Focusing on “lying” is a natural response to uncertainty but too narrow of a concern. Honesty and truth are not the same thing, and conflating them can actually inhibit accuracy. In several settings across investigations and trials, the criminal justice system elevates compliant statements, misguided beliefs, and confident opinions while excluding more complex evidence. Error often results. Some interrogation techniques, for example, privilege cooperation over information. Those interactions can yield incomplete or false statements, confessions, and even guilty pleas. Because of the impeachment rules that purportedly prevent perjury, the most knowledgeable witnesses may be precluded from taking the stand. The current construction of the Confrontation Clause right also excludes some reliable evidence—especially from victim witnesses—because it favors face-to-face conflict, even though overrated demeanor cues can mislead. And courts permit testimony from forensic experts about pattern matches such as bitemarks and ballistics if those witnesses find their own methodologies persuasive, despite recent studies discrediting their techniques. Exploring the points of disconnect between honesty and truth exposes some flaws in the criminal justice process and some opportunities to advance factfinding, truthseeking, and accuracy instead. At a time when “post-truth” challenges to shared baselines beyond the courtroom grow more pressing, scaffolding legal institutions so they can provide needed structure and helpful models seems particularly important. Assessing the legitimacy of legal outcomes, and fostering the engagement necessary to reach just conclusions despite adversarial positions, could also have an impact on declining facts and decaying trust in broader public life.

INTRODUCTION

Identifying and coping with lying has become a central focus of public discourse. And the institutions of criminal justice provide a natural setting in which to evaluate the effects of that priority. Lying is perhaps most at home in the context of adversarial investigation and adjudication. Criminal procedure also surfaces, labels, and punishes dishonesty in ways that enable analysis of an often slippery concept. In a setting where advocates dispute issues within a formal set of rules, and resolving epistemic uncertainty is the stated goal, we can look closely at the role of “honesty” in discovering “truth.” And it turns out that acquiescence to law enforcement, honest mistakes, and sincere but misguided beliefs can all generate enduring errors. A binary approach to the value of evidence also tends to exclude the nuanced and challenging testimony that could offer a more complete picture of events.

Consider, for example, the incentives and complexities in cases of recanted testimony, where the threat of perjury charges can actually undermine the accuracy and integrity of criminal proceedings. Paula Gray was an intellectually disabled teenager when she was approached by law enforcement about the brutal gang rape of Carol Schmal and the murder of Schmal and her partner Lawrence Lionberg in
Chicago in 1978. A tip had prompted the arrest of four men who were friends of Gray’s, and she was brought in for questioning. Gray was held for two days, interrogated without legal counsel, taken to the crime scene, and then sworn in before the grand jury. She testified that she witnessed the four suspects committing the rape and murder and then shooting both victims. One month later, Gray recanted her testimony at a preliminary hearing and explained the pressures law enforcement had applied. The case against one of the suspects could not proceed without her testimony and was dropped. Prosecutors brought the other three defendants to trial and added charges against Gray herself. She was accused both of participating in the actual murder and of perjuring herself in the case. Gray and her co-defendants were convicted, and one received a death sentence. The appeals court then granted two of the defendants new trials. At that point, prosecutors offered to release Gray if she would repeat her initial testimony against all of the original defendants. They were tried and convicted again in 1985. Ten years later, they were definitively exonerated by DNA analysis and released. The four men—known as the “Ford Heights Four”—received a $36 million settlement from Cook County in 1999. In 2002, Paula Gray was pardoned for the perjury offense, and she received a $4 million settlement in 2008. Her case demonstrates the premium that law enforcement places on cooperative witnesses and the equation of their statements with honesty. It also illustrates how the threat of perjury charges can lock witnesses into their initial statements and inhibit clarification and correction. And it shows how calcified errors become once investigators, prosecutors, and courts label witnesses as either liars or truth tellers. DNA analysis also led to the actual perpetrators, who were tried and convicted in 1996. Other witnesses had identified them for law enforcement immediately after the 1978 murders, but the investigation had already focused on Gray’s testimony, and the defense was never alerted to the report.

Another notorious example comes from the case that inspired the Netflix documentary Making a Murderer. Brendan Dassey was convicted in 2007 of the murder of photographer Teresa Halbach in Manitowoc County, Wisconsin. Dassey “confessed” that he assisted his uncle Steven Avery in the killing and subsequent dismemberment of Halbach’s body. At the time, Brendan was sixteen years old, and he had an IQ in the mid 70s. He was questioned, without counsel, in four sessions over a 48-hour period. Dassey’s recorded interrogation features classic psychological techniques designed to render suspects forthcoming. In what can be a well-intentioned bid for honesty, police also induce witnesses to make the statements they expect to hear. And once they are committed to a description or admission that fits the theory of the case, police and prosecutors dissuade witnesses from deviating from the script, and ignore contrary indicators or information. On the Dassey tapes, investigators feed him details about the killing, and he accepts his involvement in what seems slow motion. After hours of pleading, planting facts, and even promising that he will not face punishment, police get Dassey to admit “what they already know.” Despite the obvious deficiencies in the interrogation, and Dassey’s subsequent recantation,

1 MAKING A MURDERER (Netflix 2015); see Dassey v. Dittman, No. 14-CV-1310, Decision & Order 77 (ED WI Aug. 12, 2016); Dassey v. Dittman, 860 F.3d 933 (7th Cir. 2017) (vacated en banc).
prosecutors doggedly defended its admissibility, an issue on which the Supreme Court denied cert. in June.

The law enforcement community has also been reluctant to consider the integrity of forensic evidence, despite mounting evidence that it is a significant source of error. Gerard Richardson was convicted in 1995 of murdering teenager Monica Reyes in Bernards Township, New Jersey, and sentenced to 30 years in prison. The entire case against Richardson turned on a bitemark expert’s testimony that there was “no question” that an impression on Reyes’ body matched Richardson’s teeth. Richardson served 20 years in prison before DNA technology advanced to the point where saliva from the bitemark could be analyzed. Once it was, Richardson was clearly excluded as Reyes’ killer. He is one of at least 25 recent exonerees whose cases rested on the testimony of a bitemark analyst. Bitemark analysis has perhaps the least empirical support of all of the suspect “pattern matching” forensic sciences. Indeed, the available scientific evidence suggests that examiners not only cannot identify the source of a bite with any reasonable accuracy but cannot even consistently agree on whether an injury is a human bitemark, or an imprint made by any sort of teeth at all. Yet even after a 2016 report by the President’s Council of Advisors on Science and Technology declared bitemark analysis “far from meeting the scientific standards for foundational validity,” courts continue to admit it. Prosecutors objected to the report, alleging that excluding evidence such as bitemarks could “have a devastating impact on the ability to investigate cases, exclude the innocent, implicate the guilty, and ‘achieve true justice.’” And not surprisingly, the American Board of Forensic Odontology agreed, defending the validity of the technique based on the views of its practitioners.

Critically evaluating the systematic premium on “not lying” helps explain why so many errors persist. Even when an eyewitness identification is manipulated, a jailhouse snitch’s testimony induced, or a suspect’s confession coerced, police and prosecutors uncritically accept the evidence as accurate because they view it as usefully candid. After a trial, it is virtually impossible to clarify a statement, to recant successfully, or to overcome faulty forensic science without the assistance of a prosecutor—and generally speaking, that assistance is not forthcoming. Factual innocence, even if supported by newly discovered evidence, does not give rise to postconviction relief absent constitutional violations in the underlying proceeding. Moreover, during a trial, critical voices can be silenced by arcane rules surrounding credibility determinations. Defendants are often precluded from testifying because they can be impeached with any prior convictions in order to alert jurors to their potential perjury. Out-of-court statements by unavailable victims are also excluded, because of a preoccupation with factfinding as an in-person clash or confrontation.

Some of the ways in which we enforce honesty thus keep us from finding the truth. Bad faith witnesses may tell outright lies, but good faith witnesses will also make mistakes. Being honest—which generally means not intentionally stating falsehoods—

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2 Exec. Office of the President, President’s Council of Advisors on Sci & Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016) (noting observed false positive rates that render these methods scientifically unreliable).
seems a relatively simple proposition. There is a distinction, however, between “not lying” and “truth producing,” and it is one that criminal procedure often overlooks. Seeking the “truth” through criminal investigation and adjudication is not simple at all. It requires more costly and more complex procedures than just identifying lies.

Of course, “truth” here refers neither to transcendence nor to the verifiable findings of a setting like the laboratory. Truth-seeking in court involves the culling and arranging of facts about opaque events “in such a way as to allow conclusions, decisions, agreements.” Though adversaries may speak of “truth-telling” by individuals and of “wanting the truth” from witnesses on the stand, rarely will a single source reveal the whole picture. One cannot see all that occurred before power corrupted, an intimate relationship soured, a corporate actor took an uncalculated risk, the chaos of a terrible accident unfolded, or violence welled up. The truth of these things is a liquid rather than a line. It cannot be told all at once or traced to one data point. It is not conveyed so much as collected and contained. What emerges from the adjudicative process is thus a substitute. The outcome stands for the truth, much as money is accepted as a proxy for value and calendars and clocks purport to measure the concept of time. Investigators gather evidence, juries reach verdicts, judges enter convictions, and legal truth results.

I rely here on the same assumption that the law itself makes—that there is such a thing as facts, incomplete and imperfect, but also real and important. The formal result of adjudication does not capture the full substantive truth but aims for close correspondence. In the process, factfinders should say “of what is that it is and of what is not that it is not,” with as much precision as possible. To do that, to reliably reach a verdict, requires broad engagement with data and testimony. Regarding the process as too binary—too dependent on determining who has lied—can constrain inputs in a way that diminishes accuracy and narrows the aperture on “what happened.”

Lying and getting things wrong overlap to some extent, but their fundamental gear mechanisms are different. First of all, people honestly make completely inaccurate statements. More than a quarter of Americans would tell you with great conviction that the sun orbits the earth. The lying eyes of good faith witnesses who identify perpetrators provide another example. Clinical recreations of lineups reveal that approximately half of the time, eyewitnesses will identify innocent parties or fail to recognize guilty ones. One study concludes that fully three quarters of wrongful convictions are connected to mistaken eyewitness identifications. Though they provide compelling testimony declaring that a defendant committed the crime, and believe what they say, many eyewitnesses are being honest without telling the truth. Moreover, the FBI analyst who claimed “100 percent” certainty when erroneously

3 Steven Lubet, Nothing But the Truth 196 (2001).
matching Oregon lawyer Brandon Mayfield’s fingerprints to a latent print at the site of the Madrid terrorist bombing could not have been more sincere at the time.

Though honesty will often play a part in the search for legal truth, and legal truth can capture true propositions external to the adjudicative process, each of these things is distinct. Some statutory definitions, investigative practices, and procedural rules that endeavor to define, detect, and deter dishonesty actually widen the distance between legal and factual truth. Interrogation techniques designed to get suspects to talk can yield false and incomplete, albeit forthcoming, confessions. Impeachment rules aimed at precluding perjury often mean that the most knowledgeable witnesses cannot take the stand. The current construction of the Confrontation Clause right excludes some evidence because it privileges face-to-face confrontations, even though demeanor cues can be profoundly misleading. And forensic experts can introduce subjective conclusions about pattern matches when they find their own methodologies compelling. The sections that follow explore the potential for “true lies” and “honest inaccuracies” these contexts, as well as the broader implications of recognizing a distinction between truth and honesty.

I. COMPLIANCE AS HONESTY

In some instances, interviewing suspects and obtaining their cooperation advances truth-seeking, but too often interrogations focus exclusively on a suspect’s perceived honesty and ignore critical information. Law enforcement agents want suspects to talk but have a preconceived notion of what they will say. They tend to ask questions only after they have concluded that a suspect is guilty. In fact, many police officers confidently assert that they “do not interrogate any innocent people.” Nor do they test competing hypotheses once they have recorded a witness statement consistent with the theory of the case, or extracted a confession that will ensure an efficient clearance rate. Overcoming silence and prompting speech—sometimes even planting a false script to be repeated—takes precedence over actually investigating what happened.

These encounters enforce a version of honesty that merely consists of compliance and cooperation. Law enforcement agents confuse the thing they are doing—making suspects speak—with the thing they really want, which is accurate information. They draw the target around the hit they get and assume a confession is reliable in every case. Common practices that can undercut accuracy include guilt-assuming inquiries, prolonged interrogations, proffering false inculpatory evidence, tainting interrogations with non-public information, and suggesting an exit strategy in

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exchange for a suspect’s willingness to follow the script.\textsuperscript{10} Many of these problematic techniques date back to the 1960s and the wide adoption of the police manual authored by Inbau and Reid.\textsuperscript{11} The manual advises maintaining cramped and isolated interview rooms and applying psychological pressures to elicit statements. It replaced true custodial violence—the physically coercive tactics that were known as the “Third Degree”\textsuperscript{12}—but it substituted new forms of procedural violence. Although the Supreme Court recognized and critiqued the manual’s instructions for soft coercion as long ago as the 1966 \textit{Miranda} decision,\textsuperscript{13} the basic protocols for interacting with suspects have changed little over the past 50 years.\textsuperscript{14} And similar pressures are often applied to potential witnesses.

This remains the case despite a well-documented connection between interrogation techniques and wrongful convictions, including the wrongful conviction of the Ford Heights Four based on Paula Gray’s testimony. Consider also the West Memphis Three, the Norfolk Four, the Central Park Five.\textsuperscript{15} These notorious cases all involved young, vulnerable, disadvantaged defendants who were irreparably damaged by their own false confessions. Poorly educated and mentally unstable defendants are especially susceptible to agreeing with law enforcement’s version of events in order to end the ordeal of questioning. Their plight has become more visible as more law enforcement agencies record interrogations, and serialized true crime stories also make that footage accessible to the public. In the recent documentary series \textit{The Confession Tapes}, police induce false confessions by commanding that suspects “say it and be done with it,” insisting that they “open their minds” and “come around,” and suggesting that they just “close their eyes” and repeat what police have told them.\textsuperscript{16} Suspects deny responsibility for hours on the recordings but eventually succumb to the narratives that law enforcement agents advance.

Some suspects wrongly assume that the adjudicative process will later confirm their innocence, but for others—like Brendan Dassey—the admissions are “persuaded false confessions,” in which they become convinced that they \textit{must} have committed the crime.\textsuperscript{17} One episode of \textit{The Confession Tapes} similarly portrays a defendant, confronted with an array of false evidence against him, concluding “I guess I might have did it then.”

Even defendants who are quite clearheaded about what did or did not transpire will enter sworn pleas to negotiated or manufactured facts—such as the amount of drugs, the number of guns, or the losses incurred—under pressure from prosecutors. Misdemeanor defendants may plead guilty without regard to their actual conduct

\begin{thebibliography}{100}
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\bibitem{Simon2012} \textsc{DAN SIMON}, \textit{IN DOUBT} 122 & n.11 (2012).
\bibitem{Wells2008} See, \textsc{e.g.}, \textsc{Tom Wells & Richard Leo}, \textit{The Wrong Guys: Murder, False Confessions, and the Norfolk Four} (2008).
\bibitem{Tapes2017} \textit{The Confession Tapes} (Netflix 2017).
\bibitem{Kassin2006} See, \textsc{e.g.}, Saul M. Kassin, \textit{A Critical Appraisal of Modern Police Interrogations, in Investigative Interviewing: Rights, Research and Regulation} 207 (Tom Williamson ed., 2006).
\end{thebibliography}
because it will often mean a sentence to time served instead of waiting months for a trial when the cost of bail is prohibitive. None of this has anything to do with accuracy, but no one questions the factual basis for these pleas.

II. BEING A LIAR

Part of the leverage police and prosecutors use to make defendants more forthcoming pretrial comes from the silencing effect of impeachment rules at trial. When suspects become trial defendants, they are no longer encouraged to speak. In fact, because of concern that they will lie, evidentiary rules tend to preclude their testimony altogether. The federal rules of evidence have a stated purpose: “ascertaining the truth and securing a just determination.” To achieve that end, the rules tend to favor the admission of evidence and factfinder’s receipt of information. One of the most controversial rules, however, has the opposite effect and constrains potential testimony by defendants. All testifying witnesses—including criminal defendants—may face questioning about their past felony convictions. Any crime, the reasoning goes, portends a willingness to violate the social contract and thus a propensity to commit perjury as well. About a million criminal defendants pass through the criminal justice system every year, and all but 25,000 of them say almost nothing to anyone in court apart from entering a guilty plea. Yet engagement with defendants may provide the best opportunity to determine what happened in any case.

Until the late nineteenth century, defendants were not examined under oath so as not to force the choice of “self-accusation, perjury, or contempt.” Jurors, it was thought, would never believe an interested party anyway, and allowing them to testify only endangered the important “presumption that all sworn evidence is truthful.”

This limitation has been lifted, along with the common law prohibition against felons offering testimony. But the prospect of impeachment has virtually the same effect.

Institutions like the press have a norm—or at least they used to—against labeling individuals liars across contexts. There is no such norm in court. Witnesses get called liars all the time. According to the logic of the impeachment rules, there is such a thing as just “being a liar,” and jurors ought to know when any “liar” is testifying. Of course, the reasoning fails at several points. Because of the breadth of the criminal code and the prevalence of plea bargaining resolutions, past felony convictions do not

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18 FED. R. EVID. 102.
19 FED. R. EVID. 609.
24 See, e.g., Reed Richardson, Mainstream Media Still Won’t Tell the Truth About Trump’s Lies, SALON (Nov. 30, 2017), https://www.salon.com/2017/11/30/mainstream-media-still-wont-tell-the-truth-about-trumps-lies/ (“Within the stilted framework of mainstream news ‘objectivity,’ the simple act of calling out ‘lies’ or ‘lying’ by a politician—especially a president—is now taboo … the use of these words to identify a documented falsehood is now considered controversial, partisan, inflammatory, unfair.”).
necessarily signal knowing violations of legal norms. And even past crimes involving clear intent and express acts of dishonesty will not necessarily predict lying under oath. Social psychology long ago moved beyond the trait theory on which the rule’s rationale depends and recognized the influence of situational pressures. Moral conduct in one particular scenario does not portend an identical response in a different one. Indeed, in every other context, the rules of evidence actually preclude drawing inferences from character to conduct. But pointing to a witness’s general lack of integrity remains a permissible way to discredit testimony.

The rule purports to equip jurors with a tool to discern dishonesty. It is a blunt instrument, however, and one they do not particularly need. “All guilty defendants who choose to testify will lie on the stand about anything that might improve their chances and about which they imagine they can be persuasive. For virtually all—novice and experienced criminal—acquittal is the overriding, intensely desired, goal.” Frankly, jurors know that, and in some jurisdictions they also get an instruction urging special caution with a defendant’s testimony. As one might anticipate, jurors do not even rely on convictions as evidence of credibility. All of the experimental work on Rule 609 suggests that they use prior convictions to generalize from the earlier bad act to the likelihood that the defendant committed the offense. And the empirical data on testifying defendants reveals that past crimes like perjury are not the most damaging to their chances of acquittal. Rather, the more similar a prior crime is to the crime charged, the more perilous it is to testify.

Of course, many defendants are best advised to stay silent throughout trial, but some need and want to participate. A defendant witness “vindicates her view of justice as against the views of others.” Even if the testimony involves some dissembling, that introduces a “culturally productive” contradiction when the jury then weighs it against other evidence and determines whether the witness’s memory, judgment, and descriptive powers are fallible, and whether the story has credibility. Moreover, lying that does occur will often follow truthful revelations. Defendant testimony may be imperfect but it is also available, efficient, and a unique source of information. And sorting through any omissions, exaggerations, or shadings implicates exactly the set of skills jurors supposedly bring to the courtroom. Yet concern with a defendant’s complete honesty often precludes any testimony at all. The rule thus privileges lie prevention over a truth-seeking opportunity.

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26 See Michael J. Saks, Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn, 47 B. C. L. REV. 949, 964 (2007).
27 FED. R. EVID. 404(a).
30 See id. at 138.
Nor is accuracy the only thing at stake—fairness to the defendant also suggests the need for some space in which to construct a counter-narrative. As the Supreme Court has recognized, the defendant “above all others may be in a position to meet the prosecution’s case.”\textsuperscript{32} Empirical studies indicate that a defendant bearing witness has more impact than the testimony of “the police, of informants, of co-defendants, and of expert witnesses.”\textsuperscript{33} And recent survey data also reveals the widespread assumption that innocent people will testify. Without testifying, defendants stand little chance of persuading a jury.\textsuperscript{34} Because alerting jurors to prior criminal conduct will almost always guarantee a guilty verdict, a defendant with criminal history effectively cannot testify. And in one study of convicted defendants who were later determined to be factually innocent, only 43 percent of those who testified had a criminal record while 91 percent of those who did not take the stand would have faced impeachment by prior convictions.

The rule not only codifies a stereotype about felons but also imposes further collateral consequences for past convictions. Defendants are more likely to bargain away their trial rights and plead guilty if a criminal record will keep them off the stand. Testifying also impacts a defendant’s subsequent reintegration,\textsuperscript{35} and the chance to hear from a defendant can enable understanding and recovery for victims as well. Letting people tell their stories, even horrible ones, can fuel reconciliation. Penalizing defendants so that they will virtually never do so represents a poorly-reasoned decision. It reveals all the criminal conduct in a defendant’s past that may or may not suggest a tendency to lie rather than encourage testimony that can offer the most complete, and ultimately the most truthful, picture of the events surrounding the crime charged.

\textbf{III. THE LIMITS OF CONFRONTING TESTIMONY}

A different form of credibility concern—one grounded in the constitutional right to “confront” the evidence against you—has sometimes silenced victim witnesses too. Cross examination has taken on new significance in contemporary trials. When it was widely believed that lying under oath meant eternal damnation, there was no real need for veracity cues or tests.\textsuperscript{36} But courts now seek to both inform and equip jurors to identify “liars” while observing their testimony, and that includes complaining witnesses for the prosecution.

The Confrontation Clause of the Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”\textsuperscript{37} The rules of evidence already exclude many statements made by out-

\textsuperscript{32} Ferguson v. Georgia, 365 U.S. 570, 582 (1961).
\textsuperscript{33} Theodore Eisenberg & Valerie P. Hans, Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes, 94 CORNELL L. REV. 1353, 1370 (2009).
\textsuperscript{34} Barbara A. Babcock, Introduction: Taking the Stand, 35 WM. & MARY L. REV. 1, 12 (1993).
\textsuperscript{36} See Frederick Schauer, Can Bad Science Be Good Evidence?: Neuroscience, Lie Detection, and Beyond, 95 CORNELL L. REV. 1191, 1194 (2010).
\textsuperscript{37} U.S. CONST. amend. VI.
of-court speakers, but there are exceptions based on the necessity or reliability of particular hearsay evidence. The Supreme Court formerly interpreted the Confrontation Clause to allow the use of evidence that fell within well-established exceptions to the hearsay ban or otherwise possessed “indicia of reliability.” In a series of cases beginning in 2004, the Court expanded the constitutional requirement and declared that all witnesses must be available for cross examination if their out-of-court statements constitute “testimonial” ones offered against a defendant.\(^{38}\) Accounts by victims that would otherwise fit within hearsay exceptions fall into that category, including statements under oath in formal settings like the grand jury.

Among the hundreds of defendants exonerated by DNA evidence over the past few decades, there is not a single one whose wrongful conviction rested on “unconfronted hearsay,” which is regularly excluded by the current construction of Crawford. Meanwhile, flawed eyewitness testimony, false confessions, and faulty forensics are rarely screened out because they contain perceived indicators of honesty. In other words, we are preferring evidence that clearly causes wrongful convictions and excluding statements that jurors have shown themselves well-equipped to evaluate.

To find out what happened, the best source will often be a direct witness, testifying live, under oath, and subject to cross examination. In fact, that is all the more reason to have rules that allow criminal defendants to testify. But what about when a witness has died, or disappeared, or now refuses to talk? When the firsthand account is not available, sometimes the earlier statement constitutes the only source of information, and sometimes it has been tested in ways that reinforce its accuracy. Yet the definition the Court now uses to determine which statements fall into the testimonial category sets aside reliability and focuses exclusively on the significance of a performative opportunity to confront witnesses in person.

The requirement that defendants “look an accuser in the eye” precludes admission of hearsay assertions if they tend to accuse or have the capacity to condemn. That means that many victim statements made to first responders, medical professionals, social workers, counselors, friends, and family are inadmissible. It leads to silencing victims when their only statements come after the most fearful encounters, including in domestic violence scenarios. When a witness is available, in-court testimony ought to be required. But what about when it is not possible? In that case, the preference for confrontation in the form of a verbal duel or ritual staring contest does silence victims.

One example comes from a 2008 Wisconsin case in which Mark Jensen was convicted of murdering his wife Julie by poisoning her with antifreeze.\(^{39}\) He claimed she committed suicide, but the strongest evidence against him was a letter she gave to a neighbor before her death describing her terror and her certainty that Mark was intent on killing her. “I am suspicious of Mark’s behaviors,” she wrote, and “fear for my early demise.” The letter also disclaimed any intention to commit suicide because of her love for her children. The jurors who convicted Mark in his first trial saw the

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letter and commented later that it was a “clear road map” to his conviction. The letter’s admission, however, turned out to be a Confrontation Clause violation that jeopardized Mark’s conviction. To be sure, any such document has some self-impeaching qualities, and the jury might have seen it as consistent with Mark’s claim that Julie was despondent about an affair and plotted to kill herself and frame him as revenge. Factfinders, however, could readily observe the letter’s defects even without Julie on the witness stand. Its exclusion illustrates misplaced confidence in confrontation itself as a test of deception.

What the Court has called the “irreducible literal meaning” of confrontation—which is to stare a witness down—actually serves only a limited purpose. Justice Scalia regarded his opinions on the Confrontation Clause as his most significant legacy. In them, he repeatedly referenced “something deep in human nature” that requires the “essential” physical presence of an accusing witness. While the fairness dimensions of confrontation hold up to scrutiny, its role in assuring reliability does not. Looking at someone does not help with detection deception and might even hinder it. As the experimental evidence indicates, “ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying.” Moreover, “there is little correlation between people’s confidence in their ability to detect deception and their accuracy.”

In fact, almost every non-verbal “cue” of dishonesty is subject to conflicting interpretations. Both blinking too much and not blinking supposedly indicate lying. Same goes for staring and avoiding eye contact, talking too fast and choosing words too deliberately, having inconsistencies in a narrative and keeping the story straight, smiling and frowning, fidgeting and sitting rigidly still. Showing obvious nerves, sweating, slumping, and eye-darting—clinical studies suggest—are as likely to be the result of the stress of the courtroom situation as of effortful lying. Accordingly, cross examination has the potential to mask truth as well as reveal it. Occasionally it will highlight unmistakable signs of falsehood, but it can also make honest witnesses appear hesitant, confused, or defiant, and thereby mislead the factfinder to reject truthful evidence.

Popular culture perpetuates the myth that confrontation will yield a smoking gun or telltale sign. Countless magazine articles list techniques for identifying the liars in your social and professional circles with behavioral cues. The television series Lie to Me popularized the theory of detection deception through observing

43 Coy, 487 U.S. at 1015–19.
47 See Margaret Talbot, Duped, NEW YORKER (July 2, 2007), https://www.newyorker.com/magazine/2007/07/02/duped (“People who are afraid of being disbelieved, even when they are telling the truth, may well look more nervous than people who are lying.”).
microexpressions. Recent books like Liespotting promise to reveal the “single most
dangerous expression to watch out for in business and personal relationships.”\(^{48}\) And
in Spy the Lie, “former CIA officers teach you how to detect deception” by observing
behavior.\(^{49}\) This concept surfaces as well in just about every police manual. Seventy
eight percent of police officers report that they make veracity judgments based on
nonverbal cues like “gaze aversion.”\(^{50}\) Nonverbal cues work in some contexts—
detecting social status, appraising sexual desire, recognizing personality traits—but
they do not reliably signal deception.

The most useful confrontation in terms of arriving at the larger truth in a case has
more to do with getting answers than just asking questions. Some out-of-court
statements excluded by the Confrontation Clause—especially written ones or recorded
testimony—provide a much richer opportunity to test the substance of proffered facts
for inconsistencies and contradictions. It takes more effort to evaluate substance than
to observe behavior, but it yields more information. And that opportunity is what the
Confrontation Clause broadly guarantees: a criminal defendant’s right “to know, to
examine, to explain, and to rebut” the evidence against her. \(^{51}\) Well-documented
statements can be verified given other evidence and context. Several experiments have
demonstrated that transcripts are superior to live testimony when it comes to making
credibility judgments.\(^{52}\) Recorded statements actually eliminate the distracting and
distorting nonverbal data and underscore verbal content. Moreover, out-of-court
statements are more likely to be unprepared and unrehearsed. Of course firsthand
witnesses are better than secondhand ones, when they are available. And of course
some unique secondhand testimony presents real dangers of unfairness or inaccuracy.
But a secondhand account that supplements other evidence may be preferable to
deny the factfinder information altogether, and in too many cases, the idea that all
statements must be tested by adversarial combat excludes them.

The categorical rule persists because confrontation as Justice Scalia redefined it is
a formal rather than a functional process.\(^{53}\) To be faced down and to appear
forthcoming satisfies the standard, while the quality of the information obtained and
its relationship to accuracy is irrelevant.\(^{54}\) Accordingly, a witness on the stand and in

\(^{48}\) The author concludes that the danger signal lies in any expression of “contempt,” which could appear
in a “wrinkle in the nose, eye rolling, or a raised nostril combined with a curled upper lip.” PAMELA
Meyer, Liespotting 68 (2010). These expressions—like, apparently, any other asymmetrical
gesture—are described by Meyer as masks because “[i]nterpersonal gestures typically occur evenly on
both sides.” Id. at 60.

\(^{49}\) PHILIP HOUSTON, MICHAEL FLOYD & SUSAN CARNICERO, Spy the Lie (2013).

\(^{50}\) Aldert Vrij, Nonverbal Detection of Deception, in Finding the Truth in the Courtroom: Dealing
with Deception, Lies, and Memories 163, 165 (Henry Osgaar & Mark L. Howe eds., 2018).

\(^{51}\) Daniel H. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. PUB. L. 381, 402 (1959); see
also Chris William Sanchez, Evidence, Procedure, and the Upside of Cognitive Error, 57 STAN. L. REV. 291,
335 (2004).

\(^{52}\) See, e.g., Charles F. Bond, Jr. & Bella M. DePaulo, Individual Differences in Judging Deception: Accuracy and
Bias, 134 PSYCHOL. BULL. 477, 483 (2007).

“commands, not that evidence be reliable, but that reliability be assessed in a particular manner”).

\(^{54}\) See Joyce Plotnikoff & Richard Woolfson, Kicking and Screaming: The Slow Road to Best Evidence, in
Children and Cross Examination: Time to Change the Rules? 21, 38 (John R. Spencer &
the chair, even with no memory of the relevant events, meets the constitutional requirement.\footnote{United States v. Owens, 484 U.S. 554, 560 (1988).}

Although the Confrontation Clause plays an important role in excluding statements that may have been influenced by government actors, it does not make trials more accurate—or ultimately more truthful exercises—to silence victim witnesses whose statements contain essential information and whose motivations can be assessed from the record.\footnote{See David Alan Sklansky, \textit{Confrontation and Fairness}, 45 TEX. TECH. L. REV. 107, 108 (2012).} Mistakenly regarding cross examination as an assurance of honesty has resulted in some poor sorting of testimony. The durable myth of demeanor as a lie detection tool persists despite its potential to distort, and that myth can also impede truth-seeking by supporting the exclusion of some necessary and reliable witness statements.

\textit{IV. Scientific Authority}

A related truth-seeking issue has arisen with regard to forensic testimony, which at first seems the one form of evidence about which we might expect empirical clarity. With evidence that is supposedly scientific, we might worry less about accuracy, but recent developments suggest we should worry more.

For decades, and with respect to some techniques for almost a century, courts have allowed expert testimony about superficial pattern matches that link known samples to data collected in criminal investigations. The standard by which the courts measure the reliability of this expertise—codified in Rule 702 and known as the \textit{Daubert} standard—continues to place particular weight on whether other experts in the field rely on similar methodologies. That is, whether it is “generally accepted” and “peer reviewed.”\footnote{See \textit{Daubert v. Merrell Dow Pharm}, Inc., 509 U.S. 579 (1993); \textit{Fed. R. Evid.} 702.} Within professional communities of interest, however, an honest commitment to the validity of expert analysis turns out to have little to do with its truth or reliability.

Experts who make their livings or their reputations with the same technique—members of the Association of Firemark and Toolmark Examiners, for example—may share a sincere belief that a method works, but they are often mistaken. That Association has an internal publication as well, and one that has been cited to support the peer review factor. But publishing there amounts to “talk within a congregation of true believers” and not “the desired scientific practice of critical review” and disinterested assessment that the \textit{Daubert} Court envisioned.\footnote{David H. Kaye, \textit{How Daubert and Its Progeny Have Failed Criminalistic Evidence and a Few Things the Judiciary Could Do About It}, 86 FORDHAM L. REV. (forthcoming 2018).}

Although firearm and toolmark analysts have long stated that their discipline has “near-perfect accuracy,” the most recent studies indicate a high false positive rate. Missing context for forensic testimony also matters. Experts can testify that a certain

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Michael E. Lamb eds., 2012) (“Cross-examination aims not at accuracy or best evidence but at persuading witnesses to adopt an alternative version of events or discrediting their evidence.”) (internal quotation omitted).
\end{flushright}
gun could have fired a bullet or that a particular screwdriver could have made the pry marks on a door. But they cannot make that assertion to the exclusion of other guns or tools. So they can testify to something that is plenty precise as far as it goes but hazards inaccuracy by leaving out the larger picture.\textsuperscript{59} It would be the equivalent of stating that an alleged perpetrator’s DNA was found at the scene of a crime without explaining that the suspect actually lives in the house.

Fingerprint analysis further illustrates the way in which labels conveying reliability tend to stick. Forensic examiners have long claimed that they can match latent prints from a crime scene to identified samples, with a high degree of certainty. For the most part, courts admit fingerprints because they have always admitted fingerprints; they consider them the “archetype” of reliability because they have been used as evidence for roughly 100 years.\textsuperscript{60} Prints do display some distinctive ridge patterns from the loops and arches of the human fingertip, but there is no science supporting conclusions about how likely or unlikely particular sets of features are to repeat in different individuals. Moreover, the most common fingerprinting method has no standard test protocols and relies on subjective assessments of similarities. When experts testify to “matches,” however, courts have been “unable to muster the most minimal grasp of why a standardless form of comparison might lack evidentiary reliability or trustworthiness.”\textsuperscript{61}

Courts continue to permit such testimony despite a shattering National Academy of Sciences report in 2009 that concluded that the forensics based on what’s called “pattern matching” or “feature comparison” fall well short of scientific standards: handwriting, bitemarks, ballistics, footwear and tire impressions, tool marks, voice prints, microscopic hair comparison, blood spatter, textile fibers, burn patterns in arson cases. None of it is supported by scientific validity, or at least there has not been sufficient testing to validate its reliability.\textsuperscript{62} A subsequent 2016 report by the President’s Council of Advisors on Science and Technology further enumerated the lack of validation studies and the urgent need for reform in forensic analysis and testimony.

That is not to say that pattern comparison is irrelevant across the board—it just is not as scientific as it purports to be. As the PCAST report details, empirical studies do not establish that these methods are repeatable, reproducible, and accurate. They do not yield a binary “match” or “non-match” because choices factor heavily into the analysis. Prosecutors may present them as unassailable, but they rely on subjective human judgment about which features to compare and how to determine if they are sufficiently similar. In some cases, factfinders could even receive the data, hear a basic

\textsuperscript{61} Erin Murphy, \textit{Neuroscience and the Civil/Criminal Daubert Divide}, \textit{85} \textit{FORDHAM L. REV.} 619, 624 (2016).
\textsuperscript{62} \textit{COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCL CMTY., NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD} (2009) (concluding that “little rigorous systematic research has been done to validate” these “basic premises and techniques” of forensic pattern matching).
explanation, make comparisons of the observed facts, and draw some conclusions about the probabilities themselves.

In its reasoning, the Daubert Court recognized that science is a process rather than a collection of facts, and that the explanations it offers about the world are subject to further testing and refinement. But the Daubert rule itself does not do enough to exclude unreliable expert testimony, and it is now widely regarded as too vague to support accurate screening. In practice, trial judges rarely reject forensic testimony offered by prosecutors in criminal cases, and it takes decades for scientific advances to find expression in court. Although appellate courts closely consider scientific evidence admitted in civil cases, they almost never overturn rulings on forensics in criminal cases.

To accommodate the competing languages of science and law, the Daubert rule emphasizes “flexibility” about how to assess reliability. But over time that has meant too much emphasis on the measures that are most familiar to courts, like precedents that have accepted particular techniques or the training, experience, and qualifications of experts. “Each ill-informed decision becomes a precedent binding on future cases.” In fact, most courts functionally apply the pre-Daubert standard from Frye, which rewards the sincerity of the proponent’s belief in the value of the evidence. They even regard past testimonial descriptions of accuracy as an “implicit history of testing.” Here the preference for honesty manifests itself as an affinity for recognizing authority. Attorney General Jeff Sessions recently expressed resistance to any forensics reform in testimony that concluded: “I don’t think we should suggest that those proven scientific principles that we’ve been using for decades are somehow uncertain.”

Experts who are persuasive and honestly express a commitment to a methodology are thus permitted to testify even when their testimony does not meet the standards of rigor, reliability, and accuracy that Daubert purports to require. And too often they are permitted to state that their methodologies establish that a defendant “in fact” was at a crime scene, when they are relying on assumptions and making estimations that can produce error rates comparable to the flaws in lay eyewitness identifications.

Moreover, using scientific vocabulary to state conclusions that may be imprecise or contain motivated reasoning might be truth-hindering in a broader sense. A recent study estimated that intuitive error rate measurements for scientific experts range from 1 in 100,000 to 1 in 10,000,000. And experiments involving jury simulations reveal that an expert’s credentials and confidence matter more than the substance of scientific

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66 See United States v. Crisp, 324 F.3d 261, 278 (4th Cir. 2003) (Michael, J., dissenting) (critiquing reliance on the “dogged certainty” of fingerprint examiners to admit their testimony).
testimony to the jury’s assessment of credibility. Meanwhile, more than a quarter of the documented wrongful convictions have occurred in cases that involved this sort of identification or feature-comparison evidence.\textsuperscript{68} This is a serious misalignment between assumptions about forensic expertise and its tested reliability. Recognizing that the sincere commitment of forensic experts does not necessarily yield accurate testimony could at least widen the avenues to challenge it, with ample alternative explanations, probing questioning, competing experts, and careful assessments of suspect methodologies by courts.

\textit{V. The Allure of Lie Detection}

To overcome some of the conceptions of honesty that cause error, we have to understand where they originated. They intersect, as it happens, with a longstanding and still-evolving challenge to \textit{Daubert}: lie detection itself. The possibility of an accurate and scientific way to identify deception has been discussed since the early 1900s. And it has contributed to the notion that lying or not lying is a binary distinction, and that the right procedure can expose whether the lever has moved. A 1907 \textit{New York Times} article predicted that “[a] few years hence, no innocent person will be kept in jail, not, on the other hand, will any guilty person cheat the demands of justice.”\textsuperscript{69} That still has not happened, of course. Lie detection has thus far been almost universally excluded from trials because of its high error rate and potential to mislead the jury (although a suspect’s willingness to submit to polygraphs can be deemed relevant evidence of state of mind).

Developing technologies like functional magnetic resonance imaging (fMRI) might change the status of lie detection in court. Conventional polygraph tests, which fail the \textit{Daubert} test for reliability, measure external stress responses and rely on a few measures of arousal. FMRI uses thousands of data points per subject and looks for cognitive processes inside the brain that indicate the effort and intent to deceive.\textsuperscript{70} As it proceeds through further testing and validation, fMRI poses closer and closer questions under \textit{Daubert} and might ultimately meet the standard for admission and be a regular subject of expert testimony. If detecting lies ever looks more like DNA testing than demeanor assessments, that will raise new questions about the place of lie detection in the larger search for truth.

The allure of lie detection begins with the adversarial system to which we are committed. It stresses testimony by the parties rather than an inquisitorial process in which the courts take a more active role in investigation. In theory, truth emerges in an adversarial system from the market forces of conflict and competition at trial and not just from some neutral inquiry into what happened.\textsuperscript{71} But in practice, adversarial

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\item \textsuperscript{69} See Geoffrey C. Bunn, \textit{The Truth Machine: A Social History of the Lie Detector} (2012).
\item \textsuperscript{70} See Martha J. Farah et al., \textit{Functional MRI-based Lie Detection: Scientific and Societal Challenges}, 15 NATURE 123 (Jan. 20, 2014), https://www.nature.com/articles/nrn3665.
\item \textsuperscript{71} See David Alan Sklansky, \textit{Anti-Inquisitorialism}, 122 HARV. L. REV. 1634, 1690–91 (2009).
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process is “error-prone in a world of unequal resources.” Inquisitorial systems have deeper institutional competencies in determining historical facts and an explicit mandate to identify ground truths. In contrast, adversarial trials are uniquely and sometimes entirely reliant on the reports of witnesses rather than primary investigation by the trier of fact. Accordingly, they feature this “structured process for the determination of the credibility of strangers, many of whom will, for one reason or another, try to deceive those who rely upon their word.” That process emphasizes honesty and depends on internal rather than external validity, which can confound truth-seeking.

The substance of criminal law further reinforces these structural choices by imposing broad liability for lies about offenses. There are approximately 4,000 federal crimes, and about 300 of them have something to do with deception, including perjury, the various obstruction offenses, and making false statements in investigations. The criminal justice system not only sorts and labels liars but also sends messages about the prevalence of lying itself. From celebrity athletes to high-flying financiers, notorious defendants like Barry Bonds and Bernie Madoff have faced liability for lying. And prosecutors have been charging an expanding range of defendants with nothing but dishonesty in the context of an investigation. It was once thought unsporting to pursue a charge for lying about wrongdoing if the proof was not available on the underlying offense. But now lying charges are a common device to elicit cooperation, enforce governmental authority, or just expediently close a case. And the variations on liability for dishonesty in the criminal code mean that many suspects expose themselves to easy charges as soon as they engage with investigators.

The fundamental impenetrability of intent in a complex case makes these charges especially attractive. When liability turns on the wrongfulness with which a defendant acted, factfinders must “infer the past mental state of a defendant they do not know as he acted in a way they did not see.” Prosecutors find it less demanding to assert that a defendant simply said something false, as that requires less “sifting through the surface level of conduct for signals about internal mental processes.” When investigators regard a suspect’s lie as something observable, and courtroom rules supposedly “detect” dishonesty, factfinding appears to stand on much firmer ground. That desire for certainty also helps explain the intense interest in detecting dishonesty well beyond the courtroom. Fascination with lying has its roots in the

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76 See JAMES B. STEWART, TANGLED WEBS: HOW FALSE STATEMENTS ARE UNDERMINING AMERICA: FROM MARTHA STEWART TO BERNIE MADOFF (2011).
frustrations of the intersubjectivity divide. Between people and even those they know the best and love the most, there will always be a barrier. No path leads directly into someone else’s thoughts, and thus assurances of accurate expressions of the content of another mind fill a basic need. Trusting others is essential to survival. Navigating through the world requires communication, implicit trust in the information that is transmitted, and sustainable social relationships. A classic study of the 1960s surveyed participants on 555 different personality traits, and the one that rated 555th on the list was “liar.” Yet perceived honesty again suffices—in our “hypersocial” network of relationships, what “feels” forthcoming often rates as more satisfying than what rationality suggests is accurate.

Despite the evolutionary imperative to trust, lying seems to be everywhere. In Victorian society, lying was openly regarded as a valuable form of social dexterity. It remains the most ordinary human behavior and is even categorized as a necessary stage of development. “By inventing deceptions and withholding information, children establish boundaries between self and others, test the limits of adult power and control, and move toward independent thought and action.” The consequences of lies range from devastating to benign, but there is no question that people lie a lot, for many reasons: job applicants seeking advantage, classmates and colleagues making excuses, potential romantic partners hoping to impress.

For all of the interest in deception—across popular culture, academic disciplines, and political discourse—we still know very little about it. Recent developments in the social sciences reveal how poorly deception is understood. It is tricky to recreate clinically, and many of the published studies on its nature and frequency fail to replicate. It turns out that it is difficult to identify ground truths about lying itself, and it is not nearly as straightforward of a concept as the rules around it would suggest.

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80 See Joel Krueger, Seeing Mind in Action, 11 PHENOMENOLOGY & COGNITIVE SCI. 149 (2012) (discussing the empirical problem of other minds and “the use of our own mental states to imaginatively simulate what another person is likely thinking and feeling”); see also Susan C. Johnson, The Recognition of Mentalistic Agents in Infancy, TRENDS IN COGNITIVE SCI. 22 (2000) (“Mental states, and the minds that possess them, are necessarily unobservable constructs that must be inferred by observers rather than perceived directly.”).
82 Jessica Bennett, The Truth Is, We’re All Raging Liars, NEWSWEEK (Aug. 25, 2009), http://www.newsweek.com/truth-were-all-raging-liars-78965.
CONCLUSION

Because lying is both a pervasive act and a mysterious concept, entirely predictable but impossible to detect with precision, perhaps we should not regard it as so independently consequential. Part of the work of the criminal justice system is to make some determinations about who speaks honestly. In many cases, that sorting will also support accurate outcomes, but at times the focus on honesty enforcement will obscure larger and more significant truths. It often seems easier to tell whether someone has lied than whether all of the relevant information has been gathered. Yet the most important purpose of investigations and trials transcends lie detection. Finding facts, adjudicating guilt, and even protecting the integrity of other public institutions require a new balance that privileges engagement.

Both the procedures discussed here and the substantive criminal law offer incremental opportunities to expand truth-seeking. I take the system we have as a given, recognizing both the power that law enforcement agents wield in investigations and the persistence of the adversarial process. But the limitations of common interrogation techniques, the costs of the impeachment and confrontation rules, and the failures of Daubert screening are increasingly exposed. Some interpretations of the lying offenses have also moved toward imposing culpability for lying only when the statements in question introduce inaccuracy. Recent cases concerning lies to get elected,87 to claim unearned honors,88 and to obtain citizenship89 suggest that there is more to determining when dishonesty supports liability than the straightforward question whether someone has uttered a falsehood. A binary approach to “lying” has often masked vital evidence and silenced witnesses, and a more pluralistic conception of “truth” as the product of many voices and perspectives could help dislodge some longstanding sources of error.

Clarity about the distinction between telling lies and the status of empiricism is also vital because courts are called upon to perform a broader repair function. The fundamental advantage of legal institutions is the background requirement of engagement. In court, opposing parties are required to “join issue,” and factfinders assess and reconcile competing accounts and conflicting interpretations of events. Outside of the courtroom, the divisions in public life increasingly involve doubts about verifiable facts, and models for identifying and agreeing to them are more essential than ever. Official statements now seem so unreliable that there is little effort to correct falsehoods or assess their impact, and journalists have resorted just to counting how many thousands of times some governmental figures lie. The lies may mean less and less, but the crisis over shared facts matters.

The Oxford Dictionary’s 2016 word of the year was “post truth,” which was defined as the “circumstances in which objective facts are less influential in shaping

87 See Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016).
public opinion than appeals to emotion and personal belief.”

Even facts that consist of numbers—crime rates, climate statistics, economic indicators—do not stay stable across different communities of interest. The volume and influence of opinion over fact has increased. Empiricism and expertise no longer generate consensus, and growing ambivalence about the nature of evidence itself is corroding democratic norms. Carefully establishing facts and reliably screening expertise in court could provide some counterweight to the denigration of data and science in post-truth discourse.

Outside of the structured system of legal institutions, “the most grossly obvious facts can be ignored when they are unwelcome.” But finding right answers is a “fundamental goal of our legal system.” Of course, the adversarial process causes some distortions, as do the cognitive biases of prosecutors, judges, and jurors, but the core commitment of investigation and adjudication is to identify objective truths.

Courtrooms can also play a pivotal role in preserving the democratic aspiration of a “marketplace of ideas” because—in contrast to fractured media environments and polarized political discourse—the ideas in question actually compete and come into contact with each other. Adversaries have to sit in the same room. One has no choice but to recognize the standing of others and to respond to claims. Witnesses take oaths and must answer questions. Deliberately misleading the court has potential criminal consequences. Evidentiary rules endeavor to screen out illegitimate sources of expertise, and judges reject false claims of authority. Neutral factfinders evaluate the quality of arguments and the consistency of claims. Advocates present data, to which decision makers apply analytical thinking. And the process generates something agreed upon, or at least accepted, as a just conclusion.

The tension between rules about honesty and broader goals involving accuracy in the criminal justice system is thus newly significant. Courts can demonstrate epistemic competence in the face of complexity and uncertainty. They can model engagement with competing stories and many sources of information. They can insist on shared realities and accepted outcomes however strong adversary positions may be. By finding common baselines despite intense conflict—producing legitimate legal truth—courts could help restore reasoned public discourse about facts.

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92 See TOM NICHOLS, THE DEATH OF EXPERTISE 216 (2017) (“[T]he collapse of the relationship between experts and citizens is a dysfunction of democracy itself.”).

93 United States v. Havens, 446 U.S. 620, 626 (1980); see also Tehan v. United States, 383 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of the truth.”); HANNAH ARENDT, TRUTH AND POLITICS 252 (1971) (stating that in courts “contrary to all political rules, truth and truthfulness have always constituted the highest criterion of speech and endeavor”).