates a backlog in the courts); Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1026 (1936) (asserting that the jury system is expensive and causes delay). Critics have portrayed the system as anachronistic, unduly expensive, burdensome to jurors, and partially responsible for the clogging of civil courts. See, e.g., KASSIN & WRIGHTSMAN, *supra*, at 3; Devitt, *supra*, at 571; James, *supra*, at 1026. Yet there has been no thorough analysis of the costs and benefits and certainly no movement, based on such an analysis, to re-

problematic at the judicial level given the Court's recognition that the right to a jury trial "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of . . . justice."<sup>68</sup>

Instead of engaging in a full-scale debate about the relative costs and benefits of the jury system, the Court has adopted what it calls "gatekeeping" functions.<sup>69</sup> These procedural devices are apparently designed to reduce the number of cases that go to trial, with the ostensible justification that the Seventh Amendment is not implicated at all.<sup>70</sup> But as the next Part demonstrates, the Seventh Amendment is very much implicated; these decisions have cut away, incrementally but steadily, at the jury's historic power to draw inferences from circumstantial evidence.

## II. THE DEMISE OF THE JURY'S INFERENCE-DRAWING FUNCTION

Inferences are conclusions that "common experience" permits us to draw from circumstantial evidence.<sup>71</sup> Jurors have a duty to rely on their experiences

peal the Seventh Amendment. *See Parklane*, 439 U.S. at 338 (Rehnquist, J., dissenting) (noting that the Seventh Amendment "was included in the Bill of Rights in 1791 and . . . has not since been repealed in the only manner provided by the Constitution for repeal of its provisions").

<sup>68</sup> *Blakely*, 542 U.S. at 313. The 2004 Supreme Court decision in *Blakely* addressed the right to a jury in criminal cases under the Sixth Amendment, but "there is no doctrinal basis to distinguish between the Sixth Amendment analysis in *Blakely* and a Seventh Amendment analysis—efficiency either is a value of constitutional dignity or it is not." Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1114 (2013).

<sup>69</sup> *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 n.8 (2007) (collecting cases); *see also, e.g.,* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) ("[U]nder the Rules [of Evidence,] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967) (explaining that judgment as a matter of law does not violate the Seventh Amendment). One commentator notes that "[t]he Court has given primacy to gate keeping" by "accord[ing] efficiency and cost reduction the status of primary systemic objectives." Miller, *supra* note 50, at 597. Thus, the Court's procedural developments "explicitly enhance the judge's role as gatekeeper." Levin, *supra* note 15, at 148. Pleading, in particular, now "serves as the gatekeeper for civil litigation." Clermont & Yeazell, *supra* note 21, at 824; *infra* notes 94–179 and accompanying text (describing these gatekeeping functions based on pleading standards in detail).

<sup>70</sup> *See Tellabs*, 551 U.S. at 327 n.8 ("In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment."); *see also* *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) (holding that judicial review of juries' punitive-damage awards do not implicate the Seventh Amendment "[b]ecause the jury's award of punitive damages does not constitute a finding of 'fact'"). A cynical student of legislative history would note that the statute authorizing the Supreme Court to promulgate rules at one time provided explicitly that procedural rules could not supplant "the right of trial by jury as at common law and as declared by the Seventh Amendment" —language that was stricken in a 1988 amendment. *See* G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1944–45 (1993); *see also* Act of June 25, 1948, ch. 646, § 2072, 62 Stat. 869, 961 (codified as amended at 28 U.S.C. § 2072 (2012)) (giving the Court authority to "prescribe general rules of practice and procedure").

<sup>71</sup> *See, e.g.,* *Paulino v. Harrison*, 542 F.3d 692, 700 n.6 (9th Cir. 2008) (citing *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950)); *United States v. Scruggs*, 549 F.2d 1097, 1104 (6th Cir.

in determining whether to infer a particular fact from evidence that may support various alternative facts.<sup>72</sup> Drawing inferences involves the mental process of abduction<sup>73</sup> and requires us to draw on our reason and experience in evaluating circumstantial evidence.<sup>74</sup> Although the distinction between direct evidence and circumstantial evidence is not as straightforward as the law sometimes suggests,<sup>75</sup> for purposes of this Article, we can illustrate the difference by using the example of the child who stole the cookie. If questioned on the witness stand, the child might deny the wrongdoing, and that denial would be direct evidence of her innocence. In contrast, a deceitful demeanor or inconsistent testimony could be circumstantial evidence tending to prove that the denial was a lie.<sup>76</sup> And the lie, in turn, could be circumstantial evidence tend-

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1977). To evaluate circumstantial evidence, a factfinder must draw an “inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present.” *Radomsky*, 180 F.2d at 783.

<sup>72</sup> Schnapper, *supra* note 3, at 280 (“The task of the jury . . . is to decide what occurred by drawing inferences about the disputed events from non-conclusive evidence.”).

<sup>73</sup> See generally Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 228 (2008) (“Abduction involves inferring a conclusion that would explain the given premises. The common variety is a causal explanation—one infers from a given effect (the premise) to a causal proposition (the conclusion) that would explain, or best explain, that effect.”).

<sup>74</sup> See *Tot v. United States*, 319 U.S. 463, 467 (1943) (noting that “the jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference”).

<sup>75</sup> Circumstantial evidence traditionally requires the use of inferences to reach a conclusion relevant to the dispute, whereas direct evidence establishes the conclusion without resort to inference drawing. *E.g.*, *Radomsky*, 180 F.2d at 783; Robert P. Burns, *Some Realism (and Idealism) About the Trial*, 31 GA. L. REV. 715, 762 n.171 (1997); Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 219 (1961). Scholars often observe, however, that even direct evidence requires the use of inferences, including inferences going to the competency and accuracy of the witness. See Burns, *supra*, at 762 n.171; James, *supra*, at 219 (“In the final analysis all proof requires some process of inference, before it can be translated into an actual decision by the trier.”). One recent commentator has thus noted the “illusory nature of the direct-circumstantial distinction.” Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 HOUS. L. REV. 1801, 1804 (2009); accord Burns, *supra*, at 762 n.171 (arguing that “the probative value of all evidence is circumstantial”). Although I agree that the line between direct and circumstantial evidence is murky, I use those terms in this Article because the encroachments on the jury’s power to resolve competing inferences has been more pronounced with respect to evidence that we traditionally characterize as circumstantial.

<sup>76</sup> See Witmer v. United States, 348 U.S. 375, 382 (1955) (indicating that demeanor does not impugn credibility unless it is “shifty or evasive”). The value of demeanor evidence began to come under closer scrutiny in 1991, when Olin Guy Wellborn III produced empirical evidence showing that “ordinary people cannot make effective use of demeanor in deciding whether to believe a witness.” Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991). Jeremy Blumenthal called it “unforgiveable” that the legal system did not adjust to these research findings. Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1204 (1993). Unforgiveable or not, this Article starts from the presumption that demeanor evidence remains a valuable tool in credibility determinations, as the case law certainly continues to recognize. See, e.g., *United States v. Rosen*, 716 F.3d 691, 698 (2d Cir. 2013); *Hernandez v. Valley View Hosp. Ass’n*, 684 F.3d 950, 960 (10th Cir. 2012); *United States v. Seng Tan*, 674 F.3d 103, 108 (1st Cir. 2011). Indeed, Max Minzner’s updated research suggests a “far more com-

ing to prove that the child stole the cookie. In this simplistic example, then, the direct evidence would point in one direction, whereas the circumstantial evidence would point in the other.

In 1944, in *Tennant v. Peoria & Pekin Union Railway*, the Supreme Court explained that “select[ing] from among conflicting inferences” was “[t]he very essence of [the jury’s] function” and admonished courts not to substitute their own inferences for those drawn by the jury.<sup>77</sup> Modern commentators have agreed that preserving the power to draw inferences is crucial to maintaining a significant right to a jury trial.<sup>78</sup> One can hardly argue with that truism. Yet the courts have chipped away so extensively at that meaningful right that it now runs the risk of becoming meaningless.

This Part focuses on three specific aspects of inference drawing that courts have improperly siphoned away from juries: (1) the power to consider inferences that judges deem implausible;<sup>79</sup> (2) the power to decide between two inferences that judges conclude are equally plausible;<sup>80</sup> and (3) the power to rely on inferences, drawn from witness prevarication, that contradict the direct evidence.<sup>81</sup> In each area, courts have arrogated to themselves a factfinding function that would have historically belonged to the jury.

### A. The Problem of So-Called “Implausible” Inferences

Even in circumstantial-evidence cases, the party with the burden of proof must carry it; the party must establish that the available inferences in its favor are more likely to be accurate than the available inferences that are not.<sup>82</sup> And the jury’s historic prerogative to select from among competing inferences has

plex” picture than Professors Wellborn and Blumenthal portrayed. Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2564 (2008); accord Timony, *supra* note 44, at 934–35 (critiquing research methods of studies that find laypeople are not capable of judging credibility based on demeanor).

<sup>77</sup> 321 U.S. 29, 35 (1944); *see also id.* (“Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.”).

<sup>78</sup> *See, e.g.*, Dorsaneo, *supra* note 29, at 1699 (“If the inferences drawn by the jury could be cast aside by trial judges or appellate courts merely because the judges regard the jury’s inferences . . . as less convincing or reasonable than competing inferences, the right to trial by jury would be rendered considerably less meaningful.”); Miller, *supra* note 9, at 1120–21; Schnapper, *supra* note 3, at 281.

<sup>79</sup> *See infra* notes 82–134 and accompanying text.

<sup>80</sup> *See infra* notes 135–179 and accompanying text.

<sup>81</sup> *See infra* notes 180–261 and accompanying text.

<sup>82</sup> *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009) (holding that in an age-discrimination case, the plaintiff must prove that discrimination led to adverse employment action by a preponderance of the evidence, regardless of whether it is direct or circumstantial); Pardo & Allen, *supra* note 73, at 238 (“If the proffered explanations truly are equally bad (or good), including additionally constructed ones, judgment will (and should) go against the party with the burden of persuasion.”).

always required the choices to be “rational”<sup>83</sup> or “reasonable”;<sup>84</sup> they cannot be based on “conjecture and speculation.”<sup>85</sup> But that standard is easier to articulate than to apply. Although courts purport to precisely weigh the relative likelihoods of competing inferences, accurate or consistent methods of doing so typically do not exist.<sup>86</sup> Thus, courts have been unable to clearly delineate the boundary between “rational inference” and “speculation.”<sup>87</sup> And too often courts invoke the prohibition against speculation as a basis for reversing a verdict merely because they disagree with it.<sup>88</sup> Nowhere is that trend more blatant than in the realm of inferences that courts conclude are too implausible to permit a jury to consider in the first place. Judges, like jurors, possess intuitions shaped by individual experience, so whatever personal biases they have subconsciously threaten to skew their careful determinations of whether inferences are plausible.<sup>89</sup>

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<sup>83</sup> *E.g.*, *Balt. & Ohio R.R. v. Griffith*, 159 U.S. 603, 608 (1895).

<sup>84</sup> *E.g.*, *Tennant*, 321 U.S. at 35. The Court explained that whether or not the jury’s inferences were reasonable is “the focal point of judicial review.” *Id.*

<sup>85</sup> *E.g.*, *Mich. Cent. R.R. v. Vreeland*, 227 U.S. 59, 74 (1913).

<sup>86</sup> James, *supra* note 75, at 221–22 (noting that “[t]he test of rationality is usually expressed in terms of probabilities,” thus creating a pretense of “mathematical precision” that is spurious without corresponding “quantitative data”). Richard Friedman has endorsed “naked statistical evidence” as a basis for “satisfy[ing] the plaintiff’s burden of production.” Richard D. Friedman, Comment, *Generalized Inferences, Individual Merits, and Jury Discretion*, 66 B.U. L. REV. 509, 513 (1986). For example, where the statistical evidence demonstrates that “90 percent of the vehicles bearing the Hertz logo are owned by Hertz,” the plaintiff could reach the jury on the question of ownership merely by proving that a particular truck bore that logo, even in the face of contrary evidence. *Kaminsky v. Hertz Corp.*, 288 N.W.2d 426, 427 (Mich. Ct. App. 1980). But most cases do not lend themselves to that sort of statistical quantification of likelihood. See Friedman, *supra*, at 518. Instead, the probability of most facts is “in the mind of the beholder.” *Id.*

<sup>87</sup> Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1193 n.15 (1979) (“Courts have found the difference between rational inference and speculation difficult to define.”); see also *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 672 (6th Cir. 2010) (“[W]here one person sees speculation, . . . another may see knowledge . . .”).

<sup>88</sup> See *J.E.K. Indus., Inc. v. Shoemaker*, 763 F.2d 348, 353 (8th Cir. 1985) (upholding the trial court’s decision to grant a directed verdict based on the argument that the jury cannot rely on speculation); *Romero v. Nat’l Rifle Ass’n of Am.*, 749 F.2d 77, 81 (D.C. Cir. 1984) (affirming the trial court’s grant of judgment notwithstanding the verdict because the inferences favoring the plaintiff were “sheer conjecture”); see also Schnapper, *supra* note 3, at 287 (observing that appellate courts insert their own assessments of evidence by labeling the jury’s conclusions as “speculative” and suggesting that the jury simply guessed because it could not determine the facts (citing *Conti v. Ford Motor Co.*, 743 F.2d 195, 198 (3d Cir. 1984))).

<sup>89</sup> Miller, *supra* note 9, at 1071 (“Judges are human, and their personal sense of whether a plaintiff’s claim seems ‘implausible’ can subconsciously infiltrate even the most careful analysis.”). This threat is inevitable because “a judge cannot help but be influenced by his or her cultural background.” Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 108 (2010). Accordingly, judges “are constantly asserting or assuming broad generalizations about human behavior and all sorts of other matters which either rest on their own very fallible notions about such things (often reflect[ing] veritable old wives’ tales current in the culture of the community), or spring from considerations of policy and expediency.” James, *supra* note 75, at 222.

Historically, some judges were perhaps overly deferential to the jury's factfinding role even in the face of allegations that strained credulity and were, on balance, implausible by any rational standard. For example, Justice Felix Frankfurter observed in a 1951 oral argument that he "'would give a jury . . . every possible leeway to believe implausible stories . . .'"<sup>90</sup> And in *Arnstein v. Porter*, a 1946 copyright-infringement case against composer Cole Porter, the Second Circuit held that a jury should be permitted to accept or reject inferences that seemed fanciful or far-fetched.<sup>91</sup> Arnstein claimed that several of Porter's most famous tunes plagiarized Arnstein's prior works, postulating that Porter gained the requisite access to Arnstein's previously unpublished musical compositions by hiring "stooges" to stalk him and burglarize his apartment.<sup>92</sup> A divided court held that the inferences Arnstein asked the court to draw, though "fantastic," should be evaluated by the jury.<sup>93</sup>

But *Arnstein* was decided more than sixty years ago, and the landscape has changed; we now live in a world where claims are either "plausible" or "implausible." The terms gained notoriety as a result of the recent pair of Supreme Court cases that heightened pleading requirements. The Court's "blockbuster decisions"<sup>94</sup> in *Bell Atlantic Corp. v. Twombly* in 2007 and *Ashcroft v. Iqbal* in 2009 are usually considered as a pair—so much so that lawyers frequently conjoin their names into "*Twiqbal*."<sup>95</sup>

Although both cases discuss plausibility at the pleading stage, they do so in importantly different ways. As I demonstrate below, *Twombly* is less about a rejection of *implausible* inferences and more about a rejection of cases premised on *equally plausible* inferences.<sup>96</sup> So for the moment, I set *Twombly* aside.

*Iqbal* has a more direct impact on the value of ostensibly implausible inferences. And *Iqbal* is particularly problematic because of the Court's apparent reluctance to announce candidly the path it followed to its holding. In *Iqbal*,

<sup>90</sup> Louis L. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233, 1246 (1951) (quoting Transcript of Oral Argument at 16, *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) (No. 42)).

<sup>91</sup> 154 F.2d 464, 469 (2d Cir. 1946).

<sup>92</sup> *Id.* at 467 (internal quotation marks omitted). Arnstein's theory was that Porter directed the men "'to follow [Arnstein], watch [him], and live in the same apartment with [him],'" and that [his] room had been ransacked on several occasions." *Id.*

<sup>93</sup> *Id.* at 469 (internal quotation marks omitted).

<sup>94</sup> Edward Brunet, *The Substantive Origins of "Plausible Pleadings": An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 2 (2010).

<sup>95</sup> E.g., Dodson, *New Pleading*, *supra* note 12, at 54; Alex Glashausser, *The Extension Clause and the Supreme Court's Jurisdictional Independence*, 53 B.C. L. REV. 1225, 1236 n.60 (2012). See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* and *Iqbal* "have already spawned multiple interpretive essays searching to explain or rationalize the ambiguities presented by these cases." Brunet, *supra* note 94, at 2. Indeed, as of March 3, 2014, the "Journals and Law Reviews" database on Westlaw had captured 2861 articles that mention *Twombly* and/or *Iqbal*, of which 252 include one or both case names in the title.

<sup>96</sup> See *infra* notes 169–176 and accompanying text.

the plaintiff alleged that high-ranking government officials adopted a discriminatory policy of confining men based upon their “religion, race, and/or national origin” in the wake of the September 11 terrorist attacks.<sup>97</sup> The Court held that the inferences of high-level policy decisions were based on “bare assertions,” unsupported by the pleaded facts, and could not overcome the government’s motion to dismiss.<sup>98</sup> The Court stressed that it did not reject these inferences because they were “unrealistic or nonsensical,” but instead because they contained no factual grounding.<sup>99</sup> Nevertheless, even a cursory review of the pleaded allegations belies that rationale, as the dissenting opinion explained.<sup>100</sup>

The actual basis of the *Iqbal* holding, therefore, must be the Court’s desire to wrest from the jury the ability to draw certain inferences that appear “extravagantly fanciful.”<sup>101</sup> Indeed, in its briefing, the defendants invited the Court to do just that.<sup>102</sup> Perhaps the best evidence of the Court’s true holding is its admonition that a trial court, in evaluating plausibility, should “draw on its judicial experience and common sense.”<sup>103</sup> That language is frighteningly analogous to the “experience . . . and common sense” that *juries* were historically required to employ in drawing factual inferences.<sup>104</sup> In short, the implausible aspect of *Iqbal* is the Court’s reasoning, not the plaintiff’s pleading.

*Iqbal* has been resoundingly criticized for, among other things, failing to articulate a cohesive measure by which lower courts can differentiate between unsubstantiated conclusory allegations (apparently implausible under *Iqbal*) and factually detailed assertions sufficient to overcome a motion to dismiss (apparently plausible).<sup>105</sup> But the distinction between “plausible” and “implau-

<sup>97</sup> *Iqbal*, 556 U.S. at 680 (quoting Complaint and Jury Demand ¶ 65, at 12, *Elmaghraby v. Ashcroft*, No. CV 04 1809 (E.D.N.Y. May 3, 2004), 2004 WL 3756439, ¶ 65).

<sup>98</sup> *Id.* at 681.

<sup>99</sup> *Id.* (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”).

<sup>100</sup> *See id.* at 694–97 (Souter, J., dissenting) (arguing that the specific factual allegations were unlikely but certainly not absurd).

<sup>101</sup> *See id.* at 681 (majority opinion).

<sup>102</sup> *Id.* at 695 (Souter, J., dissenting) (noting the defendants’ argument “that *Iqbal*’s claims are implausible because such high-ranking officials ‘tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.’” (quoting Brief for the Petitioners at 28, *Iqbal*, 556 U.S. 662 (No. 07-1015), 2008 WL 4063957, at \*28)).

<sup>103</sup> *Id.* at 679 (majority opinion).

<sup>104</sup> *See Standard Oil Co. v. Van Etten*, 107 U.S. 325, 334 (1882) (“The very spirit of trial by jury is that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to, to mediate the inconsistencies of the evidence, and reconcile the extravagances of opposing theories of the parties.”).

<sup>105</sup> *E.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 334 (2013) (“And what does [plausibility] mean?”); Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 870 (2012) (“The Court . . . provided little guidance on how to draw the line between plausible and implausible

sible,” suddenly in judicial vogue,<sup>106</sup> is nothing more than the age-old distinction between “reasonable” and “speculative.” In that sense, the *Iqbal* problem is only one manifestation of a larger problem that arises whenever courts undertake to determine whether an inference is reasonable or whether a “reasonable jury” could draw it. Just as *Iqbal* fails to elucidate the standard for distinguishing between plausible and implausible, the courts have provided no criteria to evaluate what constitutes a reasonable jury.<sup>107</sup>

Nor does this undefined standard infect only the pleading stage; it also applies at the summary-judgment stage<sup>108</sup> and at trial.<sup>109</sup> Indeed, the Supreme Court itself has undertaken that sort of determination several times in summary-judgment cases, including as far back as 1968, when the Court, in *First National Bank of Arizona v. Cities Service Co.*, rejected an antitrust claim by finding it “much more plausible” that the defendant’s interests “coincided, rather than conflicted, with” the plaintiff’s.<sup>110</sup> And in 1986, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Court held that a claim can be “implausible” if it “is one that simply makes no economic sense.”<sup>111</sup> In other words, a claim can be implausible if the plaintiff’s theory of liability requires

claims.”); Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1459 (2010) (“[T]he content of ‘plausibility’ was left obscure.”).

<sup>106</sup> See Clermont & Yeazell, *supra* note 21, at 851–52 (noting that before *Twombly* and *Iqbal*, the term “plausibility” was not only “new to the world of pleading, it was largely new to the world of civil procedure”).

<sup>107</sup> Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009) (“[N]either the Supreme Court nor the lower courts have defined the ‘reasonable jury.’”). Although the Court has not defined “reasonable jury,” it has held “that ‘no reasonable juror’ could have formed beliefs contrary to the Court’s own,” which “inevitably call[s] into question the integrity, intelligence, and competence of identifiable subcommunities whose members in fact [hold] those dissenting beliefs.” Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 897 (2009); see also *infra* notes 276–280 and accompanying text (describing the Court’s excessively narrow interpretation of plausible inferences in *Scott v. Harris*, 550 U.S. 372 (2007)).

<sup>108</sup> See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that summary judgment is improper if “a reasonable jury” could find for the nonmovant); see also Clermont & Yeazell, *supra* note 21, at 833–34 (observing that both pleading challenges under *Iqbal* and summary judgment motions “ask whether a factual assertion is reasonably possible”).

<sup>109</sup> See, e.g., *Brady v. S. Ry. Co.*, 320 U.S. 476, 479–80 (1943) (holding that a directed verdict is proper when there is only “one reasonable conclusion” the jury could reach); see also Pardo, *supra* note 105, at 1453 (“Several scholars have already noted similarities between both the ‘plausibility’ pleading standard and the ‘reasonable jury’ standard . . .”).

<sup>110</sup> 391 U.S. 253, 285 (1968); see also *infra* notes 215–217 and accompanying text (noting that the Court in *First National Bank of Arizona* discounted the potential significance of witness credibility in evaluating the plausibility of available inferences).

<sup>111</sup> 475 U.S. 574, 587 (1986). One scholar notes that the *Matsushita* decision “uses variations on the word plausible an amazing thirteen times.” Brunet, *supra* note 94, at 4. Another observes that “the more one looks at [the *Twombly* and *Iqbal*] opinions, the more one finds striking parallels to the Court’s similar shift in the summary judgment context less than three decades ago.” Levin, *supra* note 15, at 144.

the factfinder to conclude that the defendant acted against its economic interests.<sup>112</sup>

These conceptions of implausibility necessarily employ individual value judgments.<sup>113</sup> The majority in *Iqbal* rejected as “conclusory” the particularized factual allegations that diverged from their beliefs about the conduct of high-ranking government officials.<sup>114</sup> And, at a core level, the *Matsushita* majority made an “assumption” about what was in the defendant’s economic interests without explaining how or why there was no room for disagreement.<sup>115</sup> Even members of the Supreme Court have disagreed about whether particular conduct makes “economic sense.”<sup>116</sup> Not only can rational actors evaluate economic interests differently, they also can (and do) make decisions that contradict those interests. The external and internal circumstances that motivate people are too complex to allow for a predictable and universal pattern of behavior.<sup>117</sup> For example, it appears implausible that a successful manufacturer would knowingly risk selling dangerous products<sup>118</sup> or that a bank would make bad loans.<sup>119</sup> And yet they do.<sup>120</sup> Thus, as Justice Hugo Black noted in a 1968 dis-

<sup>112</sup> See Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 227 (1993) (observing that the Court in *Matsushita* “denied that it was weighing competing interests” and instead “concluded that the plaintiffs had asked the court to draw irrational inferences”); see also Miller, *supra* note 105, at 311 n.94 (observing that the Supreme Court “seemed to authorize” trial courts to dispose of implausible cases on summary judgment). *Matsushita* was the first part of a famous summary-judgment trilogy. See Miller, *supra* note 9, at 1029–34. The other two were *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Miller, *supra* note 9, at 1034–41.

<sup>113</sup> See *Matsushita*, 475 U.S. at 600 (White, J., dissenting) (accusing the majority of permitting a trial judge to “decide for himself whether the weight of the evidence favors the plaintiff”).

<sup>114</sup> A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 196 (2010) (arguing that the majority rejected the plaintiff’s inferences because they were “inconsistent with their settled expectations,” thus necessitating “additional evidence to be taken seriously”).

<sup>115</sup> See *Matsushita*, 475 U.S. at 604 (White, J., dissenting) (“I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.”).

<sup>116</sup> See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 489 (1992) (Scalia, J., dissenting) (criticizing the majority’s conclusion that a manufacturer’s “sale of distinctive repair parts” for its own brand of products created an unlawful monopoly).

<sup>117</sup> Miller, *supra* note 9, at 1120–21 (“[M]otivation and other aspects of human behavior are . . . complicated . . .”).

<sup>118</sup> *Id.* at 1121 (“[I]t seems ‘implausible’ that a great manufacturing enterprise would vend a deleterious drug, insulating material, or a dangerous consumer product given the risks.”).

<sup>119</sup> See *Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 511 (6th Cir. 2012) (rejecting an inference of lending impropriety as economically “improbable” because a lender would not “lend money if it knew it would never get the money back”).

<sup>120</sup> See, e.g., *Tuscon Indus., Inc. v. Schwartz*, 501 P.2d 936, 940–41 (Ariz. 1972) (en banc) (holding an adhesive manufacturer liable for selling, without adequate warning, cement that caused nearly immediate blindness when it contacted the plaintiff’s eyes); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 267 (2012) (“The financial crisis of 2007–2009 was preceded by a period of financial firms seeking short-term profit regardless of long-term consequences.” (footnote omitted)).

sent, a judge's conclusion about the motive for the defendant's behavior is "never . . . the appropriate standard" for deciding to take a case from a jury.<sup>121</sup>

Nevertheless, federal courts are increasingly willing to take ostensibly speculative or implausible claims from the jury by granting summary judgment in "complex actions[.]" "actions turning on state of mind[.]"<sup>122</sup> or in cases involving "concealed wrongdoing,"<sup>123</sup>—a trend that has far-reaching tentacles. For example, the Court's 2013 decision in *Comcast Corp. v. Behrend*, borne of a desire to ensure that a jury awards "only those damages attributable"<sup>124</sup> to the plaintiff's theory of liability, casts doubt on the longstanding rule that a jury is free to infer the amount of a plaintiff's "uncertain damages" once it finds in favor of the plaintiff on liability.<sup>125</sup> Some courts, invoking prudential-standing rules,<sup>126</sup> have dismissed complaints by concluding that a calculation of the plaintiff's alleged damages would require conjecture on the jury's part.<sup>127</sup> The hostility toward implausible inferences is also at the core of the Supreme Court's case law requiring trial courts to evaluate experts' opinions before permitting them to testify; what is couched as an effort to cabin speculation<sup>128</sup> ultimately enables judges to invade the province of the jury by making the crucial evaluations of expert credibility.<sup>129</sup>

Even if the citizenry were willing (after honest debate) to relax the Seventh Amendment in favor of competing considerations of efficiency and fairness that underlie due process—and even if there were a consensus that taking inference-drawing tasks from juries is the proper way to meet those considerations—there is no principled standard for concluding that an inference is too implausible for trial.<sup>130</sup> *Arnstein* may be an extreme case, but it helps illustrate

<sup>121</sup> *First Nat'l Bank of Ariz.*, 391 U.S. at 305 (Black, J., dissenting).

<sup>122</sup> Miller, *supra* note 9, at 1055; *see also id.* at 1055 nn.383–84 (collecting cases). *See generally* Bone, *supra* note 12, at 879 (noting that the problem of meritorious cases being screened out prematurely due to a defendant's exclusive access to critical evidence is "likely to be especially serious for civil rights cases, and particularly cases like *Iqbal* involving state-of-mind elements").

<sup>123</sup> *See* Spencer, *supra* note 114, at 188.

<sup>124</sup> *See* 133 S. Ct. 1426, 1433 (2013).

<sup>125</sup> *See* *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562–63 (1931) (reasoning that plaintiffs can recover damages that are "uncertain in amount" as long as they are the "certain result" of the defendant's breach).

<sup>126</sup> Prudential standing requires "that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>127</sup> *See* *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1171 (11th Cir. 2007); *see also* *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 406 (6th Cir. 2012) (noting that the plaintiff's damages calculation was "speculative"), *aff'd on other grounds*, No. 12-873, 2014 WL 1168967 (U.S. Mar. 25, 2014).

<sup>128</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).

<sup>129</sup> *See* Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 217 (2003) (recognizing that a case may turn on the judge's assessment of experts, essentially resulting in "a decision on the merits by the trial judge").

<sup>130</sup> The lack of a principled basis for determining implausibility is all the more troubling when one considers that the Court has expressed a greater willingness to accept a questionable inference of

that the fact-specific nature of the inference-drawing function is incompatible with an across-the-board test. Commentators have certainly tried to formulate a standard. For example, one scholar suggests that an explanation is plausible if it “seems like it could be true.”<sup>131</sup> And another seems to embrace the *Iqbal* majority’s admonition that “[j]udicial experience must inform the district court about what is plausible in the context of each case.”<sup>132</sup> But neither approach offers a sufficiently concrete basis for avoiding the vagaries, inconsistencies, and Seventh Amendment problems of judicial inference drawing. In short, judges severely undermine the right to a jury trial when they arrogate to themselves the right to select from among competing inferences,<sup>133</sup> especially when they do so on paper motions that cannot convey witness demeanor.<sup>134</sup>

### *B. The Problem of Equally Plausible Inferences*

In 1933, the Supreme Court held in *Pennsylvania Railroad v. Chamberlain* that the plaintiff, as a matter of law, could not establish a railroad employee’s causes of death if “proven facts give equal support to each of two inconsistent inferences.”<sup>135</sup> Texas has dubbed this the “equal inference rule.”<sup>136</sup> It bears a close relationship with a rule, followed in some jurisdictions, that pro-

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fraudulent conduct when drawn by a legislature rather than by a jury. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008) (upholding Indiana’s voter-identification law as a legitimate measure to prevent voter fraud even though “[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history”). At oral argument in *Crawford*, Chief Justice John Roberts suggested that it would be appropriate to defer to the Indiana legislature’s inference of voter fraud precisely “because . . . fraud [is] hard to detect.” Transcript of Oral Argument at 19, *Crawford*, 553 U.S. 181 (Nos. 07-21, 07-25), 2008 WL 83835, at \*19.

<sup>131</sup> Pardo, *supra* note 105, at 1487–88.

<sup>132</sup> Noyes, *supra* note 105, at 876.

<sup>133</sup> Dorsaneo, *supra* note 29, at 1699 (noting that the “power of the jury to draw inferences from the evidence in deciding whether the applicable legal standard was violated . . . is the most critical component of the right to trial by jury”).

<sup>134</sup> *See supra* notes 44–48 and accompanying text (noting that the ability to observe witness demeanor is a crucial benefit of live testimony).

<sup>135</sup> 288 U.S. 333, 339 (1933). *Chamberlain* is by no means an aberration, even by the standards of the early-to-mid twentieth century. *See, e.g.*, *U.S. Fid. & Guar. Co. v. Des Moines Nat’l Bank*, 145 F. 273, 280 (8th Cir. 1906) (explaining that a plaintiff has not proven its case when the jury chooses between equal conclusions); *Burens v. Indus. Comm’n*, 124 N.E.2d 724, 729 (Ohio 1955) (“[W]here . . . the facts give rise to two irreconcilable inferences, either of which is reasonable, the submission of a choice thereof to a jury is to permit the jury to indulge in speculation and conjecture.”).

<sup>136</sup> *See Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (Phillips, C.J., concurring in part and dissenting in part) (“The equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence ‘which could give rise to any number of inferences, none more probable than another.’” (quoting *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997))).

hibits a factfinder from aggregating inferences to reach an ultimate conclusion.<sup>137</sup>

Some argue that the equal-inference rule is harmful because it permits judges to disregard jury verdicts merely by characterizing competing inferences as “equal.”<sup>138</sup> And for many years, there were nuggets in the Supreme Court and lower-court decisions that contradicted *Chamberlain*; as I show below, however, *Twombly* effectively squashed any opportunity for an equal-inference case to succeed.<sup>139</sup>

A handful of early twentieth-century Supreme Court cases after *Chamberlain* suggested deference to the jury’s assessment of competing inferences, even to the point of authorizing some degree of speculation to resolve a conflict among inferences that appeared to be equal. Perhaps no case better illustrates that deference than the Supreme Court’s 1946 decision in *Lavender v. Kurn*, where, as in *Chamberlain*, the jury had to determine the cause of a railroad employee’s death.<sup>140</sup> If he died as a result of the defendant railroad’s negligence (as the plaintiff contended), the defendant would be liable to the plaintiff’s estate.<sup>141</sup> If he was murdered (as the defendant contended), the defendant would not be liable.<sup>142</sup> The Court recognized that the jury could reasonably infer that the defendant was murdered based on the facts.<sup>143</sup> Nevertheless, the Court held that on appeal, the facts supporting the railroad’s murder theory

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<sup>137</sup> See, e.g., *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943) (“[C]harges of conspiracy are not to be made out by piling inference upon inference.”); *Nielsen v. City of Sarasota*, 117 So. 2d 731, 733 (Fla. 1960) (holding that a party with the burden of proof “cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences”). The Supreme Court of Ohio has noted that “the rule forbidding the stacking of an inference upon an inference is disfavored by scholars and many courts.” *Motorists Mut. Ins. Co. v. Hamilton Twp. Trs.*, 502 N.E.2d 204, 207 (Ohio 1986). The court distinguished between reaching a conclusion by drawing an inference solely from another inference—which is impermissible stacking—and reaching a conclusion by considering the effect of two independently drawn inferences. *Id.* The court further observed that the rule prohibiting inference stacking is “too frequently misunderstood, or misused as a convenient means of excluding evidence regarded as too remote, speculative or uncertain to be of probative value.” *Id.* at 207–08. Conversely, other jurisdictions hold that it is permissible to aggregate inferences in reaching a conclusion about evidence. See, e.g., *United States v. Eustace*, 423 F.2d 569, 571 (2d Cir. 1970) (“There is no validity to defendant’s argument that an inference cannot be based on another inference.”); *Toliver v. United States*, 224 F.2d 742, 745 (9th Cir. 1955).

<sup>138</sup> *Dorsaneo*, *supra* note 29, at 1710; see *Ayres*, *supra* note 32, at 480–81.

<sup>139</sup> See *infra* notes 140–168 and accompanying text (discussing this contradiction to *Chamberlain*); *infra* notes 169–176 and accompanying text (discussing *Twombly*).

<sup>140</sup> 327 U.S. 645, 646 (1946)

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* at 651.

<sup>143</sup> *Id.* at 652.

were irrelevant.<sup>144</sup> The Court noted that there was a “reasonable basis in the record for inferring” the railroad’s negligence.<sup>145</sup>

But the *Lavender* Court did not end its analysis there. It went on to address, and reject, the counter-argument that the plaintiff’s theory of injury “involved speculation and conjecture”:

Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, *a measure of speculation and conjecture is required* on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.<sup>146</sup>

Under *Lavender*, then, a jury was free to employ some “speculation and conjecture” in selecting among competing inferences, so long as the ultimate choice found some support in the evidence.<sup>147</sup> In essence, a jury was permitted to select among ostensibly equal inferences—precisely the opposite of the *Chamberlain* holding.<sup>148</sup> In keeping with *Lavender*, one scholar noted in 1956 that, in many cases, a conclusion can only be reached by relying on intuition or speculation after evaluating the evidence.<sup>149</sup>

The Court twice reaffirmed the *Lavender* holding: once in 1957 in *Webb v. Illinois Central Railroad*<sup>150</sup> and again in 1963 in *Gallick v. Baltimore & Ohio Railroad*.<sup>151</sup> *Gallick* is particularly instructive because of the importance the Court placed on the jury’s prerogative to select between two inferences that seemed equally logical. The case involved an individual who suffered a severe infection brought on by an insect bite.<sup>152</sup> The case proceeded solely on evidence that his employer failed to eradicate a pool of filthy, stagnant water that was infested with vermin and insects.<sup>153</sup> The appellate court had overturned the verdict because there was no direct evidence that the pool of water, as opposed

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 653 (emphasis added).

<sup>147</sup> See *id.*; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1353 (2005) (“[T]he fact that some conjecture was involved should not serve as an inherent barrier to a jury decision, for the simple reason that if there were no need for any conjecture, we would never need to send a case to a jury.”).

<sup>148</sup> See Dorsaneo, *supra* note 29, at 1707–09. Compare *Chamberlain*, 288 U.S. at 339, with *Lavender*, 327 U.S. at 653.

<sup>149</sup> Louis L. Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1024 (1956).

<sup>150</sup> 352 U.S. 512, 515 n.6 (1957) (upholding a jury verdict even though “[s]ome speculation may have entered into the jury’s decision”).

<sup>151</sup> 372 U.S. 108, 115–16 (1963).

<sup>152</sup> *Id.* at 108.

<sup>153</sup> *Id.*

to a nearby river or other nearby unsanitary land, had attracted the particular insect that bit the employee, and no direct evidence that the putrid water was the source of the infectious bacterium.<sup>154</sup> The Supreme Court reversed, holding that the lower court had “improperly invaded the function and province of the jury” to infer the causal connections.<sup>155</sup> In short, the insect may or may not have been attracted to the pool of water, but the jury was free to conclude, based solely on circumstantial evidence, that it was. And it may or may not have carried an infection from that pool, but the jury, again based solely on circumstantial evidence, was free to conclude that it did.

Since then, *Lavender* has enjoyed only mixed endurance among lower courts, which have not consistently endorsed the jury’s power to select among equally plausible inferences. In the criminal context, courts have held that the presence of two plausible inferences—one pointing to guilt and the other to innocence—automatically raises a reasonable doubt and thus requires acquittal.<sup>156</sup> The flaw in this argument, of course, is that a jury may not necessarily agree with the court’s conclusion that the evidence is in “equipose.”<sup>157</sup> Thus, a jury may convict a defendant based on a reasonable inference of guilt, despite the court’s perception of an equally reasonable inference of innocence.<sup>158</sup>

Those courts that require acquittal in the face of equally plausible opposing inferences can at least ground their holdings in the higher burden of proof and other due process concerns that arguably compete with the right of a jury in criminal cases—especially because the “accused,” not the prosecution, enjoys the right to a jury trial.<sup>159</sup> Civil cases, by contrast, present less compelling competing considerations but have nevertheless engendered doctrinal confusion about the jury’s power to choose between ostensibly equal inferences. In 1976, the First Circuit noted in *Carlson v. American Safety Equipment Corp.* that courts take two different approaches when two inferences are equally plausible.<sup>160</sup> Under one view, “a jury is entitled to make a reasonable inference from the evidence even if ‘some other inference equally reasonable might be

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<sup>154</sup> *Id.* at 112.

<sup>155</sup> *Id.* at 113.

<sup>156</sup> *E.g.*, *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010); *United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009); *O’Laughlin v. O’Brien*, 568 F.3d 287, 301 (1st Cir. 2009); *United States v. Elashyi*, 554 F.3d 480, 492 (5th Cir. 2008); *United States v. Hawkins*, 547 F.3d 66, 81 (2d Cir. 2008); *United States v. Caseer*, 399 F.3d 828, 840 (6th Cir. 2005).

<sup>157</sup> *Cf. Johnson*, 592 F.3d at 755 (illustrating a judge’s determination about how a jury *must* perceive the evidence based on his own assessment that “the plausibility of each inference is about the same”).

<sup>158</sup> *Holland v. United States*, 348 U.S. 121, 139–40 (1954); *see United States v. Hernandez*, 440 F. App’x 159, 161 (4th Cir. 2011); *United States v. Cervantes*, 646 F.3d 1054, 1059 (8th Cir. 2011).

<sup>159</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

<sup>160</sup> 528 F.2d 384, 386 (1st Cir. 1976).

drawn therefrom.”<sup>161</sup> Under the other view, if “two equally possible inferences exist, a jury cannot employ . . . guesswork, speculation, or conjecture to decide a case”<sup>162</sup>—a position that flatly contradicts the Supreme Court’s holding in *Lavender*.<sup>163</sup>

A 2001 Texas case illustrates this confusion. In *Lozano v. Lozano*, the Texas Supreme Court examined the equal-inference rule in reviewing a multi-million-dollar verdict against the parents and three siblings of a man who abducted his infant daughter to the detriment of the mother’s custody rights.<sup>164</sup> The central question was whether each respective family member intended to assist in the abduction.<sup>165</sup> The justices differed significantly in their assessments of the evidence against each defendant and wrote four opinions to capture their differing permutations.<sup>166</sup> A key dispute was whether the equal-inference rule precluded a finding of liability. One opinion limited the rule’s significance, reasoning that circumstantial evidence can be sufficient despite multiple reasonable inferences.<sup>167</sup> But another opinion insisted that a jury could not simply choose between equally likely inferences when evaluating circumstantial evidence.<sup>168</sup>

It is here that the Supreme Court’s 2007 decision in *Twombly* enters into the analysis because *Twombly* effectively sounded the death knell for plaintiffs in federal equal-inference cases. In *Twombly*, the Court rejected the plausibility of the plaintiffs’ antitrust-conspiracy claim because the underlying factual de-

<sup>161</sup> *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1038 (D.C. Cir. 2007) (quoting *Arterburn v. St. Joseph Hosp. & Rehabilitation Ctr.*, 551 P.2d 886, 890 (Kan. 1976)); see also *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1326 (11th Cir. 1982) (“[A] verdict based on circumstantial evidence is not infirm simply because the evidence supports an equally probable inference to the contrary.”); *Wratchford v. S.J. Groves & Sons Co.*, 405 F.2d 1061, 1067 (4th Cir. 1969) (“Termination of the case by the court upon its appraisal of the two conflicting inferences as equally probable was a violation, we think, of the federal standard and the province of the jury . . .”); *Am. Cas. Co. of Reading, Pa. v. Myrick*, 304 F.2d 179, 182 (5th Cir. 1962) (holding that it was improper to take the case from the jury even where “inconsistent and uncertain inferences are equally supported by the proof”).

<sup>162</sup> *Morris v. Wal-Mart Stores, Inc.*, 330 F.3d 854, 865 (6th Cir. 2003) (Krupansky, J., dissenting); see also *Se. Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 777 (6th Cir. 1970) (“When there are equal inferences which can be drawn from a particular set of facts—one inference indicating liability, the other non-liability—it is the judge’s obligation at the direct verdict stage of the trial to find for the defendant.”).

<sup>163</sup> See *Lavender*, 327 U.S. at 652; *supra* notes 140–146 and accompanying text.

<sup>164</sup> 52 S.W.3d at 149 (Phillips, C.J., concurring in part and dissenting in part).

<sup>165</sup> See *id.* at 144 (per curiam).

<sup>166</sup> See *id.* at 143–44; *id.* at 144–56 (Phillips, C.J., concurring in part and dissenting in part); *id.* at 156–65 (Hecht, J., concurring in part and dissenting in part); *id.* at 165–69 (Baker, J., concurring in part and dissenting in part).

<sup>167</sup> *Id.* at 148 (Phillips, C.J., concurring in part and dissenting in part) (explaining that “circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it”).

<sup>168</sup> *Id.* at 158 (Hecht, J., concurring in part and dissenting in part) (arguing that when “circumstantial evidence supports two reasonable inferences, neither of which is any more likely than the other,” a jury may not “pick one”).

tail alleged only “parallel conduct,” which was inadequate to warrant an inference of the required conspiracy.<sup>169</sup> The Court repeatedly suggested that an inference of liability is not sustainable unless it is more likely than an inference of nonliability. For example, the Court explained that parallel conduct, though “consistent with conspiracy,” was “*just as much* in line with” legal market behavior.<sup>170</sup> It later reiterated that “merely parallel conduct . . . could *just as well* be independent action.”<sup>171</sup> To be sure, the Court refuted the suggestion that its holding imposed “a probability requirement at the pleading stage.”<sup>172</sup> But if “just as much” or “just as well” are not probable enough to survive dismissal, then by definition something more than an equal inference is required.<sup>173</sup> At bottom, then, the requirement that plaintiffs “nudge[] their claims across the line from conceivable to plausible”<sup>174</sup> spells doom for a plaintiff who can allege only those facts that are “just as” consistent with nonliability as with liability.<sup>175</sup> As one dissenting judge in the Seventh Circuit has suggested, it is too easy under *Twombly* to hold simply that “a tie goes to the defendant.”<sup>176</sup>

Perhaps the most insidious aspect of the equal-inference rule is the premise that one can measure so precisely the likelihood or reasonableness of two competing inferences. Doing so is necessarily a subjective exercise that risks usurping jury’s power,<sup>177</sup> as some courts have implicitly recognized.<sup>178</sup> In some respects, it is worse than the rule against implausible inferences because the

<sup>169</sup> 550 U.S. at 556–57.

<sup>170</sup> *Id.* at 554 (emphasis added).

<sup>171</sup> *Id.* at 557 (emphasis added).

<sup>172</sup> *See id.* at 556.

<sup>173</sup> *Twombly*’s disingenuous rejection of equal inferences while maintaining the absence of a probability requirement has begun to infect lower courts’ analyses. *See, e.g.,* Burch v. Milberg Factors, Inc., 662 F.3d 212, 228 (3d Cir. 2011) (“Based on *Twombly*, we disagree . . . that the . . . District Court applied a probability, rather than a plausibility, standard.”).

<sup>174</sup> *See Twombly*, 550 U.S. at 570.

<sup>175</sup> *See id.*; Pardo, *supra* note 105, at 1483 (advocating for dismissal where there is “an alternative explanation of the events that a reasonable jury must find *at least as plausible* and that would not entitle the plaintiff to relief” (emphasis added)).

<sup>176</sup> *See* McCauley v. City of Chicago, 671 F.3d 611, 626 (7th Cir. 2011) (Hamilton, J., dissenting).

<sup>177</sup> *See* Dorsaneo, *supra* note 29, at 1710–11 (“In the hands of a reviewing judge who wants to violate the jury’s province so as to impose his or her own idiosyncratic preferences on the case, the ‘equal inferences rule’ provides an ideal tool.”).

<sup>178</sup> *E.g.,* Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1250 (6th Cir. 1984) (“If reasonable minds could differ over the question of whether the probabilities of the conflicting inferences are equally balanced, then a jury question is presented.”); Moore v. Car. Power & Light Co., 537 F.2d 1252, 1254 (4th Cir. 1976) (holding that a court should accept a jury verdict where “the jury could reasonably draw the inferences necessary to the plaintiff’s case or could reasonably find the plaintiff’s and defendants’ inferences equally likely”); Yeager v. J.R. Christ Co., 364 F.2d 96, 100 (3d Cir. 1966) (noting that “it is beyond the power of the court” to decide whether reasonable inferences are in equipoise (quoting Smith v. Bell Tel. Co. of Pa., 153 A.2d 477, 480 (Pa. 1959) (internal quotation marks omitted))).

judgment calls are inevitably closer—as the divided Texas Supreme Court’s decision in *Lozano* illustrates.<sup>179</sup>

### C. The Problem of Antithesis Inferences

Judges frequently instruct juries that they may disbelieve a witness and thereby reject all or part of the witness’s testimony.<sup>180</sup> This well-accepted premise, however, raises a more controversial question: whether a jury may go a step further and infer, from a belief that the witness’s testimony is not true, that the truth is the opposite—or what one might call the “antithesis inference.”<sup>181</sup> There is intuitive logic in permitting jurors to conclude that a prevaricating witness is concealing the very wrongdoing at issue in the case, especially if the witness is the party accused of wrongdoing or is closely aligned with that party. The inference that the wrongdoer has a motive to deny wrongdoing “‘is one of the simplest in human experience.’”<sup>182</sup> Sometimes, then, a jury may conclude that a given fact is less likely merely because a witness lacking credibility testified to that fact.<sup>183</sup>

As far back as 1899, in *Sonnentheil v. Christian Moerlein Brewing Co.*, the Supreme Court recognized the possibility that “[e]ven negative evidence may sometimes have a positive value.”<sup>184</sup> But courts, including the Supreme Court, have generally been hostile to accepting the probative value of the antithesis inference, especially without other evidence in support of the party carrying the burden of proof. For example, in 1891, the Court in *Bunt v. Sierra Butte Gold Mining Co.* held that a plaintiff could not meet his burden of proof by calling the defendant’s employees as witnesses in the hope that the jury would disbelieve them.<sup>185</sup> Over the years, numerous cases have similarly re-

<sup>179</sup> See *supra* notes 166–169 and accompanying text.

<sup>180</sup> See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (“When the testimony of a witness is not believed, the trier of fact may simply disregard it.”); *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 576 (1951); *Alberts v. HCA, Inc.*, 496 B.R. 1, 16 (D.D.C. 2013) (observing that the precept that factfinders can choose to reject some or all of an expert witness’s testimony is a “fundamental principle”).

<sup>181</sup> See, e.g., Schnapper, *supra* note 3, at 267 (reasoning that a jury can conclude that a witness is deliberately offering testimony that is the opposite of the truth based on the witness’s demeanor).

<sup>182</sup> *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1069 (3d Cir. 1996) (en banc) (quoting 2 WIGMORE, *supra* note 45, § 278(2), at 133).

<sup>183</sup> Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 734 (1987).

<sup>184</sup> 172 U.S. 401, 410 (1899).

<sup>185</sup> 138 U.S. 483, 485 (1891). The *Bunt* Court held that “disbelief” of the defendant’s employees’ testimony “could not supply a want of proof.” *Id.* The phrase “want of proof” is confusing because it suggests that disbelief would not be fatal to the plaintiff’s case. But the Court upheld a directed verdict for the defendant, so in this context, the phrase “a want of proof” apparently means adequate proof. See *id.*; see also *Bankers Life & Cas. Co. v. Guarantee Reserve Life Ins. Co. of Hammond*, 365 F.2d 28, 34 (7th Cir. 1966) (“The disbelief of Seidel’s testimony cannot support an affirmative finding that the reverse of his testimony is true, that is, it cannot supply a want of proof.”).

jected the antithesis inference as an adequate basis for submitting a case to the jury.<sup>186</sup> The First Circuit explained that the danger of permitting the antithesis inference was “obvious,” as it would allow a plaintiff to prove its case solely through impeachment.<sup>187</sup>

Still, the antithesis inference found support among some jurists and commentators—notably Judge Jerome Frank—until the Supreme Court squarely rejected it in 1986.<sup>188</sup> Despite its general rejection, a modified form of the antithesis inference has enjoyed a normative acceptance in employment-discrimination and criminal cases, although not as a means of overcoming a plaintiff’s initial burden of proof.<sup>189</sup> It has also been applied, albeit obliquely, in assessing the propriety of punitive-damage awards.<sup>190</sup> Finally, it has close ties to adverse inferences that can apply when a party chooses to withhold evidence.<sup>191</sup> I discuss each of these areas in turn.

### 1. The Antithesis Inference from Judge Frank to *Liberty Lobby*

Perhaps the greatest judicial champion of the antithesis inference was Judge Jerome Frank. Judge Frank is remembered as one of the central proponents of the Legal Realism movement.<sup>192</sup> He argued that “trial-court fact-finding is the toughest part of the judicial function” and is one area where “reform is most needed.”<sup>193</sup> Not surprisingly, then, he placed great probative val-

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<sup>186</sup> *E.g.*, *Bose Corp.*, 466 U.S. at 512 (“Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.”); *Moore*, 340 U.S. at 576 (“Nor would the possibility alone that the jury might disbelieve the engineer’s version make the case submissible to it.”); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (“A plaintiff cannot make his case just by asking the jury to disbelieve the defendant’s witnesses . . . .”); *Branion v. Gramly*, 855 F.2d 1256, 1263 (7th Cir. 1988) (“Disbelief is not evidence of the opposite of the thing discredited . . . .”); *Janigan v. Taylor*, 344 F.2d 781, 784 (1st Cir. 1965) (“[D]isbelief of testimony does not of itself constitute a basis for finding the opposite.”); *Magidson v. Duggan*, 212 F.2d 748, 759 (8th Cir. 1954) (“[T]he giving of such false testimony is substantive proof of nothing.”); *Dyer v. MacDougall*, 201 F.2d 265, 268–69 (2d Cir. 1952) (rejecting the use of the antithesis inference because of the potential lack of a meaningful appeal that would result from a trial transcript that would not reflect demeanor); *see also* *Imwinkelried*, *supra* note 47, at 194 (noting the “wealth of case law embracing the view” that demeanor is not substantive evidence); *Wellborn*, *supra* note 76, at 1101 & n.127 (noting that “[h]undreds of cases” reject the antithesis inference).

<sup>187</sup> *Janigan*, 344 F.2d at 784–85 (noting that a plaintiff could prove “any proposition in the world by the simple process of calling one’s adversary and arguing to the jury that he was not to be believed”).

<sup>188</sup> *See infra* notes 192–222 and accompanying text.

<sup>189</sup> *See infra* notes 223–243 and accompanying text.

<sup>190</sup> *See infra* notes 244–252 and accompanying text.

<sup>191</sup> *See infra* notes 253–261 and accompanying text.

<sup>192</sup> *See, e.g.*, Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 749–50 n.2 (2013). Judge Frank sat on the Second Circuit from 1941 until his death in 1957. Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 995 n.226 (1994).

<sup>193</sup> JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 4 (1949).

ue on demeanor evidence<sup>194</sup> and was perhaps one of the most vocal critics of the summary-judgment procedure's reliance on paper evidence.<sup>195</sup> For example, in one 1950 case, he lamented "one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit'" despite the involvement of a factual issue that turned on credibility.<sup>196</sup>

In *Arnstein*, Judge Frank not only authorized a jury to accept the plaintiff's arguably implausible inferences,<sup>197</sup> but also held that a jury disbelieving the defendant's testimony (e.g., that the defendant was unfamiliar with the plaintiff's musical works) could "reasonably infer" the opposite.<sup>198</sup> His opinion emphasized that "where, as here, credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable."<sup>199</sup> And in the 1952 Second Circuit case *Dyer v. MacDougall*, Judge Frank wrote a concurring opinion suggesting that factfinders should be able to find that a plaintiff has met its burden of proof based solely on an antithesis inference arising from a witness's demeanor evidence.<sup>200</sup>

Judge Learned Hand, who authored the majority opinion in *Dyer*, also recognized the logic behind the antithesis inference. Judge Hand wrote that if a defendant had a motive to lie, a factfinder might well believe from demeanor evidence that he "is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies," leading to "a possibly rational verdict" for the plaintiff.<sup>201</sup> Nevertheless, he rejected the availability of the antithesis inference on procedural grounds.<sup>202</sup> He concluded that there could be no meaningful appeal from a verdict in such a case if the sufficiency of the plaintiff's case

<sup>194</sup> See *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487–90 (2d Cir. 1952) (noting that demeanor assessments, although subjective, are extremely helpful in evaluating evidence).

<sup>195</sup> See, e.g., Bauman, *supra* note 48, at 488 ("Judge Frank's . . . belief in the importance of demeanor evidence in judging the credibility of testimonial evidence has led him to [reject summary judgment] in almost all cases where proof supporting the motion is other than an unimpeached document."); Sonenshein, *supra* note 48, at 779 ("Judge Jerome Frank . . . apparently believed that summary judgment is only appropriate in cases that turn on documentary evidence . . .").

<sup>196</sup> *Colby v. Klune*, 178 F.2d 872, 872–73 (2d Cir. 1949). Judge Frank's colleague on the Second Circuit, Judge Charles E. Clark, took the opposite view. Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 503–05 (1950). He criticized narrow constructions of the summary-judgment standard, particularly the approach that required a trial "where there is 'the slightest doubt' as to the facts." *Id.* at 504. Judge Clark believed that under such a standard, there could "hardly be a summary judgment ever, for at least a slight doubt can be developed as to practically all things human." *Id.*

<sup>197</sup> See 154 F.2d at 469–71; *supra* notes 91–93 and accompanying text (describing the plaintiff's allegations of espionage by "stooges").

<sup>198</sup> 154 F.2d at 469.

<sup>199</sup> *Id.* at 471.

<sup>200</sup> 201 F.2d at 270 (Frank, J., concurring) (reasoning that factfinders "should be allowed to find that a plaintiff has discharged his burden of proof when [they] disbelieve[] oral testimony . . . adverse to plaintiff," even when "there is no evidence for [the] plaintiff except that 'demeanor evidence'").

<sup>201</sup> *Id.* at 269 (majority opinion).

<sup>202</sup> *Id.*

depended on the adverse inference because the trial transcript would not reflect demeanor.<sup>203</sup> But Judge Hand wrote so favorably about the logic of the antithesis inference that at least one commentator has felt the need to clarify that he actually rejected it.<sup>204</sup> And in 1962, in *NLRB v. Walton Manufacturing Co.*, the Supreme Court quoted the majority opinion in *Dyer* as support for an agency examiner's factual finding,<sup>205</sup> prompting Justice Felix Frankfurter to explain in a dissenting opinion that Judge Hand's statement supporting the inference "was one of logic, not of law."<sup>206</sup>

Other commentators have since joined in debating the wisdom of Judge Frank's view. A few years after *Dyer*, for example, one scholar suggested that Judge Frank's opinion was unprincipled,<sup>207</sup> which suggests a concern based less on the procedural problem of appellate review than on the difficulty in ever determining that a plaintiff's evidence was sufficient.<sup>208</sup> More recently, one commentator embraced Judge Frank's approach for certain cases, particularly where the proposition in question is likely to be true apart from the antithesis inference—such as when the fact to be established through the antithesis inference is otherwise plausible, or when there is other evidence corroborates that fact.<sup>209</sup> Another scholar similarly endorsed resort to the antithesis inference when there is evidence to support not only the conclusion that the witness's testimony was untrue, but also that the witness was being deliberately dishonest.<sup>210</sup> And one commentator, a critic of the value of demeanor evidence,<sup>211</sup> subscribes to the antithesis inference if a witness's testimony can reasonably be deemed false without relying on demeanor evidence.<sup>212</sup>

In 1962, nine years after *Dyer*, a divided Supreme Court in *Poller v. Columbia Broadcasting System, Inc.* flirted with the antithesis inference in the

<sup>203</sup> *Id.*

<sup>204</sup> See Imwinkelried, *supra* note 47, at 193.

<sup>205</sup> 369 U.S. 404, 408 (1962).

<sup>206</sup> *Id.* at 418 (Frankfurter, J., dissenting).

<sup>207</sup> Bauman, *supra* note 48, at 526 (noting that "Judge Frank . . . fails to cite cases which permit a plaintiff to win without presenting affirmative evidence proving the material facts of the claim" and that "[i]t is exceedingly doubtful if any such cases can be found").

<sup>208</sup> This reasoning is reminiscent of the First Circuit's critique of the antithesis inference. See *Janigan*, 344 F.2d at 784–85 (reasoning that the antithesis inference would allow a plaintiff to create substantive evidence by impeaching witnesses).

<sup>209</sup> Friedman *supra* note 183, at 735 n.134; see also *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1324–25 (11th Cir. 2011) (Korman, J., dissenting). As discussed above, this characterization creates more problems than it solves. See *supra* notes 82–134 and accompanying text.

<sup>210</sup> Schnapper, *supra* note 3, at 268; accord *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 883 (1st Cir. 1966) ("Affirmative proof . . . that the reason given was false warrants the inference that some other reason was being concealed." (citation omitted)). See generally Dorsaneo, *supra* note 29, at 1705 (suggesting that "uncontradicted and unimpeached testimony of a disinterested fact witnesses" alone does not permit the antithesis inference).

<sup>211</sup> See Wellborn, *supra* note 76, at 1075.

<sup>212</sup> *Id.* at 1103.

antitrust context, noting that “where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.”<sup>213</sup> But in the last fifty years, courts have almost uniformly rejected the antithesis inference.<sup>214</sup> For instance, in the Supreme Court’s 1968 decision in *First National Bank of Arizona v. Cities Service Co.*, the Court decided a summary-judgment case against another antitrust plaintiff based on the Court’s own conclusion that the defendant’s lawful explanation for its conduct was “much more plausible” than the plaintiff’s theory of liability.<sup>215</sup> In this case, the Court made no mention of the possibility that a jury might draw the opposite conclusion based upon the demeanor of the defendant’s witnesses at trial.<sup>216</sup> Indeed, the Court upheld summary judgment for the defendant even though the plaintiff was unable to question several pivotal witnesses.<sup>217</sup>

The Supreme Court drove the nail into the coffin of the antithesis inference in its 1986 decision in *Anderson v. Liberty Lobby, Inc.*<sup>218</sup> There, the Court held that a plaintiff opposing summary judgment could not “defeat a defendant’s properly supported motion . . . by merely asserting that the jury might, and legally could, disbelieve the defendant’s denial . . . .”<sup>219</sup> In short, the Court held that the antithesis inference has no role to play in summary-judgment decisions. Similarly, Justice Antonin Scalia recently expressed skepticism that the evidence at trial will be more helpful to a plaintiff than the evidence in the summary-judgment record.<sup>220</sup> The upshot is that a defendant who lies under oath in an affidavit can avoid subjecting himself to the rigors of cross-examination at trial if the plaintiff does not have access to other proof.<sup>221</sup> That

<sup>213</sup> 368 U.S. 464, 473 (1962).

<sup>214</sup> See *supra* note 186 (collecting cases).

<sup>215</sup> 391 U.S. 253, 285 (1968).

<sup>216</sup> See *id.* at 284–88.

<sup>217</sup> *Id.* at 303 (Black, J., dissenting) (noting that plaintiff “never had an opportunity to question four of the eight [defense witnesses] who had been most intimately connected with the alleged transactions”).

<sup>218</sup> See 477 U.S. 242, 256 (1986).

<sup>219</sup> *Id.* Likewise, the lower courts have continued to reject the antithesis inference. See, e.g., *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1049 n.14 (10th Cir. 2013) (reasoning that the court could not reverse summary judgment “on the presumption the jury could simply choose not to believe [the defendant’s] evidence”); *LaFrenier v. Kinirey*, 550 F.3d 166, 167 (1st Cir. 2008) (“The appeal sounds a single key theme: that summary judgment could not be granted because LaFrenier is entitled to attack the credibility of the officers’ testimony. As a matter of law this is incorrect.”); *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998) (holding that “concerns regarding the credibility of witnesses cannot defeat summary judgment”).

<sup>220</sup> Transcript of Oral Argument at 56, *Ortiz v. Jordan*, 131 S. Ct. 884 (2011) (No. 09-737), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-737.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-737.pdf), archived at <http://perma.cc/C3KK-JXUY> (“That’s not going to happen very often.”).

<sup>221</sup> There are nevertheless a few courts, including the Tenth Circuit, that continue to hold “that ‘summary judgment should not be based on the deposition or affidavit of an interested party . . . as to facts known only to him—a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony.’” *Wood v. Handy & Harman Co.*, 318 F. App’x 602, 606

result is especially troublesome in state-of-mind cases, where veracity is critical but untested by the cold record of an affidavit or even a deposition transcript.<sup>222</sup>

## 2. The Antithesis Inference in Employment-Discrimination and Criminal Cases

Despite the general judicial hostility to the antithesis inference, two categories of cases have embraced a limited form of it: employment-discrimination cases under statutes like Title VII of the Civil Rights Act of 1964 and the Age Discrimination and Employment Act, as well as criminal cases.<sup>223</sup> In both areas, courts have held that juries are sometimes free to infer, from the conclusion that a witness is lying, that the truth is the opposite of the lie.

The Supreme Court recognizes that circumstantial evidence is critical in employment-discrimination cases because “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”<sup>224</sup> Thus, the framework for proving employment discrimination through circumstantial evidence requires plaintiffs initially to establish only that they belong to a protected class (e.g., race, gender, national origin, or age), were qualified for their position, and suffered an adverse employment action that someone outside the protected class did not suffer.<sup>225</sup> The burden then shifts to the employer to offer a nondiscriminatory reason for the employment action.<sup>226</sup> At that point, the factfinder must decide whether the employer’s proffered reason was pretextual and, if it was, whether discrimination actually provoked the action.<sup>227</sup>

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(10th Cir. 2008) (quoting *Madison v. Deseret Livestock Co.*, 574 F.2d 1027, 1037 (10th Cir. 1978)). But most courts hold that a challenge to interested-party testimony is not enough to defeat summary judgment. *See, e.g.*, *Coe v. N. Pipe Prods., Inc.*, 589 F. Supp. 2d 1055, 1075 (N.D. Iowa 2008) (holding that where the nonmovant “merely asserted that the witnesses are ‘interested,’ [the] court . . . may consider the ‘interested’ witnesses’ factual assertions in its disposition of the summary judgment motion”); 377 Realty Partners, L.P. v. Taffarello, 561 F. Supp. 2d 659, 662 (E.D. Tex. 2007) (reasoning that “summary judgment may be granted based upon the affidavits of interested parties” if the affidavits are clear and consistent); *Martinez v. Prestige Ford Garland Ltd. P’ship*, No. Civ.A.3:03-CV-251-L, 2004 WL 1194460, at \*4 n.7 (N.D. Tex. May 28, 2004) (“The court knows of no rule which requires exclusion of an affidavit because the affiant is an interested party.”).

<sup>222</sup> *Cf. Bauman, supra* note 48, at 490 (“[T]here appears to be no reason for giving to a party moving for summary judgment an advantage he would not enjoy at a trial . . .”).

<sup>223</sup> *See, e.g.*, 29 U.S.C. § 623 (2012) (age discrimination); 42 U.S.C. § 2000e-2 (2006) (employment discrimination); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (discrimination context); *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion) (criminal context).

<sup>224</sup> *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

<sup>225</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (articulating the threshold criteria for Title VII claims). The Court has not squarely addressed the application of the *McDonnell Douglas* framework to cases involving age discrimination but has instead assumed that it applies. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

<sup>226</sup> *McDonnell Douglas*, 411 U.S. at 802–03.

<sup>227</sup> *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

The finding that the employer's reason was pretextual does not automatically require the factfinder to find for the plaintiff. For example, in the 1993 U.S. Supreme Court case *St. Mary's Honor Center v. Hicks*, the Court distinguished between a subsequent finding of "unlawful discrimination" and "the much different (and much lesser) finding that the employer's explanation of its action was not believable."<sup>228</sup> Nevertheless, in 2000, the Court suggested in *Reeves v. Sanderson Plumbing Products, Inc.* that, at least in some cases, a factfinder *may* use a finding of pretext to conclude that the employer engaged in unlawful discrimination: "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."<sup>229</sup> The Court couched its holding within "the *general principle of evidence law* that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"<sup>230</sup>

It is rather astonishing that the Court characterized the antithesis inference as a "general principle of evidence law" when the vast majority of courts (including the Supreme Court itself) have rejected it.<sup>231</sup> Other than in employ-

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<sup>228</sup> *Id.* Under *Hicks*, even when the jury disbelieves the employer, the antithesis inference "is not required and may not even be the only reasonable conclusion." Pardo, *supra* note 105, at 1506; see *Hicks*, 509 U.S. at 515. At least one commentator disputes the soundness of the Court's reasoning, however. Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 58–59 (2000) ("If the employer lies about the reason for the plaintiff's discharge, it is more likely than not that the actual reason is one that is adverse to its interests.").

<sup>229</sup> 530 U.S. at 147.

<sup>230</sup> *Id.* (emphasis added) (quoting *Wright*, 505 U.S. at 296 (plurality opinion)). Despite the sweeping language in *Reeves*, demeanor may not be an adequate basis for demonstrating pretext, as most courts require the plaintiff to adduce additional evidence to call the employer's credibility into legitimate question. See, e.g., *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 393 (6th Cir. 2008) (noting that pretext can be demonstrated if the employer's proffered reasons: (1) are not factually supported, (2) are not the actual reasons for an action, (3) are insufficient to explain the employer's action, or (4) would have been an unreasonable action for the employer to take); *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003). *Reeves* also cautioned, obliquely, that a finding of pretext would not be sufficient to allow a case to reach a jury when there is conclusive evidence of "some other, nondiscriminatory reason for the employer's decision" or a weak allegation of pretext coupled with "abundant and uncontroverted independent evidence that no discrimination had occurred." 530 U.S. at 148. Nevertheless, once the plaintiff has adduced evidence suggesting pretext, most courts allow cases to go to the jury. See, e.g., *Carter v. Toyota Tsusho Am., Inc.*, 529 F. App'x 601, 608–10 (6th Cir. 2013) (holding that a fact question as to pretext, without additional evidence of discrimination, will always be sufficient to survive summary judgment); *Black v. Pan Am. Labs., L.L.C.*, 646 F.3d 254, 276 n.11 (5th Cir. 2011) (noting that pretext alone is insufficient only in "rare" cases (quoting *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir. 2000) (internal quotation marks omitted)); see also *Burgess v. Bowen*, 466 F. App'x 272, 277 (4th Cir. 2012) (noting that pretext alone is insufficient only in "unique situations").

<sup>231</sup> See *supra* note 186 (collecting cases). This statement takes on further significance given the Supreme Court's recognition that "trial courts should not treat discrimination differently from other ultimate questions of fact." *Reeves*, 530 U.S. at 148 (quoting *Hicks*, 509 U.S. at 524) (internal quotation marks omitted).

ment discrimination cases, the antithesis inference has gained traction only in criminal cases. So it perhaps is not surprising that the *Reeves* Court's conclusory acceptance of the antithesis inference relies on a 1992 Supreme Court criminal case, *Wright v. West*.<sup>232</sup>

In *Wright*, a plurality of the Court, citing Judge Hand's opinion in *Dyer*,<sup>233</sup> held that a jury was free "to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt."<sup>234</sup> Although the antithesis inference did not garner the support of a majority of justices in *Wright*, several circuit courts have come to embrace it in criminal cases. The value of the antithesis inference is particularly well established in the Eleventh Circuit, where a defendant's statement may be regarded as substantive evidence of guilt if the jury doubts its veracity.<sup>235</sup> A similar rule obtains in the First and Ninth Circuits<sup>236</sup> and has been supported by at least one commentator,<sup>237</sup> whereas the Sixth and D.C. Circuits have taken a contrary view.<sup>238</sup> The D.C. Circuit has criticized the derogation of a testifying defendant's appellate rights that results from use of the antithesis inference.<sup>239</sup> In those cases, the appellate court would be required to presume that the jury based the conviction on its disbelief

<sup>232</sup> See *Reeves*, 530 U.S. at 134 ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." (citing *Wright*, 505 U.S. at 296)).

<sup>233</sup> *Wright*, 505 U.S. at 296 (citing *Wilson v. United States*, 162 U.S. 613, 620–21 (1896); *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), *aff'd*, 506 U.S. 534 (1993); *Dyer*, 201 F.2d at 269). The *Wright* Court's reliance on Judge Hand's opinion in *Dyer* is curious in light of Judge Hand's ultimate rejection of the antithesis inference. See *Dyer*, 201 F.2d at 269; *supra* notes 201–207 and accompanying text (discussing *Dyer*).

<sup>234</sup> *Wright*, 505 U.S. at 296 (plurality opinion).

<sup>235</sup> *United States v. Williams*, 390 F.3d 1319, 1325 (11th Cir. 2004) ("[A] statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt." (quoting *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995) (internal quotation marks omitted))). Thus, defendants who choose to testify expose themselves to great risk. *Id.*

<sup>236</sup> *United States v. Cordova Barajas*, 360 F.3d 1037, 1041 (9th Cir. 2004) ("The jury was free to disbelieve Mr. Barajas and infer the opposite of his testimony to support its verdict."); *United States v. Cintolo*, 818 F.2d 980, 989 (1st Cir. 1987) ("The jury was reasonably entitled to disbelieve Cintolo's testimony regarding his motives and to credit the (entirely plausible) contrary interpretation urged by the government.").

<sup>237</sup> Minzner, *supra* note 76, at 2559 ("Once the jury concludes a defendant has committed perjury, they are entitled to take that as affirmative evidence of guilt.").

<sup>238</sup> *United States v. El Sayed*, 470 F. App'x 491, 493–94 (6th Cir. 2012) (noting that the antithesis inference cannot remedy otherwise insufficient evidence, despite the high deference given to a jury's credibility determinations); *United States v. Bailey*, 553 F.3d 940, 946–47 (6th Cir. 2009) (holding that the prosecution has the burden of producing affirmative evidence as to the elements of the charged crime "[r]egardless of whether the jury believed [the defendants'] oral testimony"); *United States v. Ziegler*, 994 F.2d 845, 849–50 (D.C. Cir. 1993).

<sup>239</sup> See *Ziegler*, 994 F.2d at 849. The *Ziegler* court observed that unlike other types of evidence, "[d]emeanor evidence is not captured by the transcript; when the witness steps down, it is gone forever." *Id.* Thus, the *Ziegler* court felt that it was unable to "determine whether [the defendant], by her demeanor on the stand, supplied the evidence needed to support her conviction." *Id.* at 850.

of the defendant's testimony, so "the evidence invariably would be sufficient to sustain the conviction."<sup>240</sup>

Even when courts in employment-discrimination and criminal cases permit the antithesis inference, they impose an important limitation: the plaintiff or prosecutor must still meet the initial burden of proof without the inference. In employment cases, the employer has no burden to adduce evidence of a nondiscriminatory motive—and, thus, a finding of pretext can never arise—unless and until the plaintiff presents a prima facie case.<sup>241</sup> In criminal cases, a defendant who chooses to testify does not do so until after the prosecution has rested its case,<sup>242</sup> meaning the prosecution has presumably adduced sufficient evidence without the defendant's testimony.<sup>243</sup> Still, discrimination and criminal cases are anomalous in their inclusion of the antithesis inference in the overall landscape of what a factfinder may permissibly consider in adjudicating liability.

### 3. The Antithesis Inference in Evaluating the Propriety of Punitive Damages

Although the law is scant, there has been some suggestion that the antithesis inference may have a role to play in evaluating the propriety of punitive-damages awards. For example, in 1996, in *BMW of North America, Inc. v. Gore*, the Supreme Court held that due process requires lower courts to review punitive damage awards for excessiveness and established "the degree of reprehensibility of the defendant's conduct" as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."<sup>244</sup> Importantly, this reprehensibility finding, in turn, hinges largely on the witnesses' credibility.<sup>245</sup> Indeed, in the Court's 2001 case *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*—though holding that an appellate court generally owes no deference to the district court's excessiveness review<sup>246</sup>—the Court noted that district courts do have a superior vantage point for conclusions premised on "witness credibility and demeanor."<sup>247</sup> In that vein, the Ninth Circuit has suggested that a defendant's persistent dishonesty during trial—especially his de-

<sup>240</sup> *Id.* at 849.

<sup>241</sup> *McDonnell Douglas*, 411 U.S. at 802–03.

<sup>242</sup> *See Zafiro*, 945 F.2d at 888 ("The government cannot force a defendant to take the stand . . .").

<sup>243</sup> *See generally* FED. R. CRIM. P. 29(a) (permitting defendant to move for judgment of acquittal based on insufficient evidence).

<sup>244</sup> 517 U.S. 559, 575 (1996); *see also* *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (discussing *Gore*).

<sup>245</sup> *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1349 (Fed. Cir. 2001) (noting that the reprehensibility determination "depends in meaningful part upon the credibility of witnesses"), *vacated*, 538 U.S. 974, *reinstated as modified*, 345 F.3d 1366, 1372 (Fed. Cir. 2003).

<sup>246</sup> 532 U.S. 424, 443 (2001) ("[T]he *de novo* standard should govern [the appellate court's] decision.").

<sup>247</sup> *Id.* at 440.

ceitful testimony—justified an inference that the defendant attempted to conceal his wrongful conduct, which consequently supported a punitive-damages award.<sup>248</sup> Similarly, in a fraud case, the Federal Circuit found the requisite level of reprehensibility based in part on the trial court’s determination that several defense witnesses had lied in court.<sup>249</sup>

These decisions fit squarely within the doctrine articulated by many courts that a defendant’s efforts to conceal wrongful conduct can warrant an inference that the defendant had the requisite nefarious state of mind for punitive damages.<sup>250</sup> There is attractive logic to extending this doctrine to circumstances in which a witness lies at trial because testimonial lies are consistent with an overall plan of concealment. But it also takes the antithesis inference one step further than its other applications; where punitive damages are involved, the available inference is not only that the truth is the opposite of the witness’s testimony, but that the *purpose* of the false testimony was a malicious intent to cover up the misconduct. Perhaps for that reason, some courts—before permitting a jury to consider punitive damages based on concealment—insist on a specific showing that the defendant intended to cover up the wrongdoing at the time of the wrongdoing, and not simply after the fact.<sup>251</sup>

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<sup>248</sup> *S. Union Co. v. Sw. Gas Corp.*, 415 F.3d 1001, 1010 (9th Cir. 2005) (observing the defendant’s “persever[ance] in hiding his wrongful acts throughout the trial and in particular while testifying in Court before the jury” (quoting *S. Union Co. v. Sw. Gas Corp.*, 281 F. Supp. 2d 1090, 1096 (D. Ariz. 2003) (internal quotation marks omitted))). The Ninth Circuit nevertheless vacated the punitive-damages award as excessive. *See id.* at 1011.

<sup>249</sup> *Rhone-Poulenc*, 272 F.3d at 1349 (remarking that the defense witnesses made “several rather implausible explanations and assertions”). Commentators have argued that the Federal Circuit based its reprehensibility finding in *Rhone-Poulenc* “almost entirely on perceived witness credibility.” Gale R. Peterson & Derrick A. Pizarro, *Recent Developments in Patent Law: Decisions by the U.S. Court of Appeals for the Federal Circuit*, 12 TEX. INTEL. PROP. L.J. 497, 555 (2004).

<sup>250</sup> *See, e.g.*, *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 551 (1999) (holding that an employer that “conceal[s] evidence regarding its ‘true’ selection procedures” can, on that basis, be held liable for willful violation of law necessary to an award of punitive damages); *Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 86 (2d Cir. 2007) (upholding a punitive-damages award where the defendants “sought to advance and conceal their scheme through an almost endless series of lies, threats, and chicanery” (quoting *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481, 490 (S.D.N.Y. 2003), *aff’d in part, rev’d in part*, 388 F.3d 39, 65 (2d Cir. 2004) (internal quotation marks omitted))); *Romano v. U-Haul Int’l*, 233 F.3d 655, 673 (1st Cir. 2000) (finding requisite reprehensibility where the employer “knowingly violated [the employee’s] federally protected rights and then attempted to conceal this violation”); *Sec. Title Agency, Inc. v. Pope*, 200 P.3d 977, 999 n.22 (Ariz. Ct. App. 2008) (“In determining whether a defendant’s conduct was reprehensible for the purpose of deciding if an award is constitutionally excessive . . . [.] we may consider a defendant’s attempt to conceal its wrongdoing.”); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 344 (Ohio 1994) (“An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded . . .”).

<sup>251</sup> *E.g.*, *Farm Bureau Life Ins. Co. v. Am. Nat’l Ins. Co.*, 408 F. App’x 162, 169–70 (10th Cir. 2011) (noting that the defendant’s “attempt . . . to cover his tracks” was only “after he had initiated his recruiting scheme, and the jury had no reason to infer otherwise”); *Juarez v. ACS Gov’t Solutions Group, Inc.*, 314 F.3d 1243, 1247 (10th Cir. 2003) (noting that the defendant’s “cover-up after the fact does not necessarily import previous evil intent”); *cf. Leavey v. UNUM/Provident Corp.*, No. CV-02-

#### 4. The Antithesis Inference as a Logical Extension of the Adverse Inference

Finally, one might consider the antithesis inference a cousin to the well-established rule that a factfinder may draw an adverse inference from evidentiary lapses that result from culpable conduct.<sup>252</sup> The adverse inference applies, for example, “where evidence has been altered or destroyed.”<sup>253</sup> In cases of spoliation, if the party responsible for the destruction had a “culpable state of mind,”<sup>254</sup> the judge may instruct the jury that “the party that has prevented production did so out of the well-founded fear that the contents would harm him.”<sup>255</sup> The jury is then free, but not required, to infer that missing evidence would have established facts adverse to the nonproducing party.<sup>256</sup> A similar adverse inference is available in civil cases when a party chooses not to testify<sup>257</sup> or refuses to answer questions on the basis of the Fifth Amendment privilege against self-incrimination.<sup>258</sup>

The adverse inference, when applicable, is potentially powerful; unlike the antithesis inference, some courts permit the beneficiary of the adverse inference to use it as an outright substitute for affirmative evidence that would

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2281-PHX-SMM, 2006 WL 1515999, at \*7 (D. Ariz. May 26, 2006) (noting that the defendants’ “litigation conduct” was relevant to the punitive-damages inquiry where a “cover-up . . . occurred in tandem with [the] wrongful conduct”).

<sup>252</sup> See Dale A. Nance, *Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U. L. REV. 1089, 1092 (2010) (“Courts use adverse inferences in both civil and criminal cases to respond to a variety of forms of evidentiary misconduct by a party . . .”). Nance argues that courts should resort to other forms of discovery sanctions in order to insulate the jury from the burden of evaluating misconduct in the administration of the litigation. *Id.* at 1090–91.

<sup>253</sup> *Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 73 (3d Cir. 2012). Altering or destroying evidence results in its spoliation. *Id.* Furthermore, parties have a duty to preserve evidence once litigation becomes foreseeable; failure to do so is also spoliation. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

<sup>254</sup> *E.g.*, *Stocker v. United States*, 705 F.3d 225, 235 (6th Cir. 2013). Some courts require a showing of bad faith to demonstrate a “culpable state of mind,” holding that “mere negligence in losing or destroying records is not sufficient to draw an adverse inference.” *Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009); *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004). Instead, these courts hold that an adverse inference can be drawn only where there is evidence demonstrating an intentional destruction of evidence that was motivated by a desire to hide information. *Id.* Other courts, however, hold that a knowing or negligent destruction of evidence can justify drawing an adverse inference. *E.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002) (“[A]n adverse inference instruction . . . may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence . . .”); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (noting that “a finding of ‘bad faith’ is not a prerequisite” to allowing a jury to draw an adverse inference from the destruction or spoliation of evidence (citation omitted)).

<sup>255</sup> *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995).

<sup>256</sup> *Kwon v. Costco Wholesale Corp.*, 469 F. App’x 579, 580 (9th Cir. 2012).

<sup>257</sup> *Latif v. Obama*, 666 F.3d 746, 758–59 (D.C. Cir. 2011).

<sup>258</sup> *E.g.*, *Mitchell v. United States*, 526 U.S. 314, 328 (1999).

otherwise be required to meet the burden of proof.<sup>259</sup> This rule is not universal; in fact, the traditional common law rule requires the party carrying the burden to meet it without relying on an adverse inference.<sup>260</sup> Thus, the inference was traditionally a tool to help sway the jury, rather than a tool to establish evidentiary sufficiency. But in recent years, some courts have been willing to permit the adverse inference to suffice, on its own, to meet an evidentiary burden.<sup>261</sup>

It is difficult to justify a differentiation between the antithesis inference and the adverse inference. In both circumstances, the prevaricating party seeks to deceive the jury by either withholding unfavorable evidence or concealing it with false testimony. In both cases, then, the jury should be permitted to find the facts at issue in favor of the opposing party.

### III. THE HARMFUL RESULT: LOSS OF DIVERSITY, LOSS OF DEMOCRACY

The derogation of the jury's inference-drawing function in civil cases has serious consequences. In 1874, the Supreme Court explained in *Sioux City & Pacific Railroad Co. v. Stout* that "twelve [citizens] know more of the common affairs of life than does one" and "that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."<sup>262</sup> The sheer size of a civil jury ensures greater diversity. Beyond the numbers, jurors historically have come "from the various classes and occupations of society,"<sup>263</sup> in

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<sup>259</sup> *E.g.*, *Welsh v. United States*, 844 F.2d 1239, 1248 (6th Cir. 1988) (holding that spoliation justifies a "rebuttable presumption," sufficient to submit the case to a jury because the presumption "establishes the missing elements of the plaintiff's case that could only have been proved by the availability of the missing evidence"), *overruled on other grounds*, *Adkins v. Wolever*, 554 F.3d 650, 651 (6th Cir. 2009); *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 219 (1st Cir. 1982) (affirming the district court's decision to give "the act of document destruction sufficient weight to satisfy" the plaintiff's burden of proof on a particular fact); *Sweet v. Sisters of Providence in Wash.*, 895 P.2d 484, 491 (Alaska 1995) (imposing a rebuttable presumption for the plaintiff where medical providers failed to maintain adequate records); *Pub. Health Trust of Dade Cnty. v. Valcin*, 507 So. 2d 596, 600–01 (Fla. 1987) (same). Wigmore suggested that a party should be able to use an adverse inference to carry its burden of proof. 2 WIGMORE, *supra* note 45, § 291, at 226–28. McCormick, on the other hand, argued that adverse inferences resulting from an opponent's failure to produce evidence cannot satisfy a litigant's burden of proof. KENNETH S. BROUN, ET AL., MCCORMICK ON EVIDENCE § 264, at 408 (John W. Strong ed., 5th ed. 1999).

<sup>260</sup> *Battocchi v. Wash. Hosp. Ctr.*, 581 A.2d 759, 764–65 (D.C. 1990) (rejecting the view of some jurisdictions that a "presumption from destruction of evidence can substitute for a lack of affirmative proof on an essential element of a party's prima facie case"); *Kammerer v. Sewerage & Water Bd.*, 633 So. 2d 1357, 1361 (La. Ct. App. 1994) (Waltzer, J., concurring); *Larsen v. Romeo*, 255 A.2d 387, 391 (Md. 1969) (reasoning that an adverse inference "does not amount to substantive proof and can not take the place of proof of a fact necessary to the other party's case").

<sup>261</sup> *Kammerer*, 633 So. 2d at 1361 & n.4 (Waltzer, J., concurring) (noting the "recent movement" in certain jurisdictions); *see also, e.g., supra* note 259 (collecting cases).

<sup>262</sup> 84 U.S. (17 Wall.) 657, 664 (1873).

<sup>263</sup> *Maher v. People*, 10 Mich. 212, 222 (1862). It is nevertheless true that the Supreme Court has occasionally had to intervene when courts or litigants sought to exclude certain members of their community from jury service. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (reversing a

part to ensure that federal judges, “blissfully unaware” of the plight of the average person,<sup>264</sup> would not decide cases based on their own life experiences. Although judges now have more diverse backgrounds than in the past, the judiciary still is relatively homogenous.<sup>265</sup> Even Justice Scalia, not known for championing diversity, acknowledges that Supreme Court justices are members of an “elite class.”<sup>266</sup>

It stands to reason that members of an elite class will draw inferences differently from other segments of society. As Professor Louis Jaffe recognized over fifty years ago, evaluation of evidence depends on the unique characteristics and experiences of individual factfinders.<sup>267</sup> Thus, as the Supreme Court has recognized, “[f]or a jury to perform its intended function as a check on official power, it must be a body drawn from the community.”<sup>268</sup> So it is no surprise that cases like the Court’s 2007 and 2009 decisions in *Twombly* and *Iqbal* cause commentators to wonder whether the justice system tilts in favor of those who resemble the judges—the “societal elites such as government officials, large corporations, or employers.”<sup>269</sup> At the very least, the perception is enough to erode trust in the judicial system.<sup>270</sup>

But flagging confidence in the system is symptomatic of larger substantive concerns about the quality of the decision making. Life experiences *really do* matter. Two commentators illustrate this maxim with a compelling example: the perceived cause of heartburn after eating a spicy meal will differ as

conviction after the prosecution used peremptory challenges to strike all African Americans from the jury); *Norris v. Alabama*, 294 U.S. 587, 598–99 (1935) (reversing a conviction when African Americans were uniformly deemed unqualified for jury service).

<sup>264</sup> Schnapper, *supra* note 3, at 281. The typical federal judge is a white man whose adult experiences have been limited to college, law school, and prestigious employment. *Id.*

<sup>265</sup> Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 347–48 (2012) (citing statistics on the judiciary).

<sup>266</sup> *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (arguing that the “elite” judiciary should defer to Colorado citizens who voted to prevent municipalities from enacting ordinances to protect against discrimination based on sexual orientation).

<sup>267</sup> Jaffe, *supra* note 149, at 1022.

<sup>268</sup> *Batson*, 476 U.S. at 86 n.8.

<sup>269</sup> Spencer, *supra* note 114, at 187; *see also* Miller, *supra* note 105, at 336 (“The process described in *Iqbal* appeals too much to judicial subjectivity, which inevitably depends (at least in part) on an individual judge’s background, values, preferences, education, and attitudes . . .”).

<sup>270</sup> *See, e.g.*, Kahan et al., *supra* note 107, at 884–85. The judicial system’s legitimacy depends on the citizenry’s willingness to “assent” to verdicts. *Id.* This assent, in turn, often stems from a shared social understanding. *Id.* Thus, the judiciary’s legitimacy is undermined if its decision makers alienate certain cultural perspectives. *See id.* One “obvious example” is illustrated by the fact that “he Jim Crow exclusion of African Americans from juries led to a cynical and dispirited view of legal institutions in minority communities.” *Id.* at 885 (citation omitted). Aside from cultural alienation, the Court’s intrusion into the jury’s province alarms those who recognize the need for a democratic check on the judicial process. *See* Robertson, *supra* note 22, at 206 (“Fear of a runaway jury is not the only threat to public legitimacy, however; indeed, fear of unchecked judicial power may pose just as much of a concern to the public.”).

between the sufferer's spouse (who might point to the meal) and doctor (who might look for gastrointestinal explanations).<sup>271</sup> A factfinder's unique experiences and perspectives frequently determine which inferences will appear most likely.<sup>272</sup> One scholar, for example, has already empirically demonstrated that under *Twombly* and *Iqbal*, white judges dismiss discrimination claims on the pleadings more frequently than African-American judges.<sup>273</sup> Thus, drawing from a cross-section of the community capitalizes on the Bayesian view of probability, a conceptual interpretation that views probabilities as subjective evaluations informed by past experience, and thus posits that "all probabilities [are] in the mind of the beholder."<sup>274</sup> Because "both jurors and judges may resort to heuristic decision making,"<sup>275</sup> there is an inherent danger in allowing a case to fall prey to a single judge's heuristics rather than a diverse jury's.

Perhaps no case better serves as a cautionary warning than *Scott v. Harris*, a 2007 case in which a majority of the Supreme Court held, after viewing a video of a police chase, that "no reasonable jury could have believed" the plaintiff's assertion that the police officers involved used unnecessary deadly force.<sup>276</sup> What the Supreme Court majority failed to consider—presumably because the justices' own experiences with police officers were different from the plaintiff's—were "the competing, culturally grounded affective responses a high-speed police chase is likely to evoke: from fear of those who defy lawful authority; to resentment of abuses of power by the police; to distrust of authority generally; to anger at apparent indifference to the well-being of innocent bystanders."<sup>277</sup> Empirical evidence demonstrates that, in fact, many laypeople did not share the Supreme Court's views of the video.<sup>278</sup> The Court's decision "rigorously excludes" those who held this minority view, ultimately characterizing their perspectives as "unreasonable."<sup>279</sup> Thus, judicial encroachment on the jury's role

<sup>271</sup> Pardo & Allen, *supra* note 73, at 231–32.

<sup>272</sup> Schnapper, *supra* note 3, at 281 ("The understanding and experiences [that] a trier of fact brings to a case is often of decisive significance in the selection of inferences to be drawn from the evidence."). Accordingly, one commentator has observed that "a growing literature suggests that whether a person perceives discrimination depends, in part, on the person's background." Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227, 252 (2009).

<sup>273</sup> Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 211 (2013) ("White and Black judges decided Black plaintiffs' claims comparably under notice pleading, but . . . White judges [have] granted dismissal at a higher rate than Black judges under plausibility pleading.").

<sup>274</sup> See Friedman, *supra* note 86, at 518; see also Jonathan J. Koehler, *On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates*, 67 U. COLO. L. REV. 859, 863–64 (1996) ("According to Bayesian logic, one's prior beliefs . . . are combined with a quantitative measure of the probative value of the new evidence to form posterior beliefs.").

<sup>275</sup> Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 312–13 (2013).

<sup>276</sup> 550 U.S. 372, 380 (2007).

<sup>277</sup> See Kahan et al., *supra* note 107, at 854.

<sup>278</sup> *Id.* at 864–66.

<sup>279</sup> *Id.* at 842.

in drawing inferences violates an important tenet of our judicial system: ensuring that disputes are resolved by a group of people whose diverse attributes and experiences accurately reflect the community.<sup>280</sup>

In Bayesian terms, then, jurors can have different “priors” from judges and, indeed, from each other.<sup>281</sup> Juries also tend to reason differently from judges. Whereas law school trains lawyers and judges to apply linear reasoning,<sup>282</sup> jurors assess the whole body of evidence and decide the most probable narrative that can be drawn from it.<sup>283</sup> The Supreme Court has recognized the importance of analyzing evidence holistically rather than piecemeal; “as its pieces come together[,] a narrative gains momentum.”<sup>284</sup>

Perhaps it might be worth compromising these important benefits of the jury system if doing so would lead to objectively more accurate and consistent results. After all, jury trials are criticized for their tendency to produce inconsistent verdicts.<sup>285</sup> Research also suggests that jurors are often biased and unaware of pertinent information.<sup>286</sup> And it stands to reason that improper considerations are more likely to infect close cases than clear-cut ones. At bottom, then, a thorough debate might lead some to conclude that the Fifth Amendment due process right should sometimes override the Seventh Amendment jury-trial right.<sup>287</sup>

<sup>280</sup> See Thomas, *supra* note 107, at 776 (noting the importance of “a fair cross-section of the community, including people with different characteristics and experiences”).

<sup>281</sup> See Koehler, *supra* note 274, at 863–64.

<sup>282</sup> See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1547 (1991) (“The western concept of law is based on a patriarchal paradigm characterized by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles, and the ideal of the reasonable person.”).

<sup>283</sup> Griffin, *supra* note 275, at 285 (noting that jurors “interpret information not by considering and weighing each relevant piece of evidence in turn, but by constructing competing narratives and then deciding which story is more persuasive”).

<sup>284</sup> *Old Chief v. United States*, 519 U.S. 172, 187 (1997); *accord In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (noting that one of the “trap[s] to be avoided in evaluating evidence of an antitrust conspiracy . . . is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment”).

<sup>285</sup> Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1337 (2012). The random selection and finite existence of juries ensure some measure of erratic decision making. See Friedman, *supra* note 86, at 518 (“[I]t is inherent in the nature of juries, which do not articulate their decisions or in any other way bind their successors, that different panels may decide differently even when facing identical problems.”); Robertson, *supra* note 22, at 159 (describing research suggesting that jury verdicts appear inaccurate in one out of nine cases).

<sup>286</sup> Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys’ Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 6 (2012) (“Jurors are subject to a slew of cognitive biases and are not always attuned to information that legal policymakers expect.”).

<sup>287</sup> See *supra* notes 59–66 and accompanying text (discussing suggestions of a complexity exception to the Seventh Amendment in especially complicated cases).

But the empirical evidence also “points to jurors being remarkably conscientious in their work.”<sup>288</sup> Courts recognize as much in criminal cases, continuing to show strong deference to jurors’ ability to reach conclusions about a defendant’s state of mind based upon circumstantial evidence.<sup>289</sup> Furthermore, there is no reason to believe that transferring power from juries to judges increases consistency; in fact, research shows that judges and jurors are equally susceptible to “improper considerations.”<sup>290</sup> And judges frequently disagree with each other, confirming that—like jurors—their individual characteristics affect their evaluations of evidence.<sup>291</sup> Consider the disagreement between the five-justice majority and four dissenters in the Court’s 1986 decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, regarding whether the defendant’s conduct made “economic sense.”<sup>292</sup> Consider also divided appellate panels or appellate decisions that reverse trial courts on sufficiency questions.<sup>293</sup> Two judges’ determination of what is “reasonable” is a third judge’s “legal travesty.”<sup>294</sup> As Justice John Paul Stevens pointed out in *Scott*, “If two

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<sup>288</sup> Nance, *supra* note 129, at 228 (citing JOHN GUINThER, *THE JURY IN AMERICA* (1988)) (examining a variety of studies on aspects of juror behavior and decision making); see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 149 (1966). In one study, the overwhelming majority of surveyed jurors believed that fellow jurors “took their duties seriously.” GUINThER, *supra*, at 83. Furthermore, empirical evidence suggests that juries generally comprehend the facts and posture of the case and that they usually decide the case in accordance with the weight of the evidence. KALVEN & ZEISEL, *supra*, at 149; see also Robertson, *supra* note 22, at 159 & n.4 (observing that “juries decide cases accurately in approximately eight out of nine cases” (citing Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 307 (2007))).

<sup>289</sup> E.g., *McCormick v. United States*, 500 U.S. 257, 270 (1992) (“It goes without saying that matters of intent are for the jury to consider.”); *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013) (noting that for purposes of assessing a defendant’s participation in a bribery agreement, “the question is one of inferences taken from what participants say, mean[,] and do, all matters that juries are fully equipped to assess”).

<sup>290</sup> Griffin, *supra* note 275, at 329 n.272.

<sup>291</sup> Thomas, *supra* note 107, at 769.

<sup>292</sup> 475 U.S. 574, 587 (1986). Compare *id.* at 596–97 (reasoning that the defendants had “no rational economic motive to conspire”), with *id.* at 604 (White, J., dissenting) (recognizing the possibility that the defendants “valued profit-maximization over growth”). One commentator argues that the justices based their decisions on their “different views of the facts.” Thomas, *supra* note 107, at 772–73.

<sup>293</sup> Levin, *supra* note 15, at 148 (“Every time a court of appeals divides on what might be reasonable is evidence that different views exist, as is every instance in which an appellate court reverses a lower court on this question.”).

<sup>294</sup> Compare *Ortiz v. Jordan*, 316 F. App’x 449, 454 (6th Cir. 2009) (explaining that the defendant’s conduct was “reasonable,” thus immunizing her from liability), *rev’d*, 131 S. Ct. 884, 893 (2011), with *id.* at 456 (Daughtrey, J., dissenting) (arguing that the majority’s decision was a “legal travesty”). The Fifth Circuit has demonstrated a similar divisiveness. Compare *Dixon v. Wal-Mart Stores, Inc.*, 330 F.3d 311, 320 (5th Cir. 2003) (overturning a jury verdict by concluding that the plaintiff’s proffered inferences “defie[d] common sense, and [were] against all logic”), with *id.* at 322–23 (Dennis, J., dissenting) (arguing that the majority improperly drew “inferences for the moving party that the jury was not required to make”).

groups of judges can disagree so vehemently . . . , it seems eminently likely that a reasonable juror could disagree.”<sup>295</sup>

Finally, usurping the jury’s inference-drawing function has political ramifications. One commentator laments the loss of the civil jury trial’s role as a “safeguard against tyranny.”<sup>296</sup> Equally important is the loss of the jury’s power to add a gloss to a rule of decision.<sup>297</sup> For example, when jurors are permitted to exercise their inference-drawing power, they apply principles such as “reasonable speed and “ordinary care” to particular disputes.”<sup>298</sup> Another example: the “rule of reason” standard established in antitrust cases under § 1 of the Sherman Act,<sup>299</sup> where “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”<sup>300</sup> Jury verdicts thus serve as an expression of the community’s tolerance or intolerance for certain kinds of conduct and, in so doing, significantly influence the national character.<sup>301</sup> Individually, juries resolve discrete disputes; collectively, their verdicts are “a reflection of community values and norms.”<sup>302</sup> When judges take inference-drawing duties away from juries, they necessarily substitute their own values and norms for those that the jury would bring to bear in reaching their verdicts. This result undermines the jury’s political function and skews the way in which we shape and perceive community standards.

A cynic might suggest that something nefarious is happening, while others point to more benign explanations.<sup>303</sup> Certainly, there is room for turf disputes whenever we allocate power between different institutions, as I have ar-

<sup>295</sup> 550 U.S. at 396 (Stevens, J., dissenting); *see also* Thomas, *supra* note 107, at 771 (observing that Justice Stevens believed the justices assessed the plaintiff’s claim for summary judgment “based on their own views of the sufficiency of the evidence”).

<sup>296</sup> Dorsaneo, *supra* note 29, at 1697.

<sup>297</sup> Friedman, *supra* note 86, at 510–11 (noting that the jury has “a large role in shaping, or at least polishing, a rule of decision”).

<sup>298</sup> *Id.* at 511 (internal quotation marks omitted).

<sup>299</sup> 15 U.S.C. § 1 (2012); *see also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61–62 (1911) (applying the “rule of reason” standard in the antitrust context).

<sup>300</sup> Cont’l Television, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

<sup>301</sup> DE TOCQUEVILLE, *supra* note 34, at 262; *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 473 (1993) (O’Connor, J., dissenting) (noting that the jury system is “supported by sound considerations of . . . democratic theory”).

<sup>302</sup> Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589, 619 (2013). One scholar questions this view of the jury, however. *See* Solomon, *supra* note 285, at 1382 (arguing that “litigants and the public have little idea what norm was applied or violated” when a jury decides a case).

<sup>303</sup> Compare Schnapper, *supra* note 3, at 354 (“[L]eft to their own devices, a large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box.”), *with* Secunda, *supra* note 89, at 148 (arguing that discrepancies in judges’ interpretations of inferences stem from “cultural cognition,” which subconsciously influences their factual evaluations, rather than from overt ideology).

gued in the context of appellate jurisdiction.<sup>304</sup> These disputes center on not on who should win a particular conflict, but rather on who should decide it.<sup>305</sup> Perhaps the conflict is highlighted in the context of judges and juries because there has never been a clear partition between their respective roles.<sup>306</sup> Nevertheless, the Framers clearly believed that jury trials were indispensable because they constrained judicial power to decide cases.<sup>307</sup>

Chief Justice John Roberts admonishes that “a judge’s job is to ‘call balls and strikes, and not to pitch or bat.’”<sup>308</sup> But judges generally fail to limit their power relative to that of the jury.<sup>309</sup> It is time to address that problem, and I now turn to my solution for doing so.

#### IV. A THREE-PRONGED SOLUTION FOR REEMPOWERING THE CIVIL JURY IN STATE-OF-MIND CASES WHILE ADDRESSING THE ASSOCIATED COSTS

If we continue to value the democratic principles that underlie the jury system, then we cannot tolerate its gradual decline through judicial decisions that erode the jury’s power but fail to grapple with the important Seventh Amendment concerns at stake. At the same time, any proposal that seeks to restore the jury’s inference-drawing domain must realistically account for the underlying concerns, real or perceived, that have animated this erosion. Primarily, these concerns focus on the costs of litigation<sup>310</sup> and the costs of errant jury verdicts.<sup>311</sup>

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<sup>304</sup> See Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1647 (2011); see also Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 *FLA. L. REV.* 711, 725–26 (2013).

<sup>305</sup> Dorsaneo, *supra* note 29, at 1697 (noting that disputes focus “on ‘who should win’” rather than on “‘who should decide’ litigious controversies”).

<sup>306</sup> Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 *HOFSTRAL. REV.* 377, 453 (1996) (noting that there “has never been a razor-sharp separation” between judicial and jury power).

<sup>307</sup> Roger Roots, *The Rise and Fall of the American Jury*, 8 *SETON HALL CIRCUIT REV.* 1, 14 (2011) (“The Framers and Founders were quite explicit that they viewed trial by jury as necessary to thwart and obstruct judges, not merely prosecutors with weak cases.”).

<sup>308</sup> Noyes, *supra* note 105, at 858 (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of J. John G. Roberts, Jr.)).

<sup>309</sup> Sperino, *supra* note 272, at 258.

<sup>310</sup> See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (invoking the “potential expense” of discovery as one rationale for closely scrutinizing pleadings); *KASSIN & WRIGHTSMAN*, *supra* note 67, at 3 (noting criticisms of the expense of the jury system).

<sup>311</sup> Miller, *supra* note 9, at 988 (“[T]ort reform’ proponents criticize the jury system, characterizing juries as unsophisticated bodies more concerned with compensating sympathetic victims than with administering consistent justice.”); see also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474 (1993) (O’Connor, J., dissenting) (arguing that factors such as “prejudice, bias, and caprice” risk influencing jury verdicts).

This Part offers a solution that encompasses all these considerations, striking a balance in state-of-mind cases between due process and jury-trial rights without significantly compromising either. It involves three interlocking components: (1) precluding the pretrial disposition of cases that turn on a party's mental state;<sup>312</sup> (2) implementing a fee-shifting procedure to protect prevailing defendants from paying for the cost of litigating cases that involve extremely weak factual inferences;<sup>313</sup> and (3) making liberal use of the judicial power to grant new trials in cases where the jury has drawn questionable factual inferences.<sup>314</sup> The first component would restore the jury's inference-drawing power, whereas the second and third would guard against its misuse.

#### *A. Precluding the Pretrial Disposition of Cases Involving Mental State*

The first component of my proposal would preclude courts from resolving cases without a trial whenever state of mind is a dispositive issue. In these cases, the critical facts are typically within the exclusive domain of the party accused of wrongdoing. Therefore, the jury should be permitted to evaluate all evidence, including demeanor evidence, and to draw the dispositive inferences. This deference to juries would in no way interfere with the judicial power to decide a case by applying law to undisputed facts, which is the proper exercise of judicial authority.<sup>315</sup> Nor would it preclude a judge from granting a motion to dismiss or summary judgment on an element of the claim not implicating the defendant's state of mind. For example, a court could grant summary judgment to the defendant on a fraud claim if the record established that the plaintiff suffered no damages. But it would not permit a judge to decide state-of-mind cases without a trial simply because the judge is convinced that the evidence supports only one inference about the defendant's state of mind.<sup>316</sup>

To implement this aspect of my proposal, it would suffice to incorporate a state-of-mind exception into the existing motion-to-dismiss and summary-judgment rules,<sup>317</sup> as well as the rule governing judgment as a matter of law during and after trial.<sup>318</sup> But the exception would apply only to the extent the resolution of the case turns on state of mind; if the motion establishes the movant's right to judgment on a different element of the claim, such as causation or damages, the court should still grant the motion.

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<sup>312</sup> See *infra* notes 315–339 and accompanying text.

<sup>313</sup> See *infra* notes 340–356 and accompanying text.

<sup>314</sup> See *infra* notes 357–378 and accompanying text.

<sup>315</sup> Cf. Miller, *supra* note 9, at 1091–92 (noting that summary judgment may be proper when “there truly is no genuine issue of material fact” because “there is utility to filtering out claims that do not warrant the further expenditure of systemic and litigant resources”).

<sup>316</sup> See generally *id.* (arguing that a jury should hear a case if facts are in dispute).

<sup>317</sup> See generally FED. R. CIV. P. 12(b) (motion to dismiss); *id.* 56 (summary judgment).

<sup>318</sup> See generally *id.* 50.

Properly defining what qualifies as a state-of-mind case is fairly straightforward. The category encompasses any claim in which the plaintiff must demonstrate the defendant's knowledge, motive, or intent in order to prevail—an analysis that courts already undertake without difficulty.<sup>319</sup> Simply listing the elements of the claim should identify whether the claim fits the bill. For example, cases involving intentional torts, civil rights, discrimination, corporate wrongdoing, and unlawful conspiracies all require proving a defendant's state of mind or surreptitious behavior.<sup>320</sup> Even simple negligence cases can involve a defendant's state of mind, as in premises-liability cases in which the defendant's awareness of a hazard is dispositive.<sup>321</sup>

We can illustrate this proposal by applying it to the three problematic areas of inference drawing. First, the state-of-mind exception would preclude judges from relying on a finding of implausibility to take state-of-mind cases away from juries. Thus, in *Iqbal*, the allegations of knowledge and intentional misconduct against high-ranking government officials<sup>322</sup> would have survived a pleading challenge, no matter how implausible or conclusory a judge might have believed them to be. Likewise, it would have been up to a jury, not a judge, to determine whether allegations of intentional misconduct in *Matsushita* were plausible from an economic standpoint.<sup>323</sup> Importantly, however, judges would not be required to refrain from dismissing complaints with implausible allegations that do not implicate state of mind. Justice David Souter's examples in *Iqbal* of "allegations that are sufficiently fantastic to defy reality as we know it," such as "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel,"<sup>324</sup> would not survive without corroborative evidence. Likewise, the plaintiff's allegations in *Arnstein v. Porter*—that Cole Porter's stooges had ransacked his apartment<sup>325</sup>—would not

<sup>319</sup> See, e.g., *Merck & Co. v. Reynolds*, 559 U.S. 633, 648–50 (2010) (explaining that scienter is an element of a claim for federal securities fraud); *Sneed v. Rybicki*, 146 F.3d 478, 480–81 (7th Cir. 1988) (discussing the requisite state of mind in a malicious-prosecution action); *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999) (noting the elements of intentional infliction of emotional distress, including a state-of-mind requirement).

<sup>320</sup> Scott Dodson, *Federal Pleading*, *supra* note 12, at 52 (citing Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 542 (1997)). Bone describes this posture—where the plaintiff and defendant have disparate access to the defendant's state of mind—as one of "asymmetric information." Bone, *supra*, at 550.

<sup>321</sup> *Dixon v. Wal-Mart Stores, Inc.*, 330 F.3d 311, 314 (5th Cir. 2003) (turning on whether the store had actual or constructive knowledge of the presence of plastic roping material on the floor before the plaintiff tripped).

<sup>322</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *supra* notes 97–104 and accompanying text (describing the *Iqbal* Court's arrogation of jury's inference-drawing power).

<sup>323</sup> See generally *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (reasoning that a claim was implausible because the plaintiff's theory of liability required the factfinder to conclude that the defendant corporation acted in an economically irrational manner).

<sup>324</sup> See *Iqbal*, 556 U.S. at 696 (Souter, J., dissenting).

<sup>325</sup> 154 F.2d 464, 467 (2d Cir. 1946).

have survived summary judgment based merely on the plaintiff's speculation. But judges should not dismiss state-of-mind allegations out of hand simply by characterizing them as implausible or fantastic. Instead, the jury should evaluate the plausibility of those allegations after scrutinizing the key actors' live testimony at trial.<sup>326</sup>

Second, this proposal would permit juries to consider which of two ostensibly equal inferences is more likely to be true, in effect restoring the *Lavender* rule for state-of-mind cases.<sup>327</sup> Consequently, the allegations of parallel conduct in *Twombly* would survive to trial, notwithstanding the Court's conclusion that parallel conduct is merely consistent with, and not determinative of, an antitrust conspiracy.<sup>328</sup> On the other hand, *Lavender* involved equally plausible inferences of causation, not a state-of-mind issue—so *Lavender* itself would actually have come out differently under my proposal.<sup>329</sup>

Third, my proposal would permit parties carrying the burden of proof to meet that burden with resort to the antithesis inference in state-of-mind cases, thus embracing Judge Frank's views on that subject<sup>330</sup> and abrogating the rule established in *Liberty Lobby*.<sup>331</sup> This aspect of my proposal is perhaps the most controversial; unlike the other categories of inference drawing, the Supreme Court has never embraced this one fully, nor have commentators recommended it. One scholar, for example, has declined to endorse a rule that would preclude summary judgment when the nonmovant has no affirmative evidence and offers only impeachment of the movant's witnesses.<sup>332</sup> Nevertheless, this scholar recognizes that it can be "troublesome"<sup>333</sup> to ignore impeachment of interested-party witnesses, and my proposal responds to that trouble in state-of-mind cases. This component of my proposal also has the practical consequence of complicating appellate review of evidentiary sufficiency, as Judge Hand ex-

<sup>326</sup> See *supra* notes 39–48 and accompanying text (explaining that live testimony allows factfinders to better evaluate witness credibility by providing an opportunity to observe demeanor).

<sup>327</sup> See *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (holding that courts should defer to jury evaluations of competing or equal inferences—even when the conclusion involves speculation—as long as some facts support the conclusion). See generally *supra* notes 140–154 and accompanying text (discussing *Lavender*).

<sup>328</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). See generally *supra* notes 169–177 and accompanying text (describing the Court's requirement that an inference of liability be more probable than an inference of nonliability).

<sup>329</sup> See *Lavender*, 327 U.S. at 651–52.

<sup>330</sup> See *Dyer v. MacDougall*, 201 F.2d 265, 270 (2d Cir. 1952) (Frank, J., concurring) (illustrating Judge Frank's views); *Arnstein*, 154 F.2d at 469 (same); *supra* notes 198–200 and accompanying text (same).

<sup>331</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (holding that a plaintiff cannot defeat a defendant's properly supported motion for summary judgment simply by impeaching the defendant).

<sup>332</sup> See Sonenshein, *supra* note 48, at 798–807; accord Bauman, *supra* note 48, at 526 (criticizing the antithesis inference as unprincipled).

<sup>333</sup> See Sonenshein, *supra* note 48, at 799.

plained in *Dyer v. MacDougall*.<sup>334</sup> But I believe the third component of my solution (more liberal granting of new trials) helps assuage concerns about the obstacles to a sufficiency review.<sup>335</sup> Furthermore, so long as the antithesis inference is available as an evidentiary tool only in state-of-mind cases—and only on the state-of-mind element of those cases—it will not interfere with pretrial disposition in other types of cases. For example, the inference would not affect most ordinary-negligence cases, where the plaintiff typically has equal access to proof, where the defendant's demeanor is often less probative of liability, and where the factual inferences are likely to be perceived similarly by a diverse spectrum of jurors.<sup>336</sup>

My proposal's most obvious difficulties would be the impact it would have on the court system due to the increase in cases that would require trial, the added expense of discovery and trial for litigants, and the added risk of liability for a defendant who might currently succeed in obtaining dismissal on the pleadings or summary judgment. But the impact would be limited to cases turning on state of mind; motion practice would still be available in all other types of cases. Thus, for example, my proposal does not limit summary judgment to only those cases that involve documentary evidence, an extreme view that some commentators have ascribed to Judge Frank.<sup>337</sup> And not every case would proceed to discovery or trial; many of the state-of-mind cases that would survive motions to dismiss and for summary judgment under my proposal would settle, imposing no trial costs on the court system or the parties.<sup>338</sup>

At the same time, many state-of-mind cases would likely proceed to trial—more than do so now—inevitably increasing the cost of disposition. But the increased costs are not troubling; they are acceptable if what we get in exchange is the priceless benefit of preserving the jury's constitutional function.<sup>339</sup> Moreover, we should not shy away from imposing higher costs to wrongdoers in cases that present adequate circumstantial evidence for a jury to

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<sup>334</sup> See *Dyer*, 201 F.2d at 269.

<sup>335</sup> See *infra* notes 357–378 and accompanying text.

<sup>336</sup> See Kahan et al., *supra* note 107, at 900–01 (discussing ordinary negligence cases).

<sup>337</sup> See, e.g., Bauman, *supra* note 48, at 488 (attributing this view to Judge Frank); Sonenshein, *supra* note 48, at 779 (same).

<sup>338</sup> I do not mean to disregard the cost of settlements, especially settlements borne of concern over litigation costs or the risk that a jury will err in imposing liability. But under my proposal, defendants will have added safeguards to counteract these concerns. See *infra* notes 340–378 and accompanying text.

<sup>339</sup> See ACKERMAN & HEINZERLING, *supra* note 11, at 207 (observing that when “important categories of benefits are priceless,” a cost-benefit analysis is “guaranteed to understate true benefits”). Although the costs of the jury system are measurably significant, they cannot be compared accurately to the abstract benefits that the jury provides as a check against governmental tyranny. See, e.g., Amar, *supra* note 31, at 1183; Ayres, *supra* note 32, at 342. Likewise, the role that an empowered jury plays in the democratic process is too fundamental to bend to efficiency concerns. See, e.g., DE TOCQUEVILLE, *supra* note 34, at 264; Amar, *supra* note 31, at 205.

find liability. We should reserve our concerns only for those cases that present a risk of a false positive—cases that impose litigation costs or liability on defendants who should not bear them. For that reason, my proposal has two additional components designed to ensure that innocent defendants do not unfairly bear the burden of restoring the jury’s inference-drawing function.

### *B. Fee-Shifting Protections in Extremely Weak Cases*

The second component of my proposal is a fee-shifting paradigm, designed to mitigate the risk that plaintiffs will unfairly exploit greater access to jury trials as a way to drive up litigation costs and extract unwarranted settlements. To prevent that abuse, I would empower trial judges, through an amendment to the rules of civil procedure, to shift litigation expenses in state-of-mind cases if the jury concludes that the inferences supporting the plaintiff’s case were extremely weak.

Fee shifting is not a new concept in law or in scholarly literature.<sup>340</sup> The “American Rule” and the “English Rule” are the well-known approaches to fee allocation; under the former, each party pays its own attorney fees, regardless of the outcome,<sup>341</sup> and under the latter, the court can award attorney fees to whichever party prevails.<sup>342</sup> The two rules reflect competing considerations about access to the courts and allocating the costs of litigation. The U.S. system requires parties to pay their own litigation expenses regardless of the case’s outcome,<sup>343</sup> with certain notable statutory exceptions.<sup>344</sup> To be sure, the English Rule enjoys support from numerous commentators who commend its adoption in the United States,<sup>345</sup> and others have more generally advocated for a rule that restrains plaintiffs from bringing weak claims to a jury but does not

<sup>340</sup> See generally Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982) (discussing several rationales for fee-shifting systems). For example, one scholar argues that concerns of “equity, litigant incentives, and externalities” are the major “strains” motivating fee shifting doctrines. *Id.* at 652.

<sup>341</sup> *E.g.*, *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) (describing the presumption that litigants pay their own attorney fees); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683–84 (1983) (describing the traditional view of attorney fees in the United States); see also John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U.L. REV. 1567, 1575–78 (describing the history and policy behind the American Rule).

<sup>342</sup> Vargo, *supra* note 341, at 1569. See generally Herbert M. Kritzer, *The English Rule*, 78 A.B.A. J. 55 (1992).

<sup>343</sup> Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 80 (1997).

<sup>344</sup> See 42 U.S.C. § 1988(b) (2006) (authorizing an attorney-fee award to “the prevailing party” in certain categories of civil rights cases).

<sup>345</sup> See, e.g., Vargo, *supra* note 341, at 1590 & n.210 (collecting authorities). The American Rule has been described as an obsolete system that causes unnecessary expense and litigation. See Calvin A. Kuenzel, *The Attorney’s Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 78–83 (1963). Other critics have focused on fee shifting’s allocation of costs to the unsuccessful party, which “compensates the innocent party, as a system of justice should.” Michael F. Mayer & Wayne Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426, 427 (1975).

excessively chill litigation of small claims.<sup>346</sup> Commentators also note that fee shifting can promote or discourage settlement, depending on risk tolerance and a party's accurate evaluation of the chances of prevailing.<sup>347</sup>

My proposal does not require a wholesale rejection of the American Rule or a wholesale adoption of the English Rule. Instead, it would work in tandem with the first component of my proposal to ensure that plaintiffs do not unfairly exploit their greater access to jury trials in state-of-mind cases. If the trial court believes that the plaintiff's inferences are questionable, it would pose an interrogatory to the jury to test the strength of those inferences. The following is an example of such a strength-testing interrogatory:

Do not answer this question unless you have already reached a verdict and that verdict is unanimously for the defendant.

Indicate how you would characterize the plaintiff's case:

- Strong but not strong enough to meet her burden of proof
- Weak but plausible or somewhat believable
- Extremely weak and not at all plausible or believable

If the jury finds the plaintiff's case "strong" or "weak," then there would be no fee shifting. But if the jury finds the plaintiff's case "extremely weak," the judge would then have the discretion to require the plaintiff to reimburse the defendant's attorney fees.

There are several moments in litigation when the judge could determine whether to submit a strength-testing interrogatory. That decision could accompany a ruling on any dispositive motion, or it could occur during the charge conference with other arguments over jury instructions. A judge would have wide discretion, on the basis of her own evaluation of the evidence, to conclude that the inferences are weak enough to warrant the interrogatory. The neutral wording of the interrogatory and its admonition to answer it only if there has already been a unanimous defense verdict would ensure that no party would ever suffer unfair prejudice from its inclusion.<sup>348</sup> There would thus be

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<sup>346</sup> Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 *BYU J. PUB. L.* 317, 321 (2005).

<sup>347</sup> See, e.g., Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 *TEX. L. REV.* 1863, 1870 (1998) (noting that there is no straightforward means to assess the effect of fee shifting on settlement incentives because "the variables and details affecting incentives are sufficiently complex"). One commentator has described a mathematical approach to compare the systems' probable impacts on the behavior and decision making of litigants. See generally Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Costs*, 11 *J. LEGAL STUD.* 55 (1982).

<sup>348</sup> Federal civil juries must reach unanimous verdicts. *FED. R. CIV. P.* 48(b). In jurisdictions that do not require unanimity, the existence of a dissenting juror—that is, one who would have found for the plaintiff—would be sufficient to establish that the plaintiff's case was not extremely weak, thus obviating the need for an answer to the strength-testing interrogatory.

no difficulty in deferring entirely to the judge's subjective evaluation of the evidence in deciding whether to submit the issue to the jury.

If the jury reaches a defense verdict and makes a finding that the plaintiff's case was "extremely weak," the judge would make a discretionary determination whether to award fees and, if so, how much to award. Statutes granting judges such discretion are common, especially regarding attorney fees.<sup>349</sup> In exercising that discretion, the judge could take into consideration several factors.

First, the court could consider whether plaintiffs made the decision to proceed to trial even in the face of unequivocal warnings about the weaknesses in their case and the prospect of fee shifting. Once the judge makes the determination to submit the interrogatory, plaintiffs could still proceed to trial, but would have a strong incentive not to do so<sup>350</sup> unless they are firmly convinced that either: (1) the paper evidence fails to capture the overall picture of the evidence that they expect to adduce at trial through live testimony; or (2) the judge's heuristics underlie the decision but are not fairly representative of the anticipated jurors' heuristics. Plaintiffs would have to be willing to absorb the financial risk of evaluating their case incorrectly. Plaintiffs unwilling to absorb that risk would choose not to proceed.

Second, the court could consider the related question whether the parties were reasonable in their pretrial settlement positions. Evaluating settlement conduct would give both sides an incentive to settle, as several states have recognized in crafting fee-shifting statutes.<sup>351</sup> Plaintiffs would want to pursue settlement both to avoid the risk of losing on their claims and to avoid the potential liability for attorney fees. Defendants would likewise want to avoid the risk of losing a verdict but might find the prospect of winning attorney fees an incentive to proceed to trial without a corresponding requirement that they attempt to settle in good faith.

Third, the court could consider the plaintiff's ability to pay the defendant's attorney fees, taking care to ensure at all times that the system remains compensatory and not punitive or financially crippling. This is not unprece-

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<sup>349</sup> *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254–56 (2010) (discussing judicial discretion to determine whether attorney fees should be awarded under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(g) (2012)); *see also* Clean Air Act, 42 U.S.C. § 7607(f) (2006) (enabling judges to award attorney's fees).

<sup>350</sup> Although the effects of fee shifting on litigants' incentives are complex, there is widespread agreement that it deters plaintiffs from bringing weak claims. *See* Rowe, *supra* note 340, at 665–66; Sherman, *supra* note 347, at 1869–70.

<sup>351</sup> *See, e.g.*, GA. CODE ANN. § 10-1-399(d) (2009) (precluding attorney-fee award in certain circumstances if the party seeking it has rejected a reasonable settlement offer; allowing attorney-fee award if an adverse party has rejected a reasonable settlement offer in bad faith); MASS. GEN. LAWS. ch. 93A, § 9(3) (2012) (precluding attorney-fee award in certain circumstances after the rejection of a reasonable offer of settlement); N.C. GEN. STAT. § 75E-5 (2013) (same). In other jurisdictions, an adverse party's failure to participate reasonably in settlement negotiations can serve as the basis of a fee award. *See, e.g.*, TEX. R. CIV. P. 167.4.

dented; appellate courts already consider “ability to pay” as a factor in setting the amount of a fee award.<sup>352</sup> Doing so obviously reduces the utility of fee shifting in cases brought by plaintiffs without the resources to cover the defendant’s expenses. But it also addresses a criticism of the English Rule, which favors the wealthy.<sup>353</sup> On balance, providing all plaintiffs with full access to our civil justice system and permitting jurors to evaluate circumstantial evidence are more important than indemnifying defendants from the costs of litigation, especially because defendants may always seek attorney fees “when a party brings an action in bad faith.”<sup>354</sup>

One final consideration on the fee-shifting provision is that it would have no direct impact on extremely weak cases that a plaintiff dismisses voluntarily before trial—after the defendant has already incurred substantial legal expenses in discovery and motion practice. Some might argue that my proposal would do nothing to discourage plaintiffs from pursuing a case as long as possible before trial in the hope of extracting a settlement—and then dismissing a case, if necessary, before a jury ever has a chance to answer the strength-testing interrogatory.<sup>355</sup> I question the validity of that concern because plaintiffs (and their lawyers) have their own incentive not to incur discovery costs in weak cases. Moreover, if experience demonstrates that plaintiffs are using dismissals to avoid the fee-shifting prong of my proposal, it would be easy enough to adjust the proposal to prevent that abuse—including by entering a fee-shifting order as a condition of dismissal, which the rules already permit.<sup>356</sup>

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<sup>352</sup> See, e.g., *Roth v. Green*, 466 F.3d 1179, 1194 (10th Cir. 2006); *Wolfe v. Perry*, 412 F.3d 707, 723–24 (6th Cir. 2005); *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 238–39 (5th Cir. 1990); *Miller v. L.A. Bd. of Educ.*, 827 F.2d 617, 621 (9th Cir. 1987).

<sup>353</sup> Michael D. Johnston, Note, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 *BYU J. PUB. L.* 179, 189 (2007) (arguing that the English system “render[s] the rights of the wealthy more secure than the rights of the poverty stricken or underprivileged”); see also *Vargo*, *supra* note 341, at 1636 (noting that adoption of the English Rule would “reduce access to courts and . . . the number of claims regardless of merit,” while also denying full compensation to the successful litigant and restricting access for the small claimant).

<sup>354</sup> *Marx*, 133 S. Ct. at 1175. The Court has “long recognized that attorneys’ fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129–30 (1974) (citation omitted). See generally *FED. R. CIV. P.* 11 (authorizing courts to sanction litigants for representations made in bad faith); *Vargo*, *supra* note 341, at 1584–87 (discussing the bad-faith exception to the American Rule).

<sup>355</sup> See *Developments in the Law—Discovery*, 74 *HARV. L. REV.* 940, 942 (1961) (“[I]t is . . . possible for a party to employ the discovery procedures for wholly illegitimate ends—the mere threat of extensive discovery, with its attendant specter of harassment and expense, may induce a party to accept an otherwise injudicious settlement.”).

<sup>356</sup> See *FED. R. CIV. P.* 41(a)(2) (providing that once the defendant has filed an answer or motion for summary judgment, a plaintiff may only dismiss an action only by a court order and “on terms that the court considers proper”); see also *Stevedoring Servs. of Am. v. Armilla Int’l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) (noting that courts frequently impose costs and attorney’s fees, on plaintiffs who move for voluntary dismissal under *FED. R. CIV. P.* 41(a)(2)).

### *C. New Trials Where Juries Draw Questionable Inferences*

The third component of my proposal serves as another protection against the possibility that jurors may accept questionable inferences and render verdicts for plaintiffs in cases that presently would fail to survive a paper challenge. To guard against the higher risk of incorrect verdicts, judges could invoke their power to grant new trials based on the manifest weight of the evidence.

The procedural rules already authorize trial judges not only to grant judgment as a matter of law for evidentiary insufficiency, but also to grant retrial.<sup>357</sup> But in practice, trial courts resort infrequently to this remedy.<sup>358</sup> The rare invocation of the new trial is partially owing to uncertainty about the standard for a new trial, as compared to the standard for granting judgment as a matter of law.<sup>359</sup>

Nevertheless, the new-trial remedy has been described as a “weapon to combat unjust jury verdicts,” which a judge may invoke “when the judge believes, but does not know for certain, that the jury based its verdict on something other than a rational review of the evidence.”<sup>360</sup> And it has its own discrete standard; a new trial on manifest-weight grounds is available when the evidence is theoretically sufficient for a jury to have found for the plaintiff, “but the verdict is nevertheless so contrary to the great weight of the evidence that the trial judge concludes that the verdict was based on something other than reason.”<sup>361</sup>

This standard, and the timing of a new-trial motion carry with them important differences from pretrial dispositive-motion practice. A judge who or-

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<sup>357</sup> FED. R. CIV. P. 50(a)–(b).

<sup>358</sup> See Robertson, *supra* note 22, at 169, 172 (arguing that federal courts too rarely order new trials based on the weight of the evidence).

<sup>359</sup> See Schnapper, *supra* note 3, at 308 (“[W]hile it is possible to verbalize different formulas for the type of defect warranting judgments n.o.v. and new trials, the practical difference between those formulations is neither clear nor predictable.”). Some courts have held that new trials are appropriate “only when a reasonable jury could not have reached the challenged verdict,” which is the same standard that applies in considering a motion for judgment as a matter of law. Robertson, *supra* note 22, at 184; *see, e.g.*, Henderson v. Chartiers Valley Sch., 136 F. App’x 456, 461 (3d Cir. 2005); Adams v. Lift-A-Loft Corp., 19 F. App’x 361, 362–63 (6th Cir. 2001). It is possible that courts “have inadvertently conflated the two standards.” Robertson, *supra* note 22, at 186.

<sup>360</sup> Robertson, *supra* note 22, at 161; *see also* Schnapper, *supra* note 3, at 301 (“The Supreme Court has also repeatedly emphasized that a court faced with a request for judgment n.o.v. has the authority to order a new trial instead, and should . . . make a considered judgment in choosing between a new trial and judgment n.o.v.”).

<sup>361</sup> Robertson, *supra* note 22, at 184; *see also, e.g.*, Nat’l Car Rental Sys., Inc. v. Better Monkey Grip Co., 511 F.2d 724, 730–31 (5th Cir. 1975); Garrison v. United States, 62 F.2d 41, 42 (4th Cir. 1932).

ders a retrial has a first-hand familiarity with the case and witnesses.<sup>362</sup> Thus, unlike pretrial dispositive motions that rely on the cold paper evidence, motions for a new trial call upon the judge to consider the evidence after a live-witness trial.<sup>363</sup> The judge, like the jury, can draw inferences from the overall collage of evidence, including witness demeanor.<sup>364</sup>

Importantly, though, judges do not use their inferences to reach the ultimate verdict or to supplant the jury's inference-drawing function. If a judge disagrees with a jury's inference-based verdict in a state-of-mind case, the remedy is to order a new trial, not to enter judgment as a matter of law. And in that new trial, a second jury is called upon to reevaluate the evidence. This supervision of the judicial process enables judges to require that plaintiffs demonstrate that a second jury would draw the same inferences as the first—in short, that the result of the first trial was not an aberration.<sup>365</sup> If the second jury also finds for the plaintiff, then the matter is concluded.<sup>366</sup> In this way, both the judge and the jury contribute in evaluating the evidence with the jury reaching the ultimate conclusion.<sup>367</sup>

Of course, rejecting the first jury's verdict encroaches to some extent on its independence.<sup>368</sup> But the requirement that the ultimate verdict be rendered by a jury, and not by the judge, ensures that the judge's power is a "safety valve" for the jury, rather than a usurpation of its essential function.<sup>369</sup> The new trial, then, is a device "to minimize jury inferential error" without usurp-

<sup>362</sup> *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947) (observing that the judge will have "a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses").

<sup>363</sup> See FED. R. CIV. P. 50(a)–(b) (providing that the court may grant a motion for a new trial after "a party has been fully heard on an issue during a jury trial").

<sup>364</sup> In theory, "the district court is permitted to make its own credibility determinations . . . and to order a new trial if the jury's verdict is against the great weight of the evidence, even if a reasonable jury could have returned the verdict." Robertson, *supra* note 22, at 180. Although the courts do not unanimously agree on this point, "most" do. *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985); see also Robertson, *supra* note 22, at 181 & n.120 (indicating that the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits all allow trial judges to independently assess witness credibility when deciding a motion for a new trial).

<sup>365</sup> See Robertson, *supra* note 22, at 205 ("Such a division allows the verdict loser to have another chance—a 'do-over'—when the judge is convinced that the jury has not reached a fair verdict.").

<sup>366</sup> *Id.* at 208–09 ("There is a general presumption that if a second jury agrees with the first, it was the trial judge and not the jury who was mistaken about the weight of the evidence."); see also Schnapper, *supra* note 3, at 281 (observing that agreement between two groups of jurors could indicate that the judge, who probably has "a narrower personal acquaintance with the common affairs of life" and thus evaluated the initial jury's inferences from an anomalous perspective).

<sup>367</sup> Robertson, *supra* note 22, at 205. Thus, the judge and jury are able to complement the relative strengths and weaknesses of each other's "fact-finding competencies." *Id.* at 204–05.

<sup>368</sup> *Id.* at 174–75 ("[W]hen the court concludes that the jury's verdict goes against the great weight of the evidence, the court is concluding that the jury erred in its decision making—the trial court is directly passing judgment on the jury's verdict itself.").

<sup>369</sup> *Id.* at 177.

ing the ultimate inference-drawing function.<sup>370</sup> The remedy thus fits with the historical conception of the jury trial right<sup>371</sup> and may even safeguard the power of the jury<sup>372</sup> by serving as a more moderate check on inaccurate verdicts than decisions that judges would otherwise (and currently do) make on their own.<sup>373</sup>

Those who fear runaway juries, and who thus might otherwise object to the first component of my proposal, can take solace in the fact that a single jury would no longer have the power to impose liability in a case presenting ostensibly weak inferences on paper, unless the judge ultimately agrees that the trial evidence changed the complexion of the case and justified the jury's verdict. My proposal thus strikes a balance between the important sociopolitical concerns that underlie the Seventh Amendment and the dangers, real or perceived, of jury imperfection.

But more frequent resort to new trials does create an important problem: the cost of multiple trials. Fee shifting, according to the second prong of my proposal, should not be an option if a plaintiff has already convinced a jury to find in her favor. By definition, the inferences were not extremely weak if the first jury has already found liability. But allowing the case to proceed to trial a second time is a better option for plaintiffs than dismissal on paper motions, which is the current norm. Additionally, for the defendant found liable in the first trial, retrial is presumably a better option than accepting unwarranted liability. To the extent the parties in a particular case disagree with that economic assessment, they have an additional incentive to settle.

Retrials would also be costly in terms of the trial court's resources, a consequence that is unlikely to fare well in the Supreme Court.<sup>374</sup> Judge Frank offered a glib response to the latter criticism—that the solution was “the appointment of a sufficient number of judges, not by doing injustice through de-

<sup>370</sup> See Victor J. Gold, *Jury Wobble: Judicial Tolerance of Jury Inferential Error*, 59 S. CAL. L. REV. 391, 391 (1986). Thus, the ability to grant a new trial serves as a check on the “prejudice, bias, and caprice” that sometimes infiltrate juror decision making. See *TXO Prod.*, 509 U.S. at 474 (O'Connor, J., dissenting).

<sup>371</sup> See Robertson, *supra* note 22, at 178 (noting that William Blackstone endorsed the right of judges to grant new trials and affirmed that doing so aligns perfectly with the right of trial by jury (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 391 (1768))).

<sup>372</sup> *Id.* at 179.

<sup>373</sup> *Cf. id.* (“If the new-trial remedy were not available, the judge would have an incentive to defer as little as possible to the jury—not out of disregard for the jury, but rather to minimize the likelihood of an unjust verdict.”).

<sup>374</sup> Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1042–43 (2013) (“More recently, the Court has shown itself to be receptive to considering concerns about the workload of the federal courts in reaching its decisions.”); see also *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (declining to adopt a remedy that would “invite an onslaught of *Bivens* actions”); *Schriro v. Landrigan*, 550 U.S. 465, 499 (2007) (Stevens, J., dissenting) (arguing that “the Court’s decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation”).

priving litigants of a fair method of trial.”<sup>375</sup> More practically, there is every reason to question whether disposition without a trial (even multiple trials) is any more efficient, as Justice Black observed in his 1968 criticism of a case that took eleven years to reach its summary-judgment conclusion.<sup>376</sup> Professor Miller, likewise, notes that the expense and frequency of litigating summary-judgment motions and the frequency of appeals from decisions granting them have undermined arguments espousing summary judgment as beneficial to judicial efficiency.<sup>377</sup> In any event, the quantifiable costs of jury trials, standing alone, establish nothing, because the *benefits* of the jury system are beyond numerical quantification. Thus, in the case of this fundamental right, a traditional cost-benefit comparison is simply impossible.<sup>378</sup>

### CONCLUSION

Perhaps the most insidious aspect of the assault on the jury’s inference-drawing domain is the absence of any meaningful opportunity to resist it. Judges interpret the Constitution, and judges are responsible for promulgating litigation rules. Therein lies a troubling irony; jurors can exercise their democratic function—including the check against abuse of judicial power—only if judges let them. The fox is guarding the henhouse, and the chickens are not faring so well.

But the death of inference in state-of-mind cases is not irrevocable; we can and should revive it. We must preserve the inference-drawing function that the Seventh Amendment clearly bestows on individual citizens who participate, through jury service, in the political process. My proposal would preclude pretrial disposition of cases that turn on a party’s mental state, implement a fee-shifting procedure to protect prevailing defendants when plaintiffs’ claims are extremely weak, and utilize new trials in cases where the jury has drawn questionable inferences. The combined effects of these procedural changes would restore the balance of power, while simultaneously accounting for the cost-of-litigation and cost-of-liability concerns that appear to animate the usurpation of the jury’s constitutional function. I hope that judges will exercise judicial humility and not stand in the way.

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<sup>375</sup> *Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949).

<sup>376</sup> *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 304 (1968) (Black, J., dissenting) (“It is little less than farcical to treat a case that eats up that much time as one suitable for a summary judgment. It certainly would not have taken one-tenth of that much time to give the case a full-dress trial [with] sworn testimony before a jury . . .”).

<sup>377</sup> Miller, *supra* note 105, at 312 n.98.

<sup>378</sup> See ACKERMAN & HEINZERLING, *supra* note 11, at 207.