IS INJUSTICE RELEVANT?

NARRATIVE AND BLAMEWORTHINESS IN PROTESTER TRIALS

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This Article examines application of the doctrine of relevance to exclude evidence of the motivations underlying the actions of civilly disobedient criminal defendants. While not constitutionally protected, civil disobedience plays an important role in the political, social, and legal history of the United States. Though acts of civil disobedience involve violations of law, actions of protest differ from actions of nonprotest crime in a number of important respects. Civilly disobedient protesters undertake their action openly, motivated by the desire to call public attention to an injustice. Their motivation is distinct from that of nonprotester criminal defendants who seek to promote individual goals. Despite the importance of protester motivation in distinguishing the civilly disobedient defendant, courts routinely exclude evidence of protester motivations as not relevant in criminal proceedings. Applied broadly in many contexts, the doctrine of relevance is applied narrowly in the context of motivations of protesters. The constrained application utilized in protester trials overlooks evolving understandings of evidentiary relevance. The most important of these evolving concepts are narrative relevance and blameworthiness. Evidence of underlying motivation provides an essential piece of a cohesive narrative explaining a protester's actions and intentions. The evidence also permits a factfinder to conduct the evaluation of blameworthiness required for a determination of criminal culpability. Ultimately, the Article concludes that courts should recognize the admissibility of protester motivation within criminal trials of civilly disobedient protesters.

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I. INTRODUCTION

The recent Occupy movements indicate a new wave of public interest and participation in protests. In the fall of 2011, semipermanent Occupy protest sites were set up in cities across the United States.[1] Though the Occupy protesters notoriously and purposefully remain loosely organized in goals and hierarchy, one unifying objective of the movement was expressed as opposition to "the richest 1% of people," who the protesters view as having a disproportionate share of wealth and power.[2] Through occupation of public forums, these protesters hope to bring attention to the current "political disenfranchisement and social and economic injustice[s]" they believe to be suffered by the majority of Americans.[3]

One hallmark of the Occupy protests is that protesters often camp or live in public places.[4] Though tolerated at some times and in some places, protester actions, including camping in parks, have led to police intervention, arrests, and trials.[5] By one account,

1. Jess Bidgood et al., *Other Sites Hope N.Y. Raid Will Energize Cause*, N.Y. TIMES, (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/us/other-occupy-sites-hope-ny-raid-energizes-movement.html?pagewanted=all&_r=0.

2. *About*, OCCUPY WALL ST., http://occupywallst.org/about/ (last visited Nov. 27, 2013); *see also* Bidgood et al., *supra* note 1 (suggesting that although the movement has no formal hierarchy, Occupy groups have coalesced around opposition to wealth disparities, high unemployment, and the perceived greed of corporations).

3. *Principles of Solidarity*, OCCUPY WALL ST., http://www.nycga.net/resources/documents/principles-of-solidarity/ (last visited Nov. 27, 2013).

4. *See* Sarah Kunstler, *The Right To Occupy – Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L. J. 989, 991 (2012) (describing the Occupy protesters' establishment of camps in public locations, the most notable being Zuccotti Park in New York City); Michael S. Schmidt & Colin Moynihan, *F.B.I. Counterterrorism Agents Monitored Occupy Movement, Records Show*, N.Y. TIMES, Dec. 25, 2012, at A18 (identifying Zuccotti Park as a key location for the Occupy movement).

5. See Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L. J. 1155, 1164–66 (2012), for a discussion of camping as a form of protest. In addition to the

more than 7,500 Occupy protesters have been arrested.[6] Protesters have faced charges ranging from mundane trespass and failing to disperse, to the more bizarre and obscure offenses of wearing a mask in public, using amplified sound, and even the disturbingly named California offense of lynching.[7] Many of these actions may meet the definition of civil disobedience.[8]

Most legal and philosophical scholars concur that civil disobedience, while a violation of law, differs from other nonprotest acts of criminality in some important respects.[9] Though there are many definitions of civil disobedience, general consensus exists regarding a number of its required elements.[10] In order to qualify as civil disobedience, a violation of law must be open, public, nonviolent, intended to effectuate social or political change, and directed at the government.[11] Central to the

overt police action, counterterrorism agents from the FBI appear to have been monitoring, and perhaps infiltrating, the movement. Schmidt & Moynihan, *supra* note 4.

6. *Occupy Arrests*, OCCUPYARRESTS.COM, http://occupyarrests.moonfruit.com/ (last visited Nov. 27, 2013).

7. *See* Details of Occupy Arrests, OCCUPYARRESTS.COM, http://stpeteforpeace.org/occupyarrests.sources.html (last visited Nov. 27, 2013) (listing charges for Occupy protesters arrested throughout the country, including trespass and lynching); Sean Gardiner & Jessica Firger, *Rare Charge Is Unmasked*, WALL ST. J. (Sept. 20, 2011), http://online.wsj.com/news/articles/SB10001424053111904194604576581171443151568 (describing arrests of people associated with Occupy movement for violating 150-year-old antimask laws); Adam Martin, *The Weirdest Things Occupy Protesters Get Arrested For*, THE ATLANTIC WIRE (Jan. 25, 2012), http://www.theatlanticwire.com/national/2012/01/weirdest-things-occupy-protesters-get-arrested/47863/ (describing the arrests of Occupy protesters for violating antiquated statutes related to, among others things, wearing masks in public and using amplified sound without a permit). The California Penal Code defines lynching as "taking by means of a riot of any person from the lawful custody of any peace officer." CAL. PENAL CODE § 405a (West 2013). A "riot" is defined as "[a]ny use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution" by two or more persons acting without authority of law. *Id.* § 404. One such charge apparently resulted when one protester attempted to interfere in the arrest of another. Kari Huus, *Prosecutors Aim New Weapon at Occupy Activists: Lynching Allegation*, U.S. NEWS (Jan. 17, 2012, 9:39 PM), http://usnews.nbcnews.com/_news/2012/01/17/10177446-prosecutors-aim-new-weapon-at-occupy-activists-lynching-allegation.

8. Many forms of protest do not involve the violation of law. *See* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 418 (1999) (explaining that the Supreme Court has recognized a constitutional right to use public streets and parks to assemble, communicate ideas among citizens, and discuss questions of public importance); Timothy Zick, *Property, Place, and Public Discourse*, 21 WASH. U. J. L. & POL'Y 173, 173–76 (2006) (noting that there must be public places where speakers can lawfully communicate their ideas for First Amendment rights to be exercised effectively). As discussed later in the Article, civil disobedience is a precisely defined form of protest involving, among other things, the violation of law. See *infra* note 10 for a definition of civil disobedience. For the purposes of ease and readability, when the context is clear that an individual is involved in a criminal proceeding, the Article sometimes uses the word "protester" in lieu of "civilly disobedient protester." The title of the Article reflects this shorthand.

9. *E.g.*, Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2084 (2007) (observing that scholars advocate for the abolition of punishment for civilly disobedient behavior due to the societal benefits civil disobedience can produce in the areas of political discourse and public debate).

10. *Merriam-Webster* defines the term "civil disobedience" as the "refusal to obey governmental demands or commands esp. as a nonviolent and usu. collective means of forcing concessions from the government." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003); *see also* United States v. Schoon, 971 F.2d 193, 195–96 (9th Cir. 1991) (stating "[a]s used in this opinion, 'civil disobedience' is the willful violation of a law, undertaken for the purpose of social or political protest").

11. ROBERT T. HALL, THE MORALITY OF CIVIL DISOBEDIENCE 50 (1971); Hall, *supra* note 9, at 2087–90;

definition of civil disobedience is the motivation underlying the action; the act must be one "of conscience," motivated by a desire to communicate a need for social or political change.[12]

The history of civil disobedience in the United States dates to the country's inception when what Thomas Jefferson described as a "spirit of resistance" catapulted the emerging Republic toward independence.[13] In the words of one scholar, "[c]ivil disobedience is as American as apple pie."[14] Despite its deep history, there is no constitutional right to engage in civil disobedience, and perceptions vary regarding the place of civil disobedience in the social and legal fabric of the country.[15] Some view civil disobedience as a valuable method of engagement in the political process, serving an important corrective purpose.[16] The abolition of slavery, women's suffrage, union protections, and civil rights were all precipitated by extralegal actions that helped effectuate social change.[17] Civil disobedience also serves as a "firebreak," preventing disaffection from becoming all-out rebellion.[18] Others, however, promote a very different perspective, viewing civil disobedience as "fundamentally inconsistent with the rule of law."[19] Notably, former Supreme Court Justices Abe Fortas and Lewis Powell, Jr. take this position.[20] Justice Fortas argued vigorously that each person "owes a duty of obedience to law" and that societal tolerance of civil disobedience threatens the rule of law.[21]

These divergent views indicate a deep tension between those who advocate the desirability of allowing civil disobedience as a form of protest and those who view the rule of law, even unjust law, as paramount.[22] If one adopts Justice Fortas's position that

Martin C. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1069, 1094 (1991).

12. Hall, *supra* note 9, at 2088.

13. According to Thomas Jefferson, "what country can preserve it's [sic] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance?" Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 355, 356 (Julian P. Boyd ed., 1955). See Susan Tiefenbrun, *Civil Disobedience and the U.S. Constitution*, 32 SW. U. L. REV. 677, 677–84 (2003), for a detailed description of the early history of civil disobedience in the United States.

14. Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 WHITTIER L. REV. 17, 17 (1992).

15. Tiefenbrun, *supra* note 13, at 684–85. One commentator has asserted that "[c]ivil disobedience trials are located at the clash of order and freedom." William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 5 (2003).

16. Hall, *supra* note 9, at 2094; *see also* Bruce Ledewitz, *Perspectives on the Law of the American Sit-In*, 16 WHITTIER L. REV. 499, 512 (1995) (positing that sit-ins have done "a great deal of good" and therefore have been treated differently than other crimes).

17. Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 734 (1991).

18. Hall, *supra* note 9, at 2095.

19. Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 205 (1966).

20. *Id.* at 230–31; ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 55–56 (1968).

21. FORTAS, *supra* note 20, at 18, 48–49; *see also* United States v. Berrigan, 283 F. Supp. 336, 339 (D. Md. 1968) (reasoning chaos would result if courts excused civil disobedients of their violations of valid law).

22. *Compare* Powell, *supra* note 19, at 230–31 (arguing that despite the injustices that may lead to civil disobedience, legal acceptance of civil disobedience undermines the rule of law), *and* FORTAS, *supra* note 20,

the rule of law must be unflinchingly obeyed, even in the face of an unjust law, it would be difficult to distinguish civil disobedience from nonprotester crime—civil disobedience would be viewed merely as criminal action.[23] If, however, one accepts that civil disobedience can exist alongside the rule of law, then it is possible to discern a distinction between civil disobedience and nonpolitical crime in the motivation of the actor.[24]

At trial, protester-defendants frequently seek to explain why they were engaged in the protest by introducing evidence of the motivations underlying their actions.[25] They seek to discuss how and why they came to be arrested.[26] The defendants may seek to call either lay or expert witnesses to present evidence of the defendants' belief in the necessity of their actions, the impact of political repression on themselves or others, or violations of international law. Judges often prohibit these protesters from introducing evidence of their motivations.[27] The evidence, a judge is likely to say, is not relevant.[28]

A determination of relevance is of singular importance in determining the admissibility of a piece of evidence. Evidence found to lack the necessary relevance is conclusively excluded from the trial, while relevant evidence is presumptively admissible.[29] For evidence to be considered relevant, a nexus must exist between the proffered evidence and the factual conclusion or element that must be determined or proven in order to resolve a disputed legal issue.[30] The definition of evidentiary relevance set out in Federal Rule of Evidence (FRE) 401 is both expansive and inclusive. It requires only that evidence have some minimal probative value to a fact at issue in the trial.[31] Some scholars have argued that the current definition of relevance is so broad that "[a]lmost any evidence satisfies [it]."[32]

Evidentiary determinations, including those of relevance, are made in isolation, with the admissibility of each piece of evidence determined independently.[33]

at 48 (arguing that all individuals have a duty to follow the law, even laws they believe are unjust), *with* Hall, *supra* note 9, at 2095 (highlighting the ways in which civil disobedience balances dissent and order to achieve societal benefits).

23. Hall, *supra* note 9, at 2099.

24. Loesch, *supra* note 11, at 1094–95.

25. Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOC. FORCES 944, 950 (1980) [hereinafter Barkan, *Political Trials*].

26. *Id.*

27. *See, e.g.*, Quigley, *supra* note 15, at 5, 54–56 (noting that in civil disobedience trials, judges often exclude evidence pertaining to issues of social justice on the grounds that it is irrelevant to whether the law was violated).

28. Barkan, *Political Trials*, *supra* note 25, at 950.

29. FED. R. EVID. 402.

30. Federal Rule of Evidence 401 provides that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action. *Id.* 401(a), (b).

31. *Id.*

32. David P. Leonard, *The Legacy of* Old Chief *and the Definition of Relevant Evidence: Implications for Uncharged Misconduct Evidence*, 36 SW. U. L. REV. 819, 833 (2008); *see also* David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 8 (1997) (stating that the rule is so broad it can include "evidence with the slightest degree of probative value").

33. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 83 (2d ed. 1994).

Historically, determinations of relevance have been approached from a rationalist perspective, with courts looking for a linear chain of reasoning to determine whether an adequate connection exists between the proffered evidence and a fact at trial.[34] This "atomistic" approach to relevance assumes the existence of discrete and fixed lines of reasoning that judges rationally and logically apply.[35] In fact, however, studies show that neither judicial application of the doctrine, nor a jury's use of evidence, is linear.[36] Rather, determinations of relevance are based upon assumptions about the connections between facts, which vary depending on social and cultural perspective.[37] Thus, contrary to rationalist assumptions, relevance determinations are questions of values, politics, and experience that reflect "deep-seated and largely unconscious value choices."[38] Because politics and values change over time, so too do assumptions as to the value of facts within a chain of reasoning. Thus, once perceptions on the connection between facts evolve, so too do determinations of relevance. This historic and contextual fluidity in determinations of relevance confirms that factors other than natural law or logic impact these evidentiary determinations.[39]

As understanding of the mechanisms underlying relevance determinations has evolved, so too has application of the evidentiary doctrine. Though most courts applying traditional concepts of relevance have excluded evidence of motivation in trials of civilly disobedient protesters,[40] current understandings demand another look at the relevance of protester motivations. Under these evolving concepts, determinations of relevance look not just to isolated factual connections but also to the broader context of the meaning of the evidence in the trial. In the context of protester trials, motivation is a primary characteristic distinguishing protester action from nonprotester criminal action.[41] Evidence of motivation provides a framework within which to explain protesters' actions and intentions and to distinguish them from those of nonprotester defendants.[42]

Newer concepts of relevance incorporate two important components. The first is

34. Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1042 (1998).

35. *Id.* at 1042.

36. *E.g.*, Kenworthey Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 436–37 (2010) (describing psychological studies that indicate that both judges and juries evaluate evidence in a narrative, rather than strictly rational, context); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 523–25 (1991) (relating the results of a study indicating that juries evaluate evidence through a constructed narrative).

37. Taslitz, *supra* note 34, at 1042–43.

38. Walter Otto Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CAL. L. REV. 699, 710 (1978).

39. See *id.* at 706, 717–18, for a discussion of how application of the doctrine of relevance often masked substantive determinations that usually upheld the status quo.

40. *See* Loesch, *supra* note 11, at 1100–01 (explaining how criminal law generally rejects motive testimony in civil disobedience cases, and how, under the Federal Rules of Evidence, a defendant's motive is not generally relevant to prove an element of a crime).

41. *Id.* at 1100.

42. *See id.* (arguing that admitting motive testimony in civil disobedience trials would distinguish the actions of civil disobedience from criminal actions).

narrative relevance, which looks to the importance of the evidence proffered and a meaningful and descriptive account of the circumstances giving rise to the alleged offense.[43] Evidence regarding the motivations underlying protester actions allows the factfinder to develop a contextual narrative within which to fit the protesters' actions and intentions.[44] Expanding concepts of relevance also permit the admission of evidence to evaluate the blameworthiness of a defendant's actions.[45] In order to adequately evaluate this crucial aspect, an inquiry must be made into "what a person's actions mean," by considering the reasons and motivations underlying the individual's actions.[46] These evolving concepts of relevance draw support from social science studies[47] as well as recent jurisprudence expressly recognizing that an inquiry into relevance includes allowing the jury to hear "a colorful story with descriptive richness."[48]

This Article evaluates application of the evidentiary doctrine of relevance within traditional and evolving concepts of relevance. Setting the stage for the remainder of the analysis, Section II addresses civil disobedience, exploring its definitions as well as its history and role in the social and political culture of the United States. Section III explores the body of evidentiary restrictions generally, the specific roots of the doctrine of relevance, and the doctrine's application within varied contexts. Section IV examines evolving concepts of relevance identified as narrative relevance and fault-based notions of blameworthiness. Section V uses a story of protest to illustrate how the application of traditional relevance concepts excludes evidence of protester motivations; it then discusses evidence of protester motivation under newer, evolving concepts of relevance, including concerns about admissibility. Ultimately, the Article concludes that these contemporary concepts of relevance support the admission of evidence of protester motivations in civil disobedience prosecutions.

II. CIVIL DISOBEDIENCE

Trials of civilly disobedient protesters provide a valuable lens through which to examine the contours of the doctrine of relevance. The societal value of civil disobedience has been widely debated, and its definitions have been honed due in part to its important roots in the country's evolution. This Section begins by identifying the defining aspects of civil disobedience and then explores the deeply historical context of

43. *See* John H. Blume et al., *Every Juror Wants A Story: Narrative Relevance, Third Party Guilt and The Right to Present A Defense*, 44 AM. CRIM. L. REV. 1069, 1087–91 (2007) (discussing the importance of narrative relevance and its impact on jury decision making).

44. *Id.* at 1087–88; *see also* Richard O. Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 17–18 (2002) (discussing how narrative relevance allows jurors to "actively create their own stories from the facts provided").

45. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352–53 (1996).

46. Kahan & Nussbaum, *supra* note 45, at 352 (emphasis omitted).

47. *See* Blume et al., *supra* note 43, at 1088–89 (noting that empirical research supports the notion that narrative is important throughout trials and describing trials as "story-battle[s]" (alteration in original)); Lempert, *supra* note 44, at 21 (discussing a cognitive study showing that subjects who are given a large amount of a story have the tendency to "fill in gaps in information").

48. Old Chief v. United States, 519 U.S. 172, 187 (1997).

civil disobedience and its value in the American political system. Tensions between the value of inclusive speech and concerns for the rule of law make applying the doctrine of relevance to civil disobedience a rich exploration. Understanding the elements of civil disobedience, its role in the historical evolution of the political structure of the U.S. government, and the inevitable balancing between the rule of law and open protest are critical to understanding the application of concepts of relevance within the context of protester trials.

A. Definitions of Civil Disobedience

As a violation of law, civil disobedience bears more than a slight resemblance to lawless criminal action. Distinguishing civil disobedience from general criminal action, therefore, requires application of a circumscribed and precise definition of civil disobedience.[49] In popular conception, civil disobedience evokes images of sit-ins at lunch counters, thronging masses in the middle of streets, banners unfurled from government buildings, or students with arms locked in front of a campus administration building.[50] Many of these popular ideas comport with the definition of civil disobedience teased out by political philosophers and legal scholars who have long discussed the topic.[51]

A general consensus exists on many of the required components of an act of civil disobedience.[52] In order to qualify as civil disobedience, an act must be undertaken in

49. There is not universal agreement that the action must ultimately be held to have been illegal in order to qualify as civil disobedience. *See, e.g.*, Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 69–70 (1990) (discussing an existing disagreement over whether the underlying conduct must be illegal in order to be considered civil disobedience).

50. *Merriam-Webster* defines the term "civil disobedience" as the "refusal to obey governmental demands or commands esp. as a nonviolent and usu. collective means of forcing concessions from the government." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). The term "civil disobedience" first appeared in an 1849 essay by Henry David Thoreau in which he sets out to explain his willful failure to pay taxes as a method of protesting the Mexican-American War and slavery. HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 236–56 (Sherman Paul ed., Riverside Press Cambridge 1960) (1849); *see also* Ledewitz, *supra* note 16, at 524 (discussing the role of civil disobedience in the "popular imagination").

51. *See* United States v. Schoon, 971 F.2d 193, 195–96 (9th Cir. 1991) (stating "[a]s used in this opinion, 'civil disobedience' is the willful violation of a law, undertaken for the purpose of social or political protest"); JOHN RAWLS, A THEORY OF JUSTICE 320 (Harvard Univ. Press rev. ed. 1999) (defining civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government"); Michael P. Smith & Kenneth L. Deutsch, *Perspectives on Obligation and Disobedience*, *in* POLITICAL OBLIGATION AND CIVIL DISOBEDIENCE: READINGS 3, 3–4 (Michael P. Smith & Kenneth L. Deutsch eds., 1972) (defining civil disobedience as an illegal and public act engaged in to draw public attention to injustice, and to protest and reform that injustice, with a willingness to suffer the consequences); Kevin H. Smith, *Therapeutic Civil Disobedience: A Preliminary Exploration*, 31 U. MEM. L. REV. 99, 126–27 (2000) (defining civil disobedience as a public, nonviolent, violation of law undertaken after other legal efforts have failed and based on a considered moral judgment and accompanied by acceptance of punishment).

52. Despite overlap in definitions of civil disobedience, scholars break down the definitional elements differently. *See, e.g.*, RAWLS, *supra* note 51, at 320 (describing civil disobedience as a public, nonviolent, and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies); Hall, *supra* note 9, at 2087–92 (citing a political goal, conscientiousness, nonviolence, acceptance of punishment, and openness as the requisite elements of civil disobedience); Smith, *supra* note 51, at 126–27 (defining civil disobedience as a public, nonviolent violation of law undertaken after other legal efforts have

order to promote public debate and raise public awareness. The late Harvard professor and renowned political philosopher John Rawls described civil disobedience as "an expression of profound and conscientious political conviction."[53] This requirement ensures that a civilly disobedient protester's motivation is the promotion of a public, rather than private, benefit. In order to accomplish the goal of public communication, as a second requirement, the action must be open and public; it cannot be covert or secret.[54] Though at least one scholar argues that an act that starts out as covert may become open if the actor follows it with an acknowledgement,[55] all agree that the act must either be public or become public soon after it is accomplished.[56] As a third element, the conduct must be nonviolent, and, though property may be damaged in an action, in order to qualify as civil disobedience, neither injury nor property damage can be the primary motivation.[57] The requirement of nonviolence, or the use of a minimum of force, allows the action to maintain a level of "fidelity to law" even though the action is a technical law violation.[58] As an additional requirement to ensure the action's public communication aspects and to reduce the potential for violence, acts of civil disobedience must be directed at the government rather than at private individuals.[59] Finally, the actor must be willing to submit to a legal determination of consequences

failed and based on a considered judgment and accompanied by acceptance of punishment); Smith & Deutsch, *supra* note 51, at 3–4 (defining civil disobedience as an illegal and public act to draw public attention to injustice, and to protest and reform that injustice, with a willingness to suffer the consequences); Tiefenbrun, *supra* note 13, at 684 (defining civil disobedience as "a non-violent act of breaking the law openly and publicly, without harming others, and accompanied by a willingness to accept punishment"). Noting the varied definitions of civil disobedience, one writer remarked, "[d]efinitions of civil disobedience are as diverse as those who engage in it." Luke Shulman-Ryan, Note, *Evidence—The Motion in Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State's Civilly Disobedient*, 27 W. NEW ENG. L. REV. 299, 306–07 (2005).

53. RAWLS, *supra* note 51, at 321; *see also* Charles R. DiSalvo, *Abortion and Consensus: The Futility of Speech, the Power of Disobedience*, 48 WASH. & LEE L. REV. 219, 220 (1991) (noting that civil disobedience makes "productive discussion possible"); Hall, *supra* note 9, at 2087 (stating that the existence of a political goal is a necessary element of civil disobedience); Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2042 (1996) (suggesting that a goal of civil disobedience is to persuade community members to demand change in law or social policy).

54. *See, e.g.*, RAWLS, *supra* note 51, at 321 (arguing that civil disobedience could never be covert or secret); Schopp, *supra* note 53, at 2042 (suggesting that a goal of civil disobedience is to use public violation of the law as a way of persuading community members to demand change in law or social policy).

55. *See* Brian Smart, *Defining Civil Disobedience*, *in* CIVIL DISOBEDIENCE IN FOCUS, 189, 206–07 (Hugo Adam Bedau ed., 1991).

56. See *supra* note 52 for a discussion of various scholars' definitions of civil disobedience, most of which include a publicity requirement.

57. *See* Hall, *supra* note 9, at 2089–90 (asserting that all law breaking involves some harm, but civil disobedience dictates only that the harm that occurs is minimal and bears some relationship to the injustice being protested against). *But see* PETER SINGER, DEMOCRACY AND DISOBEDIENCE 86 (1973) (agreeing with Rawls's assertion that civil disobedience should take a nonviolent form because violence tends to obscure the communicative aspect of civil disobedience).

58. RAWLS, *supra* note 51, at 321–22.

59. *See, e.g.*, Schopp, *supra* note 53, at 2043–44 (distinguishing civil disobedience from conscientious resistance, which involves crimes of personal moral obligation that are aimed at achieving personal goals rather than institutional changes).

for his actions.[60] Dr. Martin Luther King, Jr. spoke of this element as a "willingness to accept the penalty" for one's actions.[61] Scholars are not unanimous as to precisely what is required to meet this last element. Some believe that the civilly disobedient actor must passively accept the meted government punishment, while others argue that it is sufficient for the protester to accept the possibility of a sanction.[62] In either instance, by evidencing a willingness to accept the potential for punishment, the protester accedes to government authority and affirms the primacy of the rule of law.[63]

Often, courts and scholars discussing the limits on government control of protest draw a distinction between direct and indirect civil disobedience.[64] Direct civil disobedience occurs when a protester's actions are directed at the specific law being protested, and the action involves breaking that law or attempting to prevent the execution of that law.[65] Susan B. Anthony engaged in direct civil disobedience when she defied a federal law that effectively restricted voting rights to men by voting in a New York State congressional election.[66] Forty years later, 200 suffragists employed indirect civil disobedience when they were arrested for obstructing the sidewalk while demonstrating in front of the White House.[67] The actions of these protesters were considered indirect because they violated a law that was not itself the object of protest.

60. Some scholars of civil disobedience have claimed that civil disobedience requires that an actor's submission to the law requires the actor to plead guilty or otherwise not contest the law violation and acquiesce to punishment. Smith, *supra* note 51, at 124 n.63 (quoting FORTAS, *supra* note 20, at 32, 34). This position is not universally held, and this Article does not adopt this requirement as part of its definition of civil disobedience.

61. *See* Martin Luther King, Jr., *Letter From Birmingham City Jail (1968), in* LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY 453, 459 (David Dyzenhaus & Arthur Ripstein eds., 1996) ("One who breaks an unjust law must do it *openly*, *lovingly* . . . and with a willingness to accept the penalty."); MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 348 (James Melvin Washington ed., 1991) ("If you confront a man who has long been cruelly misusing you, and say, 'Punish me, if you will; I do not deserve it, but I will accept it, so that the world will know I am right and you are wrong,' then you wield a powerful and a just weapon.").

62. *Compare* FORTAS, supra note 20, at 53 ("If he is properly arrested, charged, and convicted, he should be punished by fine or imprisonment, or both, in accordance with the provisions of law, unless the law is invalid."), *with* Sanford J. Rosen, *Civil Disobedience and Other Such Techniques: Law Making Through Law Breaking*, 37 GEO. WASH. L. REV. 435, 455–56 (1969) (explaining that while a civilly disobedient protester must be prepared to accept the legal consequences for his actions, he is not barred from availing himself of legal defenses to avoid conviction).

63. Rosen, *supra* note 62, at 455–56.

64. *See, e.g.*, United States. v. Schoon, 971 F.2d 193, 195–96 (9th Cir. 1991) (distinguishing between indirect and direct civil disobedience for purposes of determining whether defendants can use a necessity defense); Rosen, *supra* note 62, at 455 n.76 (noting the differences for direct versus indirect civil disobedience in establishing the relationship between their act of protest and the goal they seek to attain).

65. *See* Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 79–80, 80 n.5 (1989) (reasoning that the famous 1960s lunch counter sit-ins constituted direct civil disobedience because the protest involved direct violation of the law that prevented the protesters from sitting at lunch counters).

66. United States v. Anthony, 24 F. Cas. 829, 829 (C.C.N.D.N.Y. 1873) (No. 14,459). Ms. Anthony was indicted in federal court. *Id.* She admitted her defiance and was convicted. *Id.*

67. John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 118 (2007); Quigley, *supra* note 15, at 22 n.70. Shortly after the arrests, Congress passed the Suffrage Amendment. U.S. CONST. amend. XIX.

A narrow definition of civil disobedience ensures a balance between recognizing a right to protest and preserving the rule of law; it distinguishes tolerated protests from unreasonably dangerous actions that threaten greater unrest.[68] Among those actions that do not meet the definition of civil disobedience, though motivated by conscience, is the killing of a physician who performs abortions since the action is neither nonviolent nor directed at the government.[69] Neither would actions by anarchists or tax deniers who are unwilling to recognize or submit to the authority of the government qualify as civil disobedience.

B. Civil Disobedience in the United States

1. The Role of Civil Disobedience

With the circumscribed definition of civil disobedience set forth in the preceding Part, the Article turns to a discussion of the role of civil disobedience in the social and political culture of the United States. The concept of civil disobedience has been traced at least as far back as Antigone and Socrates.[70] Civil disobedience shares tenets with Christian natural law theory. Saint Thomas Aquinas argues that "[h]umanly enacted laws can be just or unjust," but obedience to a higher authority trumps obedience to human-made law.[71] Early social contract theorists invoked civil disobedience precepts in arguing that, in some circumstances, citizens are justified in withdrawing their consent to be governed and defying the laws of oppressive political regimes.[72]

In the United States, civil disobedience enjoys a particularly deep history. Colonial revolutionaries invoked civil disobedience themes in advocating the right of citizens to defy the laws of an oppressive political regime.[73] Early leaders of the country embraced and encouraged the spread of these ideals amongst the rebellious colonists. For the fledgling government of the United States, the culture of resistance and revolution presented difficulties. The desire for national control by the fledgling

68. *See infra* Section II.B.2 for an examination of the social impact that civil disobedience has on the rule of law.

69. *See* Ledewitz, *supra* note 16, at 515 (explaining, in the context of antiabortion protests, that violent acts such as murder, assault, and destruction of property do not constitute civil disobedience). For example, during the 1998 trial of antiabortion activist, James Charles Kopp, for the murder of an abortion doctor, the judge rejected Kopp's assertion that his political convictions allowed him to be convicted for charges less than first-degree murder. Stephanie Simon, *Roeder Guilty of Murdering Abortion Provider*, WALL ST. J. (Jan. 29, 2010 12:01 AM), http://online.wsj.com/article/SB10001424052748703389004575033052416975506.html?mod=WSJ.

70. *See* Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929, 934 (1984) (relaying Professor A.D. Woozley's assertion that, in the *Apology*, Socrates "both expresses some pride in his own defiance [of the law] and maintains that there can be a higher call than the call of human law" (alteration in original)); A. John Simmons, *Disobedience and Its Objects*, 90 B.U. L. REV. 1805, 1809 n.23 (2010) (quoting scholar Hugo Adam Bedau for the proposition that "civil disobedience is as old as Antigone and Socrates").

71. THOMAS AQUINAS, SUMMA THEOLOGIAE: A CONCISE TRANSLATION 291–92 (Timothy McDermott ed., 1989).

72. *See* Loesch, *supra* note 11, at 1074 (illustrating the ways in which the American Revolution was philosophically rooted in social contract theory).

73. *Id.* at 1073–76.

government required dampening the spirit of rebellion.[74] Not infrequently in the country's history, the tension between a spirit of resistance and a compliant populace has proved vexing.[75]

The U.S. Constitution does not expressly recognize a right to engage in civil disobedience.[76] At least one scholar surmises that drafters of the Constitution may have intended to strike a balance in order to limit the right to engage in individual acts of resistance at the expense of expression.[77] Despite the lack of an express constitutional right to engage in civil disobedience, acts of political protest can constitute protected speech under the First Amendment.[78] The U.S. Supreme Court has held that, where an action is engaged in for the purpose of expression and under circumstances where it is likely to be understood as expression, civil disobedience constitutes speech.[79] Even as protected speech, however, protests can be controlled, circumscribed, and regulated. In addition to requiring notice and permits, and controlling the timing and location of protests, the government can criminally punish a protester for violating the law in the course of a protest.[80] The First Amendment does not prohibit a state or federal government from criminally prosecuting and punishing a protester even though the protester is engaged in speech while protesting.[81]

74. President George Washington responded aggressively to violent protests over a whiskey tax and suppressed heartily what has become known as the Whiskey Rebellion. Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 895 (2006).

75. See Loesch, *supra* note 11, at 1076–85, for a discussion of significant periods of civil disobedience in the United States including slavery, women's suffrage, and civil rights.

76. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 48 (1966) (rejecting the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please"). *But see* Mills v. Alabama, 384 U.S. 214, 218 (1966) (describing the nearly universal agreement that a major goal of the First Amendment was to protect freedom of discussion and criticism of governmental affairs).

77. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 3–35 (Harvard Univ. Press 1967) (1941). Scholars disagree on the First Amendment protections that the Framers of the Constitution intended to confer on groups of people or the engagement of protest. *Compare, e.g.*, *id.* at 3–35 (arguing that the Constitution was intended to eliminate the crime of sedition and prevent criminal prosecutions for criticism of the government), *with, e.g.*, LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY vii (1960) (claiming that the Constitution drew upon theory *justifying* government suppression of seditious speech).

78. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (confirming that "picketing and parading . . . constitute methods of expression, entitled to First Amendment protection").

79. *See, e.g.*, Spence v. Washington, 418 U.S. 405, 414–15 (1974) (per curiam) (holding unconstitutional as applied a state statute that prohibited a college student from expressing his disagreement with the bombing of Cambodia by flying a U.S. flag upside down).

80. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 838–40 (1976) (permitting the exclusion of political candidates from military bases); Grayned v. City of Rockford, 408 U.S. 104, 121 (1972) (upholding the regulation of expressive activity near a school); *Adderley*, 385 U.S. at 48 (upholding trespass arrests stemming from a protest outside of a nonpublic county jail); Cox v. Louisiana, 379 U.S. 559, 562 (1965) (upholding the application of a general trespass statute to demonstrations at jails).

81. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 372 (1968) (upholding the conviction of a man who burned his draft card, finding that the statute in question did not abridge his First Amendment rights); Nat'l Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 616 (7th Cir. 1992) ("Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior."). Despite the fact that civil disobedience is not constitutionally protected, it has been argued that it "occupies a special, and

Though not constitutionally protected, civil disobedience promotes useful societal interests both by promoting expression and providing a forum for disaffection. Permitting dissent through civil disobedience operates as a firebreak that allows political minorities who feel marginalized or disaffected to express their dissent before that unrest boils over into more socially dangerous actions.[82] The expression of conviction by a group of individuals also "grabs the attention of the majority, thus promoting debate and lessening public apathy."[83] By injecting dissenting perspectives into public discourse, civil disobedience allows the voices of otherwise marginalized groups to be heard.[84] By circumventing political and legal barriers to participation that may have operated to silence minority perspectives, civil disobedience injects perspectives that may not otherwise be heard or considered into public view.[85] By bringing attention to issues that would otherwise go unheard, protest can contribute to the exchange of ideas.[86] Based upon the social utility of civil disobedience, some philosophers consider the willingness to engage in such actions to be an affirmative virtue.[87]

2. Rule-of-Law Considerations

Not all of the impacts of civil disobedience are positive; civil disobedience also exacts a social toll, including a toll upon the rule of law.[88] Notably, two former U.S. Supreme Court Justices have publicly affirmed the primacy of the rule of law over any benefits to be achieved by disobedience to lawfully enacted criminal proscriptions.[89] Justice Powell described the civil disobedience of the 1960s as "heresy which could

somewhat protected, status in legal imagination." Ledewitz, *supra* note 16, at 524. Ledewitz criticizes the "binary thinking" exhibited in asking whether protest is protected or not. *Id.* at 528.

82. *See* Smith, *supra* note 51, at 131 (arguing that in addition to being an opportunity to protest certain laws or policies, civil disobedience is also an opportunity to express frustration with a perceived oppression in a relatively safe manner).

83. Ledewitz, *supra* note 49, at 123.

84. *See* Loesch, *supra* note 11, at 1094 (noting that civil disobedience "speaks . . . past the bureaucracy"); Smith, *supra* note 51, at 130 (commenting that civil disobedients take proactive steps to facilitate change rather than passively allowing for others to dictate their position).

85. *See* Hall, *supra* note 9, at 2083 (arguing that "[c]ivil disobedience broadly benefits society by liberating views divergent from the status quo").

86. Alicia A. D'Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 97, 103 (2006) (describing protest movements as the source of much of the progress toward social justice in the past century).

87. *See, e.g.*, RICHARD DAGGER, CIVIC VIRTUES: RIGHTS, CITIZENSHIP, AND REPUBLICAN LIBERALISM 14 (1997) (arguing that questioning prevailing views is one of the highest forms of civic virtue); HOWARD ZINN, DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY 123 (1990) (describing civil disobedience as essential to democracy because it offers an alternative to the "proper channels," which are easily blocked by tradition and prejudice); Philip Lynch, *Juries as Communities of Resistance: Eureka and the Power of the Rabble*, 27 ALTERNATIVE L.J. 83, 86 (2002) (arguing that civil disobedience by jurors provides various social benefits by advancing civilized society and promoting human dignity and freedom).

88. Not all would agree that civil disobedience exacts a toll. *See* FORTAS, *supra* note 20, at 48, 55 (arguing that all individuals have an affirmative duty to follow the law, even laws they believe are unjust); Powell, *supra* note 19, at 231 (arguing that despite the injustices that may lead to civil disobedience, legal acceptance of civil disobedience undermines the rule of law).

89. FORTAS, *supra* note 20, at 48; Powell, *supra* note 19, at 231.

weaken the foundations of our system of government."[90] His primary concerns rested with the potential for violence and civil unrest and the erosion of the rule of law.[91] Similarly, in 1968, Justice Fortas published a book on the role of civil disobedience in which he set forth his belief that the duty to obey the law is both a moral and legal imperative.[92] Granting any legal leniency or recognition to protesters would establish a jurisprudential paradigm that permits "legal illegality" and would incentivize a practice that disrupts societal order.[93] As one judge articulated after a defendant sought acquittal for trespassing during a nuclear protest:

> To accept the defense of necessity under the facts at bench would mean that markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment.[94]

On the other side, some scholars argue that civil disobedience can coexist alongside the rule of law.[95] Within Rawlsian political thought, rather than running counter to the rule of law, civil disobedience "expresses disobedience to law within the limits of fidelity to law."[96] Because of its open and public nature and politically expressive intent, civil disobedience does not present the same risks to rule-of-law considerations as do criminal actions conducted in secrecy.[97] Other scholars note that prioritizing rule-of-law considerations over those of justice and equity masks the ways in which the law preserves status quo political and economic structures.[98]

Ultimately, the value one places on civil disobedience, and the extent to which one perceives civil disobedience as distinct from general lawlessness, depends, in large part, upon how one balances the value of civil disobedience with rule-of-law

90. Powell, *supra* note 19, at 205.

91. *Id.* at 229, 231 (raising concerns about civil disobedience and noting that the law and the government framework that enforces the law is most in danger). In addition to penning scholarly articles, other Supreme Court Justices have employed judicial opinions to express opinions on the role of civil disobedience. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 167–68 (1966) (Black, J., dissenting) (stating that peaceful demonstrations could lead to hate-filled mobs).

92. FORTAS, *supra* note 20, at 18; *see also* Ledewitz, *supra* note 16, at 505 (stating that, in a democracy with fairly equal treatment and large-scale political participation, social change should not be effected by breaking the law).

93. Hall, *supra* note 9, at 2083.

94. People v. Weber, 208 Cal. Rptr. 719, 721 (Cal. App. Dep't Super. Ct. 1984).

95. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 206 (1978) (explaining that there is no evidence that society will collapse if it tolerates civil disobedience).

96. RAWLS, *supra* note 51, at 322 (arguing that a protester-defendant's acceptance of the legal ramifications of a public, nonviolent demonstration indicates faithfulness to the law). Rawlsian political thought encompasses the basic principles of justice as fairness, with individuals holding equal rights, and political liberalism, aimed at encouraging unity despite diversity. Leif Wenar, *John Rawls*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2012), http://plato.stanford.edu/entries/rawls/.

97. *See* RAWLS, *supra* note 51, at 322 (asserting that open displays of disobedience indicate political conscientiousness and faithfulness to the law).

98. *See, e.g.*, Weyrauch, *supra* note 38, at 717 (explaining how "legal masks" allow judges in the criminal justice system to enforce social policies and avoid personal responsibility for the outcomes of cases).

concerns.[99] If one values the rule of law over other considerations, then it will be difficult to recognize a distinction between common criminals and those engaged in protest. If, however, one ascribes to the theory that rule-of-law considerations can coexist with civil disobedience, then there is room to distinguish crimes arising out of protest activity from the general category of criminal action. Debate regarding the appropriate balance between support for civil disobedience and concerns for the rule of law provides a context within which to examine judicial decisions involving protester actions. As arbiters of what the jury will hear, judges are called upon to apply evidentiary limitations. The next Section examines traditional concepts of evidentiary relevance utilized by courts in making relevance determinations.

III. EVIDENTIARY RELEVANCE

A. Evidentiary Restrictions Generally

Evidentiary rules operate to place limits on the introduction of evidence and testimony at a trial. These rules offer contrast to a system of "free proof" in which the parties, given some structural limits, would determine which evidence they believe to be most persuasive and the factfinder would decide evidentiary persuasiveness.[100] Though most evidentiary rules apply whether the factfinder is a judge or a jury, limitations encompassed in evidentiary rules reflect a desire to protect juries from material that may confuse them or sway them in ways considered to be undesirable.[101] Evidentiary rules promote a variety of goals. Some evidence rules operate to limit material generally thought to be not probative enough to justify the time or potential prejudice its introduction might risk.[102] Other evidentiary limits exclude material

99. David Luban, in an article contrasting Dr. Martin Luther King's *Letter from Birmingham City Jail* with the Supreme Court's opinion in *Walker v. City of Birmingham*, upholding King's conviction, wrote that "[b]oth *Walker* and the *Letter* address an ancient question, a question that more than any other defines the very subject of legal philosophy: that, of course, is the question of whether we lie under an obligation to obey unjust legal directives, including directives ordering our punishment for disobeying other unjust directives." David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2164–65 (1989); *see also* Lippman, *supra* note 14, at 38 (stating that civil rights defenders who adopted a nonviolent philosophy defended their conduct when presented with criminal charges).

100. See Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 164 (1996), for a discussion of the potential value of a system of free proof where courts admit all evidence "until satisfied of the truth or falsity of a propounded position." Describing the justifications for a system of significant evidentiary limits, one scholar notes that "[i]f any and all evidence may be admissible . . . . [t]rials could come to an end only by the exhaustion of lawyers' ingenuity or clients' money, and the trial judge or jury might be overwhelmed and bewildered by the multiplicity of collateral issues." George F. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 701 (1941).

101. One scholar calls the rules of evidence "patronizing," saying that they "bespeak limited faith in juries." Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 154 (1989). Alschuler notes that evidence law "rests on the proposition that the prejudicial impact of relevant information may outweigh its probative value—in other words, that although judges and rulemakers can understand the limited worth of this evidence, jurors who evaluate similarly fallible evidence in their everyday lives cannot." *Id.* at 162.

102. *See* FED. R. EVID. 401 (providing the test for relevant evidence); *id.* 403 (balancing probative value against, among other things, the danger of unfair prejudice).

which, while probative, might be unfairly persuasive to a jury.[103] At other times, evidentiary restrictions reflect the desire to protect or promote social policies unrelated to accurate determinations by a jury.[104] Unsurprisingly, considerations of trial efficiency permeate the rules.[105]

Even though they serve useful functions, the application of evidentiary rules excluding information exacts systemic costs. Restrictions on evidence may reduce the accuracy of verdicts or result in outcomes that deviate from a common understanding of justice.[106] Similarly, by selectively restricting the facts that the jury is permitted to hear and consider, evidentiary restrictions may interfere with the jury's attempt to view and evaluate the facts.[107] In light of the important role of juries in providing oversight of the legislative and executive branches, this interference, if significant enough, could permit government excesses to go unchecked.[108] There is also some indication that juries may rebel against evidentiary controls in ways that may jeopardize the validity of trial processes and outcomes.[109] Thus, attempts to control too tightly juror access to information may threaten the critical role of the jury itself.[110]

Evidentiary restrictions often compete with constitutional considerations that mandate certain evidence be permitted despite the rules.[111] Confrontation, due process,

103. *See id.* 404 (limiting admission of character evidence). The theory underlying the general prohibition on character evidence is the fear that a factfinder will overvalue such evidence. *See id.* advisory committee's note ("Character evidence . . . . tends to distract the trier of fact from the main question of what actually happened on the particular occasion.").

104. *See id.* 407–411 (prohibiting the admission of evidence of subsequent remedial measures, offers to pay medical bills, participation in plea discussions, liability insurance, and offers of settlement); WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 25–45 (1999) (discussing ways in which evidentiary rules and other trial systems privilege procedural values over truth finding).

105. *See* Reeve v. Dennett, 11 N.E. 938, 944 (Mass. 1887) (describing the decision to exclude a certain piece of evidence as a "practical one, a concession to the shortness of life").

106. *See, e.g.*, Strier, *supra* note 100, at 162 (suggesting that "[j]udges can and should allow more information to reach the jury" in order to avoid rules that "perpetuate juror ignorance and are destructive to fair and informed verdicts").

107. *See* Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 512 (2008) (arguing that requiring jurors to make decisions using a body of evidence screened by the government limits jurors' autonomy and furthers the objectives of the government and litigants).

108. Even before enactment of the Sixth Amendment guarantee of a "right to . . . an impartial jury," Article III of the Constitution provided that "[t]he Trial of all Crimes . . . shall be by Jury." U.S. CONST. amend. VI; *id.* art. III, § 3, cl.2; *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34 (2003) (stating that the criminal jury was put into place by the Constitution to act as a check on the government well before Sixth Amendment guarantees were enacted); Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1318 (1987) (arguing that juries provide a critical check on government power and zeal).

109. *See* Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1581 (2011) (noting that, in an information age, juries may be obtaining unauthorized information about cases as a form of rebellion against restrictions of freer access to evidence).

110. *See, e.g.*, 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 17 (1827) (stating that the role of evaluating evidence, aside from a judge's instructions and guidance, belongs to the jury).

111. *See, e.g.*, FED. R. EVID. 804 advisory committee's note (allowing exceptions to the hearsay rule in an attempt to acknowledge constitutional concerns without codifying them).

and fair trial rights are among the constitutional doctrines that may limit the applicability of evidentiary restrictions.[112] In conformity with principles of interpretation and substantive constitutional law, when the evidentiary rules infringe on constitutional rights, the rules must give way.[113] Even when not in direct conflict with constitutional principles, however, evidentiary proscriptions impose some cost on values underlying constitutional protections including those of free and open speech.[114]

Evidentiary exclusions may also implicate nonlegal, social considerations. Parties prohibited from presenting evidence they believe important to their story may experience the evidentiary prohibition as a form of silencing.[115] This silencing may impact more particularly those groups that already feel marginalized within political or social systems.[116] Compounding these issues within the context of trials of civilly disobedient protesters, those who engage in civil disobedience are likely to have determined previously that their voices are unlikely to be heard by traditional methods of communication.[117] Thus, evidentiary exclusions that limit the ability to tell a complete story at trial may exacerbate an already-existing feeling of disaffection and alienation.[118] This disaffection negatively impacts the ability of the judicial system to demonstrate fair and just procedures for the determination of disputes.[119] Lending

112. *See, e.g.*, State v. Brechon, 352 N.W.2d 745, 751 (Minn. 1984) (noting "criminal defendants have a due process right to explain their conduct to a jury"); *id.* (Wahl, J., concurring) (stating that restrictions on a defendant's testimony offered to support his motive or intent must be carefully considered so that the defendant's right to a fair a trial is not jeopardized).

113. *See, e.g.*, FED. R. EVID. 402 (stating that relevant evidence is admissible unless the Constitution provides otherwise).

114. See *infra* Part V.A for an example highlighting an individual's inability to express her political beliefs in a courtroom because the motivation for her civilly disobedient action was deemed irrelevant and therefore inadmissible by a judge.

115. *See* Allison M. Dussias, *Exhibiting Culture in Legal Settings: Courts, Agencies, and Tribes*, 45 TULSA L. REV. 65, 86 (2009) (arguing that often-dismissed cultural evidence hampers an individual from presenting their complete story).

116. *See, e.g.*, *id.* at 85 (using Native Americans as an example to illustrate that evidentiary rules often prevent certain groups from presenting cultural evidence significant to their claims); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1453–54 (2005) (stating that, due to their lack of resources, minority groups often suffer additional silencing); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 9 (1990) (arguing that the law of evidence operates as a mechanism for silencing the voices of women and other minority groups).

117. See Smith, *supra* note 51, at 129–31, for a discussion of the "therapeutic" benefits of civil disobedience. Smith argues that certain minority groups turn to civil disobedience because they feel powerless to implement change through the mainstream system. *Id.*

118. David Luban states that "[l]egal argument is a struggle for the privilege of recounting the past" and "[w]hen you control the power of recounting history, you have therefore won a legal argument." Luban, *supra* note 99, at 2152–53; *see also* Barkan, *Political Trials*, *supra* note 25, at 953 (discussing the ways in which prosecutors attempt to use protestors own messages against them, further limiting the protesters' ability to share their perspective with a jury).

119. According to Professor Judith Resnick, the goals of a justice system should be "producing acceptable outcomes in individual cases, legitimating government decisionmaking in the absence of a guarantee of correctness, delineating the social and political import of different kinds of disputes, cherishing individuals and responding to their complaints of wrongdoing, and demonstrating the core values of equality, fairness, democracy, and justice." Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1017 (1984). According to Professor Resnick, "[p]rocedural features must be evaluated with the goal of maximizing the possibility of

empirical support to these critiques, studies have shown that, regardless of outcome, expressive, dignitary, and participatory benefits inure to litigants who are able to more fully express their stories.[120] Systemically, evidentiary restrictions must be balanced against these costs.

B. Traditional Concepts of Evidentiary Relevance

Within the context of evidentiary limitations, relevance holds a position of unique importance. Before any other evidentiary inquiries are made, evidentiary rules require a determination of relevance. Evidence determined to be relevant is presumptively admissible, and evidence determined insufficiently relevant is conclusively inadmissible.[121] Other rules may cause the exclusion of relevant evidence, but nothing overcomes a negative relevance determination.[122] One of the broadest exclusions of relevant evidence is FRE 403, which sets out a balancing test under which a court may exclude relevant evidence if the probative value of the evidence "is substantially outweighed by a danger of" unfair prejudice, delay, or confusion.[123] In light of the balancing test encompassed in FRE 403, determinations of evidentiary relevance are made without addressing questions of whether the evidence is prejudicial or its admission would constitute a waste of time.[124] Those considerations are addressed separately—only after a determination of relevance is made.[125]

FRE 401 provides that evidence is relevant if it has "any tendency to make a fact [of consequence] more or less probable than it would be without the evidence."[126] The breadth of the definition of relevance contained in FRE 401 has caused commentators to ask whether there is anything that is not relevant.[127] Recognizing the breadth of the

accomplishing these purposes." *Id.*

120. Natapoff, *supra* note 116, at 1497. "[L]itigants who are silenced by formal legal procedures experience less personal satisfaction with the legal process than small-claims participants who are permitted to speak in their own voices." *Id.* (citing William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court*, 19 LAW & SOC'Y REV. 661, 662 (1985)).

121. FED. R. EVID. 402; *see also* RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 139 (3d ed. 2002) ("Relevancy is the foundational principle for all modern systems of evidence law."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.1 (4th ed. 2009) (stating that relevancy is the most basic requirement that needs to be met when submitting evidence).

122. In large part, the rules of evidence encompass a complex set of considerations by which evidence, though relevant and presumptively admissible, may be made inadmissible. *See, e.g.*, FED. R. EVID. 403 (weighing the probative value of relevant evidence against its possible unfair prejudice when determining whether to admit it).

123. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

124. *See id.* 401 (determining relevancy based on whether the evidence makes a fact "more or less probable" without considering prejudice).

125. *Id.* 403.

126. *Id.* 401. Some scholars discuss FRE 401 as encompassing an inquiry into materiality and probative value. *See, e.g.*, Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 474 (2001) (arguing that the rule ensures both materiality and probative value).

127. *See e.g.*, Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967, 972 (2003) (noting that "under the broad definition of relevance incorporated into Federal Rule of Evidence 401, virtually all evidence is relevant"); Leonard, *supra* note 32, at 833 (arguing that almost all

doctrine, preeminent scholar of evidence John Henry Wigmore strongly advocated narrowing the scope of what would be considered relevant.[128] According to Wigmore, legal relevance should be a subset of logical relevance, and evidence should not be considered relevant unless it possesses more than minimal probative value and its probative value outweighs its prejudicial impact.[129] Rather than adopt Wigmore's narrow definition, however, the drafters of FRE 401 adopted the broad definition that evidence is relevant if it has "any" tendency to establish a fact in issue.[130]

Relevance "is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a proposition sought to be proved."[131] Thus, determinations of relevance look not to facts in isolation but to the connections that exist in the space between facts.[132] The evaluation of relevance depends upon one's perception of the strength of the relationship between the evidence proffered and the facts at issue.[133] Specifically, the inquiry is whether there exists a logical relationship between the proffered evidence and a fact of consequence to a determination of the action.[134] If the connection between proffered evidence and a fact essential to a determination of the matter is seen as weak or attenuated, the evidence will be excluded as not relevant. Conversely, the perception of a strong connection between the evidence and a fact at trial will result in a determination of relevance. The fact of consequence requirement incorporates concepts of materiality, which have otherwise been abandoned under the federal rules.[135] Under this fact-of-consequence requirement, a court will find a piece of evidence relevant only if the evidence relates to a fact that it believes is sufficiently important to a determination of the action.[136]

Though not evident from the definition in FRE 401, courts often confine facts of consequence to elements of claims or defenses.[137] Thus, a court may find facts of consequence to include only those determinations directly relating to the elements of an

evidence satisfies the definition of relevance if that definition is taken literally).

128. 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AND AT COMMON LAW § 28 (Peter Tillers ed., 1983). Wigmore advocated that the legal definition of relevance should require more than a minimum probative value. *Id.*

129. *See id.*

130. FED. R. EVID. 401.

131. James, *supra* note 100, at 690; *see also* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898) (suggesting that relevancy is determined by an unspoken evaluation of the evidence's logical connection to the case at hand).

132. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." FED. R. EVID. 401 advisory committee's note*; see also* James, *supra* note 100, at 696 n.15 (explaining that one must first determine to what specific proposition the evidence is to be relevant before determining the admissibility of that evidence).

133. James, *supra* note 100, at 690–91.

134. Pettys, *supra* note 126, at 474.

135. CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5164 (2d ed. 2013). Though otherwise abandoned, Wright and Graham agree that the concept of "'materiality' survives in FRE 401, albeit 'merged' with or 'incorporated' into the concept of relevance." *Id.*

136. One scholar discussing application of the doctrine of relevance in *Daubert* determinations notes that some courts refer to the inquiry as one of "fit." Taslitz, *supra* note 34, at 1041–42.

137. *See, e.g.*, Pettys, *supra* note 126, 474 (describing materiality as the logical relationship between the evidence at issue and one of the necessary elements of a claim).

offense or defense. In the context of a trial for failing to obey an order of a police officer, for example, a court might limit the inquiry to the circumstances of the expression of an order by the officer, whether the order was heard and understood by the defendant, and the defendant's actions in response to the order. In addition to limiting the facts of consequence to the elements of offenses and defenses, a court will also exclude evidence if it determines that the proffered evidence bears too little relation to the fact of consequence.[138] Though the evidence need not conclusively prove the fact, it must at least add something to the determination.[139] The inquiry is whether the evidence offered tends to make the fact of consequence more or less likely.[140]

Determinations of relevance have a tremendous impact upon evidence admitted at trial, and, though relevance determinations are perceived as based in formal logic, rulings of relevance are actually subjective.[141] Given the subjective nature of these determinations, relevance can be applied unevenly across time and contexts. Ultimately, perhaps the greatest concern regarding application of the doctrine of relevance is that judges may believe that they are applying a logical concept when in fact their relevance decisions reflect deeply personal goals. The next Part explores some of the complexities involved in the application of the doctrine of relevance.

C. Application of the Doctrine of Relevance

Concepts of evidentiary relevance are seen as drawing on formal reasoning, logic, and epistemology.[142] One early evidence scholar famously wrote about the doctrine of relevance that "[t]he law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience, —assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them."[143] Like all evidentiary determinations, rulings on relevance are made in isolation, by a judge individually examining a proffered item of evidence and evaluating its relevance to a specific fact.[144] Traditional evidence doctrine assumes the possibility of viewing a piece of evidence in isolation and, by application of rational deduction, identifying whether a "linear chain[] of reasoning" connects it to

138. *See id.* at 475 (defining probative value as "relationship between an item of evidence and the proposition that it is offered to prove").

139. In evidentiary determinations, it is axiomatic that "a brick is not a wall;" a piece of evidence's tendency to prove a fact need not mean that the evidence is dispositive of the fact. FED. R. EVID. 401 advisory committee's note; *see also* Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 576 (1956) (stating that "it is not to be supposed that every witness can make a home run").

140. FED. R. EVID. 401 (stating the test for relevancy is whether evidence makes a fact "more or less probable").

141. See *supra* note 36 and accompanying text for a discussion of studies showing that judges and juries do not evaluate evidence in a rational, linear manner.

142. *See, e.g.*, WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 71–82 (1990) (describing the rationalist tendencies); Richard D. Friedman, *Irrelevance, Minimal Relevance, and Meta-Relevance*, 34 HOUS. L. REV. 55, 59–61 (1997) (discussing the doctrine of relevance in terms of Bayes's Theorem of odds).

143. THAYER, *supra* note 131, at 265.

144. *See* MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 56 (1997) (explaining lawyers' focus on judicial rulings regarding the probative value of isolated information in relation to the facts at issue).

a fact at issue.[145] According to rationalist precepts, determinations of the necessary connections between facts can be made in a precise, linear, objective manner, independent of all other facts at trial.[146] One scholar refers to the ability to view independent pieces of evidence in isolation as "atomistic rationalism."[147] The atomistic rationalism view of relevance determinations masks the deeply subjective nature of relevance determinations.[148]

Determinations as to the connection between pieces of evidence and facts of consequence are highly individual, and the answer to a question as to the relevance of a piece of evidence is likely to be "it depends."[149] Citing studies, a number of legal scholars persuasively argue that determinations of evidentiary relevance are strongly influenced by personal beliefs and assumptions.[150] Whether an individual believes that a piece of evidence implicates a fact at issue in a trial depends on one's experiences,

145. *See, e.g.*, Taslitz, *supra* note 34, at 1042 (describing how traditional concepts of relevancy employed logical reasoning to determine how individual pieces of evidence interrelated to enhance probative value).

146. *Id.* Despite the prevalence of the rationalist approach, not all evidence scholars ascribed to an analysis of relevance based strictly in logic. *See, e.g.*, BENTHAM, *supra* note 110, at 17 (noting that "[i]f there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence" and describing the jury's process not as one of rational thought but of whether the jury "believe[s]" the evidence); WRIGHT & GRAHAM, *supra* note 135, § 5162 (describing certain scholars' skeptical views of the rationalist approach).

147. Taslitz, *supra* note 34, at 1042. Quipping on these assumptions, one scholar has written, "[i]f you can think of something that is inextricably connected to something else without thinking of the thing to which it is connected, you may be an evidence scholar." John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1213 (2006).

148. See Weyrauch, *supra* note 38, at 709–10, for a critical discussion of the use of the doctrine of relevance and other procedural devices as mechanisms for masking the human costs of legal decisions. According to Weyrauch,

> [t]he rules of relevance . . . have little to do with logic, reason, daily experience, common knowledge, and proper courtroom atmosphere. They are, rather, the product of deep-seated and largely unconscious value choices. Detailed articulation of the reasons for such choices is omitted because the need for such articulation does not reach the consciousness of the judge who in good faith is able to exclude information from his vision, especially when it is of a disturbing human nature. . . . The judge may say, more often than not with a touch of irritation, "Excluded as irrelevant and immaterial," when he might as meaningfully have said, 'I do not want to hear this at all!"

Id. at 710–11.

149. For example, whether one believes that prior marijuana use tends to make more likely the possession of cocaine with intent to distribute depends on one's belief about the connection between an individual's marijuana use and later cocaine sales.

150. *See, e.g.*, Weyrauch, *supra* note 38, at 709–11 (explaining how judges refer to reason and daily experience for their relevancy determinations but how the rules of relevance are the product of unconscious value choices). For other articles discussing some of these studies, see Donna Martinson et al., *A Forum on LaVallee v. R: Women and Self-Defence*, 25 U. BRIT. COLUM. L. REV. 23, 39 1991 ("Feminist legal scholars reject the assertion that the concept of relevance is simply a matter of logic, unaffected by the substantive law or the perspective of the particular judge."); Taslitz, *supra* note 34, at 1057 ("[N]otions of relevancy vary based on . . . social context. One [person's] relevance is another [person's] waste of time. Relevancy judgments are thus not purely logical but reflect our deepest moral, political, religious, and cultural assumptions.").

values, and political attitudes.[151] Because of the variability of the factors required in a determination of relevance, there is no ready test for establishing relevance, and trial judges may rely on instinct in determining the relevance of a piece of proffered evidence.[152] To judges who make relevance determinations, their determinations likely "seem self-evident" and may be treated as rational, logical, and inevitable.[153] Because judges generally view determinations of relevance as questions of logic, rather than experience, they are likely unaware of the personal assumptions underlying their determinations and are unlikely to disclose the value preferences underlying their determinations.[154] To a judge who views a relevance determination as self-evident, a challenge to the ruling may seem like a personal affront.[155]

Evidentiary rules in other parts of the world better reflect these psychological understandings than do evidentiary precepts in the United States.[156] Among the criticisms leveled at determinations of relevance are that such a system is likely to reinforce existing societal values and power structures and undervalue perspectives of subordinate groups.[157] That this normative reinforcement is accomplished through the application of evidentiary rules that appear neutral serves to "mask[]" from criticism

151. *See, e.g.*, Weyrauch, *supra* note 38, at 710; s*ee also* Steven E. Barkan, *Criminal Prosecution and the Legal Control of Protest*, 11 MOBILIZATION 181, 184 (2006) [hereinafter Barkan, *Criminal Prosecution*] (emphasizing that law is inherently political in its enactment, interpretation, and application); Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 7 (1983) (noting the prevalence of subjective interpretations throughout the law).

152. One scholar recounts that, when confronting questions of relevance in his evidence course, Harvard Law Professor John Chipman Gray would lean back in his chair and audibly ponder, "Shall we let it in, shall we let it in?" JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 2 (1947). See Glen Weissenberger, *Judge Wirk Confronts Mr. Hillmon: A Narrative Having Something to Do with the Law of Evidence*, 81 B.U. L. REV. 707, 719–33 (2001), for a narrative description of the "inevitable subjectivity that surrounds [a] judge's resolution of [an evidence] motion." Weissenberger provides a fictional account of a judge's consideration of an evidentiary motion over a few eventful days in the judge's life. *Id.*

153. Weyrauch, *supra* note 38, at 709. In spite of this tendency, one can find language by evidence scholars acknowledging that evidentiary determinations are less than mathematically logical. *See* MUELLER & KIRKPATRICK, *supra* note 33, § 83 (stating that the test of relevancy ultimately "turns on whether reasonable persons making thoughtful decisions in life outside the courtroom would consider evidence to be probative, which in turn means a logical connection to the point to be determined such that the evidence makes its existence more or less probable than it was without the evidence" (footnotes omitted)); 1 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE 401-63 (1995) (arguing that a judge must bear in mind that any piece of evidence impacting a juror's subjective assessment of probabilities is relevant, even though the juror's assessment may differ from a judge's own assessment).

154. Weyrauch, *supra* note 38, at 710.

155. *E.g.*, *id.* at 710.

156. *See, e.g.*, DAMASKA, *supra* note 144, at 57 (explaining that atomistic approaches resonate less well in Continental courts where theoretical reflection is more concerned with the psychological aspects of the factfinding process).

157. Taslitz, *supra* note 34, at 1043; *see also* JOHN T. NOONAN JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 22–23 (1976) (discussing the ways in which four great legal minds used the law as masks as they promoted dominant economic and political interests); Weyrauch, *supra* note 38, at 709 (asserting that relevance is "a useful conceptual tool for discarding arguments and evidence that challenged significant and usually unspoken societal values"); White, *supra* note 116, at 9 (arguing that the law of evidence has developed a variety of doctrines for guarding against the voices of women and other subordinate groups).

judicial determinations of relevance.[158]

1. Uneven Application

Given the subjective nature of a test for relevance, it is perhaps not surprising that the doctrine of relevance is applied unevenly. Examples of this uneven application show that relevance determinations vary both across doctrines as well as within a doctrine over time. In some doctrinal areas, the doctrine is applied very broadly; in other areas, it tends to be applied narrowly.[159] One area where relevance tends to be viewed expansively and admitted even though its logical connection is relatively weak is *res gestae*. *Res gestae* translates as "things done," and such evidence, even if not independently relevant and otherwise admissible, may be admitted in order to provide context.[160] The doctrine has roots in the common law as a "[m]atter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might not be properly understood."[161] Under a traditional, technical definition of relevance, evidence admitted as *res gestae* might have marginal relevance to a fact of consequence and likely would be inadmissible.[162]

In addition to being applied broadly in some contexts and narrowly in others, determinations of relevance within a single context can be fluid and change over time.[163] An illustration of this shift is seen in the admissibility of evidence of battered woman syndrome. Though thirty years ago evidence that a person accused of a criminal offense had been subjected to acts of domestic violence by the victim was likely to be found to lack relevance, evidence of a relationship of battering is more readily accepted as relevant today.[164] Cultural changes, made possible by an education campaign calling

158. Weyrauch, *supra* note 38, at 716 ("Individual decisions are given an institutional or transcendental legitimacy. Those in power can maintain their position by relying on a 'higher' authority, protecting themselves from direct criticism. Social conflict can be resolved and defused relatively peacefully.").

159. *Compare* David S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO. L.J. 95, 154–55 (2011) (indicating that certain broad doctrines invite jurors' speculation, which sometimes allows parties to provide background detail in order to fill narrative gaps), *with* Weyrauch, *supra* note 38, at 706 (discussing the masking function of relevance as narrowing the information available to factfinders).

160. BLACK'S LAW DICTIONARY 1423 (9th ed. 2009).

161. Jerome A. Hoffman, *Res Gestae's Children*, 47 ALA. L. REV. 73, 74 (1995) (quoting BALLENTINE'S LAW DICTIONARY 1102 (3d ed. 1969)) (alteration in original).

162. Schwartz, *supra* note 159, at 154–55 (describing *res gestae* evidence as "technically irrelevant" but allowed for "background detail").

163. According to British evidence scholar William Twining, the connections between an evidentiary fact and a fact to be proved can only be made by resort to "'the available social stock of knowledge' in a given society." TWINING, *supra* note 142, at 114; *see also* Barkan, *Criminal Prosecution*, *supra* note 151, at 184 (noting that legal actors exercise discretion as they react to both legal and extralegal considerations).

164. Kahan & Nussbaum, *supra* note 45, at 332. For other articles discussing the uneven trend toward admissibility of evidence of Battered Woman Syndrome, see Michael D. Claus, Note, *Profiles, Syndromes, and the Rule 405 Problem: Addressing a Form of Disguised Character Under the Federal Rules of Evidence*, 88 NOTRE DAME L. REV. 973, 992–1001 (2012) (critiquing the widely varied approaches applied by courts analyzing the admissibility of evidence of syndromes, including battered woman syndrome); Kelly Grace Monacella, Comment, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699, 711–22 (1997) (discussing the varied approaches taken to the admissibility of evidence of battered woman syndrome); Andrea E. Pelochino, *Justifiable Crimes: Working Toward an End to Injustice for*

attention to the complex dynamics involved in abusive relationships, changed perceptions as to the importance of understanding the underlying relationship. These changed perceptions impacted beliefs as to the connection between evidence of battering, concepts of intent and culpability, and, consequently, determinations of relevance.[165] Now, it is much more common for evidence of battered woman syndrome to be viewed as related to facts of consequence to the action and, therefore, relevant.[166] Like evidence of domestic violence thirty years ago, evidence of a defendant's social or cultural background is perhaps trending toward more general acceptance as relevant to the adjudication of a criminal charge.[167]

2. The Problem of Motive

Despite the expansive application of the concept of relevance in most contexts, relevance has a more restricted application in the context of motive. Generally, criminal law has tended to consider motive to be irrelevant to criminal liability.[168] The irrelevance of motive stems from the distinction widely believed to exist between motive and intent. In any offense other than one of strict liability, mens rea is a required element, and evidence related to state of mind is necessary and relevant.[169] Intent is the level of mental commitment with which an individual undertakes the actions underlying the offense.[170] Motive is generally viewed as relating to internal processes of the actor that are further removed from the circumstances directly attending the

Battered Women Convicted of Crimes Spurred by Their Abusers, 36 MCGEORGE L. REV. 905, 906–12 (2005) (providing a history of the admissibility of evidence by battered women in California).

165. *See* Kahan & Nussbaum, *supra* note 45, at 273–74 (describing the influence of changing social norms on legal relevance).

166. *Cf. id.* at 274 (noting that changing gender norms have led to an acknowledgment of the fear of victims of domestic violence and to corresponding changes in the law).

167. *See* Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 1, 44–46 (2008) (finding that cultural values shape perceptions of blame); Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199, 200–02 (2006) (expressing disagreement with the assumption in criminal law that the judge and jury have the same cultural values and norms as a given defendant).

168. Michael T. Rosenberg, *The Continued Relevance of the Irrelevance-of-Motive Maxim*, 57 DUKE L.J. 1143, 1144 (2008) (explaining the longstanding principle of the irrelevance-of-motive maxim, which holds that one's motives are irrelevant to criminal liability). There are exceptions to the irrelevance-of-motive maxim. *See, e.g.*, Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 2 (2002) (arguing that the irrelevance-of-motive maxim is a paradox, as it is a fundamental principle of criminal law yet conflicts with many criminal law doctrines). One example of an exception to the maxim is hate crimes prosecutions, in which an element of the offense requires a showing of motive to harm a victim because of a protected characteristic such as disability, gender, nationality, ethnicity, sexual orientation, religion, or race. *E.g.*, CAL. PENAL CODE § 422.55(a) (West 2013). See James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. OF CRIM. L. & CRIMINOLOGY 659, 664–672 (1991), for a discussion of the problems of motive in hate crimes.

169. *See* 21 AM. JUR. 2D *Criminal Law* § 132 (2008) (indicating that intent is not relevant in strict liability cases). The Model Penal Code defines four mental states, specifying the level of intent with which one undertakes an action: purposely, knowingly, recklessly, or negligently. MODEL PENAL CODE § 2.02 (2012).

170. "[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." MODEL PENAL CODE § 2.02 (2012).

offense elements.[171] It is generally considered to be the reason underlying the criminal action or the explanation as to why the action is undertaken—while intent is the immediate state of mind at the time of the actions constituting the offense.[172] Because inquiry into motive is unnecessary for a determination of criminal liability, evidence of motive is considered irrelevant.[173] Though generally accepted, the maxim that motive is irrelevant to criminal liability has been the subject of significant criticism.[174] Among those criticizing the maxim is Professor Douglas Husak, a contemporary philosophy scholar, who has written persuasively that sufficient justification for the motive-intent distinction does not exist and that there is "[n]o satisfactory explanation" for the categorization of motive as irrelevant.[175] Using examples of acts with identical intents but distinct motives, Husak argues that determinations of culpability are complex and that, often, the reason why an individual engages in an offense is important.[176] Husak uses the example of a man who takes the life of a woman to illustrate his point that motive matters: there is a difference between a husband whose motivation is to end the suffering of a terminally ill loved one and one whose motivation is to collect money.[177] Though the motive is distinct, the intent is the same: to intentionally cause the death of the woman. Husak criticizes the limited inquiry into motive permitted under traditional criminal law precepts. He points to a number of areas of criminal law where complex concepts are inadequately addressed because of stringent adherence to the irrelevance-of-motive maxim.[178]

171. *See, e.g.*, GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 48–49 (2d ed. 1961) (describing motive as "ulterior intention"); Walter Wheeler Cook, *Act, Intention, and Motive in Criminal Law*, 26 YALE L.J. 645, 658–60 (1917) (describing motive as an actor's desire to bring about an ulterior consequence from his or her actions).

172. Early criminal law scholar Sir James Fitzjames Stephen describes motive as "the prevailing feeling in his mind at the time when he acted rather than the desire to produce [a] particular result." 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 110 (1883).

173. *See, e.g.*, JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 83–93 (2d ed. 1960) (discussing the distinctions among motive, intention, and causation). Hall is credited with modern promotion of the maxim that motive is irrelevant to criminal liability. *See* Rosenberg, *supra* note 168, at 1143–44 ("According to Professor Jerome Hall, 'hardly any part of penal law is more definitely settled than that *motive is irrelevant*.'"). Hall recognized that excluding inquiry into motives in criminal cases means that there are times when the verdicts on liability are inconsistent with the community's concepts of morality and common sense. HALL, *supra*, at 93–94.

174. "The motive is irrelevant maxim has somehow survived a century of logical, descriptive and normative criticism." Binder, *supra* note 168, at 96; *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 121 (3d ed. 2001) (rejecting the claim that a meaningful distinction can be made between motive and intent); WAYNE LAFAVE, CRIMINAL LAW 244 (3d ed. 2000) (suggesting that "it [might] be better to abandon the difficult task of trying to distinguish intent from motive and merely acknowledge that the substantive criminal law takes account of some desired ends but not others"); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 263 (2012) (providing examples illustrating that distinctions between motive, intent, and character are not always clear).

175. Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 3 (1989); *see also* Binder, *supra* note 168, at 3 (critiquing the intent-motive distinction in part by exploring the historical origins of the distinction).

176. Husak, *supra* note 175, at 5–8.

177. *Id.* at 4.

178. Husak notes the difficulty the criminal law has in incorporating cultural defenses and addressing issues of intoxication and provocation. *Id.* at 3; *see also* Taslitz, *supra* note 34, at 1042 (rejecting the

IV. EVOLVING CONCEPTS OF RELEVANCE

This Section of the Article looks beyond traditional notions of relevance, focusing on the doctrine's evolution and incorporating more inclusive concepts of evidentiary relevance. Drawing on social science studies of juror decision making, the move from traditional, formalistic application of relevance doctrine toward broader, conceptual understandings is reflected in judicial adoption of broader understandings of relevance. This Section will explore these evolving concepts of relevance.

A. Old Chief v. United States

In 1997, the U.S. Supreme Court invoked expansive concepts of relevance in *Old Chief v. United States*.[179] The case arose in the context of a federal criminal charge against Mr. Johnny Lynn Old Chief alleging the offense of a felon in possession of a weapon.[180] Such charges are factually uncomplicated and generally easily proven, and at issue in the case was whether Mr. Old Chief had a prior felony.[181] Because a judicial admission would remove the need for proof of the stipulated element, Mr. Old Chief sought to stipulate to the offense element of the prior felony and thus remove the relevance of any evidence as to the agreed-upon fact.[182] Mr. Old Chief's rationale for stipulating to the felony was that if the prior felony was no longer in dispute, the jury would not be made aware of its details.[183]

Under application of a formalistic relevance analysis, Mr. Old Chief's stipulation as to the existence of the prior felony rendered irrelevant evidence regarding the prior conviction. The Supreme Court, however, looked beyond traditional concepts of relevance in determining the effect of the stipulation on the relevance of evidence of the prior conviction.[184] In an opinion that embraced a definition of relevance significantly broader than the then-existing common understanding of relevance, the Court acknowledged that evidence "has force beyond any linear scheme of reasoning."[185] Specifically, the Court relied upon concepts of relevance that are much

traditional approach of "atomistic rationalism" in favor of the more holistic storytelling theory of relevance).

179. 519 U.S. 172 (1997). See Pettys, *supra* note 126, at 468, for a discussion of how *Old Chief* broadened the concepts of evidentiary relevance and the application of such expansion on evidence of morally reasonable verdicts and jury nullification.

180. *Old Chief*, 519 U.S. at 174. The federal criminal offense of unlawful possession of a firearm by a felon is found at 18 U.S.C. § 922(g) (2012).

181. *Old Chief*, 519 U.S. at 174–75.

182. *Id.* at 175. Though the analysis in *Old Chief* focused on the probative value of the evidence vis-à-vis its unfair prejudice, an analysis required under FRE 403, the opinion also discussed relevance under FRE 401, and its analysis discussed the "fair and legitimate weight" of evidence, a determination of critical importance to relevance determinations. *Id.* at 178–80, 187. See D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force": Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 405–08 (1998), for a discussion of the use of judicial admissions or stipulations in criminal trials. According to Risinger, much of what is regularly admitted in criminal trials, including glassine bags of controlled substances, is technically irrelevant. *Id.* at 432.

183. *Old Chief*, 519 U.S. at 175. The prior felony involved an assault causing serious bodily injury. *Id.*

184. *See id.* at 186–92 (examining arguments outside of the scope of the Federal Rules of Evidence, namely the prosecution's argument that it is entitled to prove its case using evidence of its own choosing).

185. *Id.* at 187.

more expansive and nuanced than those utilized in traditional formalistic applications of the doctrine. First, the Court articulated the concept of narrative relevance, expressing that evidence is relevant, "not just to prove a fact but to establish its human significance," by allowing the jury to hear "a colorful story with descriptive richness."[186] The second concept the Court invoked in its relevance analysis was the concept of blameworthiness.[187] Because criminal law expresses condemnation, an important part of the function of a criminal trial is an evaluation of the blameworthiness of a defendant's actions.[188] Without the facts necessary to make a determination of action and intent, there can be no adequate appraisal of culpability or criminal liability. In order to adequately evaluate this crucial aspect, an inquiry must be made into "what a person's actions mean," by considering the reasons and motivations underlying their actions.[189]

Old Chief did little to change what trial lawyers have long known about the importance of providing a jury with a cohesive narrative. It did, however, lend credibility to evolving concepts of relevance.[190] Changed perceptions are significantly less likely to be found where the rubber hits the road; the impact of *Old Chief* in expanding conceptions of relevance applied by trial judges is less clear.[191] *Old Chief* has provided little change in the analysis used by most courts to determine the relevance of protesters' motivations.

B. Narrative Relevance

The Court in *Old Chief* drew upon a deep body of work affirming the important role of narrative within the context of trials.[192] The understanding that narrative is an essential component of persuasion has deep roots; scholars have documented a human storytelling tradition dating back millennia.[193] Artists, writers, and philosophers have

186. *Id.* at 187–88.

187. *Id.* at 188 (declaring that a juror's ability to sit in judgment rests upon the juror's ability to attach a human significance to the defendant's wrongful acts and decide whether a guilty verdict would be morally reasonable).

188. Kahan & Nussbaum, *supra* note 45, at 352–53; Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 137–40 (2009).

189. Kahan & Nussbaum, *supra* note 45, at 352–53 (emphasis omitted).

190. Wright and Graham recognize a term they call "psychological relevance." WRIGHT & GRAHAM, *supra* note 135, § 5165. In defining the term, they note that "[t]he decision of an issue of fact in a case of closely balanced probabilities must, in the nature of things be an emotional rather than a rational act." *Id.*

191. *Old Chief* has been extensively discussed in scholarly literature, giving rise to numerous essays and articles. *See, e.g.*, James J. Duane, *"Screw Your Courage to the Sticking-Place": The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463 (1998); Risinger, *supra* note 182. The impact on trial courts is harder to determine because (1) these determinations are often verbal rather than written, and (2) appellate opinions infrequently address determinations of relevance.

192. *Old Chief*, 519 U.S. at 187 (discussing how a narrative develops as the body of evidence grows, allowing jurors to draw conclusions and inferences in order to arrive at an "honest verdict"); *see also* Pennington & Hastie, *supra* note 36, at 521 (describing "The Story Model," which hypothesizes that juries process information by constructing a narrative); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 686 (1994) (noting that rhetoric and narrative are gaining increasing prominence in legal scholarship).

193. See Lani Guinier, *Forward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 28 (2008), for

long recognized the power of story,[194] and scholars studying trials, juries, and persuasion have developed a deep and rich body of scholarship on the "synergy between storytelling and law."[195]

Scholars have noted that stories are especially important in law where "[l]egal interpretation takes place in a field of pain and death."[196] Though not unanimous in embracing concepts of narrative relevance, evidence scholars have long understood that determinations of relevance require more than logical reasoning.[197] The authors of the Wright and Graham evidence treatise acknowledge that relevance is about more than logic, noting that "[e]ven Wigmore believed that courts had to go beyond logic in assessing relevance."[198] The authors appear ambivalent about the move toward the introduction of evidence on the basis of psychological or narrative relevance. The previous edition of the Wright and Graham treatise acknowledged that the evidentiary rules would permit consideration of the "psychological relevance" of evidence, which they described as "relevance based upon intuition and other forms of intelligence."[199] The recent edition of the treatise, however, strikes a more cautious tone toward psychological and narrative relevance, noting expressly that logic has little to offer in these determinations which "must, in the nature of things be an emotional rather than a rational act."[200]

Despite the fact that legal disputes arise from stories, narrative may be difficult to convey through the mechanism of trial. Lawyers are often inexpert in constructing narratives and, with their right-brained training in rules, may be at a disadvantage when dealing with the emotional content of stories.[201] Lawyers generally exhibit strong rational, logical, and analytical thinking, but they have weaker skills in "the perception and discrimination of emotion; in receiving and conveying information in the form of a narrative; and in the creative generation of factual hypotheses in the everyday practice

a discussion of the history of narrative, especially orality and dissent.

194. *See, e.g.*, URSULA K. LE GUIN, THE LANGUAGE OF THE NIGHT: ESSAYS ON FANTASY AND SCIENCE FICTION 31 (Susan Wood ed., 1979) ("[T]he story—from *Rumpelstiltskin* to *War and Peace*—is one of the basic tools invented by the mind of man, for the purpose of gaining understanding. There have been great societies that did not use the wheel, but there have been no societies that did not tell stories." (quoting Ursula Le Guin, *Prophets and Mirrors: Science Fiction as a Way of Seeing*, THE LIVING LIGHT, 7:3 (Fall 1970)).

195. Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 QUINNIPIAC L. REV. 1145, 1146 (2003) (positing that presenting evidence while telling a story helps jurors to organize their inferences cohesively); *see also* Cover, *supra* note 151, at 4 (explaining that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning"); Sherwin, *supra* note 192, at 686 (discussing the increased scholarly attention being paid to legal storytelling).

196. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601–02 (1986) (describing the importance of language and interpretation in the law) (footnote omitted).

197. *See, e.g.*, WRIGHT & GRAHAM, *supra* note 135, § 5165 (stating that determinations of relevance may have as much to do with human emotion as they do with reason and logic).

198. *Id.*

199. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5165, at 62 (1978).

200. WRIGHT & GRAHAM, *supra* note 135, § 5165.

201. *See* Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 777 (1998) (noting that because lawyers often rely more heavily on the analytical left side of their brains, their ability to sufficiently incorporate emotional factors into their legal practice is diminished).

of law."[202] Many trial lawyers do not understand basic storytelling devices, including metaphor, character, or the development of theme.[203]

Trials themselves are often poor vehicles for storytelling. In the course of a trial, the presentation of evidence often appears haphazard and random. Even those attorneys attuned to the importance of narrative struggle with the order of witnesses, attempting to present witness testimony in a manner that allows early parts of the story to be told first and later parts of the story told later.[204] Trial structure makes difficult the cohesive presentation of facts because, as each witness is called, that witness will answer questions about what he or she saw and may identify and discuss exhibits and witnesses that the jury has not yet met.[205] The evidence may emerge without significant context.[206] In light of proof burdens and trial structure, the difficulties facing narrative may benefit prosecutors, rather than defendants, whose success often depends on demonstrating nuance, uncertainty, and doubt.[207]

Despite these difficulties, or perhaps because of them, narrative provides a critical interpretive framework for the haphazard presentation of trial evidence.[208] Studies conducted over the last few decades indicate that the brain is hardwired to process information in a story format and that, from the start of a criminal trial, jurors fit evidence into a narrative in order make sense of it.[209] Thus, narrative provides a framework for the organization of evidence and a mechanism for ascribing meaning to disjointed facts.[210] The placing of information into a narrative framework is so

202. *Id.* at 764.

203. *See, e.g.*, *id.* at 783–84 (noting that while analytical thought plays a role in storytelling, it alone is insufficient for "full competence at the comprehension and telling of stories").

204. *See, e.g.*, Pennington & Hastie, *supra* note 36, at 523 (describing problems lawyers face related to the presentation of information at trial, including (1) the disconnected question and answer format of witness questioning; (2) the fact that different witnesses testify as to different events or occurrences; (3) the fact that witnesses do not always testify in temporal order; and (4) the fact that witnesses are not permitted to speculate).

205. *See, e.g.*, Philip N. Meyer, *"Desperate for Love II": Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931, 932 (1996) (explaining that telling a cohesive story at trial is difficult because trials take much longer than the events themselves and involve conflicting evidence and multiple perspectives from different witnesses).

206. *See* Sherwin, *supra* note 192, at 688–89, for a discussion of the dominant "logico-scientific" method of trial practice in which there is a "straightforward, logic-driven marshalling of clues culminating in closure and finality."

207. *See id.* at 689 (explaining how prosecutors often favor trial structure because it enables them to proceed methodically through the facts and allows the jury to take a more passive role—simply affirming what the prosecution has told them).

208. *See, e.g.*, W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 3 (1981) (concluding that the criminal trial is structured around storytelling).

209. *See* Blume et al., *supra* note 43, at 1086 (highlighting empirical studies that show jurors often incorporate narrative into their decisions more than they incorporate legal instructions or standards); Pennington & Hastie, *supra* note 36, at 521 (describing the juror decision-making process as a "Story Model" in which jurors reach a decision through classification of the trial narrative into the appropriate verdict category).

210. *See* LON L. FULLER, *The Adversary System*, *in* TALKS ON AMERICAN LAW 30, 31–32 (Harold J. Berman ed., 1961) (stating that it is the lawyer's role to present a cohesive narrative to the judge and jury as seen through his client's eyes); Strong, *supra* note 201, at 782 (explaining that a good story does not simply

fundamental that is has been described as required in order to permit either perception or cognition.[211] Rather than waiting until the end of trial when all the evidence has been presented, jurors actively construct a story as the evidence is presented.[212] Inferences drawn from their own experiences allow them to fill gaps in the narrative.[213]

This active process of narrative construction requires jurors to make connections between the evidence and the emerging story.[214] In this process, jurors use their own experiences and background to place the evidence within the context of their working narrative. Jurors process trial evidence by comparing the emerging story with their expectations of what the evidence should be as well as what would constitute a believable story.[215] A persuasive trial story must exhibit necessary "certainty principles" of coverage and coherence.[216] The factors of coverage and coherence measure how well a story accounts for evidence adduced at trial, including how much the story is complete, consistent, plausible, and congruous with juror experiences.[217] Ultimately, the trial becomes a "story battle," and the party with the narrative that jurors find more plausible and coherent is the one that prevails.[218] In the context of this narrative showdown, the party with the more complete and cohesive narrative has a significant advantage in the war of persuasion.[219]

describe a series of isolated facts, but rather it synthesizes facts together in a way that achieves something greater—an experience).

211. *See* Sherwin, *supra* note 192, at 717 ("[H]uman perception and cognition are never without some interpretive framework within which reality and meaning come into view.").

212. Pennington & Hastie, *supra* note 36, at 523; *see also* Blume et al., *supra* note 43, at 1088 (asserting that "jurors organize and interpret trial evidence as they receive it by placing it into a story format").

213. *See* Blume et al., *supra* note 43, at 1089–90 (stating that jurors use their own "schemas" and "scripts" to make inferences from information known to them to the unknown).

214. John Mitchell provides an informative description of this process:

> [T]rials are often fragmented affairs in which evidence comes in a piece at a time, often without any deference to logical order, and at times consists of extensive evidentiary foundations which are unrelated to the substance of the case. Jurors make sense of this by constantly trying to fit the information they are hearing into a story.

John B. Mitchell, *Evaluating* Brady *Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599, 612 (2005).

215. *See, e.g.*, DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 456 (1991) (explaining how popular culture, and television in particular, has shaped juror expectations regarding the types and quality of evidence to be introduced at trial).

216. Pennington & Hastie, *supra* note 36, at 527–28. According to Pennington and Hastie, a narrative's "certainty principles" can be evaluated using the factors of coverage, the extent to which the narrative accounts for the evidence, and coherence, which can be broken down into consistency, plausibility, and completeness. *Id.*

217. *Id.* at 528.

218. Blume et al., *supra* note 43, at 1089. In order for a story to be believable, it must have adequate coverage and coherence. Pennington & Hastie, *supra* note 36, at 527–28. Pennington and Hastie refer to the necessary elements as "certainty principles" of coverage, coherence, uniqueness, and fit. *Id.* at 527–29. Professor Delia Conti refers to similar concepts as "narrative fidelity" and "narrative coherence." Delia B. Conti, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 DUQ. L. REV. 457, 458 (2001).

219. Individuals given a cohesive narrative tend to fill in gaps in information in a manner that fits whatever the story led them to expect; they may even remember story-consistent facts they were never told. *See, e.g.*, F.C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY 213 (1932)

With this greater understanding of the mechanisms of juror decision making, evidentiary relevance takes on a new dimension. One scholar notes that, in light of what we have learned about persuasion and juror expectations, the rules should expressly recognize a "right to dramatic presentation independent of relevance."[220] Given evolving concepts of relevance, however, recognition of a novel trial right may not be necessary. The breadth of the definition of relevance allows for the incorporation of concepts of narrative importance, and the doctrine's evolution already shows signs of incorporating an understanding of the import of a descriptive account of the circumstances giving rise to the alleged offense. The next Part will discuss the relevance of evidence of blameworthiness in criminal trials.

C. Blameworthiness

In addition to its discussion of narrative, the Court in *Old Chief* drew upon concepts of blameworthiness and moral condemnation that distinguish criminal liability from civil liability.[221] As expressions of condemnation, criminal verdicts and the trials leading up to those verdicts function as evaluations of the blameworthiness of an individual's actions.[222] Legal scholar Henry Hart said that imposition of a criminal sanction involves a determination "that the violation was blameworthy and, hence, deserving of the moral condemnation of the community."[223] Hart's position echoed that

(asserting that the act of remembering is an "imaginative reconstruction," consisting of past experiences and reactions); Gordon H. Bower et al., *Scripts in Memory for Text*, 11 COGNITIVE PSYCHOL. 177, 188–89 (1979) (discussing how when people hear two versions of the same story, they often make mistakes and inadvertently substitute what they thought were implied facts but in reality were unstated during the story).

220. Risinger, *supra* note 182, at 440.

221. Old Chief v. United States, 519 U.S. 172, 188 (1997) (declaring that a juror's ability to sit in judgment rests upon the juror's ability to attach a human significance to the defendant's wrongful acts and decide whether a guilty verdict would be morally reasonable); *see also* PAUL H. ROBINSON, CRIMINAL LAW §1.1 (1997) (identifying the distinction between criminal and civil liability as the former's focus on moral condemnation); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) (asserting that the distinguishing factor of criminal law is that it involves the community's condemnation); Kahan & Nussbaum, *supra* note 45, at 352–53 (stating that narrative is an effective vehicle for articulating the nature of a crime because criminal law itself involves the expression of society's condemnation of certain acts); Kim, *supra* note 167, at 216 (explaining that the level of culpability attached to a criminal act is a direct reflection of society's moral judgment of that act); Myers, *supra* note 188, at 140 n.10 (identifying multiple sources discussing criminal law's moral underpinnings). *But see* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991) (discussing the encroachment of criminal law into the areas traditionally viewed as civil).

222. *See, e.g.*, Kahan & Nussbaum, *supra* note 45, at 352–53 (noting that criminal acts are measured against the backdrop of societal norms, and moral culpability increases as the act deviates further from community expectations); Myers, *supra* note 188, at 183 (noting that jury verdicts incorporate determinations of blameworthiness); John Shephard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999) (positing that courts are using a method of statutory interpretation that "makes moral culpability mandatory for criminal conviction in federal court").

223. Hart, *supra* note 221, at 412. "What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition." *Id.* at 404; *see also* Tison v. Arizona, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."); Binder, *supra* note 168, at 9–10 (discussing the

of sociologist Émile Durkheim, who believed that attaching blame for a crime performs the necessary social functions of allowing members of society to affirm the society's collective values, to express their disapproval of acts that offend the collective values, and to foster social cohesion.[224] Though less obvious than the role of the jury, courts, too, evaluate individual culpability, and at least one scholar has noticed a tendency by appellate courts to imply a blameworthiness requirement in the interpretation of criminal statutes.[225]

Whether within the context of a trial or outside of it, an evaluation of the blameworthiness of an act resulting in harm is automatic and intuitive.[226] Blaming serves an important social function.[227] By evaluating and determining blame, we establish, enforce, and express the social boundaries and rules of our community.[228] Not only are these determinations important, they appear to be intuitive and automatic, driven by a natural, impulsive desire to express and defend social values and expectations.[229] Because determinations of blameworthiness appear to be inevitable, attempts to suppress emotional determinations of culpability are likely to fail.[230]

As a fundamental component of the system of criminal law in the United States, the jury performs a critical role in this evaluation, operating as the "conscience of the community."[231] Because criminal trials function as evaluations of culpability, juries have an important role in deciding whether an individual's action is blameworthy.[232] By undertaking this evaluation, juries provide a backstop against government overreaching, overcriminalization, and the application of statutes that have ossified outdated values or social mores.[233] Jury verdicts also provide feedback to prosecutors,

historical and theoretical importance of "moral wrongfulness" in criminal law); Myers, *supra* note 188, at 138–39 (noting that "the defining characteristic of the criminal law is moral condemnation").

224. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 40, 61–63 (W.D. Halls trans., 1984) (1893).

225. *See, e.g.*, Wiley, *supra* note 222, at 1053 (discussing how the Supreme Court has interpreted statutes to imply blameworthiness).

226. *See* Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 284–87 (2002) (studying the psychological link between crimes committed and the seemingly innate motivation of people to exact punishment against perpetrators); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) (asserting that moral judgment is often formed through "quick, automatic evaluations" of another person's behavior).

227. Nadler & McDonnell, *supra* note 174, at 257.

228. *Id.*

229. *Id.*

230. Kahan & Nussbaum, *supra* note 45, at 353.

231. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). See Myers, *supra* note 188, at 154–60, for a brief and illuminating discussion of the history of the American jury.

232. Richard E. Myers II argues that juries should be part of a dialogue with lawmakers and prosecutors about criminal laws and prosecutions to promote the regular reevaluation of criminal laws. Myers, *supra* note 188, at 142–43; *see also* Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 95 (2005) (noting that "the basic justifications for having a right to a jury trial always have relied in part on a sense that the jury is a proper and fair arbiter of a criminal defendant's moral blameworthiness").

233. *See* Williams v. Florida, 399 U.S. 78, 100 (1970) (discussing the jury's function as "to prevent oppression by the Government"); Myers, *supra* note 188, at 152 (arguing that requiring a jury vote of censure in a criminal conviction will "force much that is now denominated criminal back onto the civil side of the

courts, and legislatures regarding community views on certain types of cases or witnesses.[234]

In order to adequately undertake the task of evaluating blameworthiness, a jury must be given sufficient evidence of culpability. According to Professors Dan Kahan and Martha Nussbaum, mechanistic applications of legal rules that deny the opportunity to inquire into broader concepts of culpability obscure meaningful distinctions within similar offenses.[235] Likewise, application of rigid evidentiary mechanisms can lead to verdicts that fail to conform to societal concepts of culpability.[236] Without the facts necessary to make a determination of action and intent, there can be no adequate appraisal of culpability or criminal liability.[237] "No jury can engage in meaningful moral reasoning when it is systematically deprived of any details about the practical implications of the choice set before it."[238]

One area of inquiry critical to a determination of culpability is "what a person's actions mean."[239] Studies have shown that judgments of blame vary depending on the reason for the action.[240] Jurors are inclined to blame transgressors with bad motives more readily than those with good motives.[241] Thus, an individual's reasons for acting

ledger").

234. *See* Myers, *supra* note 188, at 143 (arguing that a system requiring juries to expressly determine blameworthiness would aid the legislature in drafting the law and the prosecutor in applying the law).

235. Kahan and Nussbaum provide examples:

> [T]he reason that a mother who kills the sexual abuser of her daughter is less worthy of condemnation than the man who kills a person whom he believes to be a homosexual is that her emotional motivation expresses less reprehensible valuations than does his: her anger appropriately values the worth of at least something in her situation—namely, her daughter's well-being—whereas his hatred appropriately values nothing. Under an expressive theory, the man should be punished more severely to repudiate the more reprehensible message of homophobia implicit in his act. A mechanistic formulation of voluntary manslaughter that looked only to the intensity and not to the quality of offenders' emotions would sever the correspondence between the valuations expressed in wrongdoers' actions and the condemning retort of punishment.

Kahan & Nussbaum, *supra* note 45, at 353.

236. *See, e.g.*, *id.* at 352 (explaining that what a society chooses to punish "tell[s] a story about whose interests are valued and how much").

237. *See, e.g.*, Albert Lévitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117, 130–31 (1922) (discussing the religious origins of mens rea in the context of seeking forgiveness for sins committed). Lévitt traced the requirement of mens rea to Roman Catholicism, which regarded evil motives as the sinful aspect of wrongdoing: "[T]o know if the things [people] do are truly good or evil, one must know what motive animates their acts. The evil motive makes the evil act; the good motive makes the good act. . . . [K]now the motive and you know the will . . . ." *Id.*

238. Duane, *supra* note 191, at 475.

239. Kahan & Nussbaum, *supra* note 45, at 352 (emphasis omitted).

240. Nadler & McDonnell, *supra* note 174, at 264. Mark D. Alicke, a social psychologist, conducted an empirical study using the fictitious story of a man speeding home in the rain who hit another car and caused injury to the driver. *Id.* The participants who were told that the man was speeding home because he wanted to hide a vial of cocaine from his parents were more likely to ascribe blame to the man for the accident than those participants who were told that he was speeding home in order to hide an anniversary present for his parents. *Id.* at 264–65.

241. *See* Nadler & McDonnell, *supra* note 174, at 265 (discussing Alicke's argument that humans are more inclined to ascribe blame to actors with bad motives).

are critical to determining culpability.[242] Also critical to determinations of blameworthiness are perceptions of an individual's character.[243] Though evidentiary rules limit the admissibility of character evidence when offered to show propensity, jurors look closely at all evidence in order to glean what they can of a defendant's character.[244] An individual viewed as having a bad moral character is more likely to be judged blameworthy for an action than an individual viewed as having a good character.[245] When accused of a criminal offense, determinations of a defendant's character depend in large part upon the individual's motivation for engaging in the underlying action.[246]

This distinction between culpable acts, which are criminal, and nonculpable acts, which are not criminal, is a critical part of criminal jury verdicts. This is especially true in the context of civilly disobedient protesters. The actions of protesters, by definition, are acts of political conscience grounded in a desire for societal improvement. As such, there is a strong claim that society, represented by the jury, should be able to assess the claim of blameworthiness of the civil disobedient. If, owing to the reasons underlying the protester actions, the protester's actions are insufficiently culpable, the community should have the ability to find the protestor blameless.

242. *See* Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 376–77 (1992) (positing that we are more ready to blame actors with culpable motivations because they had more control over the situation that led to the harm).

243. *See* Nadler & McDonnell, *supra* note 174, at 273 (conducting experiments to confirm their hypothesis that "bad moral character influences perceptions of blame, responsibility, causation, and the like").

244. *See, e.g.*, Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1380–85 (2009) (finding that, where evidence is ambiguous, a determination of guilt is significantly more likely where the jury learns of a defendant's prior criminal record); Nadler & McDonnell, *supra* note 174, at 275–76 (conducting and analyzing experiments showing that individuals are more likely to be found blameworthy where they exhibit bad character traits).

245. Nadler & McDonnell, *supra* note 174, at 272 (coining the term "motivated inculpation" to describe the tendency to use evidence tending to show a bad moral character to construe a defendant's actions as more culpable).

246. *See id.* at 292 (concluding that experiments demonstrate that "an actor's motive (along with its implicit suggestions about moral character) can strongly influence inferences about causation, intent, and blame").

V. RELEVANCE, MOTIVATION, AND PROTESTER TRIALS

A. Story of Protest

Beatriz Gonzales always believed that the world lay in front of her.[247] She and her family lived in a small town in Georgia a couple of hours from Atlanta. Beatriz was a top student, though she had to work hard to keep her grades up. Her mom worked cleaning offices in the afternoon, so Beatriz was responsible for her eleven-year-old brother and nine-year-old sister every day after school. Teachers appreciated Beatriz's earnest curiosity, and she had a few good friends and a future full of dreams. She wanted to be a lawyer or, maybe, a doctor. With her dark hair and brown eyes, she knew she did not look like a traditional Southern girl, but she knew she was a Georgia girl just the same. She had stopped speaking Spanish in the third grade, refusing to speak anything but English even with her then-ailing *abuela*. Only once, for a school field trip to the Atlanta planetarium, had she traveled outside her county—even though she had her driver's license.

Beatriz did not think she could talk with her mother, who grew up in Mexico, about college. So she scheduled an appointment with Mr. Johnson, a school guidance counselor. Though Beatriz had never said it to anyone, she secretly wanted to go to the college in the next town. She had seen students sitting around picnic tables in the green grass courtyard, while others hurried in and out of stone buildings with large doors. Beatriz knew her family did not have money for her to go to college, but she had heard of scholarships and loans; and, with her grades and high scores on the SAT, she hoped she might qualify.

She was glad that she was sitting down when the counselor told her that because she was "illegal," she was not eligible for college grants or loans and had a slim chance of going to college. Beatriz thought later that her mother had not exactly lied to her; she knew she had been born in Mexico. But no one had told her what she now felt so deeply—that her dreams might not come true. In Mr. Johnson's office, Beatriz was so angry that she barely heard another word the counselor said. Why, she wondered, had no one told her that all of her work was for nothing? She felt naïve for having thought that she could enter the big doors of that beautiful university. After her meeting with Mr. Johnson, Beatriz put away her college applications. The rest of her year, signing yearbooks, dancing at the prom, and saying goodbye to friends and teachers, felt empty.

247. Though it draws upon actual stories and events, this narrative is offered only as an illustration of the type of narrative that may underlie an act of civil disobedience. It is based in part upon pieces of journalism like these: Pepe Lozano, *Immigrant Youth Arrested in Georgia After Civil Disobedience*, PEOPLE'S WORLD (Apr. 7, 2011), http://peoplesworld.org/immigrant-youth-arrested-in-georgia-after-civil-disobedience/; and Megan Sherman, *Students Mustn't Fear Civil Disobedience*, THE HUFFINGTON POST (Mar. 26, 2013, 6:07 PM), http://www.huffingtonpost.co.uk/megan-sherman/students-civil-disobedience_b_2957246.html. See Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1026–39 (1995), for a critical analysis of the impact of residency restrictions on college scholarships for immigrants and the policy reasons behind such restrictions.

That summer, her friend Jaime told her about a group of immigrants who were organizing to change the rules about undocumented college students. Beatriz did not see herself as an activist, but her anger still simmered. So a week later, she found herself with Jaime in a room with a dozen other college-aged immigrants. Like Beatriz, most of the other students in the room had hoped to go to college, but, with the prohibition against providing grants or loans to undocumented kids, none of them were able to attend. Beatriz was surprised by how good it felt to talk about doing something. In the months since she had met with Mr. Johnson, it had not occurred to her that she had power to act, to do something with her anger and sense of unfairness. It felt good to share and speak her outrage with others. They told her about Georgia's plan to pass a law banning undocumented immigrants from attending public universities altogether. They spoke of organizing and demonstrating; they had a plan. Beatriz left the meeting feeling for the first time in months that she was not alone in her disappointment. She felt that she could be part of bringing attention to the injustice of Georgia's treatment of her and other students like her.

Two weeks later, Beatriz and Jaime drove to Atlanta with a few of the others from the group. There, they joined a larger group of college students and college-aged immigrants in front of the capitol. At noon, as planned, six students, including Beatriz and Jaime, donned mortar boards, unfurled a banner, and stepped into the street. They set the banner on the ground and sat down. The eight students sat in the street as the crowd around them chanted: "*Si se puede*" and "Immigrant students are under attack. Stand up, fight back!" When the police arrived, they used a bullhorn to order the students out of the street. When they remained, one by one they were removed. Two police officers walked up to Beatriz, and one of them asked if she understood English. She nodded but sat silently as each officer grabbed one of her shoulders, lifted her up, and guided her out of the street. On the sidewalk, they tightened plastic cuffs around her wrists and put her into a large white van. She spent the night in jail, thinking about prison and deportation to Mexico, unsure which she feared most.

In the morning, Beatriz was handed a ticket charging her with reckless conduct, obstructing law enforcement, and blocking the street. She was released to her mother. Over the next few weeks, Beatriz spent every free moment with the other students, organizing events or working on the trial. The students' action had generated a lot of discussion, and the legislature was even considering withdrawing its proposal. But Beatriz's thoughts centered on the trial; she had definitely decided to become a lawyer. Six of the students, including Beatriz and Jaime, decided to present a unified front by going to trial together. Their public defender was young, but energetic and sympathetic to their case. Though nervous about trial, the students were excited that a jury would hear about their protest. Beatriz talked with her old counselor, Mr. Johnson, and he agreed to testify at trial and tell the jury that Beatriz was a great student with impressive grades and high SAT scores. Had Beatriz not been undocumented, he would say, she would easily have qualified for college loans and grants.

Two weeks before the date set for trial, Beatriz, the other students, and their lawyer went to court for a pretrial hearing. Beatriz had never been in a courtroom before, and, as she sat at a table with the public defender and the other students, she was more nervous than she thought she would be. She did not understand everything that the judge and lawyers said, but she definitely understood the issue that was causing

the lawyers to raise their voices. The prosecutor pointed at the students as he told the judge that Mr. Johnson and the students' other witnesses should not be allowed to testify. He said that what the witnesses had to say was "irrelevant" to the "limited issues" at trial. The judge nodded slightly. When the public defender sat down at the table, Beatriz could tell from her face that something bad had happened for their case. As they filed out into the hall, the public defender explained to them that the students would not be able to present evidence or witnesses at trial about their reasons for sitting down in the street. She said that the judge had ruled that the only issues that he would allow to be heard at the trial were whether the police ordered the students out of the street, whether the students had heard and understood the order, and whether they remained in the street. The judge had ruled that the reason why they sat in the street was not "relevant" to the charges and that evidence or testimony about the unfair college system would not be allowed at the trial.

Over the weeks that followed, the students stopped getting together. Three of them decided to plead guilty, and no one heard anything from a fourth. When Beatriz and Jaime showed up at court for the trial, they were the only two going to trial. The public defender, who had seemed so excited over the summer, now seemed distant and hurried out of the courtroom at the lunch break. The trial did not last very long into the afternoon. No one mentioned the students' dreams of college, their inability to get financial aid, or the Georgia legislature's recent decision to abandon the plan to prohibit undocumented students from attending state colleges. On the advice of the public defender, Jaime and Beatriz chose not to testify believing that their testimony would only confirm that they had heard and understood the officers' order to leave the street. When the trial ended and the jury filed into the jury room, no one had any doubt about the verdict. Not even Beatriz.

B. The Relevance of Protester Motivations

As criminal law violations, acts of civil disobedience often lead to arrest and prosecution. Though not all those who are arrested while engaging in civil disobedience will take their cases to trial, protesters take their cases to trial more frequently than do ordinary criminal defendants.[248] The frequency of trials may be due to a combination of protester desires, government choices, and systemic pressures. Protesters may perceive their actions as being justified, either fully or partially, and may hope to win a reduced charge or acquittal.[249] They may also seek to use the trial as a forum to communicate their message.[250] Through trial, protesters may hope to educate jurors, encourage public reexamination of issues, or utilize media coverage to

248. *See, e.g.*, Quigley, *supra* note 15, at 65 (noting that "citizens who have engaged in civil disobedience frequently seek juries").

249. *See* Barkan, *Political Trials*, *supra* note 25, at 950 (emphasizing that political defendants seek an acquittal or hung jury by presenting moral or ideological arguments).

250. *See, e.g.*, Barkan, *Criminal Prosecution*, *supra* note 151, at 181 (recognizing that protesters view the events after the arrest as equally and sometimes more important than the actual arrest); Barkan, *Political Trials*, *supra* note 25, at 950 (noting that protester-defendants may be motivated to speak out of a desire to communicate political and social issues they feel are important).

disseminate information.[251] Rather than focusing on a particular trial outcome, protesters may perceive that they have achieved a victory by bringing attention, support, or energy to their cause.[252]

Similarly, government and prosecuting attorneys may intentionally or unintentionally encourage trials rather than settlement outcomes. As with protesters, government lawyers may seek to air the political issues underlying a protest; however, the government may seek to expose the issues in order to discredit or encourage community condemnation of protesters' positions.[253] Prosecutors may be concerned with deterring future acts of protest by the same individuals or others and may publicize their intention to be especially harsh with protesters or to withhold plea offers from those defendants.[254]

Because courts adopt the view that evidence of protester motivation is not directly relevant to most offense elements, protesters often attempt to assert claims or defenses that might make motivation relevant. Among the most common affirmative defenses attempted by protesters are the related claims of necessity and choice of evils.[255] These defenses allow a jury to consider evidence of an individual's violation of a law where necessary to further a greater good.[256] They reflect a recognition that "legislators can

251. *See* Barkan, *Criminal Prosecution*, *supra* note 151, at 184–85 (discussing the ways in which positive media and public opinion can buoy protesters' social and political goals); Barkan, *Political Trials*, *supra* note 25, at 952–53 (noting that the favorable press coverage may be important for the defense to successfully appeal to the public).

252. *See, e.g.*, Barkan, *Political Trials*, *supra* note 25, at 954 (discussing the criminal trial of suffragist Susan B. Anthony as an example of a trial resulting in an overwhelming political victory even though Anthony herself was convicted).

253. *Id.* at 953.

254. *See, e.g.*, Kevin Flynn, *Webb Warns Columbus Day Marchers*, ROCKY MOUNTAIN NEWS, Oct. 12, 2002, at 2 (reporting that in an attempt to prevent protesters from engaging in planned civil disobedience, the mayor of Denver announced that city prosecutors would not offer plea bargains to those arrested while protesting).

255. Though technically distinct, necessity and choice of evils defenses have much overlap and are often conflated. Regardless of which label is applied, courts usually decline to allow the defenses in civil disobedience cases. See Loesch, *supra* note 11, at 1098, for a discussion of courts' general rejection of the necessity defense in cases of civil disobedience. *See* United States v. Schoon, 971 F.2d 193, 196–200 (9th Cir. 1991) (discussing the applicability of, and ultimately rejecting, the necessity defense for protesters who obstructed the operation of an IRS office); Linnehan v. State, 454 So. 2d 625, 625–626 (Fla. Dist. Ct. App. 1984), (denying the necessity defense and thereby precluding the defendants' argument that a primary motivation of their conduct was to uphold international law).

256. Despite no statute specifically embodying a federal necessity defense, most federal courts recognize the defense, though its definition varies widely. Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1260–61 (2008). The Eighth Circuit determined that the elements of a necessity defense include the following:

> (1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct, (3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, and (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

United States v. Andrade-Rodriguez, 531 F.3d 721, 723 (8th Cir. 2008). *But see* United States v. Patton, 451

have no . . . knowledge of all the possible combinations of circumstances which the future may bring."[257] Though sometimes available thirty or forty years ago, these defenses are rarely permitted in contemporary civil disobedience trials.[258] Courts have tended to reject defenses proffered by protesters based on claims of government violation of international laws or assertions of potential personal harm.[259]

The consistency with which courts find evidence of protester motivations to be irrelevant may reflect underlying concerns unrelated to evidentiary considerations. Among the reasons courts may exclude this evidence is a concern about potential jury nullification.[260] Though the Constitution does not expressly recognize a right of jury nullification, constitutional and evidentiary structures operate in concert to provide jurors with the power to acquit a criminal defendant without explanation or oversight.[261] The jury is not informed that it has the power to acquit a criminal

F.3d 615, 638 (10th Cir. 2006) (adopting a definition of necessity with the elements that: "(1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and avoidance of harm").

257. H.L.A. HART, THE CONCEPT OF LAW 125 (1961); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.4(a) (student ed. 1986) (arguing that "the law ought to promote the achievement of higher values at the expense of lesser values" and at times one may violate a criminal statute in order to achieve a greater good for society); James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and* United States v. Schoon, 81 CAL. L. REV. 351, 353 (1993) (contending that legislators cannot predict all the motivations behind breaking the law and the necessity defense reflects this reality).

258. *See Schoon*, 971 F.2d at 200 (finding the necessity defense unavailable in indirect civil disobedience); *Linnehan*, 454 So. 2d at 626 (holding the necessity defense unavailable); Cavallaro, *supra* note 257, at 359–60 (analyzing court decisions that effectively ensured that the necessity defense would be unavailable in civil disobedience cases); Loesch, *supra* note 11, at 1098–99 (examining cases prior to *Schoon* that also rejected the necessity defense for civil disobedience).

259. *See, e.g.*, United States v. Platte, 401 F.3d 1176, 1186 (10th Cir. 2005) (upholding the trial court determination that defendants "should not be excused from the criminal consequences of acts of civil disobedience simply because the acts were allegedly directed at international law violations" (quoting United States v. Allen, 760 F.2d 447, 453 (2d Cir. 1985))); United States v. Kabat, 797 F.2d 580, 590 (8th Cir. 1986) (holding that unless defendants were themselves in danger of prosecution under international law, they had no right to raise a defense that their violations of domestic law were required in order to uphold international law); United States v. Montgomery, 772 F.2d 733, 736–38 (11th Cir. 1985) (noting that "federal courts have considered the availability of an international law defense in [civil disobedience] cases . . . and have uniformly rejected [the defense]"); United States v. May, 622 F.2d 1000, 1008–10 (9th Cir. 1980) (rejecting the proffered defense based upon the finding that defendants could show "no harm to themselves from the allegedly illegal conduct of the government that is greater than, or different from, the potential harm that might affect every other person in the United States"); *Linnehan*, 454 So. 2d at 625–26 (rejecting the protester-defendants' argument that their crime was necessitated by the government's purported violation of international law).

260. Some scholars criticize the term "nullification" as being inaccurate or worse, since no law is "nullified" but only not applied in one particular case. *See, e.g.*, David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 91 (1995) (noting that jury nullification is not a nullification in the traditional sense, because this exceeds the jury's power, but rather the term refers to the jury's "act of mercy" in finding the defendant not guilty).

261. A jury's ability to nullify arises from the interplay of the Fifth and Sixth Amendments and evidentiary rules protecting jury verdicts. Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on the Jury Nullification*, 46 WASHBURN L.J. 379, 417–18 (2007). The Sixth Amendment provides the right to a jury trial and prevents a court from entering a directed verdict to convict even if, in light of the evidence, no rational juror could have voted to acquit. *Id.* at 417. The Fifth Amendment's double jeopardy clause prohibits the appeal from, or retrial of, a verdict of acquittal. *Id.* Once a verdict is announced,

defendant without explanation and for any reason it chooses.[262] Neither may a criminal defendant inform a jury of their power to nullify or argue for nullification.

Despite concerns about nullification, it is likely that juries infrequently disregard judicial instructions in a manner that constitutes complete nullification of the law.[263] Though direct jury nullification may be less of an issue than some courts fear, jurors attempt to do justice and to avoid unjust or intolerable verdicts. Studies indicate that, when significant evidence is disputed and factual determinations require subjective weighing, jurors work to conform the evidence to their perception of justice and reach a "verdict that [they] can tolerate."[264] Studies of jury outcomes confirm that the evaluation of evidence is impacted by a juror's sense of justice.[265] They tend to resolve evidentiary doubts in conformity with their sense of justice.[266] Given that jurors are called upon to make significant factual determinations—including sanity and mens rea of defendants, reasonableness of self-defense, truthfulness and credibility of witnesses, and coherence and import of numerous pieces of evidence—this more subtle form of perspective bias is likely more significant than direct nullification.

Another concern that may contribute to judicial reluctance in admitting evidence of motivation in protester trials is the fear of injecting conflicting emotional perspectives into a criminal trial.[267] Some commentators have expressed concern that injecting emotional complexity into jury trials is inconsistent with rationality and reasoned decision making and will lead to verdicts that are based on emotion rather than evidence.[268] These concerns may be especially acute where the inquiry includes

evidentiary rules protecting juror deliberative processes prohibit the introduction of evidence related to the reasons underlying the verdict. *See, e.g.*, FED. R. EVID. 606(b) (prohibiting the introduction of evidence related to the juror's deliberations while a party inquires into the validity of the verdict or indictment); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 175–77 (2011) (acknowledging the benefits of FRE 606(b) as sustaining the jury system and encouraging jurors to engage in open dialogue).

262. *See, e.g.*, Sparf v. United States, 156 U.S. 51, 102 (1895) (rejecting appellants' argument that the judge in their trial usurped the jury's authority to return the verdict that they deemed most appropriate). *But see* Brody, *supra* note 260, at 93 (arguing that the Court in *Sparf* ruled incorrectly because of its failure to fully appreciate the harm that could result in failing to inform the jurors of their nullification right).

263. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 165 (Univ. of Chicago Press 1971) (1966) (proposing that it is uncommon for the jury to consciously disregard the law, but jurors do at times surrender to their sentiments regarding the case).

264. David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 864–65 (1995) (hypothesizing that nullification occurs when the jurors disregard the court's instructions and focus on "collateral issues" that expose their discomfort with convicting the defendant).

265. See KALVEN & ZEISEL, *supra* note 263, at 486, for a discussion of their research and "liberation hypothesis," or "yielding to sentiment in the guise of evaluating factual doubt."

266. *Id.* at 165 (finding that, rather than directly contradicting instructions, a jury is more likely to permit sentiment to play a role in the evaluation of those facts that are doubtful, thus still upholding its role of "resolving issues of fact").

267. *See, e.g.*, Bilz, *supra* note 36, at 430 (arguing "the narrative model demands that we *refuse* to hear the stories of those being judged when doing so might lead us to exonerate, or even empathize, when we ought not").

268. *Id.* at 430–31; *see also* Kahan & Nussbaum, *supra* note 45, at 273 (addressing the struggle within criminal law over the role of emotion and evaluating the two competing approaches).

concepts of culpability and blameworthiness that tie into questions of morality.[269] Evidence tending to indicate that jurors are unable to manage emotionally complex or ambiguous evidence is weak, however, and some scholars suggest that balancing complex moral narratives allows verdicts in criminal cases to be more honest, just, and reasoned.[270]

In addition to concerns about jury nullification and emotional complexity, other considerations may play a part in determinations by courts to exclude evidence of protester motivations. Judges may be reluctant to allow their courtrooms to become forums for ongoing protest or the debate of larger political issues. They may fear the loss of control over their courtroom or the time it might take for evidence of motivation to be heard. Considerations of efficiency, always important to trial courts with lengthy dockets, and concerns about the expenditure of time required for the presentation of evidence of potentially complex social issues, may create pressure for the exclusion of this evidence.

While considerations of nullification, efficiency, and moral complexity are certainly understandable, allowing these concerns to influence determinations of evidentiary relevance is a misuse of the doctrine. Where evidence of protester motivations is admissible under evolving concepts of relevance, this evidence is not rendered less relevant because of nonevidentiary concerns about juries, dockets, or potentially complex social issues. Just as evidence that otherwise lacks relevance does not become relevant because of nonevidentiary considerations, neither does relevant evidence become irrelevant based on fears about efficiency or the jury's use of the evidence.[271] A fair and reasoned application of the doctrine of evidentiary relevance requires that these concerns be addressed openly, expressly, and by reference to evidentiary or procedural rules other than relevance.[272]

VI. CONCLUSION

In trials of civilly disobedient protesters, where the actions alleged to constitute a crime are grounded in political communication, perhaps nothing is more important than the motivation underlying the action. Determinations that evidence of protester motivation lacks relevance reflect outdated concepts that the doctrine of evidentiary relevance looks only for an objective, linear connection between evidence and an

269. *See, e.g.*, Bilz, *supra* note 36, at 486 (concluding that jurors should hear "morally relevant narratives," but the courts should not permit "morally irrelevant" perspectives because of the improper influence they can have on the jurors).

270. *See, e.g.*, FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS 255 (Francis Golffing trans., 1956) (1887) (noting that "[t]he more emotions we allow to speak in a given matter, the more different eyes we can put on in order to view a given spectacle, the more complete will be our conception of it, the greater our 'objectivity'").

271. *See, e.g.*, Pettys, *supra* note 126, at 505 (noting that courts generally preclude defendants from presenting irrelevant evidence for the jury when the defendant's primary objection is to gain jury empathy, not for its relation to the law in question).

272. For example, FRE 403 allows the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

offense element. Evolving concepts of relevance, supported by data on decision making and embraced by the Supreme Court, embrace the importance of evidence in providing narrative and an evaluation of blameworthiness. In the context of protesters, motivation evidence contributes an essential piece of the structural narrative, contextualizes protester intentions, and distinguishes protester actions from those of nonprotester law violators. This evidence also permits an evaluation of the blameworthiness, and, thus, the criminal culpability, of the protester. In the context of trials of civilly disobedient protesters, society, represented by the jury, should be permitted access to the evidence necessary to fully evaluate the motivation, narrative, and blameworthiness of the protester's actions.