1-24-2018

Some Remarks on the Importance of Evidence Outside Trials

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36 THE REVIEW OF LITIGATION (forthcoming 2018)

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INTRODUCTION

The law of evidence regulates the admissibility, the permissible uses, and (to a lesser extent) the weight of evidence in civil and criminal trials. Rules of evidence structure and guide the process of legal proof and are thus of paramount importance. This is perhaps so obvious that it does not need mentioning (unless one had some other reason for doing so). Therefore, if an academic panel of law professors explored the topic: "Does Evidence Still Matter for Trials?" I suppose it might be assumed to be a joke of some kind.[1] The critical importance of evidence for trials, however, tends to overshadow the roles that evidence plays in other litigation settings and in the law more

* Henry Upson Sims Professor of Law, University of Alabama School of Law. This article is based on my remarks at a panel titled "Does Evidence Still Matter?" hosted by the Section on Litigation at the 2016 Annual Meeting of the Association of American Law Schools. My thanks to Paul Radvany and the Executive Board of the Section on Litigation for inviting me to participant and to the co-panelists for a lively and informative discussion. My thanks also to Ron Allen for helpful comments on a previous draft and to Dean Mark Brandon and the Alabama Law School Foundation for general research support.

1. Perhaps a type of legal Sokal's hoax. ALAN D. SOKAL, THE SOKAL HOAX: THE SHAM THAT SHOOK THE ACADEMY (eds. of Lingua Franca, 2000).

generally. This overshadowing is problematic because it obscures the significance of evidence throughout the law. For this reason, an academic panel devoted to whether evidence "still matters" in a world of diminishing trials is definitely not a joke, even though the answer "yes, it still matters" is plainly correct and known to be so by all evidence professors, litigators, and judges. What is not obvious, however, are three related issues: (1) exactly what is meant by "evidence"; (2) the scope of the several different roles evidence plays outside of trials; and (3) why anyone might think that evidence no longer matters in a world of diminishing trials. This article is aimed at addressing these intertwined issues.

That evidence plays a profound role in trials does not necessarily mean that its importance is confined to this realm. Why might anyone think otherwise? It would seem to follow from a failure to notice or appreciate how evidence regulates, shapes, or otherwise influences non-trial issues in the litigation process and throughout the law. I will outline several of these functions in Part I. The starting point for this symposium, however, is not *merely* about whether the significance of evidence is confined to trials. This symposium asks whether the significance of evidence has diminished *because* trials currently form a small-and-diminishing slice of civil and criminal litigation practice. Our topic, "Does Evidence Still Matter?"—and the possible implication that it may not—follows, in other words, from two premises. The first premise is that trials are, in fact, "vanishing," or at least that trials no longer play as significant a role in the civil and criminal litigation processes as they once did. The second premise is that evidence matters primarily for what happens inside of trials *and not outside of trials*.

For the purposes of this article, I will take the first premise as a given. The idea of "vanishing" trials is a commonly held assumption in current scholarship,[2] and I do not take issue with that notion in what follows. It is worth noting, however, two difficulties underlying the concept of vanishing trials. First, even if the *relative* percentage of cases going to trial is diminishing, in absolute terms there may still be

2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012). *See also* Ronald J. Allen & Georgia N. Alexakis, *Utility and Truth in the Scholarship of Mirjan Damaska*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMASKA 336 (John Jackson et al., eds., 2008) ("[A] veritable cottage industry of scholarship has cropped up around 'the vanishing trial.'").

a large number of trials in the United States.[3] Second, and perhaps more importantly, trials have always been the exception rather than the rule for criminal and civil litigation (when compared with pleas, settlements, and other resolutions), or at least it has been that way for a long time now.[4] If trials are indeed vanishing, they have been vanishing for a while.[5] The implications of these issues underlying the "vanishing trial" are obvious. On the one hand, if evidence *ever* mattered for trials, then evidence still does so, because we still have a lot of trials. But, on the other hand, if trials have always been the exception for resolving litigated cases, then instead of asking whether evidence *still* matters, perhaps the participants in this symposium should have been asking whether evidence *ever* mattered in the first place.

These speculations, of course, depend on the second premise—that evidence matters primarily for what happens inside of trials *and not outside of trials*—being true. This premise, however, is false. Evidence plays a number of important roles outside of trials. These roles, moreover, are so significant that evidence would continue to be an important legal subject *even if* the number of trials continues to shrink in both relative and absolute terms. One recent example supporting this claim is the United States Supreme Court's recent decision in *Tyson Foods, Inc. v. Bouaphakeo*, discussing the permissible use of statistical evidence in class-action litigation in order to demonstrate that factual issues common to a class "predominate" (a

3. For example, in state courts (where most litigation occurs), a report by the National Center for State Courts notes over 32,000 bench and jury trials in a one-year period (July 1, 2012- June 30, 2013) in a sample of over 925,000 civil cases. National Center for State Courts, *The Landscape of Civil Litigation in the State Courts* iii, 25 (2015), available at: http://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx. Moreover, this sample comprises approximately an estimated 5 percent of state civil caseloads in the United States. Therefore, if even a roughly similar proportion of trials extends beyond this sample, then this would mean there are over half a million state civil trials in one year (32,000 x 20 = 640,000). *See also id*. at 6 n. 36 ("In 2013, litigants filed approximately 16.9 million civil cases in state courts compared to 259,489 civil cases filed in U.S. District Courts.").

4. *See* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 691 (2004) (explaining that in some jurisdictions in the 1930s "plea bargaining accounted for over 90 percent of all convictions and that remains true today."); Allen & Alexakis, *supra* note 2, at 337 ("While the trial may be 'vanishing' today . . . trials were never the norm in our system of litigation").

5. Allen & Alexakis, *supra* note 2, at 338 ("[I]t is not even clear whether the existence of jury trial matters for maintaining the rules of evidence. The paucity of such trials throughout history suggests to the contrary, and evidence law serves additional purposes than regulating jury trials.").

requirement for class certification).[6] As the Court explained, there is no general rule either permitting or proscribing the use of statistical evidence for purposes of class certification—it will depend on the particular evidentiary context, the uses to which the evidence is being put, and the rules that regulate the relevance and reliability of such evidence.[7] The issue of class certification is distinct from the trial and yet it depends fundamentally on evidence and the rules of evidence. This is just one example; many more will be discussed below.

Because evidence plays important roles outside of trials, the answer to the question posed by this symposium—"Does Evidence Still Matter?"—is "yes, obviously." So obvious, in fact, that I doubt any evidence professors, litigators, or judges would disagree. Given this conclusion, the more interesting questions, in my opinion, underlying this symposium's provocative title concern the different possible interpretations of the question itself as well as the less appreciated (but nevertheless foundational) ways that evidence continues to matter outside of the trial context.

The following Parts of this article will address these questions. Part I will unpack what it means to say that evidence matters and will articulate several different possibilities that one might mean by "evidence." This Part then uses these differing interpretations to illustrate various roles that evidence plays outside of trials. The variety of issues outlined in Part I will provide a general framework for two examples that I will discuss in more detail in Parts II and III. These Parts will focus on motion practice in civil cases and will discuss summary judgment and pleading requirements, respectively. The aim of this discussion is to clarify some of the less noticeable—but nevertheless fundamental—ways in which evidence is important outside of the trial context. Part IV discusses the importance of evidence outside of litigation.

6. 136 S. Ct. 1036 (2016); FED. R. CIV. P. 23(b)(3) (requiring that "questions of law or fact common to class members predominate over any questions affecting only individual members").

7. *Tyson Foods*, 136 S. Ct. at 1046. Citing to evidentiary rules on relevance, probative value, and expert testimony, the Court explained that the permissibility of using statistical evidence "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* (citing FED. R. EVID. 401, 403, 702). Rejecting a categorical rule, the Court added: "Whether and when statistical evidence can be used to establish class-wide liability will depend on the purpose for which the evidence is being introduced . . . ." *Id.*

I. EVIDENCE STILL MATTERS (AND WHAT DO YOU MEAN BY "EVIDENCE"?)

Evidence still matters to litigation even in a world with relatively few trials because evidence influences every stage of the litigation process. At the outset, evidence influences whether civil lawsuits or criminal prosecutions are initiated in the first place.[8] Once cases are selected for litigation, evidence influences how the case proceeds through the litigation process, and it influences when and how cases end in settlement and plea agreements.[9] Finally, evidence may determine whether cases are terminated pre-trial (or post-trial)[10], and it influences whether cases or issues are precluded from even being litigated.[11] Understanding the significance of evidence at these various litigation stages requires, I contend, distinguishing among (at least) seven different senses of "evidence." These include: (1) legal rules, (2) legal doctrine interpreting these rules, (3) the evidence itself (testimony and exhibits), (4) the process of proof, (5) facts, (6) evidence courses, and (7) evidence scholarship.

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8. *See, e.g.,* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 408–10 (1973).

9. *See id*. at 417–27 (considering the economic cost of evidence production and trial preparation and its influence on settlement); George L. Priest & Benjamin Klein, *The Selection of Disputes for Resolution*, 13 J. LEGAL STUD. 1, 12–30 (1984) (quantifying the factors, including evidence costs, that contribute to settlement). *See also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (noting distortions in the plea process that may cause outcomes to be based on factors other than the quality of evidence).

10. *See* FED. R. CIV. P. 56 (regarding summary judgment), 50 (regarding judgment as a matter of law); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252 (1986) (explaining the summary judgment standard as whether "a reasonable jury could return a verdict for the nonmoving party" and that this determination depends on the "evidentiary standard of proof" at trial); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149–50 (2000) (explaining that the standard for judgment as a matter of law "mirrors" the standard for summary judgment); FED. R. CRIM. P. 29 (allowing a judge to determine whether the evidence is insufficient to sustain a conviction); Jackson v. Virginia, 443 U.S. 307, 319 (1979) (articulating sufficiency standard in criminal cases as whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

11. *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234–35 (1972) (explaining that differing evidentiary rules, burdens, and standards may affect preclusion and Double Jeopardy analyses); Snider v. Consolidation Coal Co., 973 F.2d 555, 559 (7th Cir. 1992) ("[C]ollateral estoppel cannot be applied unless the party against whom it is to be applied had a 'full and fair opportunity' to litigate the issue in the prior proceeding. A party has not had the requisite full and fair opportunity if he or she was unable to present critical evidence in the initial proceeding.") (internal citations omitted).

The discussion that follows describes each of these different interpretations and illustrates why evidence *in that sense* matters outside of trials.

A. Legal Rules

The rules of evidence matter outside of trials. Evidentiary rules may fall into two general categories. Some evidentiary rules apply to individual items of evidence and regulate the admissibility, exclusion, and permissible uses of types of evidence.[12] The Federal Rules of Evidence (and similar state codes) that regulate relevance, hearsay, impeachment, and so on, are examples. Other evidentiary rules apply to evidence as a whole (*i.e.*, on a particular issue). For example, there are rules categorically regulating burdens and standards of proof.[13] Standards of proof such as "preponderance of the evidence" and "beyond a reasonable doubt" instruct judges and juries on when to conclude, based on the admissible evidence as a whole, whether a contested issue has been sufficiently proven as a matter of law.[14] Both types of rules influence whether cases are litigated in the first place (as well as subsequent civil settlement or criminal pleas) because these decisions consider the likely outcomes *if cases proceed to trial*, which is a function of the *admissible* evidence available and the relative burdens of proof *at trial*.[15] These rules also govern much of the pre-trial litigation process, including the discovery process (both what to look for and what to produce),[16] whether cases have sufficient

12. In previous work, I refer to these as "micro-level" rules. Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 562 (2013).

13. *See, e.g.*, FED. R. EVID. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally"). I refer to these as "macro-level" rules. Pardo, *supra* note 12, at 565.

14. Evidentiary presumptions may be either micro-level or macro-level rules, depending on whether the presumption is triggered by a particular item of evidence (micro) or whether a party's evidence as a whole proves a particular fact. For a general overview of evidentiary presumptions, see RONALD J. ALLEN ET AL., AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS & CASES 821–35 (6th ed. 2016).

15. *See* sources cited *supra* notes 8–9; Laird C. Kirkpatrick, *Evidence Law in the Next Millennium*, 49 HASTINGS L.J. 363, 365–66 (1998) (noting how civil settlement and criminal plea bargaining depend on the admissibility of evidence).

16. For example, FED. R. CIV. P 26 discusses discovery obligations and refers to several evidentiary issues: relevance ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."); the requirements for expert witnesses (expert witnesses must be designated and disclosed on a specific timeline, may be deposed,

evidence to proceed,[17] and whether to certify a class,[18] as well as how to structure other multi-party cases.[19]

B. Legal Doctrine

The legal doctrine interpreting the rules of evidence matters outside of trials. Legal doctrine interpreting rules serves the same predictive and regulative functions as the rules themselves. Doctrinal interpretations of evidence rules may affect litigation prior to trial in other ways as well. For example, differing judicial interpretations of a rule may affect where a plaintiff chooses to file a complaint or whether a defendant chooses to remove a case from state to federal court.[20] Further, gaps in certain legal doctrines may inject more uncertainty into the litigation process pre-trial, which may affect litigation behavior. For example, applying the "abuse of discretion" review standard on appeal limits the input of the circuit courts, and allows for more variance in rulings among lower courts.[21] Similarly, limits on

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and might be required to produce a report); evidentiary privileges ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed . . . ."); and impeachment ("[A] party must provide to the other parties and promptly file [particular] information about the evidence that it may present at trial other than solely for impeachment . . . .").

17. *See infra* Part II.

18. *See supra* notes 6–7 and accompanying text.

19. As with class actions, common evidence in cases involving multiple parties may be relevant for multi-district litigation as well as for joinder. 28 U.S.C § 1407 (multi-district litigation); *see, e.g.*, In re National Football League's "Sunday Ticket" Antitrust Litigation, United States Judicial Panel on Multidistrict Litigation, 148 F. Supp. 3d 1358, 1359–60 (J.P.M.L. 2015) ("We conclude that the Central District of California is an appropriate transferee district for this litigation. Fifteen actions, including potential tag-along actions, are pending in this district before Judge Beverly Reid O'Connell. DIRECTV has its headquarters in this district, and thus common evidence likely will be located there"); United States v. Cardwell, 433 F.3d 378, 385 (4th Cir. 2005) (looking to evidence produced at trial to evaluate whether joinder was proper).

20. *See* Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 483 (2005) ("[I]n cases that involve scientific evidence, the governing standard is likely to play a major role in defendants' decisions to remain in state court or remove to federal court.").

21. *See* Kumho Tire v. Carmichael, 526 U.S. 137, 153 (1999) ("Thus, whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."). By granting district courts such deference, admissibility decisions

when the government can appeal evidentiary rulings in criminal cases limits the published appellate case law on evidentiary issues; accordingly, the existing case law may not accurately reflect how likely courts are to actually admit or exclude evidence.[22] The additional unpredictability created by the legal doctrines surrounding evidence may therefore influence pre-trial decisions of parties.

C. Evidence

The evidence itself—*i.e.*, physical evidence, witness testimony, and other exhibits of various sorts—matters outside of trials. For the reasons discussed *supra*, the quality and quantity of available evidence, along with the costs of producing evidence, influence pre-trial behavior. The available—and admissible—evidence affects whether to initiate litigation in the first place, whether to settle (or plead) before trial, and the overarching litigation strategy (for example, what evidence to look for and gather, what to highlight or diminish, and what to defend against).[23] The available evidence may also affect how courts structure cases. For example, some cases require class certification[24] or joinder of claims and parties.[25] The available evidence may preclude litigation altogether, due to collateral estoppel (issue preclusion) or res judicata (claim preclusion).[26] The available evidence also determines whether cases should proceed to trial or whether they can be terminated as a matter of law, without the need for trial.[27] Finally, it also may determine whether a court has jurisdiction.[28]

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become harder to predict, depending to a large extent on the particular judge in a case.

22. The Double Jeopardy Clause limits the circuits from opining on evidentiary issues in a case that the government loses. *See* Ann Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1, 34–37 (2008) ("When the trial court rules before trial, the government can appeal an adverse determination. Mid-trial evidentiary rulings are generally not subject to appeal by the government."). Thus, the circuits are sometimes prevented from clarifying evidentiary issues, and practitioners may be left to guess whether a particular decision is an outlier or the norm.

23. *See supra* notes 8–9, 15–16 and accompanying text.

24. *See supra* notes 6–7 and accompanying text.

25. *See supra* note 19.

26. *See supra* notes 11 and 19, and accompanying text.

27. *See supra* note 10.

28. Clapper v. Amnesty International USA, 133 S.Ct.1138, 1148–49 (2013) ("The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage, such a party can no longer rest on . . . mere

D. The Process of Proof

The process by which judges and juries respond to and reason with evidence matters outside of trials. Juries interpret evidence, and the days of formal, self-proving evidence are mostly a thing of the past.[29] Legal proof proceeds based on a combination of admissible evidence and the minds of fact-finders (who must draw inferences from that evidence).[30] If the evidence by itself determined outcomes, then trials would indeed be unnecessary. Input from legal fact-finders is necessary precisely because more than one reasonable inference may be drawn from the evidence (in light of the burden and standard of proof).[31] Accordingly, knowledge about how juries (and judges) are

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allegations, but must set forth by affidavit or other evidence specific facts.") (internal quotation marks and citations omitted).

29. Under such a system, types of evidence may be taken as conclusive proof regardless of the evidence that supports the opposing party. *See* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA L. REV. 1569, 1576 (2015) ("A number of older legal systems have avoided stating a standard for comparing the evidence that supports opposing parties in civil litigation because they avoid the comparison altogether. If one side presents the appropriate proof, it prevails regardless of what the opposing side might be prepared to show.").

30. Evidence is not self-interpreting and jurors must rely on their own background beliefs and assumptions to draw inferences from the evidence. *See* Ronald J. Allen, *Rationality and the Taming of Complexity*, 62 ALA L. REV. 1047, 1054–55 (2011) (discussing the complex inferential process).

> Suppose a witness begins testifying, and thus a fact finder must decide what to make of the testimony. What are some of the relevant variables? First, there are all the normal credibility issues, but consider how complicated they are. Demeanor is not just demeanor; it is instead a complex set of variables. Is the witness sweating or twitching, and if so is it through innocent nerves, the pressure of prevarication, a medical problem, or simply a distasteful habit picked up during a regrettable childhood? Does body language suggest truthfulness or evasion; is slouching evidence of lying or comfort in telling a straightforward story? Does the witness look the examiner straight in the eye, and if so is it evidence of commendable character or the confidence of an accomplished snake oil salesman? Does the voice inflection suggest the rectitude of the righteous or is it strained, and does a strained voice indicate fabrication or concern over the outcome of the case?

Id. (quoting Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 Nw. U. L. Rev. 604, 625–26 (1994)).

31. *See supra* note 10 (discussing the role of "reasonable" or "rational" factfinders).

likely to respond to individual items of evidence,[32] process evidence as a whole,[33] or use instructions[34] serves some of the same predictive and regulative functions as the evidence itself.[35] In short, as with the evidence itself, the process by which fact-finders process evidence informs litigation decisions outside of the trial.

E. Facts

The facts matter outside of trials. This is perhaps obvious, but making explicit some of the distinct reasons *why* they matter will help to further illustrate the importance of evidence outside of trials. The facts—*i.e*., the true state of affairs—play several important roles and are distinct from the claims and allegations of the parties, as well as from the evidence itself and what may be proven. In one sense, the facts are more fundamental than the law—the legal rights, duties, and obligations that underlie legal cases are meaningless if not applied to the correctly found facts.[36] The facts provide the target for successful litigation outcomes and the vindication of legal rights. The facts play several other roles in litigation as well. Importantly, the facts play an important role in determining the evidence that will be available and

32. Michael J. Saks & Barbara A. Spellman, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 142–231 (2016) (discussing the persuasiveness of, and psychological responses to, character evidence, hearsay, and expert evidence).

33. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (concluding that presenting evidence in the context of a story helps jurors to process evidence).

34. Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, And Next Steps*, 106 NW. U. L. REV. 1537 (2012) (discussing the gap between the standard view on jury instructions—that they are "window dressing," easily ignored or indecipherable by jurors—and the legal system's assumption that jurors understand and apply the instructions). While juries do struggle with understanding or interpreting some instructions, it seems clear that juries do deliberate and evaluate evidence based upon their interpretation of the instructions. Thus, the specific wording of instructions, and whether or not juries are permitted to ask questions regarding the application of the law, is critical to how juries evaluate evidence.

35. *See supra* notes 8–9, 15.

36. *See* Ronald J. Allen, *From the Enlightenment to Crawford and Holmes*, 39 SETON HALL L. REV. 1, 7 (2009) ("Rights and obligations of any sort whatsoever are meaningless without accurate fact finding. It doesn't matter whether the question is the age of the President, the powers distributed to different branches of government, the right to be free from torture, or your rights to possess, consume, and dispose of your clothes. It is the attachment of rights and obligations to the bedrock of facts—to how the universe actually was at a particular moment in time—that gives them substance.").

thus play important predictive and regulative roles. Moreover, the facts structure various aspects of the litigation process, including whether cases may proceed at all. Examples of the latter include issues of evidential sufficiency,[37] jurisdiction,[38] and preclusion.[39] The facts matter for another fundamental reason: questions of law and legal reasoning also depend to a large extent on factual issues.[40] Determining the "law" is epistemically and analytically similar to determining the "facts" in that each involves inferences from relevant evidence and they involve similar reasoning processes.[41] In other words, the facts matter outside of trials because the law matters outside of trials.

F. Evidence Courses

Law school courses on evidence matter outside of trials. Evidence courses (and related trial-practice courses) obviously matter for students whose career interests include trials. For the reasons discussed above, they also matter for any students interested in any type of litigation-related practice, because of the effects that evidence exerts throughout the litigation process. Taking and defending a deposition, for example, require a sufficient understanding of evidence (in all the senses discussed above). Evidence courses also matter for students interested in transactional work and other, non-litigation focused legal work because this work will take place in the "shadow" of potential litigation. More generally, evidence courses matter for all law students because the topics in evidence law require sustained focus on—and analytical skills for addressing—many epistemological issues that arise throughout the law, including reasoning about facts, evidence, and inference; decision-making under uncertainty; attention to types of decision-making errors; allocating the risk of error; reasoning with burdens and standards of proof; and the operation of various types of presumptions.[42]

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37. FED. R. CIV. P. 56. *See infra* Part II.

38. *See supra* note 28 and accompanying text. *See also* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973 (2006) (discussing the various factual showings and standards of proof required to establish jurisdiction).

39. *See supra* note 11.

40. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003) (discussing the epistemological aspects of legal issues).

41. *Id.*

42. *See* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 203–33 (2012) (discussing these issues in the context of legal reasoning).

G. Evidence Scholarship

Finally, evidence scholarship (theoretical, empirical, or doctrinal) matters outside of trials to the extent it can explain, critique, or prescribe changes regarding any of the issues discussed in above categories.

In the next two Parts, I will illustrate some underappreciated connections between theoretical discussions in evidence scholarship and important, highly contested non-trial procedural issues. Part II discusses summary judgment, where the connections to evidence are more visible (although the connections to evidence scholarship may not be). Part III discusses pleading requirements and motions to dismiss, an area conventionally thought to be far-removed from evidentiary considerations and related scholarship.

II. SUMMARY JUDGMENT

Summary judgment plays an important role in modern civil litigation.[43] The standard courts employ in deciding motions for summary judgment, moreover, depends heavily on evidence and evidentiary considerations. Under this standard, parties may move for summary judgment on any claim or defense by showing that there "is no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law."[44] The process of determining whether a dispute is "material" or "genuine," or, alternatively, whether a party is entitled to judgment as a matter of law depends on evidentiary rules of two different types. As noted above, some evidentiary rules regulate the admissibility and exclusion of individual items of evidence, and other evidentiary rules regulate evidence as a whole (e.g., standards of proof).[45] Both types of rules play important roles in the summary-judgment process.

A party is entitled to summary judgment only when a reasonable jury must find for the moving party at trial.[46] Rule 56 of

43. For a critical discussion, *see generally* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1134 (2003) (arguing that courts have expanded the use of summary judgment and motions to dismiss to resolve disputes better left to jury trials).

44. FED. R. CIV. P. 56(a).

45. *See supra* notes 12–13 and accompanying text.

46. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("[T]he requirement is that there be no *genuine* issue of material fact . . . [As to materiality, o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . [A]

the Federal Rules of Civil Procedure, along with a number of prominent opinions from the U.S. Supreme Court interpreting Rule 56, spell out the requirements for applying this standard.[47] Each of these requirements depends on available evidence and underlying evidentiary rules. The information on which courts may rely in deciding motions will depend on evidence in the record and the admissibility rules at trial. First, parties must support their argument as to why there is (or is not) a genuine issue of material fact by pointing to evidence in the record.[48] Second, a party can show there is no genuine dispute as to a material fact by showing that the other party "cannot produce admissible evidence to support the fact."[49] Third, a party may object that the opposing party's evidence "cannot be presented in a form that would be admissible in evidence."[50] Finally, the trial admissibility rules also regulate the use of affidavits or declarations to support or oppose a motion for summary judgment: assertions must be based on "personal knowledge,"[51] and they must "set out facts that would be admissible in evidence, and show that the affiant or declarant is competent"[52] "to testify on the matters stated."[53] These requirements—which depend on available evidence and the rules that would regulate the admissibility of this evidence at trial—

material fact is genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

47. FED. R. CIV. P. 56; *Anderson*, 477 U.S. 242; Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

48. FED. R. CIV. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . .").

49. FED. R. CIV. P. 56(c)(1)(B) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.").

50. FED. R. CIV. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

51. *See* FED. R. EVID. 602 (requiring that non-expert witness testimony must be based on personal knowledge).

52. *See* FED. R. EVID. 601 (discussing the standard for witness competency).

53. FED. R. CIV. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). Understanding witness competence, another matter of evidence law, is therefore vital to summary judgment practice.

determine the information on which courts may decide motions for summary judgment and, thus, whether parties may proceed to trial or their cases will terminate pre-trial.

As a conceptual matter, however, admissibility is only half of the picture. The other half concerns what do with the admissible evidence: in other words, when is it sufficient to raise a "genuine dispute"[54] or when, based on the evidence, is a party entitled to judgment as a matter of law? These determinations depend on what "reasonable" juries *could* conclude at trial based on the admissible evidence[55]—which in turn will depend on the macro-level evidentiary rules that regulate the sufficiency of evidence to prove disputed facts. Most importantly, these rules include the applicable burdens and standards of proof at trial. As the Supreme Court has explained, the standard for assessing what a "reasonable jury" could conclude for purposes of summary judgment depends on the applicable burdens of proof at trial and evidentiary proof standards at trial.[56] Therefore, whether a party has sufficient evidence at the summary judgment stage may depend on whether that party would have the burden of proof at trial[57] and what the applicable standard would be (e.g., "preponderance of the evidence" or "clear and convincing evidence").[58] This standard sets forth the evidentiary obligations of the parties for purposes of summary judgment.[59] Parties *without* the burden of proof at trial (typically, defendants) do not need evidence disproving the non-moving party's (typically, the plaintiff's) allegations—parties without the burden of proof can succeed at the summary judgment stage by showing that no reasonable jury could

54. FED. R. CIV. P. 56(a).

55. *Anderson*, 477 U.S. at 248 (articulating the standard as whether "a reasonable jury could return a verdict for the nonmoving party").

56. *Id.* at 252.

57. In other words, a party with the burden of proof at trial on an issue may need evidence to survive summary judgment that they would not need if they did not have the burden of proof at trial.

58. In other words, a nonmoving party may have sufficient evidence such that a reasonable jury could find in its favor by a "preponderance of the evidence" but not by "clear and convincing" evidence. Thus, the applicable evidentiary standard at trial would determine the summary judgment issue. Similarly, a moving party may have evidence that is strong enough such that a reasonable jury must find in its favor by a preponderance of the evidence but not by clear and convincing evidence. Again, the applicable evidentiary standard would determine whether summary judgment is warranted.

59. The Court explained that, at the summary-judgment stage, courts must draw "legitimate" and "justifiable" inferences in favor of the nonmoving party and must not weigh the credibility of witnesses. *Id.* at 255.

find for the non-moving party based on the evidentiary record.[60] This can include evidence disproving the non-moving party's allegations, but it may also consist of pointing out the non-moving party's own lack of evidence regarding a material fact. On the flipside, parties with the burden of proof at trial must do more than simply offer *some* favorable evidence; they must offer enough evidence such that a reasonable jury could find for them by the applicable standard (e.g., a preponderance of the evidence).[61]

These doctrinal requirements make sense given the goal of summary judgment to eliminate cases without genuine disputes and to align outcomes with what would be the required outcome at trial.[62] To perform this function outside of trial, the procedure depends heavily on the evidentiary proof process.[63] As explained above, any determination of what a reasonable jury could conclude based on the evidence incorporates the underlying evidentiary standard of proof. In other words, the operative question is whether, based on the evidence in the record, a reasonable jury could find for the plaintiff by, for example, a "preponderance of the evidence."[64] To determine what is reasonable or not depends, therefore, on what the preponderance standard means and requires in a given case. To put it another way, any time a judge concludes that a reasonable jury could or could not, based on the evidence, find some fact by a preponderance of the evidence, the judge is relying (typically implicitly) on some conception of the preponderance standard—what it means, what it requires, and the criteria to employ in determining whether it has been met.

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60. Celotex Corp. v. Catrett, 477 U.S. 317, 324–25 (1986) ("Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. . . . [T]he burden on the moving party may be discharged by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.") (internal marks and citations omitted).

61. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986) (remanding to the court of appeals with instructions to consider evidence that was "sufficiently unambiguous to permit a trier of fact to find [for petitioners]" or issue summary judgment).

62. For a discussion of this alignment function, see Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1476–77 (2010).

63. *See id.* at 1475–79.

64. Moreover, the answer to this question may differ from whether a reasonable jury could (or must) make the same finding by clear and convincing evidence. *See supra* note 58.

The preponderance standard, however, is not self-interpreting. It is subject to competing conceptions, and its scope and contours are neither clear nor obvious.[65] As with other standards of proof, the preponderance standard has been a topic of intense investigation and debate within evidence scholarship.[66] The important pre-trial issue of summary judgment, in other words, depends fundamentally on an evidentiary standard, which itself depends on one of several underlying conceptions,[67]which theoretical debates in evidence scholarship have been making explicit. In sum, this important pre-trial issue in civil procedure depends fundamentally on theoretical debates in evidence scholarship (and, in particular, on evidence theory).

I do not have space to trace out all of the contours of these debates, nor to argue for my preferred conception.[68] Rather, my aim is to connect the non-trial issue of summary judgment to the theoretical debates. Within these debates, two distinct issues stand out. First, to what extent is the preponderance standard *comparative*?[69] That is, in determining whether the party has proven a fact by a preponderance of the evidence, to what extent does this depend on the strength of the evidence or explanations supporting the opposing party? This distinction will make a difference in cases in which, for example, a plaintiff's case does not by itself appear to be strong, but it does appear to be stronger than the defendant's alternative case.[70] Second, what inferential criteria should be used to evaluate the strength of a party's

65. In an excellent discussion of the history of the preponderance standard, Professor Leubsdorf also documents several different conceptions of the standard currently employed in modern jury instructions. *See* Leubsdorf, *supra* note 29, at 1571–76. These variations among "greater weight of the evidence," "more likely than not," "actual belief," and "balance of probabilities," each imply different outcomes from the others. *Id.*

66. For an overview of these debates, see Pardo, *supra* note 12, at 565–68, 590–94, 603–10.

67. *See* Leubsdorf, *supra* note 65 and accompanying text.

68. *See* Pardo, *supra* note 12; Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223 (2008); Michael S. Pardo, *Group Agency and Legal Proof; or, Why the Jury is an "It,"* 56 WM & MARY L. REV. 1793 (2015).

69. Some jury instructions appear to invite a comparison with the strength of the opposing party's case (e.g., "greater weight of the evidence" and "balance of probabilities") while others may appear not to (e.g., "more likely than not" and "actual belief"). *See* Leubsdorf, *supra* note 65 and accompanying text.

70. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–49 (2000) (comparing alternative explanations of evidence); Anderson v. Griffin, 397 F.3d 515, 521 (7th Cir. 2005) ("[I]f in a particular case all the alternatives are ruled out, we can be confident that the case presents one of those rare instances in which [a] rare event did occur.").

evidence: probabilistic, explanatory, or something else?[71] This question concerns exactly what criteria a fact-finder uses to assess inferences from evidence, as well as what criteria a reviewing court uses to determine which jury inferences are "reasonable" and which are "unreasonable."[72] Under one conception, fact-finder attaches subjective probabilistic values to their beliefs; under another conception, fact-finders examine how well a party's explanation fits with the evidence.[73] However one answers these two theoretical questions, it will affect one's conception of the preponderance standard, which in turn will affect how the standard for summary judgment ought to be applied. Therefore, summary judgment provides a prominent example where not only evidence, but evidence theory, matters outside of trials.

III. PLEADINGS AND MOTIONS TO DISMISS

While summary judgment provides a prominent non-trial issue in which evidence matters, the pleading stage provides a less prominent example where evidence also plays important roles. Because motions to dismiss based on the pleadings typically occur prior to discovery, it might be thought that evidence has little or nothing to do with this important stage of litigation. For the reasons

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71. The issue of which inferential criteria to employ concerns two different accounts of how to reason from evidence (based on explanatory or probabilistic criteria). For an overview of these conceptions, see Pardo, *supra* note 12, at 574–612. Both conceptions involve inductive reasoning under conditions of uncertainty and both involve attempts to measure the strength of factual conclusions based on the evidence supporting it. *Id*. They differ in the criteria used to evaluate inferences: subjective beliefs based on the evidence (*i.e.*, the stronger subjective belief, the more likely true) versus how well an explanation explains the evidence and events (*i.e.*, the better the explanation, the more likely true). *See id*. This question about inferential criteria is distinct from the question of whether the standard of proof is comparative. *See supra* note 69 and accompanying text. *See also* Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE. L.J. 1254 (2013) (arguing for a comparative, probabilistic conception of proof standards).

72. For critiques of court determinations on this issue, see Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 769 (2009) (arguing that courts have "little guidance on how . . . to decide whether a reasonable jury could find for the plaintiff."); Michael W. Pfautz, *Note, What Would a Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 COLUM. L. REV. 1255 (2015) (documenting divergences between verdicts and reasonableness determinations). For discussions of how the explanatory conception of proof provides guidance and constraint on reasonableness determinations, see Pardo, *supra* note 12, at 605–610; Pardo, *supra* note 62, at 1498–1508.

73. *See supra* note 71; Pardo, *supra* note 12, at 574–612 (discussing the similarities and differences between these two conceptions).

discussed below, however, this view is mistaken—evidence and evidentiary rules play important roles even at this early litigation stage.

It is not an overstatement to assert that the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[74] and *Ashcroft v. Iqbal*[75] injected a considerable amount of uncertainty into modern civil litigation.[76] These two decisions—interpreting the general pleading requirements under Rule 8 of the Federal Rules of Civil Procedure[77]—imposed a "plausibility" threshold for pleadings, without articulating exactly what this threshold means or requires. Scholars continue to vigorously debate the doctrinal[78] and normative[79] significance of these decisions, as well the empirical effects they have had on motions to dismiss at the district court level.[80]

To survive a motion to dismiss, the plaintiff's complaint must surpass a "plausibility" threshold. In *Twombly*, the Court explained that this threshold requires that the plaintiff's allegations must be something more than merely (1) "consistent with liability,"[81] (2)

74. 550 U.S. 544 (2007).

75. 556 U.S. 662 (2009).

76. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (asserting that *Bell Atlantic* and *Iqbal* "have destabilized the entire system of civil litigation"); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010) (noting that *Twombly* and *Iqbal* "have the potential to upend civil litigation as we know it").

77. FED. R. CIV. P. 8(a)(2) (requiring that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). The cases also centered around FED. R. CIV. P. 12(b)(6), which authorizes courts to dismiss complaints for "failure to state a claim on which relief can be granted."

78. *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016) (questioning the doctrinal significance of *Iqbal* and *Twombly* for general pleading requirements).

79. *See* Pardo, *supra* note 62, at 1467–79, 1492–97 (discussing the procedural values underlying the normative debates).

80. *See* Jonah B. Gelbach, *Material Facts in the Debate Over Twombly and Iqbal*, 68 STAN. L. REV. 369, 377 (2016) (questioning the inferences to be drawn from extant empirical work and concluding "that data are unlikely to settle the debate over the case-quality effects of the new pleading regime ushered in by *Twombly* and *Iqbal*.").

81. Bell Atlantic Corp. v Twombly, 550 U.S. 544, 557 (2007) ("The need at the pleading stage for allegations plausibly suggesting *(not merely consistent with)* agreement reflects the threshold requirement of Rule 8(a)(2) that the plain statement possess enough heft to show that the pleader is entitled to relief.") (emphasis added) (internal quotations omitted).

"speculative,"[82] or (3) "possible."[83] To be plausible, the allegations must "suggest" liability.[84] On the other hand, the Court clarified that the plausibility threshold is not a probability requirement[85] and that courts must continue to accept factual allegations as true and draw all reasonable inferences in the plaintiff's favor.[86] Applying this standard to the complaint at issue—a class action antitrust claim alleging that four companies conspired to retrain trade by inhibiting competition—the Court held that the complaint failed the plausibility requirement because the plaintiffs' factual allegations were equally consistent with independent, parallel conduct (which would not give rise to liability).[87]

In *Iqbal*, the Court again asserted that "plausibility" requires something more of pleadings than either consistency with liability or the possibility of liability.[88] Moreover, the Court further clarified that courts applying the plausibility standard need not accept "legal conclusions" as true.[89] Applying the plausibility standard to the complaint at issue—a former prison inmate detained following the September 11 attacks alleged that he was subjected to unconstitutional prison conditions—the Court held that the complaint failed to cross the plausibility threshold.[90] As with the *Twombly* complaint, the complaint in *Iqbal*, the Court explained, alleged facts that were consistent with liability but that were also consistent with other explanations that would not give rise to liability.[91] Either more factual details suggesting liability were needed, or else some explanation was needed of how discovery will reveal evidence that shows liability.[92]

Evidence and evidentiary rules play important roles in implementing the plausibility pleadings requirement. As with summary judgment, the evidentiary roles at the pleadings stage include issues pertaining to both individual items of evidence and cases as a whole. With regard to individual factual allegations, Federal

82. *Id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.") (internal citations omitted).

83. *Id*. at 557 (noting the difference between "plausibility" and "possibility").

84. *Id*. at 556 ("[W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.").

85. *Id.* (noting the standard does "not impose a probability requirement at the pleading stage.").

86. *Id*.

87. *Id*. at 564–68.

88. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

89. *Id.* at 678

90. *Id.* at 680.

91. *Id.* at 681–82.

92. *Id*. at 683.

Rule of Evidence (FRE) 201, which regulates judicial notice, plays an important role in motions to dismiss.[93] Courts may take judicial notice of facts at any point during the litigation process,[94] and parties and courts may use judicial notice as part of the process of assessing the plausibility of a plaintiff's allegations under Rule 12(b)(6).

For a recent example, consider *Milo & Gabby, LLC v. Amazon.com, Inc.*, involving a claim of trademark counterfeiting.[95] Noting that courts may take judicial notice of documents outside of the pleadings (so long as the requirements of FRE 201 are satisfied), the district court took judicial notice of documents displaying plaintiff's design mark and concluded that the plaintiff's complaint did not meet *Twombly*'s plausibility requirement.[96] Judicial notice regarding evidentiary matters, as regulated by FRE 201, thus plays an important role in regulating the information base on which courts may make plausibility determinations. The requirements of FRE 201 play a critical role at this stage because if the court were to rely on evidence that did not fit the dictates of FRE 201 this would, in effect, convert the motion to dismiss into a motion for summary judgment, for which the plaintiff would then be entitled to notice and the possibility of discovery.[97] Remaining within the confines of FRE 201, on the other hand, keeps the judicial determination properly within the motion-to-dismiss realm. Thus, another important pre-trial issue—motions to dismiss—depends on evidence, and particularly the Rules of Evidence.[98]

Evidentiary considerations may also help to clarify the plausibility requirement itself. This requirement, as articulated by

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93. FED. R. EVID. 201(b)(2) (authorizing courts to take notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

94. FED. R. EVID. 201(d) ("The court may take judicial notice at any stage of the proceeding.").

95. 12 F. Supp. 3d 1341 (W.D. Wash. 2014).

96. *Id*. at 1350–53.

97. FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *see also* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

98. Interestingly, courts often use judicial notice in the context of internet mapping technology to take notice of facts pertaining to distance and geography. *See* Rindfleisch v. Gentiva Health Sys., Inc., 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010) ("Courts commonly use internet mapping tools to take judicial notice of distance and geography."). This can further impact pre-trial issues such as personal jurisdiction and venue.

Twombly and *Iqbal*, focuses on the quality of plaintiff's allegations as a whole in suggesting liability. The same evidentiary considerations discussed in the previous Part regarding standards of proof[99] may also shed light on what makes a complaint plausible (as opposed to merely possible).[100] Two considerations regarding standards of proof also have relevance for plausibility determinations. The first consideration concerns the *inferential criteria* employed in assessing whether a standard has been met: probabilistic, explanatory, or something else?[101] The second issue concerns the extent to which the process is *comparative* (*i.e.*, depending on the strength of a defendant's alternative case).[102] If the process of proof at trial is comparative, and it involves a comparison of the competing *explanations* of the evidence and disputed events that support each side, then this suggests related plausibility considerations at the pleading stage.[103]

I will explain. If assessing plausibility functions to screen out cases that could not succeed at trial (or even summary judgment),[104] then it would make sense to align the plausibility assessment with similar criteria that will apply at the proof stage. Both *Twombly* and *Iqbal* fit this approach. In each case, a key reason for concluding the complaints were not plausible was because of an alternative explanation of the same alleged events (pointing to no liability) that was at least as plausible as the plaintiffs' explanations.[105] Given this state of affairs, the plaintiffs could not have succeeded at trial or summary judgment, subject to one important caveat. Discovery might

99. *See supra* notes 66–71 and accompanying text.

100. *See supra* Part I.D.

101. *See supra* note 71.

102. *See supra* notes 69–70.

103. For a detailed development of this argument, see Pardo, *supra* note 62, at 1470–96.

104. *See id*. at 1484 (discussing this interpretation of the plausibility standard); *see also* Gelbach, *supra* note 80, at 382 ("Even though it is true that *Twombly* and *Iqbal* are directed at early termination of cases based on a judge's *prediscovery* assessment, the object of that assessment is whether, *after* discovery, there is likely to be any evidence of entitlement to relief.").

105. *See* Bell Atlantic Corp. v Twombly, 550 U.S. 544, 567–68 (2007) ("[H]ere we have an obvious alternative explanation . . . . a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."); Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009) (identifying an "obvious alternative" explanation for plaintiff's treatment: the "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.").

have changed the plausibility of the competing explanations.[106] Thus, to survive a motion to dismiss, plaintiffs must provide either an explanation of the events that could succeed at trial (for example, that *could* be considered over alternative, pro-defendant explanations) or they must explain how discovery will provide evidence to support their explanation and render it more plausible.[107] These implications, to be sure, depend on contested issues involving the nature of legal evidence and proof, on one hand, and the highly contested normative issues involving the roles of pleading requirements in modern civil litigation, on the other.

My point here is not to defend any particular conceptions or thesis. Rather, my aim has been to illustrate how a deeper understanding of evidence and the process of proof at trial can shed light on litigation issues far removed from the trial—in this example, pleading requirements. If the motion to dismiss is designed to eliminate cases without merit, then we must look to the evidentiary proof process to determine what "merit" even means.[108] As with summary judgment, one's conception of burdens and standards of proof will play a role in determining which cases may succeed and which will fail and, thus, should also play a role in screening complaints for their plausibility. In other words, the "plausibility" pleading standard is another example in which attention to evidence, evidentiary rules, and evidence theory will help illuminate non-trial issues throughout the litigation process.

IV. EVIDENCE OUTSIDE OF LITIGATION

The preceding Parts have sketched several of the ways in which evidence (in its different senses) matters outside of trials but *within* the litigation process. The focus was primarily on civil

106. *See* FED. R. CIV. P. 11(b)(3) (requiring signing attorneys to represent that alleged facts have evidentiary support or are likely to have such support after "a reasonable opportunity for further investigation or discovery.")

107. *See* Pardo, *supra* note 62, at 1483 ("If, however, there is an alternative explanation of the events that a reasonable jury must find at least as plausible and that would not entitle the plaintiff to relief, then the claim ought to be dismissed—unless the plaintiff's allegations raise a reasonable expectation that discovery will reveal evidence making the claim plausible.") (internal quotation marks omitted).

108. *Twombly* and *Iqbal* seem to erect a screening process for courts to "weed out" meritless claims—*i.e.*, ones that are unlikely to be proven at trial. But exactly how much "merit" a claim must, or should, have to survive is debated. *See id*. at 1497 (discussing the potential efficiency benefits of other proposed standards, but noting that higher standards might "prevent meritorious claims from ever seeing the light of day" or "prevent[] plaintiffs with potentially meritorious claims from reaching further stages in the adjudicative process.") (internal quotations omitted).

litigation, including more detailed discussions of two issues: summary judgment and pleading requirements. Many of the same considerations also apply to criminal litigation.[109] In addition to evidence playing several important roles *internal* to litigation, it is important to note that evidence also plays several important roles *outside* of litigation. Therefore, in this Part, I will mention some of the ways in which evidence matters that are *external* to the civil and criminal litigation processes.

First, evidence and evidentiary rules continue to play important roles in otherwise adjudicative processes that occur outside of civil or criminal litigation. Two examples include arbitration[110] and administrative agency adjudication.[111] Even if not subject to the same formal, detailed evidentiary rules as traditional trial settings,

109. *See, e.g.*, *supra* notes 4, 6–7, 10–11, 15, 22.

110. *See* Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISPUTE RESOLUTION 141, 159–62 (2016) (discussing the importance of evidence for arbitration proceedings).

111. Indeed, as Thomas Merrill has argued, modern agency adjudication is modeled on the trial's evidentiary proof process and the relationship between judge and jury. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

> Modern administrative law is built on the appellate review model of the relationship between reviewing courts and agencies. The model was borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation—which in turn were derived from the relationship between judge and jury. The appellate review model, as developed in the civil litigation context, has three salient features: (1) The reviewing court decides the case based exclusively on the evidentiary record generated by the trial court. If the reviewing court determines that additional evidence is critical to a proper decision, it will remand to the trial court for development of a new record but will not take evidence itself. (2) The standard of review applied by the reviewing court varies depending on whether the issue falls within the area of superior competence of the reviewing court or the trial court. (3) The key variable in determining the division of competence is the law-fact distinction. The trial court, which hears the witnesses and makes the record, is assumed to have superior competence to resolve questions of fact; the reviewing court is presumed to have superior competence to resolve questions of law.

Id.; *see also* Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987) (surveying the overlap between the Federal Rules of Evidence and evidentiary decision-making at the administrative level).

administrative evidentiary considerations are still critically important in agency adjudications.

Second, as discussed above, there is an epistemological dimension to all legal analysis.[112] Therefore, evidentiary considerations are important in any context in which a contested question of law is at issue. Thus, to put it bluntly, evidence will matter whenever and wherever law matters, even outside the context of a specific litigated dispute.

Third, finally, and perhaps most importantly, evidence and evidentiary rules play important roles in influencing primary behavior—*i.e.*, behavior that occurs prior to, and outside of, litigation altogether. Three specific examples of such influence include the design of contracts,[113] precautionary or defensive behavior,[114] and criminal acts.[115] These specific examples are part of a larger pattern. Many types of individuals and entities—including, for example, doctors, police officers, lawyers, and contractors, or institutions such as corporations, hospitals, universities, churches, and so on—organize

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112. *See* Allen & Pardo, *supra* note 40 (discussing the epistemological aspects of legal questions); SCHAUER, *supra* note 42 (discussing the epistemological aspects of legal reasoning).

113. *See* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 825–34 (2006) (explaining how evidentiary considerations influence contracts even in the absence of active litigation).

114. Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 518 (2010):

> We show that evidentiary motivations will often lead actors to engage in socially suboptimal behavior when doing so is likely to increase their chances of prevailing in court. Because adjudicators must base decisions on observable and verifiable information—or, in short, evidence—rational actors will always strive to generate evidence that can later be presented in court and will increase their chances of winning the case regardless of the cost they impose on third parties and society at large. Accordingly, doctors and medical institutions will often refer patients to undertake unnecessary and even harmful examinations just to create a record demonstrating that the doctors or medical institutions went beyond the call of duty in treating them. Owners of land and intellectual property may let harmful activities continue much longer than necessary just to gather stronger evidence concerning the harms they suffer.

115. *See* Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001) (defending the general ban on character evidence based on the potential effect that admitting the evidence could have on incentivizing criminal acts). In other words, the substance of evidence law can influence human behavior *out-of-court* by changing the incentives that actors may have for engaging in, or refraining from, particular conduct.

and carry out their activities in the shadow of, and in avoidance of, possible litigation. Evidence and evidentiary rules not only help to structure the process of such litigation. They also play important roles in dictating who is likely to win. Such knowledge is vital for individuals and entities trying to organize their behavior. To put this point another way, when the outcomes of trials are predictable, we are not only less likely to see such cases go to trial—in addition, primary actors are better able to organize their activities to avoid similar situations in the first place.

These points, taken together, essentially turn the theme of this symposium on its head: they suggest that a diminishing need for trials may be a *consequence* of evidence law's dual influence on litigation outcomes and primary behavior outside of litigation. Thus, rather than being a symptom or cause of the diminishing importance of evidence law, vanishing trials may instead be a sign of evidence law's continuing health and vitality.

CONCLUSION

Evidence matters, even in a world of diminishing trials. Understanding the many reasons why this so, moreover, helps to illuminate issues that tend to be overshadowed by the overarching role that evidence plays *within* the trial. Once we shift our focus away from the trial, the importance of evidence throughout civil and criminal litigation—and throughout the law more generally—reveals itself more clearly. Drawing attention to the manifold ways that evidence (in its many senses) matters outside the trial has been the focus of these remarks. The unifying theme underlying them is the following: evidence matters whenever and wherever facts matters, and facts matter whenever and wherever law matters.