

FAKE NEWS ON TRIAL: THE JURY TRIAL AS A GUARD AGAINST SOCIETAL ENTROPY

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Currently, we live in a curious and caustic environment in the United States. Civic engagement is low.¹ Public hostility is high.² Partisans from both political poles see disaster ahead if their opponents are not checked.³ The ferocity, ubiquity, and sustainability of the battle is remarkable.⁴

No shortage of words has been devoted to identifying, describing, and prescribing solutions for the current social and political dysfunction.⁵ So far

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1. See Aaron Smith, *Civic Engagement in the Digital Age*, PEW RES. CTR. (Apr. 25, 2013), <https://www.pewresearch.org/internet/2013/04/25/civic-engagement-in-the-digital-age/>.

2. *Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), <https://www.pewresearch.org/2016/06/22/partisanship-and-political-animosity-in-2016/>.

3. Thomas B. Edsall, *No Hate Left Behind*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/opinion/hate-politics.html> (describing members of opposing parties as “downright evil” and therefore worthy of violent suppression).

4. Yoni Appelbaum, *How America Ends*, ATLANTIC, Dec. 2019, at 46–47 (noting political partisans describing their opponents as “like animals” and lacking in basic human traits).

5. See, e.g., ARTHUR C. BROOKS, *LOVE YOUR ENEMIES: HOW DECENT PEOPLE CAN SAVE AMERICA FROM THE CULTURE OF CONTEMPT* (2019); BEN SASSE, *THEM: WHY WE HATE EACH OTHER—*

at least, no solution has shown much efficacy.⁶ Is it possible that some solution, some antidote to the toxin in our collective air can be found in one of our most basic governmental structures—the jury trial? The central argument of this Article is that it can. The jury trial system provides fundamental mechanisms to repair some critical rents in our social and political fabric.

A title that uses the phrase “fake news” is particularly evocative.⁷ But that is not the purpose—certainly not directly. This Article focuses on no particular group or individual. Instead, it focuses on destructive trends of tribalism, counter-factualism, and isolating individualism that do not discriminate by party, position, or background. Others can and do debate elsewhere if these misbehaviors are manifested more profoundly by one group than another.⁸ These problems merit consideration precisely because they have become ecumenical in their reach. The goal is to identify behaviors permeating our public institutions and discourse because they are widespread, dangerous, and persistent. With those problems identified, we can consider ways to counteract them.

This Article considers how the structure of our judicial system, particularly the jury trial, checks these forces. Trial lawyers—meaning lawyers who represent all types of parties at trial—need a plan to preserve the positive force of the jury trial in society against troublesome social trends.⁹ That involves three tasks. First, naming the problems at issue.

AND HOW TO HEAL (2018); Peggy Noonan, *Defuse America's Explosive Politics*, WALL STREET J., Oct. 27–28, 2018, at A13 (calling on elected officials and candidates to empathize and respectfully engage with the anxieties and policies of the other major political party and to reduce the rhetorical excesses of their own).

6. See, e.g., Jonathan Rauch, *How American Politics Went Insane*, ATLANTIC (July/Aug. 2016), <https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/> (noting the author does not have a quick solution to the chaos).

7. Harmon Leon, *Donald Trump Now Says Even Fox News Is Fake News*, OBSERVER (June 18, 2019, 5:15 PM), <https://observer.com/2019/06/donald-trump-fox-news-fake-news/>; Jason Schwartz, *Trump's 'Fake News' Rhetoric Crops Up Around the Globe*, POLITICO (Apr. 19, 2019, 1:47 AM), <https://www.politico.eu/blogs/on-media/2018/07/donald-trump-fake-news-rhetoric-crops-up-around-the-globe-media-social-media-foreign-affairs>; *The Global Reach of Trump's 'Fake News' Outrage*, WASH. POST (Nov. 19, 2019, 6:11 PM), https://www.washingtonpost.com/opinions/global-opinions/trump-is-spreading-his-fake-news-rhetoric-around-the-world-thats-dangerous/2019/11/19/a7b0a4c6-0af5-11ea-97ac-a7ccc8dd1ebc_story.html.

8. Joshua Holland, *Why Does the Far Right Hold a Near-Monopoly on Political Violence*, NATION (June 23, 2017), <https://www.thenation.com/article/why-does-the-far-right-hold-a-near-monopoly-on-political-violence/> (arguing that most instances of American political violence have come from conservative forces); Mark Joslyn & Don Haider-Markel, *Inciting to Violence? Attributions for Political Violence Have a Partisan Bent*, POL. VIOLENCE AT A GLANCE (Aug. 2, 2017), <https://politicalviolenceataglance.org/2017/08/02/inciting-to-violence-attributions-for-political-violence-have-a-partisan-bent/> (analyzing survey data indicating a greater likelihood to attribute political violence to inciting language when the violence is directed at a member of one's own party).

9. See, e.g., Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Speech at the 5th Annual Judge Thomas A. Flannery Lecture, Washington D.C.: The Importance of Trials to the Law and Public Policy (Nov. 14, 2013), <https://www.sec.gov/news/speech/2013-spch111413mjw> (noting jury trials have had an enormous impact on society, such as the civil rights trials, the Enron trial, and the Pentagon Papers).

Second, identifying the aspects of the jury trial system that can counteract those problems. Lastly, discussing ways to bolster and improve the jury trial system to better do so.

Step one is naming the problems.

I. TRIBALISM, COUNTER-FACTUALISM, AND INDIVIDUALISM: FORCES OF ENTROPY IN SOCIETY

Society currently faces three destructive forces: tribalism, counter-factualism, and individualism. Each, in its own way, negatively impacts social interactions and governmental operations. Additionally, they are interrelated and mutually reinforcing. They have become collectively more destructive than any of them would be alone. Consider the nature and impact of each in turn.

A. Tribalism

Tribalism has become a common word to describe much of how we engage—and fail to engage—with each other as citizens in the present day.¹⁰ It is the fundamental belief, conscious or not, that the world is made up of absolute and incompatible groups, that the messenger is ultimately more important than the message, and that membership is purely binary—you are either with us or against us.¹¹

The “us versus them” worldview, central as it is to tribalism, impacts social engagement in several negative ways.¹² First, a tribalistic engagement with the world drives social sorting.¹³ Increasingly, we live, associate, and even work in homogenous enclaves.¹⁴ This sorting can be based on a variety of characteristics: Some flexible, like political party, some more persistent, like religion, and some truly immutable, like race. A tribal world is a

10. See George Packer, *A New Report Offers Insights Into Tribalism in the Age of Trump*, NEW YORKER (Oct. 18, 2018), <https://www.newyorker.com/news/daily-comment/a-new-report-offers-insights-into-tribalism-in-the-age-of-trump>. This phenomenon of internal division has also gone by the name of “faction.” Danielle Allen, *The Road From Serfdom: How Americans Can Become Citizens Again*, ATLANTIC, Dec. 2019, at 94–95. Allen cites faction as a better name than tribalism for the problem because it “captures the idea not just of political parties but of parties ready to fight existentially, as if unto death.” *Id.* Faction was the name the Founders assigned to the problem. See *infra* note 39 (discussing various issues the Founders contemplated when adopting the Constitution). The problem is the same regardless of the name assigned to it. *Id.*

11. See Tom Jacobs, *Why We Engage in Tribalism, Nationalism, and Scapegoating*, PAC. STANDARD (Mar. 5, 2018), <https://psmag.com/social-justice/why-we-engage-in-tribalism-nationalism-and-scapegoating>.

12. See, e.g., Caroline Kitchener, *The Trouble with Tribalism*, ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/membership/archive/2018/10/trouble-tribalism/573307/> (identifying tribalism as a cause of polarization and the deterioration of public debate).

13. See Jacobs, *supra* note 11.

14. Tara Westover, *Left Behind: The Real Routs of the Urban/Rural Divide*, ATLANTIC, Dec. 2019, at 53–54.

segregated world. Second, tribal sorting tends to chronically intensify.¹⁵ Demand for purity and absolute allegiance to the sorting criteria becomes more pronounced and inflexible over time.¹⁶ Diversity and dissent within tribes decreases with time; with it, any inclination to or tolerance for independent and critical thinking declines as well.¹⁷ Third, the process of self-selection and purification affects how tribal members process and assess information.¹⁸ Ideas and actions are increasingly assessed not for their content but their source.¹⁹ Those that come from the listener's tribe are accepted, and those from opposing tribes are rejected—typically uncritically in both cases.²⁰ This faulty information processing promotes the hypocrisy of casting behavior as intolerable in other tribes that is met with apology and justification within our own. Fourth, tribalism promotes a categorical rejection of nonmembers.²¹ It becomes an article of tribal faith that one's own tribe is inevitably infallible and all other tribes unendingly unsound.²² Hostility and fear grow toward the “other,” which is defined as those unlike or unaffiliated with our tribe and selected by criteria sometimes trivial or mutable—other times more pernicious and permanent.²³ This rejection can be expressed in ways ranging from trivial to tragic.²⁴

The end result of tribalism is a series of self-perpetuating and unbridgeable ruptures within society.²⁵ Any unifying “we” hopelessly split into only “us” and “them.”

Tribalism has become significantly entrenched in our governing processes.²⁶ Broadly based civic organizations common to the American 1950s have given way in subsequent decades to issue-focused groups that are increasingly political and partisan.²⁷ Groups that are “sorted” become

15. See Packer, *supra* note 10.

16. See *id.*

17. See Andrew Sullivan, *America Wasn't Built for Humans*, N.Y. MAG. (Sept. 18, 2017), <https://nymag.com/intelligencer/2017/09/can-democracy-survive-tribalism.html>.

18. See Peter Kreko, ‘Confirmation Bias’: Political Tribalism as a Driver of Disinformation, POWER 3.0 (Jan. 15, 2019), <https://www.power3point0.org/2019/01/15/conformation-bias-political-tribalism-as-a-driver-of-disinformation/>.

19. See Westover, *supra* note 14.

20. See Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342/>.

21. See Amy Chua, *How America's Identity Politics Went from Inclusion to Division*, GUARDIAN (Mar. 1, 2018, 6:00 PM), <https://www.theguardian.com/society/2018/mar/01/how-americas-identity-politics-went-from-inclusion-to-division>.

22. See Daniel R. Stalder, *Tribalism in Politics*, PSYCHOL. TODAY (June 18, 2018), <https://www.psychologytoday.com/intl/blog/bias-fundamentals/201806/tribalism-in-politics?amp>.

23. See Westover, *supra* note 14.

24. See Chua & Rubenfeld, *supra* note 20.

25. See *id.*

26. See, e.g., BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 221–24 (2008) (describing the growth of politically like-minded legislative interest groups, such as the American Legislative Exchange Council and American Legislative Issue Campaign Exchange).

27. *Id.* at 225–26.

monolithic in belief and partisan identity.²⁸

Sorting around partisan lines tends to do things within the respective groups to make tribalism worse.²⁹ First, disagreement tends to metastasize.³⁰ Division over certain issues does not fade with time, is not limited to individual issues, and becomes a basis to assume division exists on all issues.³¹ In other words, tribal disagreement becomes permanent, pervasive, and presumed. Breaking free of tribalism becomes exceptionally difficult as a result.

Second, intratribal disagreement is not tolerated.³² You are either part of the tribe totally, or not. Purity tests for inclusion make tribes increasingly homogenous and self-reinforcing—everyone thinks alike and anyone who thinks differently is banished, so more of the tribe thinks more alike.³³ This prevents members of the tribe from encountering—or having to jointly reason with—people who have different thoughts.³⁴ This erodes the skills of deliberation, communication, and intellectual openness necessary to life in a pluralistic society.³⁵

Lastly, this tribal sorting makes the views within tribes more extreme and results in labeling the views of others as extremist.³⁶ This labeling intensifies and calcifies intertribal divisions and hatreds.³⁷ In fact, it can be a gateway to tyranny.³⁸

28. *Id.* at 227–28.

29. *See id.* at 230–31, 234–35.

30. *Id.* at 230–31.

31. *Id.* Tribal division tends to creep into the most quotidian events. *Id.* at 233. As examples, opinions often divide along party lines as to public entertainment, the impact of corporations, participation in social activities, and the reliability of certain speakers or authors. *Id.* (cataloguing disparate partisan reactions to movies like *Fahrenheit 9/11* and *The Passion of the Christ*, corporations like Walmart, and participation in a Christian-oriented fitness class).

32. *Id.* at 234–35, 244 (describing the purgation of a Minnesota Republican candidate by her party as a “RINO,” “Republican-in-name-only,” because of her dissent on certain issues).

33. *Id.*

34. *Id.* at 248.

35. *Id.* Unlike earlier eras when tribal and partisan intermingling was either compelled or cultivated, the current social structure lets citizens live and work only with people who “think like them.” *Id.* They are left with the disbelief that anyone does, or could, think differently.

36. *Id.* at 229–31 (cataloguing examples of various societal tribes engaging in conspiracy theories or extremist labeling of other social tribes).

37. *Id.* Labeling and tribal division can reach a point where it “curdles into resentment and hatred, then aggression toward others.” MADELEINE ALBRIGHT, *FASCISM: A WARNING* 96 (2018).

38. TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* 100–01 (2017) (labeling opposing views as “extremist” can be a tool to marginalize and control their proponents, reinforcing a tyrannical government structure in many instances). It is a common refrain to say “not here” about the possibility of tyranny in America. *Id.* at 100. This inclination, rooted in faith in the sustaining power of our democratic traditions, needs to be reassessed in light of two current realities. First, it is increasingly common to allege that the actions of an opposing political tribe are not simply differences of policy or political philosophy, but evil. *Id.* Citizens on the left see politicians and citizens on the right not as simply more conservative in their approach to preserving traditional social values, advancing commercial activity through limited regulation, or restricting taxation to incentivize private activity and limit the reach of the government, but as “fascists.” *Id.* at 70–71. Citizens on the right see left-leaning opponents not as committed to progressive efforts at redistributive tax policy, checking corporate

Tribal division is nothing new in American history.³⁹ America has been riven by divisions over race, religion, national origin, and even political parties since its founding.⁴⁰ Given that America has survived the deep divide of philosophy among its founders, fought a Civil War over slavery, and endured violent resistance to civil rights,⁴¹ it would ignore history to contend that our current tribalism is “America at its worst.”⁴² But modern tribalism has traits that make it a unique threat.

Unlike the fights over slavery or civil rights,⁴³ most modern tribal lines are not being drawn among groups where one is simply on the wrong side of

influence or misconduct through regulation, and more diverse social policy, but as “socialists.” *Id.* at 100–01. This increasing view of political interlocutors in extreme terms creates an environment where it is not enough to win the argument, but necessary to dominate (and even eradicate) a competing viewpoint because it is not simply wrong, but intolerable.

Second, the assumption that “it can’t happen here,” ignores the degree to which it can and undercuts the vigilance and engagement necessary to preserve our governing structures. *See id.* at 66. The reason the “it” of tyranny “can’t” happen in the “here” of America is because we remain committed as citizens to the preservation of our governing structure and civil liberties. *See id.* at 92–94. The temptation to compromise those values for short-term goals is undeniable (at least for some of us in some instances). *See id.* at 73–76. Each compromise erodes the barriers against tyranny. These forces combine into the increasingly real risk that “it” can happen right here. Our perceived need to stop competing ideologies at any cost leads us to small compromises of values that, imperceptibly in the moment perhaps, inch us closer to the tipping point.

39. *See* THE FEDERALIST NO. 10 (James Madison). The peril of faction was a prominent justification for adopting the Constitution. *Id.* Likewise, in his Farewell Address, President Washington cautioned against the rise of parties and partisan spirit as corrosive. GEORGE WASHINGTON, WASHINGTON’S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, 17–18 (2004), <https://babel.hathitrust.org/cgi/pt?id=pur1.32754078035742&view=1up&seq=21>. Washington’s description of the practical effects of excessive partisanship was prescient:

It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill founded jealousies and false alarms, kindles the animosity of one part against another, foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passions. Thus the policy and the will of one country are subjected to the policy and will of another.

Id. Much of this will seem passing familiar to the modern reader who has seen their fill of partisan paralysis in the legislature, destructive and hateful political campaigns, and zero sum “debates” on current affairs. Washington’s assessment of the negative influence of parties in political activity cannot be said to have been fully avoided at a minimum. *See id.*

40. *See, e.g.,* JON MEACHAM, THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS 6–7 (2018). Meacham makes the point throughout his book that, often in response to our deepest divides, the “American soul” has prevailed over time. *Id.* at 6. That soul is the impulse to unite rather than divide, and to see one deeply connected American community, not a loose amalgamation of disconnected tribes. *Id.* A focus on this shared American soul, and its preservation, is fundamental to counteracting the tribalistic impulse. Shared purpose, and belief in that shared purpose, is foundational.

41. JILL LEPORE, THIS AMERICA: THE CASE FOR THE NATION 135–37 (2019). Lepore argues that while nationalism is often a force of intolerance and division, an “American nationalism” can be organized around our shared values of equality and dignity. *Id.* at 136–37. This is a constructive nationalism of ideals, not a destructive nationalism of ethnic tribalism writ large as “nationalism” is often generalized to be.

42. *See id.* at 135–38.

43. *Id.* at 217–18.

history and justice. While disputes about issues like taxation,⁴⁴ the scope of government regulation,⁴⁵ and educational policy and funding,⁴⁶ are important issues and powerfully felt, disputes over these issues are not the same as disputes over fundamental truths of human equality and dignity. Yet they are producing divisions within America that are similarly powerful and non-negotiable.⁴⁷

Although not based on immutable characteristics, and therefore arguably less offensive than outright racial, religious, gender, or other prejudice, this tribalism of the trivial is powerfully destructive.⁴⁸ If tribalism arising from “common” issues becomes the source of unbridgeable divides, society becomes effectively ungovernable. If policy debates become not simply searches for solutions (and hopefully compromises) but assignments into camps of good and bad, us and them, in and out, little space is left in which to form a connected and coherent society or government.

Political divisions are giving rise to violence.⁴⁹ Political opponents are refusing to engage with the opposition.⁵⁰ Disputes are increasingly treated as personal and universal.⁵¹ An individual with distinct political views is considered a bad person, not simply possessed of different ideas.⁵² It is assumed that there can be no common ground if the complete program of belief is not fully shared.⁵³ In short, people demand greater purity within their tribes and make tribal association more defining of the permissible engagements to have. The trivial becomes transformative.

This tribalism of the trivial is also problematic because it promotes tribalism in more discriminatory and destructive forms.⁵⁴ We see underlying discrimination creep into mere political divides; partisan tribalism becomes

44. Hannah Fingerhut, *More Americans Favor Raising Than Lowering Tax Rates on Corporations, High Household Incomes*, PEW RES. CTR.: FACT TANK (Sept. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/09/27/more-americans-favor-raising-than-lowering-tax-rates-on-corporations-high-household-incomes/>.

45. Kristen Bialik, *State of the Union 2018: Americans' Views on Key Issues Facing the Nation*, PEW RES. CTR.: FACT TANK (Jan. 29, 2018), <https://www.pewresearch.org/fact-tank/2018/01/29/state-of-the-union-2018-americans-views-on-key-issues-facing-the-nation/>; Russell Heimlich, *Deepening Divide Between Republicans and Democrats Over Business Regulation*, PEW RES. CTR.: FACT TANK (Aug. 14, 2012), <https://www.pewresearch.org/fact-tank/2012/08/14/deepening-divide-between-republicans-and-democrats-over-business-regulation/>.

46. Kim Parker, *The Growing Partisan Divide in Views of Higher Education*, PEW RES. CTR. (Aug. 19, 2019), <https://www.pewsocialtrends.org/essay/the-growing-partisan-divide-in-views-of-higher-education/>.

47. *See id.*

48. *See id.* (explaining how relatively minor issues such as college admissions policies have caused massive disagreements among groups).

49. Noonan, *supra* note 5.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.*

54. ALBRIGHT, *supra* note 37, at 235–40.

a proxy for something deeper and darker.⁵⁵ Already prepared to reject the “other,” divides among tribes arising from self-selected affinities can turn into tribes based on discrimination.⁵⁶ Hatred begetting hatred, exclusion prompting more exclusion, a society divided over the commonplace grows more susceptible to division on the fundamental. Tribalism is an insidious force, which working its way into small cracks within society, creates large rifts with the passage of time and pressure.⁵⁷

We see in other nations that tribalism, once having taken root, rips nations and peoples apart.⁵⁸ Again, much of American history has been a story of these deeper and darker forces of tribalism.⁵⁹ The current extension of tribalism presents a unique threat, however. We are in danger of losing the fundamental ability and inclination to seek compromise. If tribalism defines our relationships and public affairs both large and small, eventually the capacity to coexist, compromise, and understand is irreversibly eroded. Eventually all is lost.

How we function as a society and govern ourselves as a nation is built on how we define ourselves. We can define ourselves, and have historically aspired to, around a shared ideal.⁶⁰ Our identity can be based on inclusivity and openness.⁶¹ Tribalism is not that identity, however.⁶² Tribalism is an identity of exclusion and insularity.⁶³ In a society defined by tribalism, as ours increasingly is, rather than seeking ways to associate for the advancement of shared ideals and collective improvement, we seek to quarantine ourselves to avoid interference from “others.”⁶⁴ This worldview is inherently reductive. It is socially destructive. It renders our society unsustainable.

55. *Id.* at 238–39.

56. *Id.* at 235. Social and economic grievance, the belief that another tribe is getting comparably favorable treatment develops and festers. *Id.* It becomes readily targeted at the “others” than perceived as causing the circumstances giving rise to grievance. *Id.* Without meaningful engagement with the members or ideas of other tribes, this grievance grows more intense and widespread. *Id.* It becomes fertile ground for the willingness to engage in fascism to redress these grievances. *Id.*

57. *Briefing Conservatism: The Self-Preservation Society*, *ECONOMIST*, July 6, 2019, at 16–18 (explaining how nationalism, particularly ethnic nationalism, manifests with social disruption and erosion of societal connections).

58. *Britain’s Nightmare Before Christmas*, *ECONOMIST*, Dec. 7, 2019, at 13; Lars-Erik Cederman, *Blood for Soil: The Fatal Temptations of Ethnic Politics*, *FOREIGN AFF.*, Mar./Apr. 2019, at 62–64; Robert Sapolsky, *This Is Your Brain on Nationalism: The Biology of Us and Them*, *FOREIGN AFF.*, Mar./Apr. 2019, at 42.

59. See MEACHAM, *supra* note 40, at 6–7; see also Joanne B. Freeman, *The Violence at the Heart of Our Politics*, *N.Y. TIMES* (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/opinion/sunday/violence-politics-congress.html> (noting extensive political violence in antebellum American history and the possibility of reversion to that without commitment to dialogue and compromise).

60. MEACHAM, *supra* note 40, at 6–7.

61. LEPORÉ, *supra* note 41, at 135–37.

62. See *supra* note 58 and accompanying text (explaining how tribalism is the opposite of an open and understanding society).

63. See MEACHAM, *supra* note 40, at 6–9.

64. *Briefing Conservatism: The Self-Preservation Society*, *supra* note 57, at 16–18.

B. Counter-Factualism

Tribalism is an engine of division within society.⁶⁵ Counter-factualism is fuel for that engine.⁶⁶ Counter-factualism is the accelerating and insidious lack of recognition of, or downright hostility to, facts and truth.⁶⁷

Tribalism perpetuates the belief that who says something matters more than what is said.⁶⁸ Reliability and belief are rooted entirely in the identity of the source of the information.⁶⁹ Statements from my tribe are good and true, but statements from other tribes are bad and false. If you like the source, you uncritically believe what is said or try to.

Counter-factualism goes an additional, dangerous step.⁷⁰ Counter-factualism accepts things simply because they are said, regardless of their provenance.⁷¹ If tribalism attacks objectivity, counter-factualism goes on to attack authenticity.⁷² Counter-factualism is the aggregation of ways in which people lose connection with, or explicitly reject, reality.⁷³

The impulse of counter-factualism presents itself in a distressing number of guises.⁷⁴ First, opinion is often presented as fact.⁷⁵ This is accelerated in a world of round-the-clock news channels and social media.⁷⁶ Second, there are highly purposeful acts of factual manipulation, obfuscation, and deception.⁷⁷ This includes mendacity in all its forms but with scientific sophistication and post-modern complexity.⁷⁸ Thirdly, the loss of acceptable and reliable arbiters of truth in society exacerbates this problem.⁷⁹ Lastly,

65. *See id.*

66. *See* Michiko Kakutani, *The Death of Truth: How We Gave Up on Facts and Ended Up with Trump*, *GUARDIAN* (July 14, 2018, 4:00 PM), <https://www.theguardian.com/books/2018/jul/14/the-death-of-truth-how-we-gave-up-on-facts-and-ended-up-with-trump>.

67. *See* BISHOP, *supra* note 26, at 221–24.

68. *See id.* at 223.

69. *Id.*

70. *See* Richard Gray, *Lies, Propaganda and Fake News: A Challenge for Our Age*, *BBC: FUTURE* (Mar. 1, 2017), <https://www.bbc.com/future/article/20170301-lies-propaganda-and-fake-news-a-grand-challenge-of-our-age>.

71. *See id.*

72. *See id.* (explaining how for every true fact, there is a counter-fact).

73. *See id.* (describing that in today's internet age, false stories spread quickly and can appear authentic).

74. *Id.* (describing how easy incorrect, or alternative, facts spread).

75. *See id.*

76. *Id.*

77. 2 GEORGE ORWELL, *Looking Back on the Spanish War*, in *THE COLLECTED ESSAYS, JOURNALISM, AND LETTERS OF GEORGE ORWELL: MY COUNTRY RIGHT OR LEFT 1940–1943*, at 249–56 (Sonia Orwell & Ian Angus eds., 1968). This is nothing new. *See id.* For example, George Orwell identified it during his journalistic coverage of the Spanish Revolution: “[I]n Spain, for the first time, I saw newspaper reports which did not bear any relation to the facts, not even the relationship which is implied in an ordinary lie.” *Id.*

78. *See* Gray, *supra* note 70 (describing how easily false information spreads so widely and becomes regarded as a truth).

79. *See generally* Katy Steinmetz, *How Your Brain Tricks You into Believing Fake News*, *TIME* (Aug. 9, 2018), <https://time.com/5362183/the-real-fake-news-crisis/>.

there are no less insidious (arguably more so) failures of our collective ability to see, assess, or understand facts and identify truth.⁸⁰ These new realities undermine our ability as a society to work from a base of shared truth. It may no longer be true, as Senator Daniel Patrick Moynihan observed that: “Everyone is entitled to his own opinion but not to his own facts.”⁸¹

The first common manifestation of counter-factualism is the presentation of opinion as “fact.”⁸² It is not a new phenomenon. It is a profound question at the heart of epistemology and metaphysics.⁸³ Setting aside the complex puzzle of philosophy, however, the practical problem of opinion being substituted for knowledge is commonplace in daily life.⁸⁴ Consider a common chain of events. An opinion is stated. That opinion becomes a belief. The believer, and others who hear that belief, mistake it for a fact. Absent rigorous application of the verifying tools of skepticism, that belief can come to pass as a reliable fact. Thus, the opinion, never subjected to meaningful testing or verification and unsupported by the factual structure of true knowledge, is given credence. The phenomenon has become so commonplace as to have the recognized definition as “post-truth.”⁸⁵

One need only turn on a cable news program from either ideological pole to see this in action.⁸⁶ The factual alchemist’s formula to turn opinion into fact is simple.⁸⁷ An opinion is authoritatively presented even if incomplete, speculative, or contradicted by the evidence.⁸⁸ When it is critiqued, the simple response is to reassert, usually more loudly, that it is believed and thus unassailable.⁸⁹ An opinion becomes a belief, presented as

80. *See id.*

81. DANIEL PATRICK MOYNIHAN, A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY 2 (Steven R. Weisman ed., 2010).

82. *See* Deb Calbert, *My Political Rant: Are You Presenting Opinions as Facts?* PEOPLE FIRST PRODUCTIVITY SOLUTIONS: CONNECT2LEAD (July 25, 2016), <https://blog.peoplefirstps.com/connect2leadpresenting-opinions-as-facts>.

83. *Epistemology*, NORTON DICTIONARY OF MODERN THOUGHT (Alan Bullock & Stephen Trombley eds., 1999) (defining epistemology and discussing the debate about the definition and foundations of “knowledge”); *see* Perry Weddle, *Fact From Opinion*, 7 INFORMAL LOGIC 19, 19–24 (1985) (articulating practical applications for students attempting to discern between fact and opinion); John Corvino, *The Fact/Opinion Distinction*, PHILOSOPHER’S MAG. (Mar. 4, 2015), <http://www.philosophersmag.com/essays/26-the-fact-opinion-distinction>. Considered as epistemological and metaphysical questions, the difference between “opinion” and “fact” may not even be a valid question. *See Epistemology, supra* note 83, at 279. These issues are far beyond the scope of this Article.

84. *See* Corvino, *supra* note 83. Given that this Article does not seek to explore the complex philosophical issues presented by what constitutes “opinion” or “fact,” it is important to define how the terms are used here. For purposes of this argument, an opinion is simply a belief that is not subject to external review or verification. Weddle, *supra* note 83. It is a bare belief. *Id.* A fact is some statement that has been subjected to external verification. *Id.* It is a belief supported by testing or other verification. *Id.*

85. LEE C. MCINTYRE, POST-TRUTH 5 (2018).

86. *See id.* at 3–4.

87. *See id.*

88. *See id.*

89. *Id.* For example, McIntyre cites an exchange between Newt Gingrich and television journalist Alisyn Camerota wherein Gingrich asserts that violent crime rates in America are not in decline. *Id.* When Camerota contradicts him with FBI data, Gingrich asserts that the rate is not lower in certain larger cities.

a known fact.

In the world of nonstop news,⁹⁰ statements of opinion are then reported elsewhere. Soon, they are repeated widely, often, and long enough to take on a vitality historically reserved for the objectively knowable, testable, or otherwise verifiable.⁹¹ This self-perpetuation of opinion masked as truth, and belief passing as knowledge, is accelerated by the Internet and our collective reliance upon it for information.⁹² A post-truth world moves at the speed of opinion.⁹³

Beliefs cloaked as truth and desires to hold clear beliefs are preyed upon by public figures in politics, commerce, and entertainment who simply want to sell us the candidate, product, or story of the day.⁹⁴ There is no investment in edification or growth.⁹⁵ Just sell it, whatever it is in the end; sometimes through opinions not fully informed, researched, or realized, and sometimes through outright mendacity by intentionally representing opinion as fact.

A second species of counter-factualism is the manipulation of facts by agenda-driven actors.⁹⁶ This occurs when facts are hidden from public view, disputed or denied on questionable grounds, or contradicted by “alternative facts;” in other words, through direct assault on the facts.⁹⁷ Perhaps the most prominent example of this in recent history was the manipulation by the tobacco industry of scientific testing proving tobacco to be a carcinogen.⁹⁸ In what is now a well-documented campaign of misinformation, cigarette manufacturers hid studies demonstrating links between smoking and lung cancer while simultaneously marketing competing “research” that suggested

Id. Camerota again points out that the statics reflect a nationwide decline. *Id.* Gingrich responds that he believes most Americans do not feel safer and that: “As a political candidate, I’ll go with how people feel and let you go with the theoreticians.” *Id.*

90. *Id.* The line between news and entertainment blurred long ago. *E.g., id.* at 73. In some instances, “news” is presented solely as entertainment. *Id.* Many programs replace rigorous journalism, subject to factual vetting, with the ersatz “debate” of a wall of talking heads. *See id.* at 75. The opinion industrial complex moves quickly, relentlessly, and in partisan fashion. *Id.*

91. TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 112–15 (2019).

92. *Id.*

93. *See* HARRY G. FRANKFURT, *ON BULLSHIT* 63–64 (2005). This is driven in no small part by the current ubiquity of communication modes in society, and the societal perception that everyone can, and should, have an opinion on every topic. *Id.* With this belief, citizens put less stock in the informed opinions of experts. *See infra* note 113 and accompanying text (explaining that many people distribute false information without realizing it).

94. SNYDER, *supra* note 38, at 66–67 (explaining how repetition of non-factual information consistently and extensively can drive public belief away from the truth, a common tool of nondemocratic regimes). When carefully crafted for purposes of commercial marketing and politics, one scholar has described the pushing of a counter-factual agenda for a particular purpose “the most indisputable and classic paradigms” of bull. FRANKFURT, *supra* note 93, at 22–23.

95. FRANKFURT, *supra* note 93, at 22–23.

96. MCINTYRE, *supra* note 85, at 23.

97. *Id.*

98. *Id.* at 22–24.

the opposite.⁹⁹ This effort has been repeated in other settings.¹⁰⁰ Purposeful manipulation of truth has been similarly weaponized in national politics and strategic geopolitics.¹⁰¹ With technological advances, the battle between efforts to purposefully manipulate reality and recognize truth is increasingly fierce.¹⁰² The line between true and false is increasingly hard to recognize, verify, and maintain even for discerning consumers of information.

The assault on facts, purposeful and not, has a second order effect.¹⁰³ It undermines the ability and willingness of people to believe that there is a base of “facts” from which to work.¹⁰⁴ We come to this point in a couple of ways. First, modern journalistic ethics call for fairness, often resulting in the provision of a counterpoint to every point.¹⁰⁵ For example, antivaccination advocates have been presented in conjunction with scientists, creating a false equivalence and undermining belief in clearly established science.¹⁰⁶ Second, attacks on the very notion of “truth” from postmodernist philosophers have been used to contend that nothing is knowable, and all is opinion.¹⁰⁷ When this door opens, anything and everything is up for “debate” which allows counter-factual thinkers, ignorant or malevolent, to aggressively speak out and unsubstantiated ideas to proliferate.¹⁰⁸

A third cause of counter-factualism in American society is decreased reliance on, and reliability of, mediating sources of authority to filter

99. *Id.*

100. *Id.* at 30–34; Azhar Hussain, et al., *The Anti-Vaccination Movement: A Regression in Modern Medicine*, CUREUS (July 3, 2018), <https://www.cureus.com/articles/13250-the-anti-vaccination-movement-a-regression-in-modern-medicine>; Tyler Pager, *‘Monkey, Rat and Pig DNA’: How Misinformation is Driving the Measles Outbreak Among Ultra-Orthodox Jews*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/nyregion/jews-measles-vaccination.html>; see also Amy Westervelt, *How the Fossil Fuel Industry Got the Media to Think Climate Change was Debatable*, WASH. POST (Jan. 10, 2019), <https://www.washingtonpost.com/outlook/2019/01/10/how-fossil-fuel-industry-got-media-think-climate-change-was-debatable/> (discussing the strategic reporting on the uncertainties in climate science).

101. JIM MATTIS & BING WEST, CALL SIGN CHAOS: LEARNING TO LEAD 127–28, 140–41 (2019) (describing propaganda used by terrorists seeking to influence United States military operations); *Sex, Lies and Politics*, ECONOMIST, Nov. 9, 2019, at 12, <https://www.economist.com/leaders/2019/11/09/women-in-public-life-are-increasingly-subject-to-sexual-slander-dont-believe-it> (describing the use of “deepfake” technology to attack female politicians through “doxx[ing]” and phony sex videos in some countries).

102. Cade Metz, *Internet Companies Prepare to Fight the ‘Deepfake’ Future*, N.Y. TIMES (Nov. 24, 2019), <https://www.nytimes.com/2019/11/24/technology/tech-companies-deepfakes.html> (describing efforts to use AI technology to identify videos which have been manipulated from the original and true form).

103. See MCINTYRE, *supra* note 85, at 75.

104. *Id.* at 77.

105. *Id.* at 82.

106. *Id.* at 82–85.

107. *Id.* at 126. This idea has been used to “fight[] the science” on a variety of issues. *Id.* at 136.

108. NICHOLS, *supra* note 91, at 147–48. This counter-factualism commingles with tribalism to become particularly virulent. *Id.* People consume media only in line with their political or personal beliefs and preferences. *Id.* The resulting effect is an echo-chamber of confirmation bias where people often end up less well informed than if they had consumed no media at all. *Id.* at 157.

information.¹⁰⁹ Traditional sources of authority, who provided a mark of authenticity to information, are losing their social relevance.¹¹⁰ Public rejection of subject matter experts and anti-intellectualism (a long-running strain of American thought)¹¹¹ have become more widespread and more virulent.¹¹² With raw information widely available, substitution of “facts” gleaned from sources not verified or curated are given preference over the knowledge of actual experts.¹¹³ The proliferation of sources of news and information has undercut the impact of having reliable, shared sources within society.¹¹⁴ Disseminating news, for example, has evolved from an effort to identify and share the truth to the mere attraction of viewers (increasingly commonly known as “clicks”) to pushing a partisan agenda.¹¹⁵ The loss of expertise, and shared reliance on recognized experts accelerates counter-factualism.

A final driver of counter-factualism is the declining ability to discern truth from falsity.¹¹⁶ Decreased scientific literacy and increased faith in pseudoscience are components of this problem.¹¹⁷ So too is the impulse to politicize science, which is exacerbated by lack of understanding that the

109. Sean M. Kammer, “*Whether or Not Special Expertise Is Needed*”: *Anti-Intellectualism, the Supreme Court, and the Legitimacy of Law*, 63 S.D. L. REV. 287, 332–33 (2018).

110. *Id.* (noting the declining public confidence in the United States government, news media, scientists, universities, and lawyers).

111. *Id.* at 290 (citing RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 7 (1974)).

112. NICHOLS, *supra* note 91, at xx–xxi, 20.

113. *Id.* at 106–08. Additionally, people often lack the inclination or ability to take steps to verify information themselves. SNYDER, *supra* note 38, at 79–80. Failing to do so, many of us distribute false information without realizing that doing so undermines the ability of our fellow citizens to work from truth. *Id.* To sustain truth, each of us needs to have commitment to it and understand how to maintain it.

114. SNYDER, *supra* note 38, at 141–44.

115. *Id.* at 150–54. This undercuts the reliability of news by shifting the focus from true journalism to commercialism or partisanship. News is increasingly treated like any other commodity for sale or as another front for partisanship. Additionally, our susceptibility to manipulation by counter-factual material can lead to attacks on democracy itself. *See, e.g.*, Richard Stengel, *We’re in the Middle of a Global Information War. Here’s What We Need to Do to Win*, TIME (Sept. 26, 2019), <https://time.com/5686843/global-information-war/>. Purposefully manipulated information, often demonstrably untrue, is interjected into our news and social media streams by other nations to attempt to fracture American society and manipulate elections. *Id.*

Equally dangerous is that media outlets, even while attempting to apply high journalistic standards, can get caught up in the counter-factual web. *See, e.g.*, Peter Wade, *How Disinformation Spreads According to Chuck Todd*, ROLLING STONE (Dec. 20, 2019, 11:19 AM), <https://www.rollingstone.com/politics/politics-news/how-disinformation-spreads-according-to-chuck-todd-interview-929912/> (describing Todd’s observations that guests appeared on his interview program, Meet the Press, and disseminated false information). When media is caught up in the free-for-all of counter-factualism, their collective credibility is undermined. *Id.* However, some have criticized the current, profit-driven media environment for making many media outlets complicit at worst and perhaps willfully blind at best in the spread of misinformation in the quest to gather viewers. *See* Jay Rosen, *The Christmas Eve Confessions of Chuck Todd*, PRESSTHINK (Dec. 26, 2019, 1:40 AM), <http://pressthink.org/2019/12/the-christmas-eve-confessions-of-chuck-todd/> (criticizing Todd’s claim that he was “naive” in failing to realize partisan speakers were using his show to spread false information).

116. *See, e.g.*, Rosen, *supra* note 115.

117. CARL SAGAN, *THE DEMON HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK* 25–27 (1996).

scientific method can produce hypotheses that prove false after further testing.¹¹⁸ Many members of the public mistake the trial and error inherent to the scientific method as demonstrating a lack of reliability.¹¹⁹ Without understanding what makes a process, resultant data, or an expert opinion actually reliable, citizens can substitute fame or alignment with their own personal preferences as the imprimatur of truth.¹²⁰ The danger becomes that truth is identified based on the messenger or the content of the message, rather than the verifiable and reliable process through which the message was developed or through which the messenger developed the ability to provide a reliable message.¹²¹

Combined with the segregating effects of tribalism, counter-factualism promotes hostility to questioning or reassessing personal beliefs or preferences.¹²² Not only do we fail to seek out new facts and ideas, to realign our beliefs, or to simply entertain the possibility of error, we become affirmatively hostile to any idea that does not instantly and fully align with our preferred worldview or that of our chosen tribe.¹²³ Our self-selected and self-reinforcing affiliations and sources of information confirm for us that: we know what we need to know, it is unassailably correct, and those espousing other views are simply seeking to undermine the truth for some nefarious agenda.¹²⁴ In this environment, even the most intelligent, informed, and open minded struggle to operate from a base of truth, and others—less well provisioned or intended—lose all ability or inclination to do so.¹²⁵

Counter-factualism is driven by many forces in modern society.¹²⁶ Some are purposeful, some are accidental, and some are simply unchecked dangers of the world we live in. Recognizing the cause matters because different sources of counter-factualism must be attacked in different ways.¹²⁷ Most

118. Naomi Oreskes, *Science Isn't Always Perfect—But We Should Still Trust It*, TIME (Nov. 24, 2019), <https://time.com/5709691/why-trust-science/>.

119. *Id.*

120. NICHOLS, *supra* note 91, at 117–18.

121. See, e.g., Margarida Arede et al., *Combating Vaccine Hesitancy: Teaching the Next Generation to Navigate Through the Post Truth Era*, FRONTIERS IN PUB. HEALTH (Jan. 14, 2019), <https://www.frontiersin.org/articles/10.3389/fpubh.2018.00381/full>.

122. See SAGAN, *supra* note 117, at 281–82.

123. ORWELL, *supra* note 77, at 253. (“The truth, it is felt, becomes untruth when your enemy utters it.”).

124. See Jaeho Cho et al., *Influencing Myself: Self-Reinforcement Through Online Political Expression*, 45(1) COMM. RES. 83, 85 (2018), <https://doi.org/10.1177/0093650216644020>. This can manifest as “magical thinking,” whereby believers accept any premise necessary for their belief and reject any fact or approach that would undermine it. SAGAN, *supra* note 117, at 171–73.

125. SNYDER, *supra* note 38, at 66–68. Abandonment of critical thinking about the statements of an associated tribal member or leader can devolve into acceptance of overt contradiction or the acceptance of magical thinking. SARAH ROSE CAVANAGH, HIVEMIND: THE NEW SCIENCE OF TRIBALISM IN OUR DIVIDED WORLD (2019). In short, individual critical thinking is surrendered to the shared mind of the tribe. *Id.*

126. See, e.g., SAGAN, *supra* note 117, at 26 (noting several sources that undermine the public’s ability and inclination to seek truth).

127. *Id.*

fundamentally, however, we must recognize that we live in a world where an understanding and agreement of what is true simply cannot be assumed.

C. Individualism

Where do tribalism and counter-factualism culminate? Excessive and isolating individualism.¹²⁸ Individualism of this sort produces a tendency to only ask: What benefits me?¹²⁹ The possibilities of compromise or everybody-wins solutions are not entertained, much less meaningfully pursued. The solution is always what I want, what I believe,¹³⁰ and the devil takes the others.¹³¹ This is not to say that self-concern is inherently wrong. Instead, it is simply to observe that it can be placed above all other values. The demands of individuals then leave no room for compromise, growth, or self-sacrifice for the collective good.¹³²

Excessive individualism can breed isolation.¹³³ A focus on self-interest to the exclusion of other concerns comes at the cost of meaningful social and civic connection. When self-interest predominates, even basic acts in service of connection or the greater good are rejected.¹³⁴ A fundamental divide about our approach to governance exists between a liberal vision, focused on

128. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 286 (3d ed. 2007).

129. *Id.*

130. *See, e.g.*, ANTHONY T. KRONMAN, *THE ASSAULT ON AMERICAN EXCELLENCE* 140–43 (2019). Kronman notes that liberal arts education has shifted its focus from an encounter with a canon of great works from which students can draw inspiration and model to providing fodder for an idiosyncratically developed personal view of life. *Id.* at 141. The absence of a shared educational base facilitates individualism that becomes isolating and toxic by promoting a view that all opinions are entitled to equal validity. *See id.* at 145–46. Absent a rank ordering of opinion and knowledge, individual opinions can become formed simply by mass public opinion, not merit. *Id.* at 39. In other words, unguarded individualism can fuel counter-factualism and tribalism.

131. *See* DAVID BROOKS, *THE ROAD TO CHARACTER* 70–71 (2016). An excessively individualist view can cause individuals to move away from the value of moderation. *Id.* Balance and proportion within life and relationships is as lost as the target. *Id.* Classical individualism thus devolves into mere narcissism. *Id.* at 6–8.

132. Scott Bales, *Two Presidents, Two Inaugurations, and the Course of Freedom*, 45 U.C. DAVIS L. REV. 261 (2011). It may be clearer to think of this through negative comparison with a famous rhetorical example. In his inaugural address, President Kennedy asked American citizens: “And so, my fellow Americans: ask not what your country can do for you—ask what you can do for your country. My fellow citizens of the world: ask not what America will do for you, but what together we can do for the freedom of man.” LET THE WORD GO FORTH: THE SPEECHES, STATEMENTS, AND WRITINGS OF JOHN F. KENNEDY 1947 TO 1963, at 14 (1988). The context of this quote is often lost. President Kennedy addressed a nation and world that in recent memory was fractured by World War II, and in the clearly visible future faced the danger of nuclear war. Bales, *supra* note 132, at 271. His address, not only to American citizens but also the larger world, called for a recognition that the largest issues require collective action and interest, not simply service of our most parochial or individual interests. *Id.* at 272. This vision of collective human purpose is the antithesis of obsessive individualism. This vision is also consistent with the collective American soul Meacham extols. MEACHAM, *supra* note 40, at 6–7.

133. *See* BELLAH ET AL., *supra* note 128, at 286.

134. *Id.* at 198.

preserving individual rights, and a republican vision, focused on collective deliberation in advancement of the common good.¹³⁵ Without taking a side in that debate, it can be acknowledged that if individualism is given primacy, it comes at the cost of structuring actions and engagements to build up the health and capacity of the Republic through participation in shared institutions and preservation of shared ideals.¹³⁶ Without shared purpose or belief and without commitment to facts and processes to evaluate truth, we end up not even as real tribes but as individuals possessed with self-obsession and fear, even loathing, of those who do or cannot advance our personal benefit or preference.

Individualism has a rich tradition in the United States.¹³⁷ That tradition is not inherently negative.¹³⁸ However, individualism can become so defining as to crowd out community engagement and service.¹³⁹ Even social participation can become part of the individualistic impulse to get ahead.¹⁴⁰ Engagement beyond the self and the derivative joy of making a deliberate personal choice to participate in community, comes only intermittently and is often considered to be at the cost of personal advancement.¹⁴¹

Desire for individual advancement has driven enormous achievement.¹⁴² Wealth and opportunity has exploded in America over the last 100 years—largely fueled by the pursuit of personal freedom and achievement.¹⁴³ However, that enormous achievement has arguably come with proportionate collateral costs.¹⁴⁴

Fear can deter collective participation.¹⁴⁵ America's traditional view of individualism as the route to achievement and as the foundation of freedom

135. Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: A Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 519–20 (2000).

136. BELLAH, *supra* note 128, at 198.

137. *Id.* at 39–41. Bellah identifies prominent Americans like Thomas Jefferson, John Winthrop, Benjamin Franklin, and Abraham Lincoln as representative examples who have fueled the cultural myth that defines us as a society. *Id.* Each balanced individual accomplishment with communal participation in religion and politics. *Id.* The loss of this balance is a central symptom of individualism, which becomes isolating and culturally pathological.

138. *Id.*

139. *Id.* at 198.

140. *Id.*

141. *Id.* Bellah describes a disconnect between the generosity individuals perceive as necessary to “redeem” personal economic striving and the small-scale personal service that individuals see as available to them. *Id.* at 199. It becomes easy to see an imbalance between personal opportunities for service or community and the social forces that incentivize individual pursuits.

142. *Id.* at 284.

143. *Id.*

144. *Id.* Although not the focus of this Article, Bellah discusses the enormous cost of individualism to the environment. *Id.* Environmental degradation is significantly rooted in societal incoherence and disconnection, the individual isolation that is the focus of this Article. *See id.* Separation from community devolves into separation from concern for the common good. Negative consequences, many of them profound, follow on a variety of fronts. *Id.* at 284–85.

145. *Id.* at 286.

can produce fear of collectivity.¹⁴⁶ But the social disconnection and fragmentation that follows from extreme individualism actually erodes the ability to preserve individual dignity and autonomy.¹⁴⁷ In short, demanding individuality over all can come at the cost of a coherent society in which to securely, if individually, exist.

Modern society is rife with fragmentation.¹⁴⁸ The highest ranks of intellectual achievement often promote (if not outright demand) it.¹⁴⁹ Sources of coherent narratives about our collective purpose and connection are in short supply.¹⁵⁰ Education, culture, and the economy—the primary forces in society—do not effectively push back against fragmentation.¹⁵¹ This bleeds into politics such that competing interests (e.g., religion, race, occupation, gender) become the political focus, but not a foundation of connection from which to understand, prioritize, and advance them as a society.¹⁵² Rooted in individualism, competing interests lack a coherent moral hierarchy from which to make those decisions.¹⁵³ We each become our own selves alone—a product of our collective choices and priorities—disconnected from those around us.

American upbringing cultivates an individualistic worldview.¹⁵⁴ We tend to see a world consisting of individuals, not relationships.¹⁵⁵ As a result, moral concerns trend toward individual rights, fairness, and harm.¹⁵⁶ Contrast this with cultures that focus more on relationships, groups, and context.¹⁵⁷ Moral concerns in those societies focus primarily on community or divinity.¹⁵⁸ The individualist worldview can become so powerful as to perceive oppression or inequality (and thus, harm to individual autonomy) in simple acts that people raised in other cultures do not.¹⁵⁹

146. *Id.* By becoming more communally oriented it may be feared that, “we will be abandoning our separation and individuation, collapsing into dependence and tyranny.” *Id.*

147. *Id.*

148. *Id.* at 277.

149. *Id.* at 277–78.

150. *Id.*

151. *Id.*

152. *Id.* at 203–04.

153. *Id.*

154. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 112–14 (2012). Haidt contrasts the worldview of members of Western, educated, industrialized, rich, and democratic (as he calls them, “WEIRD cultures”) with Eastern or more traditional cultures. *Id.* WEIRD cultures typically view the world as driven by separate individuals and objects rather than by relationships or divinity. *Id.*

155. *Id.* at 114.

156. *Id.*

157. *Id.*

158. *Id.* at 116–17. Communal focus emphasizes groups such as families, companies, and nations. *Id.* Decisions become driven by hierarchy, respect, and reputation. *Id.* at 117. Divine focus prioritizes transcendent values and rejects individual value judgments about conduct as hedonistic or libertine. *Id.*

159. *Id.* at 128. Also, the fundamental discrepancy of priorities and values can make empathy or engagement challenging across groups. *Id.* at 129–30.

Individualism is a powerful cultural force. It can become destructive.¹⁶⁰ It can produce social isolation, not simply emphasis of individual achievement.¹⁶¹ This can result in hyper-individualized values and beliefs.¹⁶² Solipsists—convinced that what they believe, who they associate with, and what they prefer is all that matters—use their sense of shared values, beliefs, and hierarchies. The individual is all; anyone not fully aligned with that individual is naught.¹⁶³

American society has balanced the individual and the collective.¹⁶⁴ Giving priority to the individual over the collective does not automatically destroy that balance.¹⁶⁵ When the balance is lost to the demand of individualism alone, however, much is lost.¹⁶⁶ Not only is the ability to address our social needs collectively jeopardized, but, even as individuals, we run the risk of being so isolated as to lose meaning and purpose within our lives.¹⁶⁷

II. CHECKING SOCIETAL ENTROPY THROUGH THE JURY TRIAL: OBJECTIVE GOVERNING PRINCIPLES, EVIDENCE-BASED DECISION MAKING, AND CITIZEN SELF-GOVERNANCE

The view of current affairs outlined above is undeniably dark. However, it appears equally, undeniably accurate. Were it immutable or irresistible, one could say that these are dark times indeed, but there is a vital and viable alternative in the American jury trial system. It offers three counterweights to this state of affairs: objective governing principles, evidence-based decision making, and citizen self-governance. Consider each and how they offset the negative forces of tribalism, counter-factualism, and individualism in turn.

160. Nicholas Kristof, *Let's Wage a War on Loneliness*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/opinion/sunday/britain-loneliness-epidemic.html> (discussing how personal isolation can be damaging to personal health and wellbeing).

161. See *supra* notes 130–31 and accompanying text (explaining problems with hyper-individualism).

162. See *supra* notes 130–31 and accompanying text (discussing hyper-individualized beliefs as a result of individualism).

163. See BROOKS, *supra* note 131, at 6–8. Another way to describe this would be unbridled narcissism. *Id.* Excessive focus on individual value, belief, and rectitude becomes isolating because nothing can be as important as the self—“the Big Me” as Brooks calls it. *Id.* From this perspective, how could any individual meaningfully engage with a community? The community should instead seek the privilege to engage with them. *Id.* This thought process is unavoidably isolating and destructive of the community. *Id.*

164. See BELLAH ET AL., *supra* note 128, at 198.

165. *Id.* at 39–41.

166. See KRONMAN, *supra* note 130, at 140–43.

167. Kristof, *supra* note 160.

A. Objective Governing Principles

The American jury trial system rests on a foundation of objective governing principles formed in an open fashion and neutrally applied.¹⁶⁸ Contrary to the tribalistic impulses in society, message content rather than messenger identity matters in the jury trial system.¹⁶⁹ From these foundations up, the jury trial system checks the tribalistic impulse.¹⁷⁰

Checking this impulse begins with our process of establishing law.¹⁷¹ In America, open processes formulate both positive and common law; here, statutes are proposed, debated, and adopted in the open.¹⁷² Legislatures provide avenues for direct public feedback through comments on legislative proposals and indirectly through electoral consequences for legislators out of step with the public will.¹⁷³ Citizens have the ability to actively track the legislative process.¹⁷⁴ Once enacted, statutes are made available to the public through a variety of platforms.¹⁷⁵ So too, if in a different way, American common law is publicly developed. Courts are open to the public, with rare exceptions.¹⁷⁶ At the appellate level, most courts make some transcripts or recordings of arguments publicly available.¹⁷⁷ Judicial decisions are typically

168. See *infra* notes 176–77 and accompanying text (discussing the open nature of the court and the development of the common law).

169. See H.L.A. HART, *THE CONCEPT OF LAW* 126–28 (3d ed. 2012).

170. See *id.* at 134–35.

171. *Id.* at 124–25.

172. See CHARLES W. JOHNSON, *PARLIAMENTARIAN, U.S. HOUSE OF REPRESENTATIVES, HOW OUR LAWS ARE MADE*, H.R. Doc. No. 108–93, at 1 (1st Sess. 2003).

173. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 3 (2d ed. 2006).

174. See, e.g., CONGRESS, <https://www.congress.gov> (last visited May 30, 2020) (providing links to text of currently proposed legislation, committee and floor hearing schedules, and contact information for legislators).

175. *Id.*; see also *United States Code - Unannotated*, FINDLAW, <https://codes.findlaw.com/us/> (last visited May 30, 2020) (free online platform collection of the current U.S. Code); *U.S. Code*, JUSTIA, <https://law.justia.com/codes/us> (last visited May 30, 2020) (free online platform collection of passed laws).

176. U.S. CONST. amend. VI; *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cty.*, 478 U.S. 1, 9–10 (1986); Jack B. Harrison, Comment, *How Open is Open? The Development of the Public Access Doctrine Under State Open Courts Provisions*, 60 U. CIN. L. REV. 1307, 1307–08 (1992) (tracing development of protections of public access to courts under state constitutional provisions).

177. See, e.g., *Argument Transcripts*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/oral_arguments/argument_transcript/2019 (last visited May 30, 2020) (cataloguing transcripts of the United States Supreme Court arguments); *Oral Arguments*, U.S. CT. OF APPEALS FOR THE EIGHTH CIR., <https://www.ca8.uscourts.gov/oral-arguments> (last visited May 30, 2020) (cataloguing audio recordings of oral arguments before the Court of Appeals for the Eighth Circuit); *Oral Arguments Recording*, U.S. CT. OF APPEALS FOR THE SECOND CIR., http://www.ca2.uscourts.gov/oral_arguments.html (last visited May 30, 2020) (cataloguing audio recordings of oral arguments before the Court of Appeals for the Second Circuit); *Oral Arguments Webcasts*, CAL. CTS., <https://www.courts.ca.gov/35333.htm> (last visited May 30, 2020) (cataloguing webcasts of oral arguments before the Supreme Court of California).

published with the ratio decidedly expressed in careful detail.¹⁷⁸ Our governing rules are publicly established and publicly expressed.

A second aspect of our laws that checks the tribalistic impulse is their neutrality of application.¹⁷⁹ In a variety of ways, we reject laws that target individuals unduly or apply unevenly.¹⁸⁰ Laws that criminalize conduct after the fact are barred by the Ex Post Facto Clause of the Constitution.¹⁸¹ Laws that do not apply evenhandedly are barred by the Equal Protection Clause.¹⁸² At minimum, statutes must have a rational basis for the distinctions that they draw,¹⁸³ but heightened justifications apply to certain invidious distinctions like race or gender.¹⁸⁴ Many states bar special laws that apply only to one individual or circumstance.¹⁸⁵

Neutrality of application extends beyond statutory text, however.¹⁸⁶ Those tasked with enforcement of the law must maintain neutrality.¹⁸⁷ Grossly unequal enforcement of the law can give rise to “class of one” Equal Protection claims.¹⁸⁸ Government officials may not make the law a tool of personal advancement, discrimination, or unfair treatment.¹⁸⁹ The jury trial itself demands neutrality.¹⁹⁰ Jurors must commit to apply the applicable law neutrally and not on the basis of bias, prejudice, or other external forces.¹⁹¹ Openness and neutrality extend from formation of the law through its implementation and application.¹⁹² The shared commitment to these principles prevails over the tribal impulse to place the end (advancement of

178. FED. R. APP. P. 32.1; *but see* Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 755–59 (2003) (cataloguing arguments about the practice of unpublished or nonprecedential decisions by the United States Courts of Appeals).

179. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

180. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3; *Cleburne Living Ctr.*, 473 U.S. at 439.

181. U.S. CONST. art. I, § 9, cl. 3.

182. *See Cleburne Living Ctr.*, 473 U.S. at 439; Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 368–71 (2003).

183. *See, e.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 11–12 (1992). Given that laws inherently classify and differentiate, mere unequal treatment is not the issue. *See id.* So long as the policy is based on a rational basis, not some arbitrary drawing of lines, it does not run afoul of the Equal Protection Clause. *Id.*

184. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (discussing gender); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (discussing race).

185. *See* 73 AM. JUR. 2D *Statutes* § 6 (2020) (describing state constitutional provisions which prohibit enactment of special laws).

186. *See Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918).

187. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

188. *See id.*

189. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631–34 (1996) (singling out a group, gay people in this instance, for negative treatment is impermissible particularly when rooted in animosity towards that group).

190. *See, e.g.*, COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 1.01 (2019).

191. *See, e.g., id.* (stating that jurors “must decide this case based only on the evidence received by the court here in the courtroom and the instructions on the law”).

192. *See* HART, *supra* note 169, at 206–07.

the tribe) before the means (neutral and open decisional processes).¹⁹³

Objectivity within our justice system is a necessity to check tribalism.¹⁹⁴ So too is public belief in that objectivity.¹⁹⁵ Without belief in its fundamental fairness, citizens can view the jury trial system as just another front for tribal competition.¹⁹⁶ Losing awareness of, and faith in, objective governing principles, openly formed and neutrally applied, will allow tribal prejudices to fill the void.¹⁹⁷ It is no idle concern that this loss of faith can occur.¹⁹⁸ Public satisfaction with the political branches of government is low and highly polarized.¹⁹⁹ Alas, the judiciary is now under attack by a similar pathology.²⁰⁰

Public trust in courts, judges, and lawyers is advanced by mechanisms that preserve and demonstrate procedural fairness.²⁰¹ Fairness within our judicial system is dependent upon allowing litigants to feel as though their position was heard and considered.²⁰² A system of objective, open, and neutrally-applied principles for the resolution of disputes is critical to allow litigants to feel that way.²⁰³ As jury instructions and other sources note, it is important not only to do justice but to appear to do so, as well.²⁰⁴ Seeing objective principles in action reinforces trust in those principles among participants and observers.²⁰⁵ Public engagement with such principles becomes a virtuous cycle.²⁰⁶ People see principles in action, boosting their trust in the process, and that trust builds commitment and support for such principles as the means of resolving disputes.²⁰⁷ Our trust in the system leads

193. *See id.*

194. *See* Allen, *supra* note 10, at 95.

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

199. Honorable Steve Leben, *We All Have a Role in Protecting Our Justice System: Promoting Procedural Fairness*, 46 LITIG. 6 (2019). Gallup polling data demonstrates that public satisfaction with how the nation is being governed is below Watergate-era numbers. *Id.* Additionally, the satisfaction level corresponds largely with the allegiance to the party in power of the individual being surveyed. *Id.*

200. *Id.* Public satisfaction with the Supreme Court plunged following the decision in *Bush v. Gore*. *Id.* Since then, approval has swung dramatically following decisions touching on issues of deep partisan divide. *Id.* Although, as Judge Leben notes, it is challenging to answer how fundamentally these divides undermine our judicial system, these divides are not positive. *Id.* Certainly, if the courts become, or become perceived as, additional turf for tribal battle, their moral authority and legitimacy is undercut. *See id.* So too is their ability to be a unifying entity within American governance and society. *See id.*

201. *Id.* at 7.

202. *Id.*

203. *Id.*

204. COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 1.08 (2019); Peter David Blanck, *The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887, 890–94 (tracing cases describing the need to provide the appearance of justice in criminal trials).

205. Leben, *supra* note 199, at 7.

206. *See id.* at 8.

207. *Id.* at 8. Participation in dispute resolution based on objective, consistent, and transparent principles increases the satisfaction of participants. *Id.* It can, in fact, strengthen relationships rather than

to support for the system, which leads to preservation of the system.²⁰⁸

This system not only provides an alternative to tribalism but also demands its rejection.²⁰⁹ Within juries, a unifying “we” predominates over “us” and “them.”²¹⁰ And it is shared allegiance to open and neutral application of our objective governing principles that forms that “we.”²¹¹ One of those crucial principles is evidence-based decision-making.²¹²

B. Evidence-Based Decisions at Trial

Just as governance by objective principles offsets tribalism, making decisions at trial based on proven facts offsets counter-factualism.²¹³ Decisions at a jury trial are evidence-based.²¹⁴ Deciding what the facts are is the heart of the jury’s role.²¹⁵ Juries assess witnesses for credibility,²¹⁶ evidence for veracity, and weigh all to determine what is most credible, not

destroy them. *Id.* Conflict can be productive and community building, not merely destructive and reductionist. *Id.* As Judge Hedren rightly puts it, “[t]he litigants and witnesses we encounter want to see a fair process. And giving it to them strengthens the system we all rely on.” *Id.*

208. See HART, *supra* note 169, at 115.

209. See COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 1.02 (2019) (“You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence received in court and my instructions on the law. If you decide this case on anything else, you will have done an injustice.”).

210. See *id.* § 1.01 (“Each of the parties is entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process.”).

211. See *id.*

212. See *id.* (“[You] must decide this case based only on the evidence received by the court here in the courtroom and the instructions on the law . . .”).

213. See FED. R. EVID. 102 (stating that courts should admit evidence that will help ascertain the truth).

214. COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 1.01 (2019) (telling jurors they “must decide this case based only on the evidence received by the court here in the courtroom and the instructions on the law”); *id.* § 1.03 (“Your duty is to decide what the facts are from the evidence. You are allowed to consider the evidence in the light of your own observations and experiences. After you have decided what the facts are, you will have to apply those facts to the law that I give you in these and in my other instructions. That is how you will reach your verdict. Only you will decide what the facts are.”).

215. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 202–03 (explaining that in the face of evolving reforms to the right of trial by jury, the role of juries as fact finders has remained sacrosanct); see *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (confirming that a jury must find any question beyond the existence of a prior conviction that can increase maximum punishment).

216. COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 1.03 (2019) (“In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it. In deciding what testimony to believe, consider the witnesses’ intelligence, their opportunity to have seen or heard the things they testify about, their memories, any reasons they might have to testify a certain way, how they act while testifying, whether they said something different at another time, whether their testimony is generally reasonable, and how consistent their testimony is with other evidence that you believe.”).

what is most personally palatable or comforting.²¹⁷ The law describes jurors as “finders of fact,” because in any trial, they must reckon with and resolve unclear, uncomfortable, and sometimes ugly facts.²¹⁸ The system, from start to finish, searches for the truth to the greatest degree feasible.²¹⁹

In fact, at trial, few assertions remain untested or unchallenged.²²⁰ The rules of evidence serve as a rubric to administer disputes fairly and avoid the introduction of unreliable or inflammatory information.²²¹ Parties vigorously apply cross-examination, the great engine of truth.²²² The skill of forceful advocates for the parties and the dispassionate supervision of judges helps maintain focus on the actual questions at hand.²²³ The collective common sense of a jury of the litigants’ peers serves as a final filter to determine the facts, apply the law to those facts, and to resolve the dispute peacefully.²²⁴ The elements of the jury trial system check counter-factualism in many ways.²²⁵

First, the rules of evidence are strong guards against counter-factualism.²²⁶ We see this most clearly with expert witness testimony.²²⁷ Prior to the introduction of expert testimony, a judicial gatekeeping function assesses that testimony for its relevance and reliability.²²⁸ In performing this function, judges assess the process experts

217. *Id.* (“Do not let sympathy, or your own likes or dislikes, influence you. The law requires you to come to a just verdict based only on the evidence, your common sense, and the law that I give you in my instructions, and nothing else.”).

218. *See id.* (“Your duty is to decide what the facts are from the evidence.”).

219. *See* *United States v. Bagley*, 473 U.S. 667, 675 (1985) (describing the adversary system as the primary means by which the fact finder uncovers the truth).

220. *See* Robert Gerchen, *Will Jurors Hold It Against Me if I Object (Too Much) at Trial?*, LITIG. INSIGHTS (Dec. 6, 2014), <http://www.litigationinsights.com/objections-at-trial-jurors/> (noting that many lawyers ask how many objections are too many).

221. *See, e.g.*, FED. R. EVID. 102.

222. Ralph Adam Fine, *The Great Engine that Drives the Truth*, 32 LITIG. 3, 3 (2006). Fine points out that many aspects of adversarial trial practice (e.g., exclusion of evidence, sidebar conferences, pre-trial plea or settlement agreements) make trials anything but engines to ascertain the truth—these are valid critiques of the state of modern litigation. *Id.* However, while jury trials may not be as well used engines of the truth as they can be, they do check the counter-factual impulses in many instances. *See id.*

223. *See, e.g.*, *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam/ (explaining that courts usually limit questioning only to matters that the parties raise on direct examination and that cross-examination’s purpose is to test the credibility of a witness’s statements on direct).

224. *See* Fine, *supra* note 222.

225. *See id.*

226. FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

227. *See* FED. R. EVID. 702.

228. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *see also* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (applying the gatekeeping requirement of *Daubert* to all expert testimony, not simply formal scientific processes).

use in formulating their opinions.²²⁹ The court explores the nature of the testing and body of expertise supporting proposed testimony to determine if they stand on solid footing or are mere opinions covered with the veneer of science.²³⁰ This prevents the introduction of opinion masquerading as fact.²³¹ Exclusion of evidence that is not up to technical snuff is common.²³²

The rules of evidence also provide guardrails against making decisions based on emotion, prejudice, or other nonfactual grounds.²³³ Courts can exclude evidence that improperly interjects the risk of trial making decisions on these improper grounds.²³⁴ Where these risks exist, judges again serve as gatekeepers against counter-factual impulses by exercising their discretion to exclude this type of evidence.²³⁵ In fact, courts devote a great deal of time and energy to assessing this question.²³⁶

Striking the balance poses an enormous challenge.²³⁷ Certain evidence with heavy emotional impact and potential for prejudice can also be vital

229. *Daubert*, 509 U.S. at 592 (explaining that prior to the admission of expert testimony, the judge must perform this gatekeeping inquiry to ascertain if the testimony has “a reliable basis in the knowledge and experience of [the relevant] discipline”).

230. *Id.*

231. See Julie A. Seaman, *A Tale of Two Dauberts*, 47 GA. L. REV. 889, 894–96 (2013). The process is not flawless, of course. *Id.* For example, courts may not apply the gatekeeping standard with equal rigor in civil and criminal cases at times, particularly in favor of experts called by criminal prosecutors. *Id.*

232. See, e.g., *Daubert*, 509 U.S. at 585 (excluding expert testimony that Bedectin caused birth defects in the sampled pool); *Mohney v. USA Hockey, Inc.*, 138 Fed. App’x 804, 808–09 (6th Cir. 2005) (excluding testimony about the failure of hockey goalie mask because it did not have a basis in reliable method of testing or subject to peer review); *Zaremba v. General Motors Corp.*, 360 F.3d 355, 358–59 (2d Cir. 2004) (excluding a biomechanical engineer’s opinion on a design alternative due to a lack of design drawings, supporting calculations, testing, or peer review); *Tanner v. Westbrook*, 174 F.3d 542, 547–49 (5th Cir. 1999); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 278 (5th Cir. 1998) (excluding expert testimony on symptom causation based primarily on temporal proximity); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 737 (3d Cir. 1994) (excluding opinion that polychlorinated biphenyls caused the plaintiff’s injury because they did not have a basis in standard diagnostic techniques); *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358, 373–75 (D.N.J. 1995) (excluding testimony regarding occupation exposure to platinum that testing and reliable methodology did not support); *Schutz v. State*, 957 S.W.2d 52, 70–71 (Tex. Crim. App. 1997) (en banc) (declaring that expert testimony on whether a child witness was testifying through fantasy, manipulation, or lie is not a proper subject of expert testimony, but a question for the jury).

233. Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 54–57 (2011). How much emotion can, and perhaps even should, be fully eliminated from trial decisions is not an easy question, however. *Id.*

234. FED. R. EVID. 403.

235. FED. R. EVID. 403.

236. See, e.g., *United States v. Asher*, 910 F.3d 854, 860–64 (6th Cir. 2018) (reviewing admission of prior similar misconduct); *United States v. Strong*, 826 F.3d 1109, 1114 (8th Cir. 2016) (reviewing admission of prior sexual assault by defendant); *United States v. Wardlow*, 830 F.3d 817, 820–22 (8th Cir. 2016) (reviewing exclusion of prior sexual activity by victim); STEPHEN E. ARTHUR & ROBERT S. HUNTER, *FEDERAL TRIAL HANDBOOK: CRIMINAL* § 28.8, Westlaw (database updated Dec. 2019) (explaining the exclusion of relevant evidence under the Federal Rules of Evidence rule 403).

237. See Cathren Koehlert-Page, *Tell Us a Story But Don’t Make It a Good One: Embracing the Tension Regarding Emotional Stories and the Federal Rule of Evidence 403*, 84 MISS. L.J. 351, 356–59 (2015) (discussing the balance of effective versus excessive emotion at trial).

background information.²³⁸ As examples, prior convictions,²³⁹ prior similar criminal or improper conduct,²⁴⁰ habits,²⁴¹ or motives to fabricate, can all be critical facts for a decisionmaker but not admissible in all instances, or for all purposes, due to the risk of producing decisions not on a truly factual basis.²⁴²

It can readily be said that, while trials are intensely fact driven, the question of “which facts” is inherent to the trial.²⁴³ While trials are fact-driven searches for the truth, they can still become counter-factual in that they are not inclusive of all facts,²⁴⁴ nor are they open-ended searches for absolute truth. Unlike the current culture of political debate and commerce, however, outright untruthfulness is impermissible, and mechanisms exist to expose and penalize such misconduct.²⁴⁵

Before information may be presented at trial, it must be demonstrated to be relevant.²⁴⁶ Trial exhibits require evidentiary foundations to demonstrate that they are genuine.²⁴⁷ Testimony must be based on firsthand knowledge.²⁴⁸ In most instances, testimony derived from secondary sources faces intense screening and typically is allowed only for limited purposes.²⁴⁹

Trials are conducted through an adversarial process with the aid of cross-examination.²⁵⁰ Litigants can task their own lawyers with pointing out flaws in the facts argued by an opposing party and presenting favorable facts in the best light.²⁵¹ While lawyers can stray too far into being partisans, the rules of professional responsibility impose an obligation to hold to the truth

238. See FED. R. EVID. 403 advisory committee’s note (“[C]ertain circumstances call for the exclusion of evidence which is of unquestioned relevance.”).

239. FED. R. EVID. 609 (discussing witness impeachment based on prior criminal conviction).

240. FED. R. EVID. 404; FED. R. EVID. 413 (discussing admission of defendant’s prior committed sexual assault cases); FED. R. EVID. 414 (discussing admission of defendant’s prior committed child molestation cases).

241. FED. R. EVID. 406.

242. See, e.g., FED. R. EVID. 403 (allowing exclusion of evidence when probative value is substantially outweighed by prejudicial input); FED. R. EVID. 412 (limiting evidence of victim’s prior sexual conduct).

243. See FED. R. EVID. 401.

244. FED. R. EVID. 105; FED. R. EVID. 402 (showing that “irrelevant” evidence is inadmissible).

245. See, e.g., 18 U.S.C. § 1621 (1994) (criminalizing perjury); 18 U.S.C. § 1622 (1994) (criminalizing subornation of perjury); 18 U.S.C. § 1623 (1994) (criminalizing false statements before a grand jury or in ancillary court proceedings); 8TH CIR. CIVIL JURY INSTR. § 3.03 (2014) (noting that juries are free to assess witness credibility and reject all or part of their testimony on the basis of that assessment).

246. FED. R. EVID. 401 (defining relevance); FED. R. EVID. 402 (showing the level of relevance of evidence for admission).

247. FED. R. EVID. 901.

248. FED. R. EVID. 602.

249. See, e.g., FED. R. EVID. 703 (limiting expert witnesses’ description of the information considered in formulating their opinion which are not independently admissible); FED. R. EVID. 801 (generally precluding use of hearsay testimony).

250. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998).

251. U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963); Freedman, *supra* note 250, at 64–67; Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 467–69 (1992).

while attempting to win the case for a client.²⁵² Honesty and candor are fundamental professional obligations.²⁵³

Cross-examination provides a valuable guard against counter-factual evidence.²⁵⁴ It is easier to present counter-factual narratives that go unchallenged.²⁵⁵ Through cross-examination, even after the threshold evidentiary requirements for veracity are met, the actual substance of the claim can be thoroughly tested.²⁵⁶ Motives to fabricate, gaps in recollection, inconsistencies, and other cracks in the edifice of fact can be exposed.²⁵⁷

The concern with making decisions based on facts does not end when a verdict is returned.²⁵⁸ The appeal process stands as a guard to make sure that decisions do not run against permissible readings of disputed facts.²⁵⁹ Decisions with no foundation in fact are subject to being overturned.²⁶⁰ Failures or abuses of the procedural checks are also subject to reversal.²⁶¹ In criminal cases, decisions can be overturned because evidence subsequently demonstrates actual innocence.²⁶²

The jury trial stands as a check against counter-factualism in these many ways.²⁶³ It begins with a commitment to fact-based decisions and a search for

252. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983) (requiring lawyer candor to the court); MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 1983) (requiring general lawyer honesty and fairness with opposing counsel); MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 1983) (prohibiting lawyers from making false statements to third parties).

253. See MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983); MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 1983); MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 1983).

254. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688–90 (1996) (discussing the truth-finding component of confrontation and cross-examination at trial).

255. *Id.*

256. *Id.*

257. See KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, 1 FEDERAL JURY PRACTICE & INSTRUCTION § 6.3, Westlaw (database updated Feb. 2020) (discussing means of cross-examination to demonstrate bias, absence of knowledge, lack of credibility, and other flaws in witness testimony).

258. FED. R. CIV. P. 50 (allowing the trial court to grant judgment before or after the jury verdict if legally-sufficient evidentiary basis does not exist for contrary finding); FED. R. CRIM. P. 29 (allowing the trial court to enter judgment of acquittal before or after the jury verdict if sufficient evidence has not been presented to support conviction).

259. See Amar, *supra* note 254.

260. See, e.g., *United States v. White*, 794 F.3d 913, 918 (8th Cir. 2015) (showing that a jury verdict may be reversed on appeal if no reasonable jury could find guilt beyond a reasonable doubt based on the evidence presented); *Zellner v. Summerlin*, 494 F.3d 344, 370–71 (2d Cir. 2007) (showing that a trial court may set aside a civil jury verdict if evidence cannot support the jury verdict).

261. See, e.g., *Weisgram v. Marley Co.*, 528 U.S. 440, 456–57 (2000) (showing that a verdict may be set aside when, after improperly admitted evidence is excluded, there is not sufficient evidence to support it).

262. *McQuiggen v. Perkins*, 569 U.S. 383, 396–98 (2013); *Shlup v. Delo*, 513 U.S. 298, 324–36 (1995); see John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need For a State Constitutional Right in New York in the Aftermath of CPL § 440.10(1)(G-1)?*, 76 ALB. L. REV. 1453 (2013).

263. See *supra* notes 226–62 and accompanying text (noting the role of the rules of evidence).

the truth.²⁶⁴ It pursues that goal through rigorous and clear procedural mechanisms, which keep the focus on fact and reliability.²⁶⁵ Lastly, there are additional steps of review to ensure that fidelity to the facts is maintained.²⁶⁶

Facts matter in trial; truth matters. While litigants contest mightily which facts are true and what those facts mean under the law, the system is built to preclude the manipulation of the truth, the masquerading of falsity as truth, or the marketing of mere opinion as fact.²⁶⁷ Each participant in the system takes an oath to be bound and guided by truth, inherently pledging to reject the impulse of counter-factualism.²⁶⁸ Jury trials therefore provide a powerful counterweight to the disturbing spread of counter-factualism.²⁶⁹ It is a critical aspect of the process of citizens governing themselves through the resolution of legal disputes.²⁷⁰

C. Citizen Self-Governance

Collective self-governance that we undertake as citizens offsets excessive individualism.²⁷¹ Power does not aggregate in any one participant in the jury trial system.²⁷² It is diffused among lawyers, judges, legislators, and citizen jurors, who each has interconnected and indispensable roles in the creation and enforcement of the law.²⁷³

This interconnected system perpetuates citizen self-governance.²⁷⁴ Each participant helps build up a reinforcing store of citizen commitment and contribution to our collective enterprise.²⁷⁵ In other words, our participation ineluctably knits us together in stronger bonds of familiarity and purpose. Isolation and individualism are crowded out in favor of the collective benefit of resolving disputes through a shared system of belief and work towards a purpose greater than shallow self-interest.²⁷⁶

264. See *supra* notes 227–35 and accompanying text (noting how the rules of evidence treat expert witness testimony).

265. See *supra* notes 246–49 and accompanying text (explaining the importance of relevant facts and information).

266. See *supra* notes 250–62 and accompanying text (explaining the importance of cross-examination).

267. See Freedman, *supra* note 250, at 90.

268. See *supra* note 252 and accompanying text (showing how the rules of professional responsibility require lawyers to uphold the truth during trial).

269. See Amar, *supra* note 254, at 642–43.

270. See Leventhal, *supra* note 262, at 1486.

271. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–02 (2003).

272. See, e.g., FED. R. CIV. P. 48; FED. R. CRIM. P. 31.

273. See Staszewski, *supra* note 271, at 401–03.

274. Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 229–30 (2001).

275. *Id.* at 230.

276. See *id.*

American constitutional structure promotes the republican virtue of citizens by facilitating their involvement in the governing process.²⁷⁷ Engagement promotes a better understanding of government, a fundamental duty of all citizens.²⁷⁸ This understanding of government is necessary to the ability of the citizenry to sustain our form of government.²⁷⁹ No clearer expression of this idea can be found than Jefferson's:

We owe every other sacrifice to ourselves, to our federal brethren, and to the world at large, to pursue with temper[ance] and perseverance the great experiment which shall prove that man is capable of living in society, governing itself by laws self-imposed, and securing to its members the enjoyment of life, liberty, property, and peace; and further to show, that even when the government of its choice shall manifest a tendency to degeneracy, we are not at once to despair, but that the will and the watchfulness of its sounder parts will reform its aberrations, recall *it to original and legitimate principles*, and restrain it *within the rightful limits* of self government.²⁸⁰

Citizens have a necessary role in their own governance in order to sustain it.²⁸¹ For many citizens, participation in a jury trial is the most common form of direct participation beyond voting.²⁸²

It is easy to see jury service as simply the opportunity to have our "peers" resolve disputes.²⁸³ But the commitment to trial by jury is a more fundamental commitment to the structure of our governance. Enshrining trial by jury as a fundamental right and duty of citizens makes citizen self-governance fundamental.²⁸⁴ Trial by jury literally requires citizen participation in the act of execution of the laws.²⁸⁵ This requirement does

277. William A. Stanmeyer, *Keeping the Constitutional Republic: Civic Virtue vs. Pornographic Attack*, 14 HASTINGS CONST. L.Q. 561, 565–66 (1987).

278. *Id.* at 562 (citing Letter from John Adams to Abigail Adams (1780), reprinted in SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS 66 (Adrienne Koch & William Peden eds., 1946)).

279. *Id.*

280. *Id.* (alteration in original) (emphasis in original) (footnote omitted) (*quoting* JEFFERSON: MAGNIFICENT POPULIST 92 (M. Larsen ed., 1981)).

281. *See id.* at 506–07.

282. Paula Carter, *I Thought Jury Duty Was for Suckers—Until I Helped Save an Innocent Man from Conviction*, USA TODAY (Oct. 16, 2018, 7:00 AM), <https://www.usatoday.com/story/opinion/voices/2018/10/16/jury-duty-never-felt-more-significant-citizen-column/1603079002/>.

283. U.S. CONST. amends. VI–VII.

284. Harrington, *supra* note 274, at 230.

285. *Id.* at 229–30. *See also* 28 U.S.C. § 1861 (1968) (describing that federal judiciary policy facilitates a fair cross section within grand and petit jury panels, to allow “all citizens” to have a chance to serve and to require such service from citizens when called). Tribalism is also explicitly rejected in juries through the prohibition of discrimination in jury service and the explicit direction to jurors to base their decisions on fact and law, not fear or favor. *See* 28 U.S.C. § 1862 (2018); COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CIVIL INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 1.01 (2019).

several positive things for our society.²⁸⁶

First, requiring jury service promotes respect for the law by engaging citizens with it.²⁸⁷ The requirement to contemplate and apply the law places citizens in a judicial role, increasing their familiarity with the law.²⁸⁸ In a republican democracy, such familiarity is an important good.²⁸⁹ We are better able to defend, and less likely to ignore or denigrate, a system in which we are invested through participation and understanding.²⁹⁰ Jury service can be seen as a gateway to civic “buy-in.”²⁹¹

Second, this service increases citizen awareness of the concept that they live within a republican system, and as a result, they have obligations to their fellow citizens.²⁹² Citizenship cannot be passive for a republic to endure. Active citizen participation is required.²⁹³ Jury service, beyond the simple act of service in that instance, reinforces within the minds of citizens the obligation to actively serve.²⁹⁴ The temptation to focus solely on self-interest, and the isolation of individualism by extension, is pushed off by this service.²⁹⁵ Citizens are called to community and to serve those around them.

Third, jury service allows citizens to serve as a check against excessive power or corruption of government officials.²⁹⁶ A verdict is the collective judgment of citizens; that judgment mediates the authority of judges, preventing abuse of their power.²⁹⁷ This mediating capacity of juries ensures

286. Harrington, *supra* note 274, at 229–30; Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J.L. PUB. & POL’Y 415, 483–84 (2016).

287. Harrington, *supra* note 274, at 229 (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (J.P. Mayer et al. eds., 1966)).

288. *Id.* at 230.

289. *Id.* at 229.

290. *Id.* at 229–34 (describing the historical appreciation for the jury right).

291. *See id.* at 229.

292. *Id.*

293. *See* Johnstone, *supra* note 286, at 483–84 (citing THE FEDERALIST NO. 39, at 237 (James Madison) (Clinton Rossiter ed., 1999)) (discussing that increased citizen participation in government helps perfect the republican form of government).

294. *Id.*

295. *Id.*

296. Harrington, *supra* note 274, at 230–31. Juries can offer an additional check through nullification—rejecting application of a law within a particular context because of a belief that it would be unjust. *See, e.g.*, Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1104 (2013). Traditionally, nullification was a response to improper government action or disagreement with the law. *Id.* at 1106–07. Some call for the application of nullification to respond to criminal policy they see as unwise or unjust, and to provide protection to minority groups. *See generally* Leigh Ainsworth, *Jury Nullification: Fixing the Law When Politicians Won’t*, 53 AM. CRIM. L. REV. ONLINE 26 (2016); Adrien Leavitt, *Queering Jury Nullification: Using Jury Nullification as a Tool to Fight Against the Criminalization of Queer and Transgender People*, 10 SEATTLE J. SOC. JUST. 709 (2012); Paul D. Butler, *Race-Based Jury Nullification: Surrebuttal*, 30 J. MARSHALL L. REV. 933 (1997). The point here being, not the validity or invalidity of jury nullification per se, but that jury service provides citizens a fundamental role not only in applying the law but also in saying what the law is. McKnight, *supra* note 296, at 1107–08.

297. Harrington, *supra* note 274, at 188–87.

that the people retain ultimate authority within our constitutional structure.²⁹⁸ Republican self-governance is sustained by the reality that the citizens actively govern themselves, even within the Judicial Branch.²⁹⁹

Jury service and deliberation forces citizens to move beyond the impulse of individualism towards collective problem-solving.³⁰⁰ Participation in collective decision making with a cross-section of peers allows citizens to work openly and collaboratively, reassess their pre-existing beliefs, and wrestle with their obligations under the law.³⁰¹ In fact, the mandate to reassess beliefs and to be open to the ideas of other citizens is a central charge to jurors.³⁰² Jury participation is a clear example of collective citizen self-governance.³⁰³ While each individual juror has a voice, the jury must act collectively to apply the law to the facts before them.³⁰⁴ Jury service compels citizens to individually participate in an act of collective self-governance.³⁰⁵

III. THE WAY FORWARD: TRIBALISM, COUNTER-FACTUALISM, AND INDIVIDUALISM ON TRIAL

At least so far, the salutary attributes of the jury trial system have not fully offset the negative forces described above.³⁰⁶ But they do provide an important check—perhaps as aligned and effective a check as is systematically available.³⁰⁷ But how can we do better? Can we identify what else is needed to swing the tide in favor of objective governing principles, evidence-based decision making, and citizen self-governance? We can certainly identify a few things that could make a vital difference.

298. *Id.* at 229–30.

299. *See id.*

300. *See* James E. Gritzner, *In Defense of the Jury Trial: ADR Has Its Place, But It Is Not the Only Place*, 60 *DRAKE L. REV.* 349, 360–61 (2012).

301. *Id.* (describing the author’s interviews with jurors after their service, and observing that the process of serving on the jury altered their beliefs in surprising and positive ways).

302. *See, e.g.*, JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 3.12 (2014) (“Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because the other jurors think it is right, or simply to reach a verdict.”); NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 3.1 (2017) (“Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.”).

303. Harrington, *supra* note 274, at 230.

304. *See* NINTH CIRCUIT JURY INSTRUCTIONS COMM., *supra* note 302, § 3.1 (2017) (explaining that the jury’s duty is to find facts and follow the law).

305. *See id.* (providing that jurors should come to a conclusion after a collaborative discussion).

306. *See supra* Part II (arguing that the American jury system provides a positive balance to the current state of affairs).

307. *See, e.g.*, *supra* notes 296–99 and accompanying text (noting some of the ways a jury can provide a check on power through nullification).

A. Conscious Commitment

Tribalism, counter-factualism, and excessive individualism are negative impulses in American society with long histories.³⁰⁸ These impulses have persisted and manifested in many ways over time.³⁰⁹ Trial by jury and its supporting structures have not yet eradicated these impulses.³¹⁰ The jury trial, however, provides powerful counterweights to ameliorate their negative effects.³¹¹ It is important to recognize the normative superiority of the virtues of the jury trial system over the dark forces of tribalism, counter-factualism, and individualism.³¹² Absent a conscious choice of the former, the latter can insidiously become our dominant worldview.

Consciously supporting the jury trial structure is a purposeful rejection of those negative impulses in favor of more positive forms of social and political engagement.³¹³ In other words, conscious commitment to the jury trial system requires thoughtful consideration of its values and effects, and a rejection of negative forces in favor of a better way.³¹⁴ That conscious act is powerful and self-reinforcing. Making such a decision requires understanding, deliberation, and purposeful choice.³¹⁵ Those steps, properly taken, build our inclination toward the better path. It can also help educate and involve nonlawyers in the process to spread the positive impacts of the jury trial system more widely.³¹⁶ That ongoing commitment is crucial for society.³¹⁷

Additionally, conscious commitment to the jury trial system reinforces our norms of civic engagement and self-governance.³¹⁸ Erosion of our societal norms is bad for society, and at some level, threatens the fundamental security of the Republic.³¹⁹ A structure that preserves and reinforces positive

308. See *supra* Part I (explaining the context of tribalism, counter-factualism, and excessive individualism).

309. See *supra* Part I (providing a historical concept for the three impulses).

310. See Gritzner, *supra* note 300, at 361–62 (discussing how jury participation can cause individuals to re-assess their current or pre-existing beliefs).

311. See *supra* notes 40–41 (discussing how the American people want to become united, which is fundamental to counteract the negative effects).

312. See *supra* note 40 (noting specifically how the shared American soul connection in a community counteracts the tribalistic impulse).

313. See *supra* Part I (discussing the negative forces that should be rejected by society for more positive forms of social and political engagement).

314. See *supra* Part I (discussing the negative forces that should be rejected by society).

315. See *infra* Part III.B (explaining the importance of citizen engagement).

316. See *supra* notes 112–13 and accompanying text (discussing the incredible amount of information available to the public and the need for the public to investigate the information before relying on it).

317. See *infra* Part III.B (encouraging citizen education); *infra* Part III.C (arguing ways to improve the jury trial system).

318. See *infra* Part III.C (providing recommendations on how to improve the jury trial system).

319. See *supra* notes 26–28 and accompanying text (explaining the effects of tribalism and the political system).

norms is, therefore, of increased importance in the current environment.³²⁰ Perhaps the jury trial system alone cannot maintain and restore the best of us as a nation, but it can contribute to it.³²¹ It therefore behooves each of us to recommit ourselves to preservation and advancement of that system and the fundamental role it plays in sustaining us.

B. Citizen Education

To resist the pull of these negative forces, citizens need to understand them. All citizens need to be educated on the values at stake in choosing our forms of public engagement.³²² Conscious commitment is impossible—or highly unlikely—without information.³²³ Information begins with education.³²⁴ There are some key areas of education to highlight.

First, scientific and factual literacy. We need to work to educate all citizens on the skills of skepticism and critical thinking that help us resist the counter-factual impulse. This is found most readily in education on the scientific process.³²⁵ The need for more science education has been a concern for some time.³²⁶

Second, we need to educate on how to recognize truth.³²⁷ This is not, however, a reference to epistemology at an abstract level. While that has value, for most citizens the more immediate questions will be practical.³²⁸ Each of us needs to be informed on how information is manipulated and even misrepresented to us.³²⁹ Each of us needs to have at least some familiarity with how to distinguish neutral and reliable information sources from those with an agenda and without credibility.³³⁰ Each of us must have awareness

320. *See id.*

321. *See supra* notes 38, 135–36 and accompanying text (examining how self-interest can lead to negative effects on society).

322. *See supra* Part II.A (discussing the governing principles that create the foundation of the American jury trial system; that society should be educated about these principles in order to understand what values are at stake with their choices).

323. *See, e.g.,* BELLAH ET AL., *supra* note 128, at 198 (discussing how people must make a deliberate and conscious decision to participate in a community because it is seen as destructive to personal advancement).

324. *See generally* Trends in Higher Ed, *Teaching Skills to Combat Fake News and Misinformation*, UNIV. WASH. (Nov. 5, 2018), <https://www.washington.edu/trends/teaching-skills-to-combat-fake-news-and-misinformation/> (educating students on validating information).

325. SAGAN, *supra* note 117, at 326–27.

326. *Id.*

327. JAMIE WHYTE, CRIMES AGAINST LOGIC: EXPOSING THE BOGUS ARGUMENTS OF POLITICIANS, PRIESTS, JOURNALISTS, AND OTHER SERIAL OFFENDERS x–xi (2004) (arguing that formal education needs to better provide students not simply with facts but with the ability to recognize effective reasoning and fallacies in reasoning in order to recognize their effects in real life situations).

328. *Id.*

329. GARY SMITH, STANDARD DEVIATIONS: FLAWED ASSUMPTIONS, TORTURED DATA, AND OTHER WAYS TO LIE WITH STATISTICS 289–97 (2014) (describing how to avoid manipulations or misinterpretations of data that can lead to erroneous conclusions).

330. MCINTYRE, *supra* note 85, at 163.

that we now live in a world where “reality” can be manipulated through technology, mass media, and state actors.³³¹ All of this comes together in a developed and engaged skepticism.³³²

Third, we must emphasize education about our fundamental governing principles.³³³ Our system of citizen self-governance is premised on collective understanding, engagement, and defense of it.³³⁴ We can lose what we do not know unwittingly or through uninformed neglect. We must, fundamentally, educate for citizenship.³³⁵

Lastly and relatedly, we must educate about what is at stake. None of these are self-effectuating propositions.³³⁶ The integrity of a system of neutral and objective principles relies entirely on our recognition that we are one Republic united under those ideas, not simply competing tribes.³³⁷ Our commitment to truth and evidence-based decisions is only as strong as our commitment as advocates of our ethical obligations to integrity and candor.³³⁸ Citizen self-governance will only endure while citizens choose to subordinate self-interest to understanding, debate, and participation in their governance.³³⁹ If we are not educated to be aware that our central values can be lost, we will not protect them.³⁴⁰ We put in play the prospect that “it” most certainly can happen here if we fail to do so.³⁴¹

331. See Trends in Higher Ed, *supra* note 324 (discussing the importance of teaching students to detect fake news in a world saturated with misinformation).

332. Jonathan K. Van Patten, *Skills For Law Students*, 61 S.D. L. REV. 165, 188–89 (2016). My colleague Jon Van Patten aptly described this as the need to “develop a bullshit detector.” *Id.* at 188. His reference is largely to the “gut feeling” of when someone is not telling the truth. *Id.* That is a key place to start, but we need to go beyond that. It is important to have three key techniques at hand: (1) skepticism as our presumption (having our “bullshit detector” turned on); (2) awareness of the ways in which false information is presented; and (3) tools to discern what is true from what is false. *Id.* at 188–89. It is increasingly vital to be informed consumers of information. *Id.*

Carl Sagan likewise emphasized the need for a developed sense of skepticism, calling it a “baloney detection kit,” which contained tools for skeptical thinking. SAGAN, *supra* note 117, at 210. Those tools include insisting on independent confirmation of facts, substantive debate with proponents of multiple viewpoints, proposition of multiple hypotheses, avoiding emotional attachment to the hypothesis, quantification, consideration if the results can be falsified in whole or part, and application of Occam’s Razor. *Id.* at 210–11.

333. SAGAN, *supra* note 117, at 434.

334. NICHOLS, *supra* note 91, at 215–18.

335. See Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 148–56 (1995) (contending that rights carry concomitant responsibilities). In the context of education, that means that the right to an education is paired with the responsibility for that education to be pursued wisely in a fashion that equips each citizen to more fully and thoughtfully participate in the process of self-governance. *Id.* at 157.

336. Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 847 (2018) (expressing skepticism that the fake news market can regulate itself).

337. See *id.* at 869 (concluding that fake news is a threat to democracy).

338. See *id.* (arguing that society has a role in fighting the influence of fake news).

339. See *id.* at 869–79.

340. See *id.*

341. See SNYDER, *supra* note 38, at 100–01.

C. Refinement of the Jury Trial System

We must also look for ways to improve our jury trial system. There are refinements that can help further push back on the negative forces of tribalism, counter-factualism, and individualism.

First, expanding the opportunity for jury service can resist both tribalism and individualism.³⁴² Restoring the right to serve on a jury after completion of a felony sentence is one step that can expand jury pools.³⁴³ Changes can also be made to the lists from which jurors are drawn (e.g., registered voters versus driver license holders) to draw in a broader cross-section of jurors by geography, race, and other factors.³⁴⁴ Expanding the pool of potential jurors resists tribalism by bringing people together for collective action across their “tribes.”³⁴⁵ It pushes back on individualism by introducing more citizens into the work of active self-governance.³⁴⁶ Broadening jury service to the greatest degree is an important step to take.

Second, jury instructions can be revised and expanded to help combat counter-factualism.³⁴⁷ While it is important not to dictate how jurors decide an individual case, instructions commonly provide guidance on how to consider evidence.³⁴⁸ Model instructions should be developed to guide jurors as to how they weigh the reliability of evidence in a counter-factual world.³⁴⁹ Although the evidentiary gatekeeping function of judges is an important

342. Stanley P. Williams Jr., *Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom*, 6 IND. J.L. & SOC. EQUAL. 48, 65 (2018) (arguing that jury diversity may cancel our biases).

343. See James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1397–98 (2010); Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65, 186–87 (2003). It can also provide a check on tribalism as a formal reacceptance into society, avoiding a possible basis for negative tribal self-selection. See Kalt, *supra* note 343, at 186–89. Fewer citizens are cast as “other,” providing another opportunity for communal inclusion rather than exclusion. *Id.*

344. L.S. Tellier, *Proof as to Exclusion of or Discrimination Against Eligible Class or Race in Respect to Jury in Criminal Case*, 1 A.L.R.2d 1291 (1948); see also Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 747–51 (2006) (discussing how Indian citizens are commonly and chronically underrepresented on juries).

345. See Williams, *supra* note 342, at 65 (discussing how a same race jury panel is more likely to convict someone outside of their tribe).

346. See *Senator Wiener Introduces Legislation to Create Fairer, More Representative Juries*, SCOTT WIENER REPRESENTING CAL. SENATE DIST. 11 (Feb. 14, 2020), <https://sd11.senate.ca.gov/news/20200214-senator-wiener-introduces-legislation-create-fairer-more-representative-juries>.

347. See generally Richard A. Harpootlian & Christopher P. Kenney, *Jury Practice in Post-Truth America: A Cautionary Note*, 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 131 (2017); Ken Broda-Bahm, Shelley Spiecker & Kevin Bouilly, *Jury Persuasion in an ‘Alt-Fact’ World*, LAW360 (Nov. 8, 2017, 5:01 PM), <https://www.law360.com/articles/982244/jury-persuasion-in-an-alt-fact-world>.

348. See *supra* note 216 and accompanying text (demonstrating model jury instructions used in the Eighth Circuit).

349. See generally Broda-Bahm et al., *supra* note 347 (discussing different techniques to ensure juries focus on reliable facts).

check, providing guidance to jurors is an appropriate additional step.³⁵⁰ It may also be useful to provide orientation to jurors prior to the voir dire process on tools to identify truth.³⁵¹ The jury trial remains a check on counter-factualism only if it promotes decision making based on facts.³⁵² We must respond to the changing world of information around us by setting decisional rules and providing guidance to jurors on how to recognize fact from fiction or opinion.

D. Expanding the Use of Juries

A more ambitious step would be a significant expansion of the use of juries.³⁵³ Given the beneficial effects of the jury trial system in checking negative impulses, it may be a step worth considering. Jury use can be expanded in a few ways.³⁵⁴

First, changes to the rules of criminal and civil procedure could force more cases to be resolved through trial.³⁵⁵ Eliminating, or paring down, tools like summary judgment, judgment of acquittal, and the use of court trials could increase the involvement of juries and the frequency of jury trials.³⁵⁶ More trials would mean more opportunities for individuals to serve and see the value of juries.³⁵⁷ It would also involve the citizenry more regularly in the act of self-governance.³⁵⁸

Second, mandating the use of grand juries to initiate state level criminal prosecutions could involve more citizens in jury service.³⁵⁹ Although obviously not the same in all respects as petit jury service, grand jury engagement provides some of the same checks against tribalism and isolating

350. See FED. R. EVID. 801 (generally precluding use of hearsay testimony); FED. R. EVID. 703 (limiting expert witnesses' description of the information considered in formulating their opinion which are not independently admissible).

351. See Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 857–60 (2012). Some jurisdictions have taken this step to address implicit bias. *Id.* Similar steps could be taken to address a lack of knowledge about the scientific process and identifying truth. *Id.*

352. See Harpootlian & Kenney, *supra* note 347, at 132–41 (telling a cautionary story about the consequences of a jury's reliance on fake information).

353. See 18 U.S.C. 3593(b) (2018) (providing the process for a special hearing to determine if a criminal defendant should be sentenced to death).

354. See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 185 (2016).

355. *Id.*

356. *Id.* Along with this, it may be important to evaluate how trials operate when they do take place. With the currently declining number of trials, there is a parallel phenomenon of a declining length of trials as judges often take a more active role in trials that can artificially compress the trials. Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2132–36 (2018) (discussing how a higher percentage of cases are shorter duration due to active trial management by judges).

357. See THOMAS, *supra* note 354, at 185.

358. *Id.*

359. *Id.* at 158–63.

individualism as does the petit jury.³⁶⁰ Expanding grand jury use could have similar benefits.

Third, to promote more criminal trials by equalizing the power of prosecutors and criminal defendants, a “plea offer requirement” could be imposed.³⁶¹ Under such a process, juries in criminal cases would be presented with the same options that were presented to a criminal defendant in plea negotiations.³⁶² The jury could decide the appropriate disposition for a criminal case, not simply rely on the resolution of factual questions to determine guilt or innocence based on the charges that the prosecutor chooses to bring.³⁶³ Juries would thus be restored to a more significant role of self-governance, and the balance of power between people and prosecutors would be realigned.

Fourth, sentencing issues could be presented to juries. Indisputably, the Sixth Amendment requires that the jury be involved in some key questions of punishment, such as mandatory minimums or increased maximum penalties.³⁶⁴ But it is possible to go further and let juries determine punishment, not just guilt.³⁶⁵ This is already done with death penalty sentences³⁶⁶ and in court martials.³⁶⁷ At a minimum, juries could be informed about punishment, certainly mandatory sentences, to better inform their ability to be active self-governing entities.³⁶⁸ Purposeful and systematic expansion of the jury into punishment determinations could significantly move the needle to keep the jury as an active check against negative societal

360. *Id.*

361. *Id.* at 237.

362. *Id.*

363. *Id.*

364. *See, e.g.,* *Apprendi v. New Jersey*, 530 U.S. 466, 476–78 (2000) (providing that juries have to consider the evidence and decide guilt or innocence beyond a reasonable doubt); *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999) (restating the principles established by the Constitution and the Sixth Amendment’s jury trial guarantee). This requirement for certain key facts to go to the jury points out the problem, fundamentally theoretical but importantly practical, that the boundary between culpability (guilt or innocence) and punishment is far from solid. *See* Mohammed Saif-Aldan Wattad, *The Meaning of Guilt: Rethinking Apprendi*, 33 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 501, 524–25 (2007).

365. *See, e.g.,* TENN. CODE ANN. § 40-20-104 (West, Westlaw through the 2020 1st R.S.); KY. R. CRIM. P. § 9.84 (West, Westlaw through Jan. 15, 2020); VA. CODE ANN. § 19.2-295 (West, Westlaw through 2020 R.S.) (showing that states have allowed juries to determine punishment). It would go further to allow the defendant (or possibly the state) to demand jury determination of the sentence in all cases or at least allow jury recommendation of an advisory sentence to the court. Joel Feinberg, *The Expressive Function of Punishment*, in *A READER ON PUNISHMENT* 76–77 (R.A. Duff & David Garland eds., 1994). Versions of this type of jury involvement exist in various jurisdictions; as an effort to expand the ability of jury service to check negative social forces, it could be broadly and systematically expanded. *Id.* Giving juries a say in punishment also advances the expressive goal within sentencing of reflecting social judgment about right and wrong. *Id.*

366. 18 U.S.C. § 3593(b) (2018).

367. 10 U.S.C. § 856(c)(3) (2018).

368. Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 *RUTGERS J.L. & PUB. POL’Y* 411, 485–90 (2007).

forces.³⁶⁹ Many more jurors would have the chance to engage in fact-based, neutrally principled acts of self-governing through criminal sentencing.³⁷⁰

Lastly, juries can be used in an advisory fashion in civil cases. Civil cases are now predominantly resolved through settlement and alternative dispute resolution processes like arbitration and mediation.³⁷¹ Arbitration and mediation proceedings could incorporate advisory juries on the questions of damages or valuation.³⁷² Doing this would add important insights to that process. It can provide further guidance and incentive to the settlement process by showing lawyers and parties a truer picture of what the value of a case could be if tried.³⁷³ It can also provide guidance on liability or causation within a particular case.³⁷⁴ More significantly, information from advisory juries, if made publicly available or if aggregated and made searchable through a private vendor, can guide lawyers and litigants in other cases.³⁷⁵ Involving juries in this advisory capacity, and making that information available, provides invaluable guidance as to public opinion about cases that are increasingly hard to come by in an era of vanishing jury trials.³⁷⁶ Advisory juries in civil cases can fill a critical information gap: “With no jury verdicts we lose the benchmarks that each trial attorney must look to in determining exposure, settlement, or alternative dispute resolution. Without clients willing to go to trial and attorneys willing to take cases to trial, we would have absolutely no benchmarks.”³⁷⁷ More dissemination of information like this can also help rebut the idea of the “runaway” jury by having the value of more cases publicly stated by a jury.³⁷⁸

IV. CONCLUSION

Much of this Article could be, perhaps should be, seen as a restatement. The existence and impact of tribalism, counter-factualism, and individualism are widely discussed. So too, the values of the jury trial have long been celebrated. It would be easy to say that discussing these topics is simply discussing “the way it is.” But that would be too easy.

Accepting the forces of tribalism, counter-factualism, and individualism as “the way it is” is to simply accept negative forces as though they cannot

369. *Id.*

370. *Id.*

371. Hon. Mark A. Drummond, *The Demise of the Civil Jury Trial*, ABA VOICES FROM THE BENCH (Feb. 27, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/the-demise-the-civil-jury-trial/>.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

be resisted. It is also to ignore the ways in which their manifestation is expanding and accelerating. Simply accepting these forces as reality can make us blind to both their presence and impacts in society. Saying that this is “the way it is,” is to let down our collective guard as a nation. Unless society vigilantly identifies and resists these forces, it runs the risk of the forces overtaking society without our notice. Society becomes the boiled frog who never took the time to say, “is it getting warm?” as the water temperature slowly increased.

In a similar way, it is too simple to say that the protections and benefits of the jury trial system are “the way it is.” Jury trials continue to decline in number, and thus, in influence.³⁷⁹ Without exposure to trials, citizens are increasingly inclined to dismiss their value, attribute negative attributes such as partisanship, elitism, or tribalism to them, and to advocate against them. The jury trial system was built by citizens, and it can be demolished or allowed to decay by citizens as well. Without broad commitment and defense, the role of the jury trial can be lost.

In short, as obvious as these realities are, they should not be assumed. Society should not simply accept the negative. Society should not simply assume the positive. Chief Justice Roberts has noted the importance of this work, discussing how the world has changed and remained the same since *The Federalist Papers* were drafted:

But in the ensuing years, we have come to take democracy for granted, and civic education has fallen by the wayside. In our age, when social media can instantly spread rumor and false information on a grand scale, the public’s need to understand our government, and the protections it provides, is ever more vital.³⁸⁰

Society must stand committed. The ways in which the jury trial guards against negative social forces may not be in the forefront of citizens’ minds. Citizens should endeavor to make it so. The importance of these issues must be paramount. While commitment to fundamental ideals of objective governing principles, evidence-based decision making, and citizen self-governance should be truisms, in the current environment, public restatement of their—hopefully—self-evident truth is necessary. That restatement is central to what this Article has sought to do in addition to providing some suggestions of how to further protect society.

The response to these ideas should be making an ongoing commitment as citizens to sustain our republican democracy. That requires commitment to certain principles and actions reflected in our jury trial system. If those are forcefully honored, our system will endure for generations against any wind

379. *See id.*

380. U.S. SUPREME COURT, 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2 (2019).

that might blow. If they are forgotten, ignored, or placed behind some temporal concern, they will be lost to the lightest breeze.

It is our system, our duty, and our opportunity. Society, as protectors of the jury trial system, must shoulder that burden for generations to come.