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Law's Credibility Problem

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Abstract: Credibility determinations often seal people's fates. They can determine outcomes at trial; they condition the provision of benefits, like social security; and they play an increasingly dispositive role in immigration proceedings. Yet there is no stable definition of credibility in the law. Courts and agencies diverge at the most basic definitional level in their use of the category.

Consider a real-world example. An immigration judge denies asylum despite the applicant's plausible and unrefuted account of persecution in their country of origin. The applicant appeals, pointing to the fact that Congress enacted a "rebuttable presumption of credibility" for asylum-seekers "on appeal." This presumption, the applicant argues, means that the Court of Appeals must credit his testimony and reverse the decision below.

Should the applicant win? Clearly, the answer depends on what "credibility" (and its presumption) entails. But the Supreme Court, confronting this question in *Garland v. Dai*, declined to provide an answer. Instead, it showcased the analytic confusion that surrounds credibility writ large. At oral argument, the Justices canvassed four distinct ideas of credibility. In their unanimous opinion, they offered a "definition" of credibility that managed to replicate, rather than resolve, the ambiguity among the four. Meanwhile, the everyday work of adjudication continues. Every year, thousands of cases are resolved on credibility grounds—many with life-altering consequences—despite the confusion at the heart of the legal concept.

The time has come for our legal system to clarify what it means by "credibility." While the term can be an umbrella for different ideas, within any given adjudication—like an immigration proceeding—precision about how we are using it is a must. To that end, this Article explores different ideas of credibility, taking the *Garland v. Dai* argument and opinion as a source of (cautionary) inspiration. It explains why credibility is necessarily distinct from truth, and the malleable nature of the concept. Is credibility a synonym for persuasiveness? Does it refer to the likelihood that someone is telling the truth in this case? To the likelihood that they generally tend to tell the truth? To whether they seem like they're telling the truth? Ultimately, there is no ideal definition of credibility; it depends on what work the concept is trying to do. What is far from ideal, however, is the current state of affairs, in which credibility means everything and nothing—notwithstanding its role in shaping people's lives.

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INTRODUCTION

> *I'm worrying about this Court writing some kind of opinion and saying 'credible' is different than 'true,' and before you know it, who knows what will happen.*[1]
>
> Justice Breyer

In a country where facts and truth are deeply contested, it would be surprising if we agreed on what makes a person worthy of belief. The premise that there is such a consensus, however, is at the heart of how credibility is conceptualized in the law. Credibility jurisprudence is centered around the fiction that there is a societal understanding of what (and who) is believable.

American law's credibility problem is not only this fiction but the doctrinal and conceptual neglect that perpetuates it. Although facets of credibility jurisprudence are much-maligned in evidence scholarship,[2] to this point there is no generally accepted definition or operative theory of credibility in our legal system. Even as it is largely taken for granted, credibility has long been a source of confusion and consternation within the law. We lack an understanding of how credibility operates within adjudication. Moreover, the justifications offered for evidentiary rules and practices relating to credibility are conflicting and incoherent.[3] Every

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1. Transcript of Oral Argument at 19, Garland v. Dai, _ U.S. __, 141 S. Ct. 1669 (2021) (No. 19-1155) [hereinafter *Dai* Oral Argument] (transcript filed under Wilkinson v. Dai).

2. *See* ROGER PARK & TOM LININGER, THE NEW WIGMORE: A TREATISE ON EVIDENCE; IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. 2021) ("The wisdom of [impeaching with prior convictions] has been debated at length in the scholarly literature.").

3. For example, judges routinely suggest that credibility is a probabilistic concept that reveals a witness's likelihood of being truthful. *See, e.g.*, United States v. Estrada, 430 F.3d 606, 617 (2d Cir. 2005) (holding "all Rule 609(a)(1) felonies are not equally probative of credibility but . . . many are significantly probative of a witness's propensity for truthfulness"). Yet, leading treatises instruct that the main type of evidence admitted with this justification—the prior conviction—is inapposite to the task of predicting lying. *See, e.g.*, PARK & LININGER, *supra* note 2, § 3.4 (acknowledging that a "substantial argument can be made that convictions should not be admitted at all when the witness is

year, thousands of cases are resolved on credibility grounds—many with life-altering consequences—despite the confusion at the core of the legal concept.[4]

Recently, the Supreme Court had two occasions to address this confusion.[5] The Court's opinion in the first of these cases, *Garland v. Dai*,[6] exemplifies our present difficulties with credibility. Congress, in the Immigration and Nationality Act (INA), enacted a "rebuttable presumption of credibility" for asylum-seekers "on appeal."[7] Some courts of appeals understood that to permit, or even require, them to reverse an immigration judge who denies asylum without making an explicit credibility finding when the applicant has offered a plausible account of persecution in their country of origin.[8] The Trump Justice Department opposed that interpretation.

When it agreed to hear *Dai*, the Court seemed poised to determine what "credibility" and its presumption entail.[9] And sure enough, at oral

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the criminal defendant" because they have so little probative value on the question of truthfulness). Putting its efficacy aside, the probabilistic view clashes with doctrine that holds that credibility is a matter of lay intuition, something that jurors and judges can best assess by examining the demeanor of witnesses and listening to their tones of voice. For example, model jury instructions suggest that jurors be told to "[c]onsider each witness's intelligence, motive to falsify, state of mind, and appearance and manner while on the witness stand" as evidence of whether a witness is "worthy of belief." KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15:01 (6th ed. 2022). Thus, even from this brief summary, we might conclude that credibility is either about probabilistic judgment or lay intuition, and it is either a result of a witness's pre-trial conduct or something to uncover based on how the witness performs at trial. Or perhaps it is all of these things?

4. *See, e.g.*, Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 225 (1989) (describing how "credibility assessment is often dispositive of the outcome" of criminal cases with less "corroborative evidence" and can decide "between life and death or liberty and restraint"); Linda Lam, *The REAL ID Act: Proposed Amendments for Credibility Determinations*, 11 HASTINGS RACE & POVERTY L.J. 321, 325 (2014) ("Negative credibility assessments are a leading reason for denial of asylum claims in most refugee status determination systems."); Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989) (describing centrality of "claimant's credibility" in disability benefits cases, particularly when they turn on the claimant's level of pain); *In re* Schoenfield, 608 F.2d 930, 936 (B.A.P. 2d Cir. 1979) (describing "the importance of credibility assessments" to personal bankruptcy proceedings).

5. This marked a rare sortie for the Court. Longstanding doctrine shields credibility determinations from appellate review. Statutes and rules leave the term undefined even as rule-drafters have occasionally removed it, citing its inscrutability. *See* Julia Simon-Kerr, *Credibility in an Age of Algorithms*, 74 RUTGERS U. L. REV. 111, 147 n.228 (2021) [hereinafter Simon-Kerr, *Credibility in an Age of Algorithms*]. In short, the legal system incentivizes reasoning as little as possible about credibility and legal actors have largely obliged.

6. Garland v. Dai, __ U.S. __, 141 S. Ct. 1669 (2021).

7. 8 U.S.C. § 1158(b)(1)(B)(iii).

8. *See Dai*, 141 S. Ct. at 1676–79.

9. *Garland v. Dai* consolidated two cases that ask what federal courts of appeals should do when immigration judges, and later the Board of Immigration Appeals (BIA), fail to make explicit

argument, the Justices engaged at length with essential questions like whether there is a difference between being persuasive and credible; how the story being told by an applicant relates to a credibility finding; and how reviewing courts might be able to tell when an immigration judge has made a credibility finding if that finding is not explicit.[10] In its eventual unanimous opinion, however, the Court largely avoided discussing credibility.[11] And what little it did say raised more questions than it answered. Writing for the Court, Justice Gorsuch offered two definitions of credibility: that it means both truthfulness *and* "worth[iness] of belief."[12] As this Article will show, this definition conjoins two distinct understandings of the term while failing to clarify any of the central definitional concerns.

Six months later, the Court grappled with credibility once more during oral argument in *Patel v. Garland*.[13] And once again, the Court ignored central questions about credibility when it decided the case, such as whether credibility judgments are inherent in all fact-finding, and if so, whether that means any factual determination "requires the exercise of some discretion . . . ."[14] Instead of resolving these central conceptual issues, the Court chose instead to use credibility instrumentally in holding a factual judgment nonreviewable.

These recent cases show a Supreme Court unable or unwilling to decide what a credibility finding looks like, what it signifies, or how such determinations operate in the context of other judicial fact-finding. Still, as they discussed credibility and its many forms during oral argument in *Dai*, the Justices sketched an outline of credibility's legal terrain.[15] This Essay finishes that sketch, undertaking work the Court left undone to

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credibility findings. *Id.* at 1669. This question was a subsidiary part of several difficult questions of administrative law raised directly by the cases. For example, the cases ask how the "substantial evidence" standard operates with the presumption of credibility in favor of an asylum applicant. *See* Petition for Writ of Certiorari at 22, Garland v. Dai, __ U.S. __, 141 S. Ct. 1669 (No. 19-1155) ("[S]o long as there is substantial evidence to support the administrative findings of fact, such that a 'reasonable adjudicator' could have arrived at the Board's decision, the court of appeals must deny the petition for review.") (citation omitted).

10. *Dai* Oral Argument at 19, *supra* note 1.

11. *See* Garland v. Dai, __ U.S. __, 141 S. Ct. 1669 (2021).

12. *Id.* at 1681; *see also infra* section I.A.

13. *See generally* Transcript of Oral Argument, Patel v. U.S. Att'y Gen., 971 F.3d 1258 (11th Cir. 2020) (No. 17-10636), *aff'd sub nom.* Patel v. Garland, __ U.S. __, 142 S. Ct. 1614 (2022) [hereinafter *Patel* Oral Argument]. The issue was whether the case fell within a federal statute that bars federal court review of certain "discretionary" immigration status determinations. *See* Petition for Writ of Certiorari at 2–3, Patel v. Garland, __U.S. __, 141 S. Ct. 2850 (2021) (No. 20-979) [hereinafter *Patel* Petition for Writ of Certiorari].

14. *Patel* Oral Argument, *supra* note 13, at 35.

15. *See infra* Part II.

reveal a taxonomy of credibility. First, credibility is often used interchangeably with persuasiveness. Second, credibility is commonly defined as worthiness of belief. Third, credibility may refer to anything that relates to whether a witness is being honest. Finally, and more obliquely, comes the claim that credibility is a measure of a witness's *propensity* to lie.

This systemization allows us to see with clarity the ways in which credible *is* different from true. Credibility may depend on how persuasive a witness's story is and how that witness looks when telling it. Or it may reflect whether the other evidence in the case suggests a witness is being honest. Yet finding that a witness tells a persuasive story is not the same as finding that her demeanor makes her believable. Finding that the evidence is consistent with a witness's testimony is not the same as holding that we can infer from her tone of voice that she is worthy of belief. Evidence discussed under the banner of credibility may or may not have to do with truth itself. If a witness looks away when testifying, for example, we may decide she lacks credibility, but her averted gaze has no bearing on her actual propensity for untruth. In short, it is only when we can assess what is going into a credibility judgment that we can recognize constraints on what we can expect to get out of that judgment. Even as credibility judgments may represent a composite of impressions of a witness in the context of other evidence, we can and should understand the inputs to credibility as distinct categories.

It is not clear what consequences Justice Breyer feared in the statement quoted at the beginning of this introduction if the Court were to announce that "'credible' is different than 'true.'"[16] This Article contends that the consequences of failing to do so, or to acknowledge the many faces of legal credibility, are profound. First, this willful inattention obscures credibility's all-powerful role in legal analysis and case outcomes, as illustrated in microcosm in *Dai* and *Patel*. Moreover, what findings are captured under "credibility" will determine their reviewability on appeal. Taking a broader view, the very foundation of legal credibility—a big picture agreement about what gives a person the capacity to be believed—may no longer hold. We can only see why this is the case if we do the analytic work that the Court refused to undertake. Without mapping credibility in the law and exposing its component parts, we cannot recognize that its role in our system of law centers on stereotypes of believability. In addition, absent greater conceptual clarity, credibility's amorphousness functions to empower ad hoc decision-making and then

16. *Dai* Oral Argument, *supra* note 1, at 19.

shield it from review.[17]

Perhaps most importantly, the taxonomy reveals that under the status quo, credibility will inevitably turn our gaze, in one form or another, to answering one question alone, which is whether a witness is conforming with social expectation. Did she meet the fact-finder's preconceptions of how someone believable should look, sound, or behave? Was her past free of errors that matter in credibility judgments? Did her story resonate with the life experience of the judge? In this way, credibility creates and reinforces social norms; its legal instantiation has become a force for regressive social reproduction over time; and it has become a site of fixed racial bias within the system. Credibility insinuates conceptual value judgments into law that are then treated as findings of fact.

Our current credibility regime is not only unjustified, it is also unjustifiable. The privileged few who wrote the rules might once have agreed about the basic qualities that should contribute to credibility and the price that should be paid by those unable to meet its requirements. That notion has endured even as decades of social upheaval and cultural change have begun to upend the power structures credibility jurisprudence so tenaciously reproduces. These fractures silently underlie the analytic difficulties surfaced by the Supreme Court in *Dai* and *Patel*. They raise questions that the legal community can no longer ignore.

This Article proceeds in four parts. Part I critiques the Court's discussion of credibility in its opinions in *Dai* and *Patel*, showing that a taxonomy is needed. Part II identifies and explores four conceptions of credibility offered by the Justices at oral argument in *Dai*. Part III creates a credibility taxonomy through examples that illustrate its component parts and their implications for appellate review. Part IV concludes, showing that without analytic rigor, credibility defaults to a marker of worthiness of belief, which in turn raises questions about credibility's continued legitimacy within our system of law.

I. CREDIBILITY AT THE COURT

When it decided *Garland v. Dai*, the Supreme Court echoed several of the most common legal credibility tropes while offering two contradictory definitions of credibility. Like many legal opinions, Justice Gorsuch's toggles between separate visions of credibility without acknowledging

17. Credibility is not the only legal construct that promotes socially contingent and unreviewable decision-making, but it may be the most widely used. *See, e.g.*, Jones v. Mississippi, _ U.S. __, 141 S. Ct. 1307, 1333–34 & n.2 (2021) (Sotomayor, J. dissenting) (criticizing discretionary "incorrigibility" standard for juvenile sentences of life without parole and noting its disparate effect on African-American young people).

their distinctiveness. The Court suggests that demeanor is a potent guide to credibility but also that credibility comes from narrative coherence. At the same time, other forms of evidence, such as testimony from a lay or expert witness or physical evidence may not correlate with credibility. According to *Dai*, a witness can be credible even when testifying in a way that flatly contradicts the other evidence. In the end, the Court offers a non-definition by eliding the idea of credibility as honesty with a competing view that it is really a measure of whether a witness is worthy of belief.

This Part traces these various definitional moves. It then turns to *Patel*, which illustrates some of the consequences of the Court's failure to either acknowledge or address the pervasive ambiguity surrounding credibility. Without a working understanding of credibility, the judicial system allows chance and error to govern one of the concepts at the heart of the very process of adjudication. This definitional vacuum, in turn, means that credibility can be a tool to reach certain outcomes.

A. Garland v. Dai

The Immigration and Nationality Act, as amended by the REAL ID Act in 2005, provides that an applicant may demonstrate eligibility for asylum if her "testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[18] Although Congress specified that "[t]here is no presumption of credibility," it also provided that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal."[19]

Ming Dai applied for asylum in the United States based on a history of persecution in China, his home country.[20] Dai testified that when he and his wife were expecting a second child, "family-planning officials abducted [his wife] and forced her to have an abortion" and that "police broke his ribs, dislocated his shoulder, and jailed him for 10 days" when he tried to stop the abduction.[21] He eventually fled to the United States as a result of this oppression.[22] He did not initially disclose until pressed at the hearing that his wife and daughter had come to the United States and then returned to China so his wife could care for her elderly father.[23] Dai

18. 8 U.S.C. § 1158(b)(1)(B)(ii).

19. *Id.* § 1158(b)(1)(B)(iii).

20. Garland v. Dai, __ U.S. __, 141 S. Ct. 1669, 1675 (2021).

21. *Id.* at 1675–76.

22. *Id.* at 1676.

23. *Id.*

said he omitted these facts initially because he was nervous and misunderstood the question.[24] The Immigration Judge (IJ) found that Dai had failed to meet his burden of proof and denied Dai's application for asylum.[25] The Board of Immigration Appeals (BIA) upheld that decision on appeal.[26]

When the Ninth Circuit considered *Dai*, it found that there had been no adverse credibility findings at either stage of the proceedings below.[27] It therefore "treat[ed] Dai's testimony as credible."[28] The Ninth Circuit then reversed the BIA for impermissibly making a credibility assessment disguised as a finding that Dai was "unpersuasive."[29]

In *Dai*, the Court tasked itself with resolving what Congress meant by a "rebuttable presumption of credibility on appeal."[30] Writing for the Court, Justice Gorsuch rejected the Ninth Circuit's approach.[31] Rather than treating an applicant's testimony as credible if there is no explicit adverse credibility finding made by the IJ or the BIA, Justice Gorsuch held that the focus on review should be more squarely on the evidence. He wrote that even without an adverse credibility finding, "so long as the record contains 'contrary evidence' of a 'kind and quality' that a reasonable factfinder could find sufficient, a reviewing court may not overturn the agency's factual determination."[32]

As for the INA's dictate that absent an "adverse credibility determination," there is a "rebuttable presumption of credibility on appeal,"[33] Justice Gorsuch reasoned that the relevant "appeal" is the appeal from the IJ to the BIA and not any subsequent proceeding in a federal court of appeals.[34] This conclusion reflects the longstanding treatment of credibility judgments as the product of demeanor assessments made in the moment by fact-finders. Justice Gorsuch—somewhat bafflingly given the language in the statute—opined that "[r]eviewing courts have no need for a presumption of credibility one way

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24. Dai v. Sessions, 884 F.3d 858, 865 (9th Cir. 2018), *vacated sub nom.* Garland v. Dai, 141 S. Ct. 1669 (2021).

25. *Id.*

26. *Id.* at 865.

27. *Id.* at 870.

28. *Id.* at 871.

29. *Id.* at 871, 874.

30. Garland v. Dai, __ U.S. __, 141 S. Ct. 1669, 1677 (2021) (quoting 8 U.S.C. § 1229a(c)(4)(C)).

31. *Id.*

32. *Id.*

33. 8 U.S.C. § 1158(b)(1)(B)(iii).

34. *Dai*, 141 S. Ct. at 1678 ("[N]o such presumption [of credibility] applies in antecedent proceedings before an IJ, or in subsequent collateral review before a federal court.").

or the other because they do not make credibility determinations."[35] Rather, it is the IJ who has the ability to assess a witness's demeanor and thereby her credibility.[36]

This left the problem of explaining how the BIA, just as removed from the witness as any reviewing court, could apply the credibility presumption. To do this, Justice Gorsuch fell back on the notion that narrative persuasiveness is a component of credibility. The BIA can "apply the credibility presumption," he explained, because it "has experience with the sort of facts that recur in immigration cases . . . ."[37] By contrast, in the Court's view, the Article III judges reviewing the BIA's findings have access neither to demeanor nor to the expertise needed to assess immigration narratives. Therefore, the "only" question they may answer is whether a reasonable factfinder "could have found as the agency did."[38] The Court did not explain how the BIA's expertise in narratives relates to the IJ's ability to look at the applicant's demeanor, or how those two factors should interact in a credibility finding. As Part II will elaborate, these two visions of credibility are different in meaningful ways.[39]

The Court also gave little guidance on the statutory credibility presumption. Instead, Justice Gorsuch declared that the Court would "leave for another day" deciding what the IJ or BIA would need to do to "furnish an 'explici[t] adverse credibility determination.'"[40] This punt is not surprising given the preceding discussion of demeanor and narrative. Trying to articulate what a credibility finding looks like might entail coming to terms with some kind of boundary for credibility, a move the

35. *Id.* at 1678.

36. *Id.* (noting that the IJ, "who actually observes the witness," is "best positioned to assess . . . credibility").

37. *Id.*

38. *Id.*

39. One logical conclusion an IJ wishing to avoid intervention from the BIA might make, however, is that claiming an applicant's demeanor was suspect is a way to remove a matter from review by the BIA. Similarly, if the BIA wishes to avoid intervention from the federal court of appeals, it might base any conclusion on the suspect nature of the asylum-seeker's narrative. These possibilities echo tropes in the legal system that situate credibility as a site for instrumental work-arounds to reach desired outcomes.

40. *Dai*, 141 S. Ct. at 1679 (quoting *Dai* Oral Argument, *supra* note 1, at 50); *see also Dai* Oral Argument, *supra* note 1, at 50 ("I also understand your position to be that there are no magic words here . . . the BIA does not specifically have to . . . have an explicit adverse credibility determination. Is that right?") (Roberts, C.J.); *id.* at 20–21 ("If at the end of the day you conclude that your son really did eat the cookies [despite saying he did not], he was not credible . . . to say, well, he was worthy of belief, but in the end, I don't believe him, that escapes me.") (Alito, J.).

Court was obviously not willing to make.[41] In the course of not answering the boundary question, Justice Gorsuch did briefly wave in that direction. In a nod to yet another conception of credibility, he suggested there is a "line" between "credibility and persuasiveness."[42] He tried to illuminate that line with a hypothetical in which he used credible as a synonym for honest. He wrote that a witness could still be credible even though her testimony about a car accident was controverted by video footage and other witnesses.[43] According to Justice Gorsuch, such a witness might have credibility even if her testimony was not ultimately persuasive.[44] Here, credibility seems to refer to the witness's own belief in the veracity of her testimony. Justice Gorsuch wrote that the controverted witness would not lack credibility "in the sense that she was lying or not 'worthy of belief.'"[45] This explanation, however offhanded, is a definition of credibility, the only one on offer in the opinion. It suggests that credibility may refer to honesty or to worthiness of belief, and that the two concepts may be interchangeable.

In summary, the *Dai* Court held that demeanor is essential to credibility such that appellate courts should not revisit factual determinations even in the face of contradictory evidence as long as there is "sufficient" support for them in the record.[46] At the same time, the BIA can revisit credibility judgments of this kind, and apply the credibility presumption in the absence of explicit findings on credibility, because it has expertise in the kind of stories asylum applicants might tell. And finally, it's possible that a witness might be credible despite tangible evidence that contradicts that witness.

This may seem like enough of a muddle, but as Part II explains, the Court's definition of credibility further compounds the problem. Defining credibility as worthiness of belief corresponds with the emphasis on demeanor and narrative persuasiveness, while defining credibility as "lying" is very different.[47] With this Janus-faced definition, Justice

41. Part of the Court's reluctance might result from an inherent tension between the statutory reference to an "explicit adverse credibility determination" and the reality that a person's testimony could be found to be credible on some topics but not others. *Dai* Oral Argument, *supra* note 1, at 20. This tension itself is a result of Congress's own lack of clarity about what credibility means or should mean.

42. *Dai*, 141 S. Ct. at 1680–81.

43. *Id.* at 1681.

44. *Id.*

45. *Id.* (quoting *Credibility*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

46. *Id.* at 1677.

47. Although narrative persuasiveness is distinct from the credibility of a speaker, as described in section II.A, both are common ways in which the law gives substance to what it means to be worthy of belief.

Gorsuch reinforced the fundamentally syllogistic nature of the legal doctrine that surrounds credibility. As in that doctrine more broadly, his definition draws false equivalencies between honesty, truthfulness and credibility. This facilitates the claim that credibility-centered evidence helps assess the truth or honesty of a witness. Yet the inputs selected under this doctrine have no validity as metrics of truth or honesty. Rather, what the law says is relevant to credibility is conclusively relevant to credibility only because the law itself constructs what it means to be worthy of belief.[48]

In *Dai*, Justice Gorsuch wrote that credibility is both worthiness of belief and honesty.[49] Yet these words cannot create a reality in which features that indicate worthiness, like demeanor or even persuasiveness, have actual probative value on the separate questions of honesty or truth. Whether a witness believes herself to be honest or whether she is describing events that correspond to measurable reality are separate questions with at least potentially testable answers. This is why it is possible to cite studies showing that demeanor and testimonial inconsistencies are poor markers of a person's truthfulness[50] or to demand some evidence bearing out the law's insistence that those with particular prior convictions are more likely to lie.[51] Rather than bring clarity to an area in need of it, the Court in *Dai* embraced the status quo emphasis on demeanor and worthiness, offered the thinnest of lines between persuasiveness and credibility, and insisted that we can equate honesty with credibility and a lack of credibility with lying. In doing so, it invited courts to continue to view credibility instrumentally, as a mechanism for avoiding or manipulating appellate review.

B. Patel v. Garland

The Court's credibility problem was once more apparent in *Patel v. Garland*. The Court heard oral argument in this case six months after

48. *See* Simon-Kerr, *Credibility in an Age of Algorithms*, *supra* note 5, at 123–33.

49. *See Dai*, 141 S. Ct. at 1681.

50. *See generally* Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Jury Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331 (2015). *See also* Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given by Asylum Seekers Be Taken as Proof of Deceit?*, 16(2) TORTURE: Q. J. ON REHAB. OF TORTURE VICTIMS AND PREVENTION OF TORTURE 81, 81 (2006); Jane Herlihy, Peter Scragg & Stuart Turner, *Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, 2002 BRIT. MED. J. 324, 324.

51. *See* 36 AM. JUR. 2D *Proof of Facts* § 747.I.1, Westlaw (database updated Oct. 2022) ("Evidence of a prior conviction is offered on the theory that because the witness or the defendant has been previously convicted of a crime, his character is such that he will be less likely to tell the truth than the average law-abiding citizen.").

issuing its opinion in *Dai*.[52] And it once again tasked itself with thinking about credibility in the immigration context. The specific question in *Patel* was whether Pankajkumar Patel, an Indian citizen who has lived in the United States for almost thirty years, was ineligible for an "adjustment of status" that would permit him to obtain a green card because he had either falsely or erroneously checked a box saying that he was a U.S. citizen when applying for a driver's license.[53] The IJ found him ineligible and the BIA affirmed.[54] The Court granted certiorari to consider whether federal courts can review the IJ's fact-finding about Patel's intent in checking the box.[55] The relevant statute bars federal courts from reviewing denials of discretionary relief.[56] Patel and the government[57] argued that an IJ's decision whether an immigrant does or does not meet statutory eligibility requirements is reviewable because it is a finding of fact that is not discretionary.[58] Under their theory, only the second step of the IJ's decision-making, in which the judge decides whether to grant relief, is discretionary under the statute and therefore non-reviewable.[59] The court-appointed amicus contended that discretion is involved in both steps and therefore the finding that Patel misrepresented his citizenship is barred from appellate review.[60]

During oral argument, the Justices once again sought to clarify the nature of credibility determinations. Are these determinations "non-

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52. *Dai*, 141 S. Ct. at 1671; *Patel* Oral Argument, *supra* note 13, at 1.

53. *Patel* Petition for Writ of Certiorari, *supra* note 13, at i, 7.

54. Patel v. Garland, __ U.S. __, 142 S. Ct. 1614, 1620 (2022).

55. Patel v. U.S. Att'y Gen., 971 F.3d 1258 (11th Cir. 2020), *cert. granted sub nom.* Patel v. Garland, __ U.S. __, 141 S. Ct. 2850 (2021) ("Petition for writ of certiorari . . . granted limited to Question 1 presented by the petition."); *see also Patel* Petition for Writ of Certiorari, *supra* note 13, at i (asking in Question 1 "[w]hether [the INA] preserves the jurisdiction of federal courts to review a nondiscretionary determination that a noncitizen is ineligible for certain types of discretionary relief").

56. 8 U.S.C. § 1252(a)(2)(B)(i).

57. The Supreme Court appointed Attorney Taylor A.R. Meehan to brief and argue as amicus curiae in support of the judgment below because Patel and the government largely agreed. *See Patel*, 141 S. Ct. at 2881.

58. *Patel* Oral Argument, *supra* note 13, at 4 ("As the government agrees, [the INA] does not bar review of the agency's threshold determination that Mr. Patel is ineligible for adjustment of status . . . consistent with this Court's explanation in *Kucana* that the [statutory] bar is limited to decisions made discretionary by legislation.").

59. Brief for Petitioners at 17, *Patel*, 141 S. Ct. 2850 (2021) (No. 20-979) (arguing that the first step does not represent a grant of relief because "the Executive retains full authority to deny any benefit at the second step").

60. Brief for Court-Appointed Amicus Curiae in Support of the Judgment Below at 28, *Patel*, 141 S. Ct. 2850 (2021) (No. 20-979) ("Judgments relating to whether discretionary relief could be granted necessarily subsume the many determinations about a noncitizen's eligibility for such relief.").

discretionary fact questions," or do they involve discretion?[61] The Justices seemed divided on this, in part because they and the advocates were all using different definitions of credibility. Justice Thomas, for example, wondered if "whether or not [Patel] lied in checking the box" is "a fact."[62] In response, Assistant Solicitor General, Austin Raynor, used honesty, or Patel's "subjective intent" as a stand-in for credibility.[63] He explained that it is a fact because "subjective intent" can "be determined either correctly or incorrectly."[64] In other words, whether Patel lied when he checked the box is a fact question because that question has a right or wrong answer, no matter how elusive such an answer may be.

Justice Barrett pushed back. Using what this Article will show is a worthiness-centered view of credibility, she suggested that "credibility determinations . . . require some element of judgment" because the judge has to look at the witness's demeanor, "listen[] to his testimony, and draw[] a conclusion."[65] Making a common move, Justice Barrett then suggested that these worthiness inputs would then help reveal "whether or not Mr. Patel was telling the truth."[66] Her implication was that by looking at Mr. Patel's face and his body language, the IJ could decide if he was being truthful about his earlier motivation for checking the wrong box on his driver's license application.

Chief Justice Roberts similarly suggested that certain credibility inputs would offer outputs about honesty. He posited that credibility is discretionary because people weigh different things when they assess it. Some "place a lot of weight on demeanor . . . if a person looks nervous," while others may not regard demeanor because they "think people applying for . . . this type of relief [are] going to be nervous."[67] Nonetheless, Chief Justice Roberts suggested that this discretion would be in the service of determining a "factual issue," presumably Patel's intent in checking the box.[68]

Justice Kagan, in contrast, worked to distinguish Patel's credibility from the question of his earlier intent. She proposed that whether he was

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61. *Patel* Oral Argument, *supra* note 13, at 41.

62. *Id.* at 33–34.

63. *Id.* at 34.

64. *Id.*

65. *Id.* at 34–35.

66. *Id.* at 35. In previous work, I have described at length how evidence doctrine treats worthiness inputs, like prior convictions, as metrics of the probability that a witness will lie on the witness stand. *See* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017) [hereinafter Simon-Kerr, *Credibility by Proxy*]; *see also infra* section II.D.

67. *Patel* Oral Argument, *supra* note 13, at 40.

68. *Id.* at 41.

"lying in the legal proceeding" would be a separate determination from assessing his intent when years earlier he filled out the driver's license application and checked the wrong box.[69] She argued that the IJ's credibility determination could be entirely unrelated to the judge's other fact-finding.[70] Specifically, the factual determination about Patel's reason for checking the box would not become discretionary just because the IJ made a separate decision, based on Patel's demeanor or other factors, that Patel was not credible when he testified in the proceeding.[71]

As this summary shows, the Court continued to struggle with the nature of credibility determinations in *Patel*. Is credibility a discretionary question that tracks the witness's capacity to be believed based on demeanor or other external features? Or does credibility connote metrics that are indicative of honesty, which is factual in the sense that it has a right or wrong answer? Or is it instead a cumulative measure of how a witness's statements line up with the rest of the evidence in the case? And if all evidence in the case necessarily implicates our belief in a witness, and thereby his credibility, does that render all fact-finding inherently discretionary?

In its opinion in *Patel*, the Court resolved none of these questions. Instead, writing for the majority, Justice Barrett once again implied that credibility may consist of any of a number of interchangeable parts and that the distinctions among those parts are insignificant.[72] If forced to choose, Justice Barrett might at least agree with the last proposition above—that any evidence implicates our belief in a witness and this renders all fact-finding discretionary. She wrote that the "credibility determination" in *Patel* did constitute an exercise of discretionary judgment because the IJ "weighed Patel's testimony, reviewed documents, and considered Patel's history" when deciding that he was "evasive and untrustworthy."[73]

Curiously, Justice Barrett made no mention of demeanor in this description, despite her interest in it at oral argument. This tactical omission enabled her to make the further claim that the use of judicial discretion was not unique to what she labels the "credibility determination."[74] Rather, she explained that the IJ's determination that Patel lied on his driver's license application likewise "involved the same exercise of evaluating conflicting evidence to make a judgment about

69. *Id.* at 42–43.

70. *Id.*

71. *Id.* at 43.

72. Patel v. Garland, __ U.S. __, 142 S. Ct. 1614 (2022).

73. *Id.* at 1624.

74. *Id.*

what happened."[75] In this way, Justice Barrett equated the IJ's credibility assessment of Patel at the hearing with the factual determination about Patel's motive in filling out his application for a driver's license years earlier. Of course, as Justice Kagan tried to point out at oral argument, the IJ was not there when Patel checked the wrong box, so it's hard to see how he could decide that Patel was being "evasive and untrustworthy" in taking that action.[76] But Justice Barrett did not respond to that point. Rather, by leaving demeanor out of her discussion of credibility assessment, she could more easily claim that all fact-finding, including credibility assessment, rests on the same "exercise" and is simply a function of "conflicting evidence."[77]

Patel shows one consequence of the conceptual vacuum around credibility. Justice Barrett used the ambiguity to assert that factual determinations are always discretionary because they are in some sense indistinguishable from credibility determinations. This was a move with major ramifications for this area of immigration law. The dissenters protested that after *Patel*, when the government makes an "obvious factual error, one that will result in an individual's removal from this country . . . nothing can be done about it."[78]

Most lawyers would assume that there should and must be a distinction between a factual determination and a credibility judgment. Evidence law relies on this premise, and much of credibility jurisprudence, such as the deference to credibility determinations, follows from the idea of credibility's exceptionalism, its dependence on demeanor and its reflection of in-person character assessment. Still, this vision is fuzzy and capacious enough that Justice Barrett sidestepped it. Indeed, the Court's recent jurisprudence both rests on and compounds disfunction in the legal landscape of credibility. Even as Justice Gorsuch cited demeanor as a key reason that appellate courts cannot review credibility determinations in *Dai*, Justice Barrett ignored demeanor in order to equate credibility assessment with other factfinding in *Patel*.[79]

II. FOUR CONCEPTIONS OF CREDIBILITY

Part I shows the Court struggling with and ultimately both avoiding and manipulating the concept of credibility. This Part takes up the work the Justices chose not to do. From the colloquies during the *Dai* oral

75. *Id.*

76. *Patel* Oral Argument, *supra* note 13, at 43; *Patel*, 142 S. Ct. at 1624.

77. *Patel*, 142 S. Ct. at 1624.

78. *Id.* at 1627 (Gorsuch, J., dissenting).

79. *Id.* at 1624; Garland v. Dai, __U.S. __, 141 S. Ct. 1669, 1678 (2021).

argument, it draws out the map of credibility as it is understood in law. This map has four parts, which are elaborated in the following sections. First, credibility is often used interchangeably with persuasiveness. Second, credibility is commonly defined as worthiness of belief. Third, credibility may encompass anything that relates to whether a witness is being honest. And finally, legal actors often claim that credibility is a measure of a witness's *propensity* to lie.

Seeing these as distinct categories allows us to also interrogate them. Is it really the case that credibility and persuasiveness are indistinguishable? Can a legal credibility assessment using evidence admitted for that purpose really predict a witness's propensity for untruth? Does all evidence count as evidence of credibility if it supports or contradicts a witness? And finally, what does it mean to be worthy of belief? Answering these questions, in turn, shows that despite Justice Breyer's skepticism,[80] a legal credibility finding is very different from—and possibly anathema to—finding the truth.

A. Credibility as Persuasiveness

> *I'm baffled by the distinction that you're drawing between 'credibility' and 'persuasiveness.'*[81]
>
> Justice Barrett

Justice Barrett's bafflement brings out a common confusion about credibility. Is there a difference between being persuasive and having credibility? And if so, what is it? Congress, at least, seems to recognize such a distinction. In the REAL ID Act, for example, Congress specified that in order to be eligible for asylum, applicants' testimony must be both "credible" and "persuasive."[82] As that provision suggests, there is a real and useful conceptual boundary between persuasiveness and credibility. Put simply, the persuasiveness of a narrative focuses on the story being told. Is the witness saying that a spaceship landed on her front lawn?[83] Credibility of a witness considers other features of a witness as perceived

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80. *See Dai* Oral Argument, *supra* note 1, at 19.

81. *Id.* at 41–42.

82. 8 U.S.C. § 1158(b)(1)(B)(ii).

83. In the immigration context in particular, narrative persuasiveness also interacts with corroboration. A plausible story, presented by a credible witness, may still be deemed unpersuasive if expected corroborating evidence, such as scars or proof of medical treatment, is not presented and its absence isn't convincingly explained. *See, e.g.*, Patrick J. Glen, In re L-A-C-*: A Pragmatic Approach to the Burden of Proof and Corroborating Evidence in Asylum Proceedings*, 35 GEO. IMMIGR. L.J. 1, 9 (2020) (critiquing BIA's general requirement that asylum applicants present corroborating evidence "where available").

and interpreted by the fact-finder. In other words, credibility is an attribute of the person while persuasiveness is an attribute of the narrative.[84]

Of course, as Justice Barrett's comment suggests, persuasiveness and credibility are intertwined. A story told by a witness who appears credible may also seem more persuasive. Conversely, if a witness claims to have seen a spaceship on her lawn, she may be viewed as less credible. Both persuasiveness and credibility may also be influenced by information about the speaker. A person may lack credibility because of some attribute known to the fact-finder, such as a prior conviction for identity theft, while at the same time becoming more persuasive in offering certain narratives, such as testimony that involves awareness of how to hack into online accounts. Still, Congress's decision to require that asylum applicants' testimony be both "credible" and "persuasive" reflects its view that these are distinct and incompletely overlapping categories.[85] Narratives have their own force separate and apart from the narrator. And people's capacity for being believed often does not hinge on the stories they tell. As a leading trial advocacy treatise puts it, "that a story is consistent or inconsistent with everyday experience is likely to be unrelated to the demeanor of the witness who testifies to the story."[86] For this reason, advocates are advised to "consider each factor separately when trying to identify credibility evidence."[87]

One benefit of recognizing this distinction is that it allows us to draw on narrative theory and legal scholarship on narrative to hone in on the task of assessing an asylum-seeker's persuasiveness as distinct from her credibility. This facilitates understanding the specific difficulties that come with assessing narrative in the context of immigration determinations. Two observations about narratives are particularly salient here. First, judgments of narrative are contextual, and second, this can be problematic when they work to privilege dominant narratives.[88] On this first point, Cicero observed that a "narrative will be plausible if it seems to embody characteristics which are accustomed to appear in real life."[89]

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84. At least one trial advocacy treatise makes a similar point, though it treats narrative persuasiveness as a broad category of credibility, labelling the distinction one between "credibility of story" and "credibility of witnesses." PAUL B. BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 52 (6th ed. 2017). For the reasons discussed in this Article, calling narrative persuasiveness by its own name offers greater conceptual clarity.

85. 8 U.S.C. § 1158(b)(1)(B)(ii).

86. BERGMAN, *supra* note 84, at 52.

87. *Id.*

88. *See, e.g.*, Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2084 (1989) (critiquing tendency in law for "the stories of outsiders [to be] systematically ignored").

89. 2 MARCUS TULLIUS CICERO, DE INVENTIONE 61 (E.H. Warmington ed., H.M. Hubbell trans.,

Narrative theorists have expanded on this, suggesting that we assess narrative persuasiveness intuitively, judging what we are told against what we see as likely in the world around us.[90] This act of reasoning depends on our vision of the world, including our lived experience and acculturation.[91]

This need to evaluate how a narrative matches up with reality is what makes evidence of country conditions essential to the asylum process. Such evidence offers crucial contextual information that immigration judges must have in order to assess stories that take place in unfamiliar locations and contexts. Even with these reports, judges have lamented how difficult it is to assess the persuasiveness of asylum-seekers' stories. Judge Posner, for example, once called for additional studies that could help judges appropriately understand behavior that might be "anomalous" in the United States "but may not be in [other] countries."[92] While these reports are helpful in assessing the story being told, they can say nothing about the person telling the story.

Yet, even the most comprehensive of anthropological studies would struggle to overcome the tendency for dominant narratives to be believed over others, often at the expense of truth. As many scholars of narrative and law have pointed out, judges can only witness stories told about

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Harvard Univ. Press, 3rd prtg. 1968). Plausibility and persuasiveness are close cousins. *See, e.g.*, Hyunyi Cho, Lijiang Shen & Kari Wilson, *Perceived Realism: Dimensions and Roles in Narrative Persuasion*, 41 COMMC'N RSCH. 828, 843–45 (2012) (detailing study findings that plausibility predicts narrative persuasion because it facilitates emotional involvement with narratives); *see also* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 66 (2008) (explaining that a narrative's correspondence to what the factfinder knows about the world "is an important part of the story's plausibility and hence of its persuasiveness"). Congress lists narrative plausibility as a separate factor for immigration judges to consider in the REAL ID Act. *See* 8 U.S.C. § 1158(b)(1)(B)(iii).

90. WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION 64–65 (1989).

91. Psychology research is also salient in thinking about narrative persuasiveness as distinct from credibility. Psychology researchers have found that acculturation can influence the ways in which we explain behavior. *See, e.g.*, Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCH. 949 (1994) (finding that Chinese and American cultures attributed behavior to different causes). Psychologists have also long recognized the prevalence of cultural scripts that allow those within the group to behave in ways that are expected by in-group members, but which may be inaccessible to those outside the group. *See, e.g.*, Harry C. Triandis, Gerardo Marín, Judith Lisansky & Hector Betancourt, Simpatia *as a Cultural Script of Hispanics*, 47 J. PERSONALITY & SOC. PSYCH. 1363, 1373 (1984) (describing how ignorance of "simpatía" social script among non-Hispanic cultural groups "brings about discomfort and stress in intergroup relations"). In her book, *Legalizing Moves*, anthropologist Susan Coutin describes how immigration judges and asylum officers assess asylum claims through the lens of stock narratives to which they expect a deserving asylum seeker's story to conform. SUSAN BIBLER COUTIN, LEGALIZING MOVES 105–33 (2003).

92. Djouma v. Gonzales, 429 F.3d 685, 688 (7th Cir. 2005).

events, rather than the events themselves, making stories themselves preeminent in the fact-finding process.[93] This is problematic when the stories judges disbelieve are in fact "accurate versions of events that grow from experiences different from the experiences of [the judges]."[94] The difficulty in assessing narrative when such an enterprise depends on the experience of the fact-finder is not limited to asylum cases. But the problem becomes particularly apparent when the decision-maker has no grounding in the narrator's country and culture and thus no basis to decide whether the story being told is one that is "accustomed to appear in real life."[95] As a statistician might describe it, the judge has a base rate problem. The judge can't identify the "frequency with which an event occurs or an attribute is present in some reference population."[96]

Congress's emphasis on asylum-seekers' persuasiveness is a command to pay careful attention to the narrative itself and to treat this as a question distinct from other markers that might make the applicant more or less believable. This directive cannot help immigration judges overcome the epistemic constraints they face in assessing narratives from unfamiliar locales. But it can help judges achieve greater clarity about what aspect is leading them to be skeptical of the applicant: Is it their impression of the story or of the individual? In answer to Justice Barrett, the particular goal of the "persuasiveness" inquiry is to assess whether the story itself—rather than the storyteller—is believable.

B. Credibility as Capacity, Being Worthy of Belief

> *'Credible' means capable of being believed, worthy of belief.*[97]
>
> Justice Alito

93. Kim Lane Scheppele's introduction to a Michigan Law Review volume devoted to narrative in law and the other articles in the volume are important contributions to this body of work. *See generally* Scheppele, *supra* note 88.

94. *Id.* at 2083.

95. CICERO, *supra* note 89, at 61 and accompanying text. Walter Kälin provides a seminal account of this feature of immigration determinations in his article, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INT'L MIGRATION REV. 230 (1986).

96. Jonathan J. Koehler, *When Do Courts Think Base Rate Statistics Are Relevant?*, 42 JURIMETRICS 373, 374 (2002). An example from a context in which base rates are openly discussed and more easily knowable helps illustrate this idea. One court admitted evidence of the base rate of people who committed suicide by shooting themselves multiple times. *Id.* at 393 (citing State v. Sage, No. 82AP-983, 1983 Ohio App. LEXIS 15736 (Ohio Ct. App. 1983)). This base rate evidence was used to rebut a defense argument that the victim in a murder case had died by suicide. *Id.* Of course, we might question how the prosecution obtained that base rate evidence and its accuracy, but assuming it is accurate it can help assess the likelihood of the claim that the victim died by murder rather than suicide.

97. *Dai* Oral Argument, *supra* note 1, at 20.

Justice Alito seems to have prepared for the oral argument in *Dai* by reading his dictionaries.[98] While "worthy of belief" has been the legal definition of credibility since before the first edition of *Black's Law Dictionary* was published,[99] "capacity to be believed or believed in" is the definition of credibility in standard English dictionaries today.[100] Contrary to Justice Alito's suggested equivalence between the two in the quote above, these definitions are not synonymous. Taken together, however, they offer revealing description of how credibility functions both culturally and in the U.S. legal system.

Under the standard English language definition—"capacity to be believed"—credibility is a reflected capacity. It exists entirely in relation to the person who will determine if the speaker is believable. As such, credibility cannot always be demonstrated or proved by a person who wishes to be believed. Credibility is something that appears in the eye of the beholder. A person lacking the capacity to be believed experiences a real deficit. But that deficit—the absence of credibility under this definition—is outward-facing. It is impossible to have inner credibility.

So what makes up the capacity to be believed? When we have limited information about the person with whom we are speaking, credibility is comprised of "generalizations we make from often limited information to help us decide whom to believe."[101] Not surprisingly, in these situations we rely on what Tversky and Kahneman call heuristics and what philosopher Miranda Fricker refers to as stereotypes.[102] These come in various forms, from preconceptions about how a particular type of person should look or dress, to associations of particular racial, gender,

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98. This is apparently typical of Justice Alito. *See* John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 508 (2014) (describing Justice Alito as "the most frequent user of dictionaries on the Supreme Court").

99. *See Credibility*, BLACK'S LAW DICTIONARY (1st ed. 1891) ("worthiness of belief"); *see also, e.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 519 (Boston, Charles C. Little & James Brown 1844) ("When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the Court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence, tending to show them to be unworthy of belief." (emphasis omitted)).

100. *Credibility*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/44108 (last visited Feb. 5, 2023); *see also Credibility*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/credibility [https://perma.cc/XJ2N-EF33] ("capacity for belief").

101. Julia Simon-Kerr, *Uncovering Credibility*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES 583, 587 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020) [hereinafter Simon-Kerr, *Uncovering Credibility*].

102. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124–31 (1974); MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 30 (2007) [hereinafter FRICKER, EPISTEMIC INJUSTICE].

socioeconomic or other groups with particular attributes,[103] to beliefs about human behavior that lead us to credit certain speakers and not others.[104]

These examples begin to suggest how credibility judgments can mirror prevailing norms and biases. Yet Tversky and Kahneman argue persuasively that humans need this type of shortcut to draw inferences and make predictions in the face of uncertainty.[105] Just as we need to trust others in order for societies to flourish,[106] we need ways to assign that trust based on limited information. Miranda Fricker similarly argues that it may be socially constructive to generalize by comparing what someone is telling us to our own previous observations or to what we have been taught.[107] It is beneficial to rely on these heuristics when they are accurate. They help us make better decisions more quickly. To quote Fricker, this "social categorization of speakers" helps us interact productively with one another.[108]

Credibility assessments may vary widely from person to person because they depend largely on the assessor's subjective lived experience, beliefs, or position in the world.[109] Unlike scientific findings, which must be replicable in order to have weight, credibility judgments are inherently irreplicable. Most importantly, the credibility judgments we make of strangers are based on observations that may have nothing at all to do with truthfulness. Rather, these judgments have to do with our expectations about how believable people should look and act in particular situations.[110] Indeed, psychology researcher Alexander Todorov explains that part of our impressions of strangers are driven in large part by how our brains are wired.[111] We are very good at making connections between

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103. FRICKER, EPISTEMIC INJUSTICE, *supra* note 102, at 30.

104. *See, e.g.*, Guri C. Bollingmo, Ellen O. Wessel, Dag Erik Eilertsen & Svein Magnussen, *Credibility of the Emotional Witness: A Study of Ratings by Police Investigators*, 14 PSYCH., CRIME & L. 29, 34–35 (2008) (finding rape complainants disbelieved if not displaying emotions expected of victims).

105. Tversky & Kahneman, *supra* note 102, at 1124–31.

106. *See, e.g.*, NIKLAS LUHMANN, TRUST AND POWER 39 (Christian Morgner & Michael King trans., 2017) (1973) (suggesting that trust "lies at the foundation of law" and enables "reliance upon other people"); *see also* ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 32–33 (1990).

107. FRICKER, EPISTEMIC INJUSTICE, *supra* note 102, at 32.

108. *Id.*

109. Legal articulations of the "factors affecting credibility" miss this point as they focus exclusively on features of the speaker rather than the listener. *See, e.g.*, BERGMAN, *supra* note 84, at 52 (listing "factors affecting credibility" as "[e]xpertise[,] [m]otive or [b]ias[,] [r]eason to [r]ecall[,] [d]emeanor," and "[c]haracter for [h]onesty").

110. Simon-Kerr, *Uncovering Credibility*, *supra* note 101, at 587.

111. *See* ALEXANDER TODOROV, FACE VALUE: THE IRRESISTIBLE INFLUENCE OF FIRST IMPRESSIONS 244–45 (2017).

faces and characteristics for people we know.[112] In other words, we associate the characteristics of people we know—whether good or bad—with their faces.[113] We then use those associations when we form impressions of strangers.[114] This means that if a stranger's face looks like our beloved first grade teacher, we will be inclined to trust that person. Because most humans are good at recognizing faces and because we make accurate associations between faces and characteristics when it comes to people we know, we falsely believe that we can make the same kind of connections between faces and characteristics when we form impressions of strangers.[115]

This is where *Black's* definition of credibility as *worthiness* of belief starts to matter. When credibility operates as a measure of how well the person being judged can assimilate to the expectations of the person doing the judging, or even how familiar a speaker's face appears, it is a powerful mechanism for reinforcing norms and perpetuating biases. Most of us want and need to be believed, and those of us who can may seek to act in ways that will give us the capacity to be believed. We shape our behavior and sometimes our appearance in order to appear credible.[116] For those who are unable to conform, perhaps because of immutable characteristics or fixed status markers, shape-shifting into a form that seems *worthy* of belief is impossible.[117] It is very difficult to counteract biased understandings of what it looks like to be worth believing. These understandings can thus operate within the legal system to presumptively discredit certain groups.

In addition, in conditions where a person's capacity to be believed comes to reflect how worthy of belief a speaker seems to the person with whom she is speaking, it matters who is judging credibility. For example, in a recent celebrity trial where actors Amber Heard and Johnny Depp, a formerly-married couple, sued each other for libel, Heard's account of abuse in the relationship was by most accounts plausible and backed by

112. *Id.* at 259–63.

113. *Id.*

114. *Id.*

115. *Id.*

116. Bennett Capers describes this phenomenon in *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 874–79 (2018). He writes that both prosecutors and defense attorneys counsel witnesses on how they should dress in court so that they project the image desired, which, in turn, is a way to gain credibility with the jury. *Id.* at 874–76. Professor Capers aptly characterizes this as "using clothing as evidence." *Id.* at 876.

117. *See id.* at 883–84 ("[I]t is problematic that jurors may invest meaning in something that is likely to be beyond the defendant's control, that is demonstrably unreliable, and that is racially contingent.").

evidence.[118] An earlier trial involving largely the same evidence resulted in a judge validating her accusations as "substantially true."[119] At the second trial in front of a jury, however, Depp received a net award of millions of dollars in damages.[120] Pundits put this down to credibility: one judge might find a speaker wholly incredible, while another may believe that person implicitly.[121] Commentators on the jury trial believed that Depp seemed "more trustworthy" while Heard's demeanor created an "intuiti[on]" that "she was not being honest."[122] That both participants in the trial drama were actors highlighted the "element of performance involved."[123] But the jurors' knowledge that it was a performance did not diminish the efficacy of Depp's acting. Features beyond the parties' control, such as the judge or jurors' characteristics, socialization, or life experiences, may also have influenced the differing verdicts. More generally, fact-finder characteristics likely contribute to systematic problems with how witnesses' worthiness of belief is assessed. This is of particular concern in cases involving people of color.[124] It is also a recognized problem in sexual assault cases where women have historically contended with reduced credibility.[125] As this example shows, the sense that an abuse victim is unworthy of belief may persist despite strong evidence in the form of witness testimony, texts from the abuser, audio recordings of his apologies, or even a video of him in an intoxicated and angry state.[126]

Finally, assessing witnesses' worthiness of belief is a distinct enterprise from thinking about the persuasiveness of their stories. Whether they appear forthright or not, or even whether they look like our first-grade teachers, bears no necessary relation to whether they are telling a story that makes sense in light of our understanding of the world. The example above demonstrates as much. Of course, our perception of the narrative

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118. Michael Hobbes, *What Really Happened at the Amber Heard-Johnny Depp Trial*, SLATE (June 3, 2022, 6:56 PM), https://slate.com/culture/2022/06/johnny-depp-amber-heard-trial-verdict-evidence-truth.html [https://perma.cc/F3MD-7XFJ].

119. Gene Maddaus, *Johnny Depp Wins a War of Credibility Against Amber Heard*, VARIETY (June 1, 2022, 5:50 PM), https://variety.com/2022/film/news/johnny-depp-amber-heard-credibility-verdict-1235283140/ [https://perma.cc/3XCS-5PL7].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.*, I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1379 (2010) ("[R]ace is still a factor in credibility determinations.").

125. *See generally* Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008).

126. Hobbes, *supra* note 118.

may influence our perception of the speaker's worthiness and vice versa, but they are distinct conceptual inquiries.

C. *Credibility as Honesty*

> *[I]f the evidence is related to whether he's being honest in his testimony, then it goes to credibility.*[127]
>
> Justice Kagan

By now, it should be clear that Justice Kagan's formulation of credibility cannot resolve our definitional quagmire. It is itself question-begging. What does it mean for evidence to be related to honesty? Justice Kagan does not tell us what factors bear on a determination that a witness is honest, factors that might reflect Justice Alito's worthiness, Justice Barrett's persuasiveness, or something else entirely. Apart from this, Justice Kagan's interpretation proves too much. Much of the evidence in any adjudicatory setting will relate to the honesty of any given witness's testimony because the evidence, along with the witness's testimony, must in most cases be relevant to proving or disproving a fact in issue. From this perspective, Justice Kagan's definition is no definition at all. It largely collapses the question of credibility into the prior question of relevance.

Justice Alito's definition of credibility as worthiness of belief, which was repeated in the *Dai* opinion itself,[128] most obviously contradicts the notion that anything that goes to honesty also goes to credibility. To the extent that credibility means *worthiness of belief*, then a witness can be lying and still have credibility. If a witness's external characteristics, such as her demeanor or her credentials as an expert, lead the fact-finder to find her believable, evidence that contradicts her testimony or suggests that she is biased and untruthful may not change that initial assessment. Of course, evidence related to honesty may affect whether a witness is believable to the fact-finder. But it is equally possible for a witness to be credible in the face of evidence contradicting or casting doubt on her testimony. Consider the judge who credits the testimony of a priest who denies having abused children in his parish despite much evidence to the contrary.[129] Put another way, there are many liars who are credible in the

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127. *Dai* Oral Argument, *supra* note 1, at 28.

128. Garland v. Dai, __ U.S. __, 141 S. Ct. 1669, 1681 (2021).

129. This link between status and credibility is not speculative. Such a pattern of crediting priests in the face of evidence to the contrary is borne out by the most comprehensive early study of sexual abuse by Catholic clergy. The study found that between 1950 and 2002, out of the subset of abuse allegations that were actually brought to police, only 6% resulted in criminal convictions. JOHN JAY COLL. OF CRIM. JUST., THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002 7 (2004).

sense that they have the capacity to be believed. The opposite is also true. Witnesses may lack credibility despite being honest. Consider the witness who testifies truthfully that he was not the person who robbed the bank, but whom the jury doubts because of a prior conviction.[130] If this is the case, then evidence that relates to a witness's honesty does not necessarily go to her credibility.

Similarly, under Justice Barrett's formulation, a witness may tell a persuasive story even in the face of other evidence suggesting dishonesty. Whether a witness's narrative is persuasive is a question we can answer without reference to the witness's honesty. To be sure, evidence that goes to her honesty may influence how persuasive her narrative seems. But it is also possible that such evidence will not shake the fundamental persuasiveness of her story if that story comports better than the others on offer with the fact-finder's conception of the world.[131]

Part of why it may be difficult to grasp the distinctions drawn above is that we cannot refer to evidence as "related to honesty" without being clear what we mean by honesty itself. For purposes of this discussion, this Article uses honesty to refer to an inward-facing state in which a witness believes herself to be truthful. Honesty is thus a close partner of lying, which is also an inward-facing state in which a witness believes herself to be deceptive.[132] Because honesty depends on the speaker's own understanding, it does not need to correspond to outward reality. This is where "truth" is important. Truth is best conceptualized as an outward-facing question. Does this statement match up with some quasi-objective reality in the world? A witness may be honest while making an untruthful statement or believe herself to be dishonest while speaking the truth. Indeed, one contribution of the innocence movement has been to make clear how often witnesses testify honestly to facts which are later proved to be false. For example, sexual assault victims have described how they genuinely believed that they were identifying their attackers when testifying in court, only to discover years later through DNA evidence that

130. *See, e.g.*, Simon-Kerr, *Uncovering Credibility*, *supra* note 101, at 595–96 (describing case of exoneree Calvin Willis, whose rape conviction was handed down in the face of shockingly weak prosecutorial evidence after the prosecutor cross-examined him extensively about his prior misdemeanor convictions).

131. Indeed, Justice Gorsuch seems to be trying to make a version of this point when he asserts in *Dai* that a witness whose story is not persuasive because the physical evidence contradicts it can still be credible. *See Dai*, 141 S. Ct. at 1681; *see also supra* section I.A.

132. Sissela Bok describes this distinction in her work on lying. She writes that "[t]he moral question of whether you are lying or not is not settled by establishing the truth or falsity of what you say." SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 6 (1999). Rather, "we must know whether you intend your statement to mislead." *Id.*

their identifications were mistaken.[133]

If we accept these categorizations, we see that another source of confusion around credibility is whether it hinges on internal honesty, truth in the sense of veracity, or both. One answer might be that credibility is about both the external and internal dimensions of honesty and truth. There is, after all, much interconnectedness between truth and honesty. If evidence contradicts a witness or indicates that the truth lies elsewhere, it may also suggest that the witness is being dishonest.

This brings us to a final problem with Justice Kagan's formulation. When read in its broadest form, it largely collapses the credibility inquiry with the question of relevance. Much of the evidence in any adjudicatory setting will at least potentially relate to the honesty of the witnesses because the evidence, along with the witness's testimony, must in most cases be relevant to proving or disproving a fact in issue. If a witness testifies to certain facts and other evidence goes to those same facts, it often has some bearing on the truth of the witness's claims, which can, in turn, have a bearing on the honesty of that witness's testimony. In addition, evidence tending to show a witness's bias, cross-examination showing flaws in a witness's testimonial capacities, such as memory, narration, sincerity or belief, and prior inconsistent statements may also be relevant to truth as well as honesty.[134] So if anything related to honesty also goes to credibility, then it is unclear how we would put boundaries around a credibility inquiry. Under such a definition, virtually all evidence is relevant to credibility to the point where it ceases to be a useful concept. There is little need to refer specifically to credibility if the term simply encompasses the balance of the evidence as it relates to believing a particular witness.

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133. *See* Corina Knoll, Karen Zraick & Alexandra Alter, *He Was Convicted of Raping Alice Sebold. Then the Case Unraveled.*, N.Y. TIMES (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/nyregion/alice-sebold-anthony-broadwater.html (last visited Dec. 12, 2022) (describing Sebold's genuine but mistaken belief that she had correctly identified her rapist as part of broader pattern in which "misidentifications by eyewitnesses, especially those that are cross-racial, make up a large percentage of erroneous convictions"); *see also, e.g.*, RONALD COTTON & JENNIFER THOMPSON, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009) (describing Jennifer Thompson's misidentification of Ronald Cotton as her rapist leading to his wrongful conviction and subsequent exoneration). One report found that 80% of sexual assault convictions in which defendants were later exonerated were based on eyewitness misidentifications. Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, at 40 tbl.13 (Univ. of Mich. L. Sch., Working Paper No. 277, 2012), http://ssrn.com/abstract=2092195 [https://perma.cc/RKA3-PCEA].

134. Veracity can be treated as a subset of honesty in the sense that even if a witness believes herself to be telling the truth, if her faulty memory and other evidence suggests she is mistaken, this evidence goes to her "honesty" writ large.

D. *Credibility as Propensity for Truth*

> *[T]he question presented is whether a court of appeals may conclusively presume that an asylum—asylum applicant's testimony is credible and true if there's no explicit . . . adverse credibility determination. And—and your answer to that is no, the court of appeals cannot conclusively presume that the applicant's testimony is credible and true . . .*
>
> *Yes, to a point, Your Honor . . . . [the court of appeals] is to presume the testimony is credible, but there is sometimes a distinction with truth.*[135]
>
> Justice Roberts in colloquy with Neal Kumar Katyal

As described in the previous section, it is unhelpful definitionally to posit that anything relevant to honesty is relevant to credibility. But it is the converse proposition upon which evidence law most often and perniciously insists. As the colloquy above intimates, that converse proposition holds that anything the law *says* is relevant to credibility is probative of a witness's propensity for truthfulness. Credibility doctrine assumes that evidence admitted to impeach witnesses' credibility will generate information about their propensity for being truthful. For example, fact-finders may be told that witnesses have prior convictions.[136] They may also be instructed to be alert to demeanor and to whether or not the witness *appears* trustworthy.[137] And they may hear from witnesses who tell them that another witness has a bad reputation in the community for truthfulness.[138] Courts and scholars alike treat these markers as evidence that should tell us something about a witness's "propensity for truthfulness."[139] Yet, they can answer only one question well: whether a witness seems worthy of belief. Thus, rather than indicia of reliability, these components of credibility evidence line up nicely with Justice

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135. *Dai* Oral Argument, *supra* note 1, at 49–50.

136. *See* 36 AM. JUR. 2D *Proof of Facts* § 747.I.1, Westlaw (database updated Oct. 2022) ("The use of prior criminal convictions to impeach the credibility of a witness or criminal defendant is generally permitted by nearly every American jurisdiction.").

137. *See* Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 173 (2020) [hereinafter Simon-Kerr, *Unmasking Demeanor*].

138. *See, e.g.*, FED. R. EVID. 609 (permitting impeachment with prior convictions).

139. *See, e.g.*, PARK & LININGER, *supra* note 2, at 127 (discussing impeachment with prior convictions in terms of its efficacy in predicting witness's "propensity for truthfulness"); United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983) (discussing which crimes bear on a witness's credibility by showing a propensity for truthfulness); Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DEPAUL L. REV. 701, 736 (2022) (equating "credibility determination" with "lie detection" in discussing the role of technology in dispute resolution).

Alito's dictionaries and their emphasis on external markers that make a witness capable of being believed.

Importantly, these worthiness-centered methods of assessing credibility cannot be justified if the goal is to identify a propensity for truthfulness. Prior convictions are routinely admitted as bearing on credibility, but there is no evidence that they are probative of a witness's likelihood of lying on the witness stand.[140] Rather, such convictions are a societal black mark, often making their bearers ineligible to vote or gain employment.[141] A witness's demeanor, which is not relevant evidence other than for purposes of identification, also becomes central because of the jurisprudence of credibility.[142] But research shows that humans are quite bad at identifying lies based on demeanor alone.[143] In fact, focusing on demeanor may make us worse at assessing lies when we have other information.[144]

Put simply, as Neal Katyal points out in the colloquy quoted at the beginning of this section, it is wrong to flatly equate a witness's credibility with her propensity to tell the truth. Sometimes there is "a distinction."[145] And because the factors the law makes relevant to credibility are not *necessarily* relevant to truth, or even to honesty, the distinction is crucial. A person tells the truth if what she describes corresponds to measurable reality. She is honest if she believes herself to be truthful. Yet her credibility will depend on the perceptions of the fact-finder as informed by factors that may not track truthfulness or honesty. Under the definitions offered at oral argument in *Dai*, among other things she may be credible if her demeanor makes her appear worthy of belief or if her narrative

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140. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 66 (arguing that scientific research does not support the notion that prior convictions can predict untruthfulness on witness stand).

141. *See, e.g.*, Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–94 (2010) (offering an overview of prominent collateral consequences in the United States, including "exclusion from public or government-assisted housing, employment-related legal barriers, ineligibility for public benefits, and felon disenfranchisement").

142. Doctrines of appellate review privilege the jury or judge's credibility findings because of those players' unique access to demeanor. *See, e.g.*, FED. R. CIV. P. 52(a)(6) (establishing clear error standard of review for appellate courts reviewing trial courts' findings of fact because appellate judges are not privy to the demeanor of the witnesses). Jury instructions similarly emphasize the importance of demeanor to credibility. *See* Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 323 (2020) ("Most pattern instructions have a generic instruction about how to evaluate witness testimony that discusses a number of factors like memory, demeanor on the stand, and whether the witness has any bias."). And the prohibition against hearsay itself has a basis in the notion that without access to a witness's demeanor, we cannot assess her credibility. Simon-Kerr, *Unmasking Demeanor*, *supra* note 137, at 162.

143. Simon-Kerr, *Unmasking Demeanor*, *supra* note 137, at 166–67.

144. *Id.*

145. *Dai* Oral Argument, *supra* note 1, at 50.

corresponds with the fact-finder's conception of the world.[146] These inputs to credibility have the power to tell us much about how worthy of belief a witness appears, but they are not a reliable indicator of the same witness's actual propensity for telling the truth.

III. SYSTEMATIZING CREDIBILITY

Thus far, this Article has explored four ways of conceptualizing credibility. It has suggested that they are distinct, and that the variations between them matter. It has also argued that confusion surrounding credibility is both deeply embedded within the law and problematic. This final Part makes a modest proposal. Legal actors can and should be clear what we mean when we talk about credibility. As the Conclusion elaborates, without such effort, credibility assessments reduce to intuitions about which witnesses seem worthy of being believed. Although conceptual reframing may not change that default, without such efforts, lawyers and judges will have no need to reckon with the problematic bases of their assumptions about credibility.

The taxonomy provided in Part II assists in such an enterprise. There are four primary referents for credibility. First, credibility may refer to the persuasiveness of a witness's narrative. Second, credibility may reflect our perceptions of the witness's worthiness of being believed based on demeanor or other information about the witness. Third, credibility may be understood as a metric of honesty that indicates whether the other evidence in the case suggests a witness is being honest as opposed to deceptive. And finally, credibility is often used as a synonym for truth in the sense that once we have decided evidence goes to credibility, we suggest that it also has a bearing on truth itself.

One way of grouping these concepts is by using the matrix below. We can think of credibility evidence in terms of whether the information offered is specific to the case as opposed to being more broadly about the witness's characteristics. Put another way, we can distinguish evidence focused on whether the witness is untruthful in the moment (case specific) from evidence that might show the witness is generally untrustworthy (case unspecific). Separately, we can ask whether the inputs are, in fact, helpful in identifying true statements in the courtroom (truth focused) or whether they are instead truth unfocused in that they employ unproved or disproved social signifiers of believability.

146. *See supra* Parts I, II.

Fig. 1. Credibility Matrix

	Truth Unfocused	Truth Focused
Case Unspecific	• Worthiness of Belief (prior convictions, demeanor)	
Case Specific	• Worthiness of Belief (demeanor) • Persuasiveness (matching fact-finder's assumptions)	• Evidence in the case • Persuasiveness (matching real world observation)

This matrix illustrates graphically the error in the pervasive claim that all inputs to credibility have a bearing on truth. Simply labeling a piece of evidence relevant to credibility does not render it truth-focused. Whether a piece of evidence is tailored to truth or agnostic to it instead requires careful analysis. As the credibility matrix shows, some concepts may fit into multiple categories, depending on what type of evidence is being adduced and how the fact-finder is using it. If a fact-finder believes that because a witness looked away while testifying, she was telling a lie, that is case-specific but also truth-unfocused in the sense that scientific studies have found there are no reliable demeanor-based indicators of lying.[147] If a fact-finder believes the witness looks untrustworthy, that is case-unspecific as well as truth-unfocused. Similarly, witnesses' prior convictions are both case-unfocused in terms of what they reveal about possible lying on the witness stand and truth-unfocused in the sense that we lack any evidence that those with prior convictions are more likely to lie as witnesses. Of course, these forms of credibility evidence do track preconceptions about what makes a witness worthy of belief.

Persuasiveness requires a similarly nuanced analysis. If a fact-finder is unpersuaded by a witness's story because in his mind someone who had the experience the witness describes would have behaved differently, that is case-specific but may also be truth-unfocused. An example of such a scenario is fact-finders who disbelieve testimony about a sexual assault that involved delayed reporting because of the widespread myth that

147. *See, e.g.*, Aldert Vrij, Maria Hartwig & Pär Anders Granhag, *Reading Lies: Nonverbal Communication and Deception*, 70 ANN. REV. PSYCH. 295 (2019) (conducting overview of research on deception and detection and concluding that "research consistently shows that attempting to read truth and deception results in very poor accuracy rates, most likely because the behavioral traces of deception are faint").

victims of sexual assault will report immediately.[148] By contrast, if the witness tells a story about a UFO landing in her yard and the fact-finder finds that unpersuasive, that is both case-specific and truth-focused. Finally, it is worth noting that although the intersection of case unspecific and truth focused evidence is empty in the matrix, in previous work I have argued that a limited category of information would fit in that box, at least at present: evidence that the witness has lied on the witness stand previously.[149]

Referring to so many disparate forms of evidence under the umbrella of credibility perpetuates the fiction of a functional, truth-oriented legal construct. It is thus worth a brief thought experiment to ask whether the word "credibility" itself has a useful function in the law. Could we not simply talk instead about narrative persuasiveness, honesty, evidence related to truth and worthiness of belief? The answer is that we could. There is no reason that we must use credibility to represent these concepts. Yet, bringing clarity to this area is not as easy as simply removing a shape-shifting word. As the Supreme Court has ably demonstrated, the concepts that inform legal understandings of credibility are difficult to explicate. Much of credibility jurisprudence treats the whole topic of credibility as a matter of lay intuition or common sense that needs no analysis. Concepts that are understood as related to credibility also interact in complex ways with distinct questions like the difference between questions of fact and questions of law. In the absence of the credibility label, rather than offer clarity on the reasons for disbelieving a witness, courts might simply substitute some other word, like truthfulness, for the disparate package that now falls under the banner of credibility. Perhaps more importantly, any argument that we should eliminate credibility is likely a non-starter within a legal system in which the term is both foundational and taken for granted.

Even without a drastic change in verbiage, however, the system offered here would enable courts, commentators and lawyers themselves to achieve greater clarity about what they mean when they talk about credibility. For example, a judge in a case involving a car accident may find herself persuaded that most of the evidence is inconsistent with a certain defense witness's testimony. The witness may have offered conflicting statements or been shown to be biased in some way. Thus, the judge may discount the testimony of the defense witness because the evidence indicates a lack of honesty, and the judge might be well-justified

148. *See generally* Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992).

149. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 66, at 221–23.

in making an adverse credibility finding based on that lack of honesty. In communicating such a finding, the judge should be clear that the problem was the honesty of the witness as indicated by inconsistent evidence in the case, inconsistent testimony, or the witness's bias, among other things. Or, to offer a second example, a judge adjudicating a family law dispute might find that the father's narrative about how much time the children spent with him was highly persuasive. The judge might therefore choose to believe the father's account. Once again, such a finding falls under the umbrella of credibility but should be explained as a result of narrative persuasion.

These first two examples have implications for appellate review. The standard explanation for appellate deference to the credibility findings of lower courts is that the trial judge is the only one who may see "variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."[150] Yet, credibility judgments that turn on persuasiveness or honesty findings are at least theoretically reviewable because they are based on information contained in the record. The story told by the father or the inconsistencies offered by the defense witness are not intangible and fleeting like a witness's demeanor.[151] Instead, they continue to exist on paper long after the proceeding is over, providing a basis upon which an appellate court can offer a meaningful reexamination. We might go so far as to identify certain bases for credibility judgments as truth-focused and others as truth-unfocused and prescribe different standards of review accordingly. With greater clarity on what type of inputs are going into a credibility judgment, we can see what conclusions follow from that judgment and how those conclusions can be reviewed. Such credibility mapping would also demystify the question at the heart of *Patel* by making it easier to be clear about how credibility featured in an immigration judge's factual determination about a witness's earlier conduct. Along these lines, it has the potential to allow appellate judges to identify when biased credibility assessments have colored a lower court's analysis of the facts and led to an unjust outcome.

For a third example, we might turn to criminal cases in which defendants are impeached with evidence of their prior convictions. In such cases, courts frequently decide which convictions may be introduced by opining on the extent to which a prior convictions is relevant to the witness's propensity for truth.[152] Crimes of violence, it is said, do not

150. Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985).

151. *See, e.g.*, United States v. Zeigler, 994 F.2d 845, 849 (D.C. Cir. 1993) ("Demeanor evidence is not captured by the transcript; when the witness steps down, it is gone forever.").

152. *See, e.g.*, United States v. Devery, 935 F. Supp. 393, 408 (S.D.N.Y. 1996) ("Just as mundane

relate to a witness's truthfulness, while crimes like theft are relevant.[153] Such credibility myths mistake the true rationale for the evidence, which is not that it tells us about the witness's propensity for truthfulness, but instead that it is extremely probative of whether the witness should be deemed *worthy* of belief.[154] If this rationale were accurately understood, the Supreme Court's own definition—that credibility means worthiness of belief—would be the most revolutionary category in this taxonomy. It would allow courts to drop the fiction that such evidence is truth focused and instead decide which prior convictions the jury should know about because, as a cultural matter, they make people unworthy of belief. Being discredited could at last be properly conceptualized as another collateral consequence of a conviction.

A fourth example might come in an asylum case where a judge faces an applicant with a plausible narrative and country condition reports that suggest she may be telling the truth. But if the witness is unable to meet the judge's gaze or offer coherent responses to questions, the judge may find her lacking in credibility. In such a situation, the judge should be explicit about the form of credibility deficit she has found.[155] In this instance, the deficit is that the applicant's demeanor was problematic. In other words, she did not demonstrate a capacity to be believed. This type of worthiness-centered finding is classically insulated from review. A court of appeals cannot see or hear the witness and is therefore thought to be unable to second guess the trial court's opinion of her demeanor.[156]

Conceptualizing prior convictions and demeanor properly as being

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misconduct may be telling of a witness's character for truthfulness, the loathsomeness of prior misconduct does not necessarily bear on the perpetrator's capacity for truth-telling."); Gordon R. Fischer, Annotation, *Propriety of Using Prior Conviction for Drug Dealing to Impeach Witness in Criminal Trial*, 37 A.L.R.5TH 319 (1996) (collecting cases showing split in whether drug convictions are admissible to impeach witnesses and noting that "a substantial minority of courts have determined that a prior conviction for drug dealing is not probative of an individual's lack of veracity").

153. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 66, at 196–203 (describing emphasis in impeachment jurisprudence on perceived connection between prior convictions and lying); *see also, e.g.*, United States v. Estrada, 430 F.3d 606, 617–18 (2d Cir. 2005) (approving the "analytic value" of longstanding distinction between crimes of violence, which don't bear on truthfulness, and crimes, like theft, that bear on a person's integrity).

154. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 66, at 207–11.

155. The BIA does require a specific description of the factors that an IJ relies on when discounting an applicant's credibility based on demeanor and has sometimes overturned such findings when not based on "specific and cogent reasons." Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998) (articulating reason-giving requirement and approving IJ's credibility finding supported in part by observation that asylum seeker testified in a "very halting" and "hesitant" manner); *see also* Matter of B-, 21 I&N Dec. 66 (BIA 1995) (sustaining asylum-seeker's appeal because IJ's credibility finding was based on lack of eye contact, which the BIA found did not "necessarily indicate[] deception," particularly in the context of the other evidence).

156. Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985).

truth unfocused, or going to a witness's worthiness of belief rather than her honesty, raises questions about whether such practices are normatively desirable. Even without grappling with those bigger questions, which I take up in the conclusion, the conceptualization would provide additional avenues for appellate scrutiny. Reviewing courts would not be entitled to conclude from a finding of a worthiness-centered credibility deficit that the witness was, in fact, lying or that her evasive eyes meant her story was false. If the other evidence were sufficiently strong, it might be clear error for it to be outweighed simply by impeachment with a prior conviction or failing to present an appropriate demeanor.[157] In addition, reviewing courts might reconsider the types of prior convictions that should carry collateral consequences in the courtroom. This type of frank reexamination, freed from a misguided need to weigh convictions as markers of truthfulness, might generate legislation or rule adaptations.

In addition to these benefits, a credibility schema could change the incentives that surround adjudication itself. At present, participants in the system have every incentive to discredit opponents through avenues that sound in worthiness. They are well advised to play on stereotypes of disreputability and weaponize minor yet damning prior convictions. Success in such endeavors may not only provide victory but also largely insulate the victory from meaningful appellate review.

CONCLUSION

Some might object that credibility assessments are rarely so simple as the vignettes offered in the preceding Part. A witness may appear untrustworthy while also offering testimony that is internally inconsistent or doesn't align with the other evidence. If credibility assessment is partly intuition, how is a judge to know which factor mattered most in her assessment of the witness's credibility? Credibility judgments made by jurors are even more opaque. Perhaps disentangling the distinct conceptions of credibility is a fool's errand in a system that has incentivized reasoning as little as possible about credibility. The answer to this objection is that the status quo does have a place in the taxonomy. When a judge is unable or unwilling to articulate why a witness has a credibility deficit, that amounts to a worthiness finding. Without categorizing its origins, the judge is acting on a sense that a particular

157. Careful courts already make such findings. *See, e.g.*, Feng Yu v. Sessions, 695 F. App'x 8, 11 (2d Cir. 2017) ("Given the initial lack of clarity in the question, this single example of a lack of responsiveness does not support the IJ's conclusion that Yu was testifying from a script rather than from actual memory or that his demeanor alone was sufficient grounds for the adverse credibility determination . . . .").

witness lacks the capacity to be believed.

It is precisely because the status quo contains so many visions of credibility that at present, we must bow to Justice Alito and his dictionaries. Credibility is best understood as something that the law uses to encapsulate "worthiness of belief." As Justice Roberts points out, it is highly subjective.[158] Judges may care about different metrics and care to different degrees when they assess it. It is not independently measurable because each judge may view it differently. And so it is critical that credibility not be mistaken for a measure of truthfulness, reliability, or honesty. Rather, it tells us something about the witness's performance on the stand and possibly about her status in society.

In this time of social dissensus, particularly around truth, it matters that worthiness is our de facto credibility metric. To see this, it is helpful to recognize that credibility judgments are a daily part of civil society. They allow us to entrust people we have never met before with fixing our cars or our bodies and to make other decisions that depend on interpersonal contact with strangers. Attempting to comply with the dictates of a credibility-based society itself creates and reinforces norms. We shape our behavior in ways that we hope will make us seem credible. These performances, in turn, reflect and reinforce norms relating to credibility.

Credibility within the law is also a potent vehicle for reinforcing norms. But because it has been doctrinally centered around certain metrics of worthiness, in particular demeanor and prior convictions, it has served to reproduce outmoded or even problematic social values. Dressing conservatively, speaking in the tones expected, and telling the right story all help a witness be seen as credible in the courtroom. At one time, jurors and judges might have largely agreed on what attributes would give a witness the capacity to be believed. And most legal actors may have accepted until recently that respectful attire and certain speech patterns connoted a truthful witness. But these are no longer defensible claims. Turning to other metrics of credibility is no solution. Even as the carceral state invaded communities of color in unprecedented ways towards the end of the last century and into the current one, the law continues to single out prior convictions as crucial indicators of the propensity for lying.[159] In this way, in addition to reinforcing outdated behavioral norms that are often unreachable by those who are least privileged, credibility has become an unyielding avenue for racial bias within the system.

The law's approach to credibility is, simply put, unjustifiable. The white men who once ruled this country and its courts almost exclusively

158. *Patel* Oral Argument, *supra* note 13, at 40.

159. *See supra* section II.D.

may once have had a uniform vision of credibility. Indeed, defining the behavior that would accord financial and social credit was a self-conscious project of the founders, who saw in such an enterprise a mechanism for stable and productive business relations.[160] Credibility jurisprudence has not strayed far from these values in the subsequent centuries.[161] We still code crimes of violence as less related to credibility because honor norms once suggested as much, we still impeach women with evidence of prostitution convictions because at one time a dishonorable woman could not have credibility, and we still embrace the notion that one's reputation in the community for truth or falsity is both distillable and worth discussing in a court of law.[162] More broadly, the notion that there is such a status as being worthy of belief was once the foundation of laws that prohibited witnesses from testifying on the basis of race.[163] This certainty that worthiness should form the essence of credibility within the law has been untouched even as the power structures that created it, and that it serves to reproduce, have begun to crack. Credibility jurisprudence is built on this crumbling foundation. That is a painful truth that we ignore at our peril.

It may be easy to insist that all of the evidence in a case that has to do with honesty has to do with credibility. It may be convenient to fold persuasiveness and all its amorphous content into the idea of credibility. It may be helpful to the Court—and the legal world more broadly—to accept the fiction that by inputting measures of a witness's worthiness of belief, we can learn her propensity for truthfulness. But neither the convenience of these false equivalences, nor their durability within our system of law can make them true.

Perhaps now, at long last, in a country facing dissensus about basic concepts like facts and truth, it might be possible to see the attenuated place of credibility in law. If we ever did, we can no longer claim a unitary vision of what gives a person the capacity to be believed. In such a world, it is debatable what the concept of credibility can offer our system of adjudication. At best, it is a useful excuse for judgments in hard cases. At worst, it is a tool for jurists, honestly or not, to skirt the truth.

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160. *See, e.g.*, Julia Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1012 (describing the founders' focus on promoting certain conceptions of male honor as a way to promote industry in the new nation).

161. *See* Simon-Kerr, *Credibility by Proxy*, *supra* note 66.

162. *Id.*

163. *Id.* at 165–66.