

**JUDICIAL CONFERENCE ADVISORY
COMMITTEE ON EVIDENCE RULES**

**SYMPOSIUM ON SCHOLARS' SUGGESTIONS
FOR AMENDMENTS, AND ISSUES RAISED BY
ARTIFICIAL INTELLIGENCE***

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DISCUSSION ON SCHOLARS' SUGGESTIONS FOR AMENDMENTS
AND ISSUES RAISED BY ARTIFICIAL INTELLIGENCE

CHAIR SCHILTZ: As those of you who have been in the rules work for a while know, rules work is cyclical. During the time I've been Chair of the Advisory Committee on Evidence Rules, we've had two packages of amendments that have gone through. The first package will take effect on December 1, 2024, and that's the package that is led by the amendment to Rule 702 on expert testimony.¹ And then we have another package that was just approved by the Judicial Conference and sent to the U.S. Supreme Court, and that package is led by the new rule on illustrative aids and a number of other rules.²

So, we've basically cleared the deck, and we also have a number of new members or almost-new members. So, I thought it would be helpful to have more of a thinking meeting than an action meeting.

I asked Dan Capra to invite to our meeting a handful of highly respected top evidence scholars to tell us one or two ways in which they would amend the Rules of Evidence if they were king or queen of the evidence world. And as always, Dan's execution was great, and in a minute I'm going to turn it over to him to introduce our guests and to moderate the discussion.

After we're done hearing from the professors, we will have another presentation from Professor Grossman and Judge Grimm, who are going to

1. *See* ADVISORY COMM. ON EVIDENCE RULES, ADVISORY COMMITTEE ON EVIDENCE RULES: APRIL 28, 2023, at 28 (2023), <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-evidence-rules-april-2023> [<https://perma.cc/7EDW-QA3W>].

2. *See* COMM. ON RULES OF PRAC. & PROC., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE 19 (2023), https://www.uscourts.gov/sites/default/files/september_2023_standing_rules_report.pdf [<https://perma.cc/Y35U-Y5N5>].

present on the evidentiary problems raised by artificial intelligence [“AI”] and in particular by deepfakes, and Dan will moderate that discussion as well.

So, I think, with that, Dan, I’ll turn it over to you.

PROF. CAPRA: Thank you, Judge Schiltz. I’m really happy to have the five scholars that we have here today.

Our first presenter is Professor Jeff Bellin from William & Mary Law School, who is at the top of the field in not only evidence but also criminal procedure. He once appeared before the Committee on the panel discussing electronic evidence, and he had views on e-hearsay that we talked about and considered,³ so we appreciate you coming back, Jeff, and I’m going to leave it to you.

PROF. BELLIN: Thanks. I had a good enough experience that I returned when Dan decided to call again. And just to stress it’s an honor to be here. As Dan mentioned, I do have an affinity for criminal procedure issues. I’m a former prosecutor. But evidence is where my heart is, and the “Supreme Court” of evidence is really the Federal Rules of Evidence Advisory Committee, so in my world, this is the Super Bowl, which is why I’m here.

And also, you have to know me a little, but I don’t like to travel, never been to Minneapolis. I see people who have family and cousins. I’ve got none of that.

[Laughter.]

PROF. BELLIN: This is as dressed up as I get. I made the effort to dress up this much, wrote an actual written submission,⁴ all because I think what I’m going to talk about is really important. I wrote a casebook on evidence.⁵ I wrote the Wright & Miller hearsay volume for evidence.⁶ I’m well-versed in everything that’s going on in evidence in the academic community. And when Dan said, “Tell the Advisory Committee about the one rule you think is the biggest problem, the biggest sore on the evidence landscape,” it’s Rule 609, and it’s been that way for a long time. I’ll tell you a story about how it started for me. Like I mentioned, I was a prosecutor in the U.S. Attorney’s Office in Washington, D.C. I had a trial and in the case file was a prior record for one of the witnesses that the defense called. So, the defense called the witness, and he’s an older gentleman, and you could see he’s dressed up for court, and he testified that he had come to the trial to be a good citizen, and that was the image he was portraying, and you could see the jury liking him.

But I’m a new prosecutor, and I’ve got the file. And what you’re supposed to do with a defendant witness is, if you’ve got a prior conviction like he did, I was going to bring that out. So, on cross-examination, I talk about his

3. See generally Jeffrey Bellin, *The Case for eHearsay*, 83 *FORDHAM L. REV.* 1317 (2014).

4. See generally Jeffrey Bellin, *Eliminating Rule 609 to Provide a Fair Opportunity to Defend Against Criminal Charges: A Proposal to the Advisory Committee on the Federal Rules of Evidence*, 92 *FORDHAM L. REV.* 2471 (2024).

5. See generally JEFFREY BELLIN, *THE LAW OF EVIDENCE* (2021).

6. See generally 30B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* r. 801 (2023).

testimony and then I say, “Isn’t it true that you are”—and I can’t remember exactly what the conviction was, but it’s something in the middle-of-the-road type of felony convictions, but admissible—and I brought it up, and this is the part I remember. I remember how hurt he was, the expression on his face when I brought this thing up that he had tried hard to overcome. And it was like he was hoping to have gotten past this and instead, in this moment when he felt like he was really part of society and doing the right thing, here was this prosecutor as part of the process bringing out the thing he least wanted anyone to know about. And you could see that even the jury was hurt on his behalf, and it was just this moment that I’ll never forget.

And part of the reason I remember it is because I had no idea what was happening. I thought I was just doing the rule. The Rules of Evidence say you can do this, and I was going to do this.⁷ That was my thought. But the insight that he had because of his experience was—that’s not really what was going on. What was really going on was I was singling him out as not part of our community. I was saying he’s someone else. Don’t believe him, and not because he made a statement in the past that was different or there’s some bias or interest he had in the case, but don’t believe him because he’s a criminal. And that’s what I was saying when I brought the conviction out.

And when I thought about it later, I felt terrible about that. I didn’t want to be part of a system that said, “Don’t believe him not because anything he said is untrue but because he’s a criminal. He’s different from the rest of us.” And that insight has always stuck with me.

And after that, I was very reluctant to use prior convictions because I felt like there was something unfair about it. It didn’t have anything to do with the case. It was just a way of smearing the witness when I didn’t have something better. Let’s then talk about Rule 609. It’s a long, long rule but at the heart of it is what I just said. This is the insight that this witness, the gentleman, gave me that I didn’t realize. All Rule 609 says is “don’t believe him because he’s a criminal.” That’s it. It’s a lot of words, it’s a lot of legalese, but that’s all it does.

And if you look back at where this rule came from, that’s what Congress said.⁸ I show in my presentation some of the fight in Congress and there was a razor-thin margin, a real debate.⁹ And it was interesting when I look back at it, one of the people trying to keep convictions out of a trial, that really argued against this idea of “don’t believe him because he was a criminal,” is Senator Joe Biden, who in 1974 was young, he’s saying “I’m just a young Senator, but this is wrong.”¹⁰ Rule 609 was passed by a razor-thin margin.¹¹ The expressed rationale was, “We want to be able to tell people ‘don’t believe the witness because he’s a criminal,’” and it’s crazy language where the main

7. Cf. FED. R. EVID. 609.

8. See 120 CONG. REC. 2348, 2376 (1974) (statement of Rep. Lawrence Hogan) (“Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not.”).

9. See Bellin, *supra* note 4, at 2483–86.

10. See *id.* at 2484–85, 120 CONG. REC. 37039, 37082 (1974).

11. See 120 CONG. REC. 37039, 37083 (1974).

sponsor says, “What if the witness is a white slaver?”¹² We have to tell the jury that. And I don’t even know what that means.

[Laughter.]

PROF. BELLIN: But it doesn’t sound like the kind of argument I would want to be on the side of. Look for what is the argument in favor of this rule. What I just told you, that’s actually the reason for the rule. That’s the good side. That was why we should have Rule 609.

You’ll hear other arguments in support of the rule, such as this group won’t like it, this person won’t—the strategic concerns. But there’s no explanation as good as that. That’s as good as it gets. Another argument is that we used to not let people with convictions testify at all and this is better than that.¹³ But “it could be worse” is not a rationale for the rule. Rule 609 is an exception to Rule 404.¹⁴ Rule 404 says we can’t talk about character, and that protection is for everyone, but the main reason for it is so we don’t have the prosecution talk about the defendant’s other crimes and then the jury convicts them because they’re a criminal.¹⁵

So, there’s one tradition in our law that is: we don’t prosecute people for who they are. We prosecute them for what they did and so we’re going to focus on what they did and we’re not even going to tell the jury about past convictions. And that is in Supreme Court cases; I can find all these great quotes about “the person starts with a blank slate and the jury knows nothing about the defendant’s background.”¹⁶ But we have an exception for witnesses.¹⁷ So, for witnesses, you can attack their character, and one of the ways you can attack their character is what I just said. You can say, “Don’t believe him because he’s a criminal.” But when the defendant takes the witness stand, now Rule 609 says, “Oh, well, the defendant’s a witness.” Now you can tell the jury, “Don’t believe him because he’s a criminal,” and that’s Rule 609 letting you do that. The rule is saying, “Go and do that,” like I did in the D.C. case I was telling you about, but here it’s now the defendant.¹⁸ And so we’re telling the jury, “Don’t believe the defendant because he’s a criminal.”

So, under Rule 404 there’s a long tradition of “don’t convict him because he’s a criminal.” But then under Rule 609, we tell the jury, “don’t believe him because he’s a criminal.” And there’s no way they’re going to separate these two concepts. When the defendant testifies, their prior convictions

12. See 120 CONG. REC. 2348, 2380 (1974) (statement of Rep. Lawrence Hogan) (“You simply cannot get away from the fact that, if a thief or perjurer is unworthy of belief, one might be even less inclined to believe a murderer, or assassin, or drug trafficker, or white slaver, or saboteur, or what have you.”).

13. See *infra* note 40 and accompanying text.

14. FED. R. EVID. 404(a)(3).

15. See *id.*

16. See, e.g., *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (“The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.” (footnote omitted)).

17. See FED. R. EVID. 609.

18. See *United States v. Lipscomb*, 702 F.2d 1049, 1077 (D.C. Cir. 1983).

usually come in—I have some examples in the briefing about [the U.S. Court of Appeals for the] Ninth Circuit saying, “Yeah, you can impeach a bank robber with his prior bank robbery conviction because he testified.”¹⁹ That’s the entire reasoning. I know that there are judges who don’t let them in. Fine. But many, many judges—there’s a study in there about this²⁰—are letting all sorts of convictions in.²¹ They’re letting in the same convictions that the defendant is charged with.²² They’re letting in convictions for drug dealing and assault—convictions which are far from perjury.²³ So, even if some judges are getting this right, a lot of judges are getting it wrong.

And so, what that means is the guy that’s on trial for bank robbery, if the jury is hearing that he has a prior bank robbery, he has almost no chance of winning that case anymore—and we know that. That conviction is damaging in two ways. One is that the jury thinks, “Well, he’s a bank robber, so he probably did this one.” That is totally forbidden by Rule 404 but allowed indirectly through the Rule 609 back door.²⁴ Or he’s just some criminal and we don’t care as much about him. So, all that is just anathema to the American system of evidence but coming in through this back door. And defense attorneys know this, we have defense attorneys here, and so, when they say to the judge, “I don’t want the bank robbery conviction coming in” and the judge says, “Well, it’s coming in anyway because Rule 609 tells me to let in these convictions,” then the defense attorney says, “Well, I’m going to advise my client not to testify,” and so the defendant doesn’t testify.

So, there’s two pieces, one is that the person who testifies and gets impeached suffers terrible prejudice, and then the other piece is that most of the defendants who have these prior records that are going to come in just don’t testify at all, and that’s terrible for the system also. The defendant has got a constitutional right to testify.²⁵ The jurors want to hear from the defendant, and when they don’t hear from the defendant—and I’ve done a study on this—when they don’t hear from the defendant, they say, “Huh, he’s not even telling us he’s innocent, he must be guilty,” even though they’re instructed not to, but they think this way anyway.²⁶

So, the jury is assuming that the defendant is guilty when he does not testify. What they don’t realize is that the defendants are not remaining silent because they don’t have a story to tell. They’re remaining silent because, if they testify, their bank robbery conviction comes in, or their aggravated

19. See, e.g., *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991).

20. See generally Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993 (2018).

21. See *id.* at 1034.

22. See *id.*

23. See *id.*

24. See *Perkins*, 937 F.2d at 1406 (allowing the admission of a defendant’s prior bank robbery conviction in a subsequent bank robbery trial).

25. See *Rock v. Arkansas*, 483 U.S. 44, 49–53 (1987).

26. See Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 426–27 (2018) (collecting empirical evidence of the phenomenon).

assault or drug dealing convictions come in. Sometimes—I have an example in there—the judge says the guy’s thirteen prior convictions could come in.²⁷

So, it’s a tremendously distorted, convoluted system all built on this principle that we must be able to tell the jury, “Don’t believe him because he’s a criminal.” And to me, if you say, “I think there’s a lot of important things that the Rules Committee is doing and tweaks to the Rules and such,” okay. But Rule 609 is a tremendous embarrassment. I have to teach these rules to new students, idealistic about law school, and we get to Rule 609, and they say, “Why do we have this rule, we don’t understand what’s going on?” And I don’t have a good answer. I traditionally will say “it is important to be a lawyer and it’s good and it’s a great profession.” I even say “I think that the Advisory Committee does a great job, and the Evidence Rules are as sane and logical as any set of rules.” And I have a joke. (Don’t tell Congress this, but) anytime we encounter a rule that was drafted by Congress, I say, “This doesn’t make sense because Congress drafted it.” But, in this case, this was the original Advisory Committee’s error, and we need to correct errors.²⁸

I know it’s a heavy lift. I know that it’s hard, but we should at least try to start this conversation and pull back the curtain of strategic reasons why we can’t do this. This is the Federal Rules of Evidence Advisory Committee. This is the body that’s charged with safeguarding evidence law. To me, if I were on the Committee, it’s like having an atom bomb in your attic, and you’re out fixing the door so someone doesn’t slip. It’s fine to make these other changes, but at least take on this or maybe you want to explain “We’re going to keep this rule for these reasons,” and maybe there are reasons that I don’t know about, as I’ve been citing this forever. And I’m also open to the idea that it doesn’t have to be this solution of deleting the whole rule. That, to me, is the best way to deal with it. To me, it’s just the whole premise—the rule is rotten, and so tweaking the rule, I just don’t think that works. I think eventually, ten years from now, this rule will be gone. It’s just a question of who’s going to step up and finally deal with this.

But a lesser limitation is better than nothing. If the Committee wants to do other things, I’m happy to talk about those, and then I’ll stop here so I can leave time for Q&A.

But what I present here is the best way to deal with prior convictions. Just stop with the special rule for convictions. We still have Rule 608(b)(1) where you could ask witnesses about bad acts that show untruthfulness.²⁹

The only thing I’m asking, stopping the worst part of this, is to eliminate this argument that the defendant shouldn’t be believed because the defendant

27. *United States v. Crittenden*, No. 23-CR-18, 2023 WL 2967891, at *4 (N.D. Okla. Apr. 17, 2023).

28. *See* Bellin, *supra* note 4, at 2486–87.

29. *See* FED. R. EVID. 608(b)(1) (“Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness . . .”).

is a criminal, at least take that away. That is distorting trials. It's just indefensible. So, let me stop there and answer questions if you have any.

PROF. CAPRA: Questions from the Committee or anybody?

CHAIR SCHILTZ: So, you would leave 609 for nondefendant witnesses?

PROF. BELLIN: It's a great question. What I have is get rid of 609 entirely. And then everything would shift to 608. This is what's so interesting about 609. You don't actually need 609 to do what people are doing with 609 because 608 already lets you with (b)(1)—you can ask the witness about anything that goes to credibility.³⁰ And so, if someone has lied under oath or if they've stolen, the judge has to decide if it goes to credibility, but that's the premise of the conviction rules.³¹

So, if the underlying incident goes to credibility, you would still be able to ask about it under 608(b)(1), but under my proposal, Rule 608(b)(1) would not allow impeachment for the criminal defendant, because then, if we left that, it would just allow the prosecution to just ask about the criminal conviction through 608(b)(1).³² But that's the reason I had to do this, is because 608(b)(1) already does all the work here for bad acts that actually go to credibility. And that's the real tragedy of 609, is I think where it came from was to limit impeachment with convictions because they were so prejudicial, so the thought of many members of Congress was to create some limits on it.

And what Congress did instead was it told judges that there's something about convictions that goes to credibility just as an automatic matter.³³ Instead of looking at each one like you would under 608(b)(1), where you'd have to say, "This goes to credibility," now judges are just saying, "All right, defendant testified, that means his convictions come in under 609," so what 609 did was to create a pathway for introducing these convictions.

MR. COONEY: I don't understand why a criminal defendant should have more protection than other witnesses for convictions that go directly to truthfulness or untruthfulness.

PROF. BELLIN: That's the right question. It has to do with the status of their believability as a witness. And so, if you have two witnesses, one who's just a guy off the street who saw a car crash and the other witness is the criminal defendant, then the question to me is, how much more does the jury

30. *See id.*

31. *See* FED. R. EVID. 609 advisory committee's note on proposed rules.

32. *See* Bellin, *supra* note 4, at 2486–87. Professor Bellin's proposed amendment to Rule 608 provides as follows:

(b) SPECIFIC INSTANCES OF CONDUCT. Except for a criminal conviction under Rule 609, Extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness (if the witness is not a defendant in a criminal case); or
 (2) another witness whose character the witness being cross-examined has testified about

Id. at 2488.

33. *See* FED. R. EVID. 609 advisory committee's note on proposed rules.

need to know about their credibility to get to the truth here? And so, for someone that's just walking off the street, the jury doesn't know anything about them, we'll assume they're telling the truth, and if there's something that we need to tell them—this person is a serial liar or whatever—under 608(b)(1), you can ask those questions.³⁴ For the criminal defendant, everyone knows the criminal defendant is biased—let's say they're on trial for bank robbery and they're facing ten years in prison. The defendant in a criminal case—the jury already treats them as unbelievable. They're not thinking, "Oh, this guy seems really credible." They know he has a huge interest in avoiding convictions, and all they're going to use the prior convictions for is not to say, "Huh, maybe I shouldn't believe him, just take his word for it." They're going to say, "Oh, he's committed crimes in the past, so I'm just going to convict him, not just believe him."

MR. COONEY: I trip at the threshold on that because it seems to me a disinterested witness—they didn't ask to be involved. They're just involved. I mean, they're just a citizen who's been subpoenaed coming in telling what they saw, as opposed to somebody who's been charged with a crime, and so why should we be able to cross-examine the disinterested person who didn't want to be involved more thoroughly on credibility than we do the criminal defendant?

PROF. BELLIN: I don't think it goes to credibility at all. I think it's just a smear. But fine. You said it's like the witness doesn't want to be involved. The defendant doesn't want to be involved. Nobody is volunteering to come in and be prosecuted.

MR. COONEY: Let's say the defendant's charged with securities fraud. And ten years earlier they were convicted of a Ponzi scheme. Now that's going to come in under Rule 404(b) anyway.³⁵

PROF. BELLIN: Exactly. So, for bad acts that actually have anything to do with the case, there are rules for that. So, if it's not character evidence, you could bring it in just per the relevance rules. If it goes to intent or identity or other proper purposes, you can bring it in through 404(b).³⁶

With this amendment, all you all would be doing is—when it doesn't have anything to do with the testimony and it doesn't have anything to do with the case, you can't bring in the defendant's past convictions just because they testified. And that's been the basic foundation of American jurisprudence forever. It's just this weird back door that we've created through 609 and then, not noticing what's going on, just basically automatically letting these convictions in.

PROF. CAPRA: I'm going to call on John Siffert next.

MR. SIFFERT: Stepping back from the likelihood of this getting through I think is remote, but if we step back and see our rules—

PROF. BELLIN: That's awfully cynical for a brand-new member.

34. *See id.* 608(b)(1).

35. *See id.* 404(b)(2).

36. *See id.*

[Laughter.]

MR. SIFFERT: I've been on the Criminal Rules Committee.³⁷

PROF. BELLIN: Okay.

MR. SIFFERT: Very good. So, to the extent that we are talking about rules for trials, there is a diminishing rate of going to trial in the United States, and we are down to, like, 2 to 2-and-a-half percent in New York of cases that go to trial from 22 percent when I was a prosecutor. And to the extent that our charge is to make sure that trials are protected, there ought to be trials. If there's one rule that will change whether there are trials, this is probably it.

PROF. BELLIN: I agree with that. I've talked to defense attorneys, and this is I think what you're saying. They will say, "I have a defense in this case, but I need my client to testify to make that defense, and I can't put my client on the stand because the judge is going to let in their convictions."

MR. SIFFERT: Yes.

PROF. BELLIN: And so, it's really a tragedy, and it gives us innocent defendants who don't testify, so the jury doesn't get to hear from the innocent defendant.

JUDGE SULLIVAN: You've said that defendants are not testifying because of this rule, and I'd be curious as to what is the basis for that?

Because I'd be curious to hear from our defense lawyers who are on this Committee. I mean, I've certainly presided over trials that were white collar cases where the defendant had no prior convictions and it's still a tremendous rarity that a defendant takes the stand. And my experience with defense lawyers is they're generally advising their clients not to take the stand anyway. I'd imagine getting rid of this rule would lead more defendants to testify, but do you have any data to suggest that people are not testifying because of this rule?

JUDGE BATES: And that specifically is because of this rule because you say that in lots of instances other rules are going to get that prior offense in, 404, et cetera, et cetera. So, what's the evidence that this rule actually just impacts a substantial number of defendants?

PROF. BELLIN: There's a couple studies. It's very hard to study, but the main one was a study of hung juries.³⁸ They were trying to figure out why they're a hung jury, but along the way they collected all this information.

In the Innocence Project study, the researcher asked all the people that didn't testify, "why didn't you testify," and I have a quote in the Essay where it says something like 91 percent said it was because of the prior convictions.³⁹

JUSTICE MASSA: Professor, I appreciate your written submission and your discussion of the congressional record and the history of this in the

37. See John S. Siffert, PRACTISING L. INST., <https://www.pli.edu/faculty/john-s.-siffert-i202619> [<https://perma.cc/EB9K-6YTS>] (last visited Apr. 3, 2024).

38. See Bellin, *supra* note 4, at 2483 (citing John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 490 (2008)).

39. See *id.*

seventies, but I'm wondering if you might tell us a little more about the common law roots of this rule that you have distilled as "don't believe them because they're criminals," and is there any research to the contrary that would contradict that notion that convicted felons are certainly less credible than people who have been law-abiding citizens?

PROF. BELLIN: Good questions both. As to the common law, it used to be that if you had a felony conviction you just couldn't testify at all.⁴⁰ And so, what you see over time is statutes providing that we're going to let you testify even if you have a felony conviction now, but the fact of the felony can be shown to discredit you.⁴¹ So it was that they seemed to think, on your second point, that this was valuable, and so that's where it comes from. It was a compromise between "don't let them testify at all" and "just let them testify without impeachment." We'll let them testify, but we're going to then bring in—it's basically automatic—we'll bring in the felony conviction, and that played out across the states and that's how we got the prior convictions.

JUSTICE MASSA: So, is your argument that it's not that it's not probative but that it's too probative?

PROF. BELLIN: I'm not saying it's not probative at all. There are a lot of people in the academic community who would say its probative value is zero and so don't bring it in, but I'm not pushing that.

What I'm saying is when the defendant testifies, the jury is already very skeptical that the defendant's going to be totally honest with them because the defendant is on trial for their life and their liberty. So, like everyone, the defendant is going to shade the testimony and the jury is going to be skeptical assessing that. And some courts are giving instructions to weigh the defendant's testimony accordingly.⁴² And the U.S. Court of Appeals for the Second Circuit, for example, says, of course, jurors already know that.⁴³ Jurors know defendants have a huge incentive to shade their testimony.

So, what I'm saying is the probative value of the conviction—the additional probative value when you say, "Oh, by the way, six years ago this guy was convicted of drug dealing"—there's very little additional probative value there. The jury is not saying, "Oh, well, I was going to believe the witness, but now that you've told me that, I won't." What they are really

40. *See* 92 CONG. REC. 2348, 2381 (1974) (statement of Sen. Trent Lott) ("[T]he prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of a prior felony conviction without restriction as to type of felony.").

41. *See id.* at 2374; FED. R. EVID. 609(a)(2).

42. *See, e.g.,* *United States v. Gaines*, 457 F.3d 238, 246 (2d Cir. 2006); *United States v. King*, 485 F. App'x 588, 590 (3d Cir. 2012) ("Binding Supreme Court precedent has specifically approved jury instructions that refer to a defendant's 'deep personal interest' in a criminal case against him and noted that the jury may consider that interest in determining whether the defendant's testimony is credible." (quoting *Reagan v. United States*, 157 U.S. 301, 304 (1895))).

43. *See Gaines*, 457 F.3d at 246 ("We recognize that our precedents in this area include cases that find no error in similar jury instructions so long as the 'motive to lie' charge is 'balanced' by a further instruction that the motive does not preclude the defendant from telling the truth.").

saying is, “Oh, the witness is a criminal, so now we’re more likely to convict.”

So, it’s very small probative value when it’s the defendant who’s the witness, and then you’re opening the door up to all this danger of the unfair prejudice when the jury learns about this unrelated prior conviction that they’re supposed to not be hearing about, and they’re only hearing about it because of this weird quirk in our rules where, if you testify, it comes in.

PROF. CAPRA: So, let’s go to Judge Sargus.

JUDGE SARGUS: First of all, I like the Essay a lot, but there’s always devil in the details. I think you’d agree.

So, going back to the Ponzi scheme ten years earlier, a prior conviction is inadmissible under Rule 404(b),⁴⁴ and the defendant wants to testify. Assume the defendant was convicted of perjury one year ago. You wouldn’t want 609 to be completely eliminated for that purpose, would you?

PROF. BELLIN: So, I think that’s a hard question, that’s a hard case, but I say, you’re going to have to prove this guy’s guilt of the charged crime without the prior conviction. Just prove the actual guilt of this crime. That’s the whole point, that’s what prosecutors are supposed to do. But you have raised the hardest question, which is don’t some convictions, like perjury, directly speak to untruthfulness? Why deprive jurors of those convictions? And to me, it’s just what you said. The devil is in the details. You’ve got to craft some kind of rule here.

And so, for me, yes, there is more probative value in a perjury conviction. It’s unclear what is the extra probative value for the perjury conviction when it is the criminal defendant who testifies. That’s the hardest case.

But it’s also only a tiny part of what we are talking about; let’s all agree that few people with recent perjury convictions are going to try to testify. And second, like I said, if you talk to jurors after cases, they are not sitting there thinking, “Oh, I believe the defendant.” They already think of the defendant as diminished in terms of credibility. But they do want to hear from the defendant. How the jury assesses the defendant’s credibility if there’s a prior perjury versus not—I think the additional probative value remains still so small that it’s not worth making all sorts of exceptions.

PROF. CAPRA: But that said, one way of dealing with Judge Sargus’s point is to take the fallback position, of getting rid of 609(a)(1) and leaving Rule 609(a)(2) as it is.

PROF. BELLIN: Yes. And that’s where Congress was. That’s the razor edge they were on. We were one vote away from having a rule that allowed convictions only for lying crimes like perjury—a very small universe.⁴⁵

JUDGE SARGUS: The point that I really liked in the Essay is, when someone’s on trial for bank robbery and they’ve got prior convictions for bank robbery, I think that’s allowing impeachment under the rule that is

44. See FED. R. EVID. 404(b)(1).

45. See 120 CONG. REC. 37039, 37082.

completely skewed. And there is data that if the jury knows about prior acts of conviction that are for the same crime that's charged, then it's over.⁴⁶

MR. VALLADARES: From my standpoint as a federal defender and having participated in dozens and dozens, maybe hundreds of brainstorming sessions through the years whether a client should or should not take the stand, unquestionably 609 is the principal deterrent. There is no doubt about that. 404(b) has at least more controls, and you can possibly figure out whether evidence is coming in or not. But 609 is the biggest deterrent from testifying.

I do think, however, that Mr. Siffert is right. I mean, say if we were to take this on as a Committee, it still has to be sold to the Standing Committee, and then to the Supreme Court, and then to Congress.

So, my question to you, Professor Bellin, is that your proposal is to jettison 609 and then modify 608. Short of that, are there controls that can be placed into 609 to prevent some of the problems we've been talking about?

PROF. BELLIN: Yes, great. Two points on that. One, this is a political moment. The President of the United States is the most outspoken opponent of this rule and on the record.⁴⁷ He can't dodge that. And he has issued an Executive Order that says systemic racism is the cause of lots of convictions and we need to do what we can.⁴⁸ Once someone has served their time, it's done. We're not going to keep punishing them for it.

I know there's a [U.S.] Department of Justice [(DOJ)] person here. I think, if the DOJ had to focus on this—and I'm purposely not looking at you, but, like, if they had to focus on this—

[Laughter.]

PROF. BELLIN: —if someone was sympathetic to it, there is an argument now that there didn't used to be that might make this more politically palatable than it has been in the past. I mean, this is a lot less radical than a lot of things that are passing in Congress now about no-knock warrants and similar limitations on law enforcement. So, I think that while it once was true that you'd never be able to get this through, I think it would be a mistake to not do it because you assume it's not going to go through. I think there might be surprises out there. The second point—and this is where Dan Capra was going as well—there is an obvious kind of fallback position, which I'm nervous to say because I feel like now I'm debating myself, but which is to just limit impeachment to what's already in Rule 609(a)(2), meaning only convictions like perjury, embezzlement, the convictions where an element of the offense is lying.⁴⁹ If you could just limit it to those, that's very close to what Congress almost did once. It would look less like a radical reworking because you have kept most of the rule, you just remove one piece of it.

46. See Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 39 (1985); Bellin, *supra* note 26, at 403–04.

47. See Bellin, *supra* note 4, at 2479, 2484–85.

48. See Exec. Order No. 14,074, 87 Fed. Reg. 32945 (May 25, 2022).

49. See FED. R. EVID. 609(a)(2).

And so, if the political resistance was there, that would be the obvious fallback and it would do a lot. I'm nervous about leaving it like, if it's not clear enough, sometimes judges . . . improperly expand the convictions covered by Rule 609(a)(2), but you could make it clearer, I guess.

PROF. CAPRA: The Chair has one final question.

CHAIR SCHILTZ: If we enacted your proposal, I'm concerned about the possibility of reverse prejudice, meaning that when the defendant takes the stand and they've got the thirteen convictions, and the jury assumes that the defendant has no convictions, because if the defendant had them, they would be mentioned. If they're not, it must mean this is the first time this person's ever been charged with a crime. Would you have an objection to a standard instruction that told jurors, under the law, the prior convictions of witnesses are not allowed to be admitted and you shouldn't assume that either there are convictions or there are not?

PROF. BELLIN: I'd have an objection to that because I think then that the jurors would take that as you're saying that there are convictions, and so that always hurts defendants if there are.

But I'll just say a couple other things. One, that assumption is happening now, when the defendant is not testifying. Then there is no impeachment, and the jury is not hearing about the prior convictions, and so . . . if that's a problem, it's already a problem that's baked into our law that we've accepted as a cost of keeping convictions out of the trial. But we're just not going to talk about them. But I would say this: as a former prosecutor, I'm conscious of the fairness here. What defendants shouldn't be able to do is cross the government witnesses with prior convictions and then get on the stand and hide their own. But I think that concern could be handled by limiting the admissibility of the government witnesses' prior convictions. It would be misleading to let those in and not let in those of the defendant, so I agree with you that there are fairness concerns here.

PROF. CAPRA: Thanks very much, Jeff.

PROF. BELLIN: Thanks to the Committee for engaging.

PROF. CAPRA: Our next presenter is Professor Ed Imwinkelried, Emeritus Professor at the University of California, Davis, and one of the foremost scholars on evidence in the country.⁵⁰

PROF. IMWINKELRIED: At the outset, I want to thank you for listening to me this morning.

I'm going to be talking about a very modest topic, Rule 608(b), but I don't want to talk about it in isolation. I want to talk about it in the context of both 404(b) and 609. I've studied 404(b) for decades, and, as you know, it's the most frequently cited evidence rule on appeal.⁵¹ But, in the last few decades, both the courts and the legislature have been tightening the standards for

50. See *Edward J. Imwinkelried*, U.C. DAVIS SCH. L., <https://law.ucdavis.edu/people/edward-imwinkelried> [<https://perma.cc/TTD2-ZKYC>] (last visited Apr. 3, 2024).

51. See Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 771 (2018).

introducing 404(b) evidence.⁵² They've not only tightened the substantive standards.⁵³ There are new procedural restrictions in terms of pretrial notice and limiting instructions.⁵⁴

And I think the predictable result is going to be that over the long-term prosecutors are going to be turning more and more to 608(b) because it's going to be more and more difficult to use the 404(b) door. In the past, when I looked at Federal Supplement advance sheets, I'd ordinarily find multiple 404(b) cases and frequently not a single 608(b) case, but I think that's going to change. The government now has a massive amount of data about the prior criminal activity of an accused.⁵⁵ It's not only computerized. Consequently, it can be shared, and it can be easily accessed. In the past, when a prosecutor was armed with that sort of data, they preferred the 404(b) avenue, and that's understandable. To begin with, under 404(b), it comes in as substantive evidence, not impeachment, and moreover, extrinsic evidence is routinely admissible, which isn't the case in 608(b).⁵⁶

But, if we tighten the 404(b) standards, there's going to be a temptation to shift to 608(b), and the purpose of my presentation today is to try to keep the Committee ahead of the curve on that development.

Now today there are a few splits of authorities related to Rule 608(b). In the past, they haven't been very troublesome. They haven't posed serious problems because there have been relatively few 608(b) cases. But I think that's going to change in the near future, and, consequently, I'd like the Committee to think about these splits of authorities and consider whether they want to proactively stay ahead of the curve, amending 608(b) in light of the foreseeable development of increased resort to 608(b).

Now the threshold question is this: if there's been a prior conviction for the transaction in which the lie occurred, does that conviction preclude resort to 608(b)? As I said, I want to consider 608(b) in the context of 404(b) and 609. 608 and 609 purport to be independent provisions in Article VI, so you would think that they are independent avenues of admissibility. But there are a few cases saying that if there is a prior conviction, you're precluded from using 608(b).⁵⁷ There are only a handful of cases on this issue, but some of them say, if there's a prior conviction, the door to 608(b) is closed.⁵⁸

52. See Edward J. Imwinkelried, *Viewing Federal Rules 404(b) and 608(b) as Parts of the Same Legislative Scheme: The Tightening of Rule 404(b) Makes It the Right Time for the Clarification of Rule 608(B)*, 92 *FORDHAM L. REV.* 2507, 2509 (2024).

53. See *id.*

54. See *id.*

55. See *id.* at 2509–10.

56. Compare FED. R. EVID. 404(b)(2) (permitting evidence of prior criminal acts to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”), with *id.* 608(b) (“Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness.”).

57. See *United States v. DeLeon*, 308 F. Supp. 3d 1229, 1235 (D.N.M. 2018).

58. See, e.g., *United States v. Osazuwa*, 564 F.3d 1169, 1173 (9th Cir. 2009); see also Donald H. Ziegler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003

My initial reaction when I read *United States v. DeLeon*⁵⁹ was this: well, this issue's probably moot because, surely, if there's been a prior conviction, you're going to be held to admit the detail that there was a lie told as a means of committing the crime.

But the more I thought about it, the more I realized I was wrong. To begin with, under 609(a)(1), you're limited in detail typically to the statutory name of the offense.⁶⁰ If you've got a murder in which the person lied to lure the victim to the site of the killing, then the name—the statutory name of the offense—typically isn't going to include a mention of the fact that there was a lie. Now you might think under 609(a)(2), clearly, we've got a false statement or dishonesty. But remember how 609(a)(2) was amended in 2006. It now reads—it applies only “if the court can readily determine that establishing the element of the crime required proving—or the witness admitting—a dishonest act or false statement.”⁶¹ And then the Advisory Committee gives examples, the “indictment, a statement of admitted facts, or jury instructions.”⁶²

But, if there isn't any mention of the lie in any of those, the upshot is, even if it's clear that there was a lie, you're not going to be able to introduce it under 609. And if the issue isn't moot, the issue becomes one of statutory interpretation, and I want to talk very briefly about the text of 608 and the Advisory Committee note.

Rule 608(b) text states “except for a criminal conviction under 609.”⁶³ You could point to that language, but it purports to be a limitation on extrinsic evidence, not a limitation on the right to inquire about the act. Then you can point to the Advisory Committee note, which reads, “Particular instances of conduct, though not the subject of criminal conviction.”⁶⁴ But I'd suggest that the language “though” is ambiguous. Let's suppose you've got a reference to a per se error rate. A court might write, “A violation, though not prejudicial in character, is grounds for reversal.” Meaning that whether or not it is prejudicial it's reversible; just as you could argue here whether or not there's a prior conviction, you can inquire about an untruthful act.

So, it seems to me that there is not only a split of authority here. This would be an issue on which the courts would gain guidance if the Committee

UTAH L. REV. 635, 677 (“[I]t plainly seems unfair to forbid impeachment under Rule 609 . . . but allow the defendant to be questioned about the underlying acts under Rule 608(b).”).

59. 308 F. Supp. 3d 1229, 1235 (D.N.M. 2018).

60. See *United States v. White*, 222 F.3d 363, 370 (7th Cir. 2000); *Ochoa v. County of Kern*, 628 F. Supp. 3d 1006, 1012 (E.D. Cal. 2022) (“[A]bsent exceptional circumstances, evidence of a prior conviction admitted for impeachment purposes may not include collateral details and circumstances attendant upon the conviction.” “Generally, only the prior conviction, its general nature, and punishment of felony range are fair game for testing the [witness's] credibility.” (alterations in original) (citation omitted) (first quoting *United States v. Sine*, 493 F.3d 1021, 1036 n.14 (9th Cir. 2007); then quoting *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009))).

61. FED. R. EVID. 609(a)(2).

62. See *id.* 609(a)(2) advisory committee's note to 2006 amendment.

63. *Id.* 608(b).

64. *Id.* 608(b) advisory committee's note.

would take a position as to whether prior 609 conviction absolutely precludes resort to 608(b). It's a minor issue today, but if we begin shifting more and more from 404(b) to 608(b), certainly, if we begin limiting 609, as Professor Bellin is suggesting, this has become an issue of greater importance.

Now, at this point, I want to turn to an issue that's developed and generated much more case law—namely, the question of should the cross-examiner be permitted to refer to documentary evidence to pressure the witness to concede that they committed the prior untruthful act.⁶⁵ When I was a young evidence teacher, I remember listening to a BARBRI lecture by Professor Faust Rossi, a legendary teacher of evidence at Cornell, and I remember Faust saying, “If it's 608(b), the only thing you can do is directly and bluntly ask, ‘did you lie about that?’” You could pressure them by referring to the laws of perjury, but you couldn't do anything else.⁶⁶

But then later I began reading the occasional references to this issue in *Federal Rules of Evidence News*. Professor John Schmertz used to be the editor of *Federal Rules of Evidence News*, and every so often when the issue popped up, he would make this argument: it doesn't serve the interests of justice to allow somebody to lie again about a prior lie, especially if there would be only a minimal additional expenditure of time.⁶⁷

Consider this example: you've got the accused on the witness stand and the accused lies about a prior lie. But, unbeknownst to the accused, you have a letter that the accused wrote to a friend or relative in which the accused admitted the prior lie. To begin with, you can easily authenticate the letter out of the mouth of the accused, and, secondly, there's no hearsay problem because it's going to qualify as the admission or statement of a party opponent.⁶⁸ So, even without the benefit of a second witness's testimony, you're going to be able to satisfy both authentication and the hearsay standards. And given that, Professor Schmertz argued, if there's only a minimal additional expenditure of time, the interests of justice cut in favor of not imposing an absolute ban on resort to documentary evidence but rather a general rule subject to sensible exceptions.⁶⁹

And if that's where the Committee wants to go, the question becomes what sort of sensible exceptions should you carve out, and this leads us to Professor Steve Saltzburg's famous 1993 article that's approvingly quoted in the 2003 Advisory Committee note to the amendment to 608(b), and in that article, Steve wrote, “Counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.”⁷⁰ But,

65. See Imwinkelried, *supra* note 52, at 2526–33 (collecting cases).

66. See generally *id.* at 2526 (“The language of Rule 608(b) can be construed as meaning that the cross-examiner's only right is to refer directly to the untruthful act.”).

67. John R. Schmertz, *Rule 608(b): Impeachment by Prior Misconduct*, FED. R. EVID. NEWS, Jan. 1996, at 136, 136.

68. See FED. R. EVID. 801(d)(2)(a).

69. See Schmertz, *supra* note 67.

70. Stephen Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, CRIM. JUST., Winter 1993, at 28, 31.

as you know, despite Steve's article and despite the 2003 approving citation to Steve's article, there are a fair number of cases deviating from that.⁷¹ In particular, they involve prior jury or judge determinations rejecting a witness's testimony. They have been permitted to be inquired about on cross-examination notwithstanding Steve's article and the Advisory Committee note.⁷²

Now, if you're going to begin grappling with that problem, I'd suggest that you look at a spectrum of variations of the problem. At one end of the spectrum, you have situations like Professor Schmertz's simple example. The accused—the letter easily authenticated falls within a hearsay exception or exemption. That's only one example of a somewhat broader category of cases in which, without resorting to a second witness's testimony, you could surmount both authentication and hearsay objections during cross-examination.

Now that's the strongest case for carving out an exception. But then you've got the middle of the spectrum, and in the middle of the spectrum, you might have cases in which the evidence is not truly independently admissible, but, nevertheless, you've got a relatively reliable determination that there was a prior lie.

For example, assume the prior proceeding is a suppression hearing. A police officer testifies there, and the officer is the only prosecution witness. The defendant is the only defense witness, and it's a swearing contest. It's clear that it will be implausible to infer that someone's mistaken. It's relatively clear that someone is lying. And when the dust settles at the end of the suppression hearing, the judge grants the motion to suppress, strongly indicating that the judge concluded that the officer was lying about the consent to the search. Now we go to hearing number two, and in hearing number two, the officer again is the witness, and on defense cross-examination of the police officer, the defense counsel wants to refer to the prior determination at the suppression hearing. On the other hand, I'm hard-pressed other than 807⁷³ to find any hearsay exception for the prior ruling at the suppression hearing.

So, in the middle of the spectrum, you've got a relatively reliable determination, but it's not the clear-cut case in which it would be independently admissible but for 608(b). You can probably overcome authentication, but you're going to be hard-pressed to find a hearsay exemption or a hearsay exception. And then, finally, you come to the other end of the spectrum, the weakest cases for carving out an exception. The last

71. *See, e.g.,* United States v. Dawson, 434 F.3d 956, 957 (7th Cir. 2006) (noting that because the reference to "tucking a third person's opinion about prior acts into a question" appears only in reference to the article in the note, the court should not construe the amendment as precluding a question inquiring whether a judge had disbelieved the witness in a previous case); *id.* at 958 ("[F]indings by judges or juries are entitled to more weight than what any old third party might happen to think about a witness's credibility.").

72. *See, e.g., id.*; United States v. Jones, 728 F.3d 763, 767 (8th Cir. 2013).

73. Federal Rule of Evidence 807 is the residual exception to the hearsay rule. *See* FED. R. EVID. 807.

example that I gave you, the police officer versus the accused at the suppression hearing—that’s an oversimplified case. In that case, you’ve got a swearing contest, and it’s relatively clear that the finding represented a determination that the officer was lying. But, in the typical case, you’re going to have multiple witnesses, and, in the typical case, you’re going to have multiple reasons why the jury or judge might have rejected the testimony.

When 608(b) was amended in 2003, the word “credibility” was deleted and the word “untruthfulness” was inserted, meaning it’s no longer enough to conclude that the officer was mistaken or that the witness was previously mistaken when they gave that testimony.⁷⁴ You’re going to have to conclude that there was a finding that the testimony was perjurious, that they lied in the prior proceeding, and that’s going to be very difficult. I can see where, at this end of the spectrum, the Committee might well say, “Flyspecking a transcript in order to try to find what the basis of the determination was, that’s simply not something we want trial judges to do in the middle of another proceeding.”

Now Dan tells me that the Committee’s practice is that you don’t issue a new note unless you propose a new amendment. My suggestion would be this: I’d like to see the Committee expressly address the question of the extent to which the cross-examiner may use documents during the cross-examination itself, so long as they don’t need to resort to a second witness’s testimony. I don’t think that the term “extrinsic evidence,” referenced in 608(b), is enough.⁷⁵ Rule 613(b) also refers to extrinsic evidence, but it has an entirely different meaning there.⁷⁶ There, it means testimony admitted after the witness has left the stand. It would be very helpful for the judiciary if the Committee addressed the question, specifically what documents can be used during cross-examination to pressure the witness to admit the lie.

The current rule, according to Faust Rossi, is all you can do is bluntly and directly ask about the lie,⁷⁷ but it seems to me that Professor Schmertz presented a strong argument that it’s not in the interests of justice to have an absolute rule, at least when you can prevent resort to documents without an additional substantial expenditure of time. And certainly, the strongest case for that is when you can overcome both authentication and hearsay without the need for a second witness’s testimony.⁷⁸ If the Committee decided to do that—to amend the rule to more expressly address the question of what documents can be used during cross-examination to pressure the witness into admitting the prior lie—then I think, in the accompanying Advisory Committee note, it would be very helpful if the Committee addressed the

74. See Imwinkelried, *supra* note 52, at 2531–32.

75. FED. R. EVID. 608(b).

76. *Id.* 613(b).

77. See *supra* note 66 and accompanying text.

78. See Schmertz, *supra* note 67.

question, the threshold question, of whether a prior conviction absolutely precludes resort to 608(b).

As I said, this is a very modest topic, but I think the topic is going to grow in importance as we tighten the standards for 404(b), and we begin thinking about tightening 609. If we do one or both of those things, we're going to see increased resort to 608(b), and the prior splits of authority about 608(b) are going to grow in importance.

I hope my comments today may get you thinking about how you could amend Rule 608(b) to help the judges who struggle with this issue, particularly the issue of the use of documents during cross-examination. Thank you very much for your time this morning.

PROF. CAPRA: So, Ed Imwinkelried won the Wigmore Award, which is a lifetime achievement award in evidence, and you can see in his level of detail and his analysis here how he won that award.⁷⁹ Thanks so much, Ed.

Next, we have Hillel Bavli, Associate Professor of Law at Southern Methodist University,⁸⁰ and he's here to talk about Rule 404(b). He's a noted expert on this rule.

PROF. BAVLI: Thank you for having me here. I'm delighted to have the opportunity to speak with you today.

So, I'll start by describing what I view as the most significant problem in evidence law. Specifically, I'll explain how courts misinterpret Rule 404 in a way that undermines its purpose and effectively replaces it with the highly skewed Rule 403 balancing test. I'll then describe my recommendation for an amendment to correct an ambiguity in Rule 404 that underlies this interpretation . . . in the hope that it helps to restore the effectiveness of Rule 404 in excluding evidence that relies on character reasoning.

So, here's the problem: under Federal Rule of Evidence 404(b)(1), "evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."⁸¹ For example, as you know, a prosecutor may not introduce evidence that a defendant committed a prior burglary to prove that the defendant has a propensity or character to commit such acts and is, therefore, more likely to have acted in accordance with that character and to have committed the burglary in question.⁸²

But, while Rule 404(b)(1) prohibits the use of other act evidence that relies on character reasoning, Rule 404(b)(2) clarifies that the evidence may be admissible for another purpose, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."⁸³ For example, in a burglary case involving an advanced alarm system, a prosecutor may introduce evidence that the defendant has

79. See generally Edward J. Imwinkelried, *supra* note 50.

80. See Hillel J. Bavli, SMU DEDMAN SCH. L., <https://www.smu.edu/Law/Faculty/Profiles/Bavli-Hillel-J> [<https://perma.cc/QLX6-3A9K>] (last visited Apr. 3, 2024).

81. FED. R. EVID. 404(b)(1).

82. See *id.*

83. *Id.* 404(b)(2).

committed a prior burglary involving a similar alarm system, not to prove that the defendant has a character propensity to commit such acts and likely acted in accordance with that character, but rather to prove that the defendant knew how to circumvent the alarm system in question. This evidence is to prove knowledge rather than propensity, and it's therefore admissible subject to a Rule 403 balancing test.⁸⁴

However, courts misinterpret Rule 404(b)(2). They incorrectly interpret Rule 404(b)(2) not as a clarification but rather as the exception to Rule 404(b)(1).⁸⁵ In other words, they allow character reasoning prohibited in Rule 404(b)(1) as long as the evidence is offered for an ultimate purpose listed in Rule 404(b)(2), such as intent, knowledge, identity, and the other purposes listed there.

For example, a court will exclude evidence of a defendant's prior drug crimes to prove that the defendant has a propensity to commit such acts and is likely to have acted in accordance with that propensity.⁸⁶ But that court is likely to admit that evidence if the evidence is offered to prove that the defendant had knowledge of certain drugs or an intent to distribute them rather than to prove guilt directly, even if that intent or knowledge is based on a propensity inference.⁸⁷ This is a problem because when character evidence is offered, it's always to prove a relevant fact, such as those enumerated in Rule 404(b)(2), right? So interpreting Rule 404(b)(2) as an exception effectively eviscerates the rule against character evidence and replaces it with judicial discretion under a Rule 403 balancing test.

Moreover, this is not just any Rule 403 balancing test. Because courts read 404(b)(2) as an exception, they treat character inferences as probative rather than prejudicial, thus favoring admissibility rather than exclusion in the already admissibility-prone Rule 403 balance test.⁸⁸ This all has very serious consequences. Not only is it contrary to the intended meaning of Rule 404, but it's also inconsistent with good policy.⁸⁹

84. *See id.* 404(b)(1)–(2); *see also id.* 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

85. *See* Hillel J. Bavli, *Correcting Federal Rule of Evidence 404 to Clarify the Inadmissibility of Character Evidence*, 92 *FORDHAM L. REV.* 2441, 2446–56 (2024) (collecting cases).

86. *See id.* at 2449 (citing *United States v. Manning*, 79 F.3d 212, 217 (1st Cir. 1996)); *id.* at 2448 n.27 (citing *United States v. Henry*, 848 F.3d 1, 8–9 (1st Cir. 2017); *United States v. Wilchcombe*, 838 F.3d 1179, 1192 (11th Cir. 2016); *United States v. Smith*, 383 F.3d 700, 706–07 (8th Cir. 2004)).

87. *See id.* at 2448 n.27.

88. *See, e.g., Manning*, 79 F.3d at 217 (concluding that “evidence that [the defendant] had previously sold cocaine makes it more likely both that he was aware of the contents of the plastic bags in the briefcase and that he intended to distribute the two bags of cocaine” and weighing this inference for its probative value in the court’s Rule 403 balancing).

89. *See* FED. R. EVID. 404 advisory committee’s note on proposed rules (“Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for

Because character evidence is so highly influential on the outcome of a case, this misinterpretation generates verdicts based on conduct not at issue in a case and undue pressure on criminal defendants—and even innocent criminal defendants—to accept plea agreements just based on the concern that a jury may well hear evidence regarding their prior conduct.

Further, a quick review of case law applying Rule 404(b)(3)'s notice requirements makes clear that while Rule 404(b)(3) is very beneficial with respect to notice, it does not resolve the underlying misinterpretation of Rule 404(b)(2).⁹⁰ So, I therefore recommend an amendment to clarify the meaning of Rule 404(b)(2) to correct its misinterpretation as an exception to Rule 404(b)(1). The proposed amendment replaces the current language of Rule 404(b)(2), that is, “this evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident,” with the following language:

Evidence of any other crime, wrong, or act may be admissible for a noncharacter purpose—that is, a purpose (such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) that does not involve inferring the person's character to show that on a particular occasion the person acted in accordance with the character.⁹¹

This proposed amendment makes simple but important changes. It replaces the phrase “for another purpose” with the phrase “for a noncharacter purpose” and then defines a noncharacter purpose in terms in line with Rule 404(b)(1)'s prohibition on character evidence. It replaces the phrase “this evidence” with the phrase “evidence of any other crime, wrong, or act.” And it de-emphasizes the illustrations of noncharacter purposes by placing them in parentheses.

This proposed amendment clarifies that other acts evidence is admissible only if it does not rely on character reasoning. Admissibility requires a noncharacter purpose, which the proposed rule defines in the terminology of Rule 404(b)(1). This realigns the test for admissibility with Rule 404's underlying purpose to exclude character evidence. The focus here is on whether the evidence relies on character reasoning, not on what is the ultimate purpose of the evidence.

Finally, my written proposal addresses the doctrine of chances, which is a unique form of character evidence offered to prove the absence of chance or accident.⁹² The only thing I'll say about it here is that this addresses faulty arguments that Rule 404 requires the current level of flexibility to account for this evidence. I argue that this doesn't justify undermining Rule 404 and that there are far better options, two of which I discuss in my written

another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition.”).

90. See Bavli, *supra* note 85, at 2456 n.71.

91. *Id.* at 2444.

92. See *id.* at 2459–67.

proposal.⁹³ So, in short, courts misinterpret Rule 404(b)(2) in a way that opens the door to all character evidence and effectively replaces Rule 404 with a highly skewed Rule 403 balancing. My proposed amendment seeks to resolve Rule 404's ambiguity and restore Rule 404 to its proper meaning and purpose. Thank you.

PROF. CAPRA: Thank you, Hillel. Any questions from the Committee? John Siffert.

MR. SIFFERT: I'm interested in why you say this is a problem. What is the evidence that you have mistaken applications of Rule 404(b)?

PROF. CAPRA: Every Eighth Circuit decision on Rule 404(b).⁹⁴

[Laughter.]

CHAIR SCHILTZ: Your assertion that courts are treating Rule 404(b)(2) as an exception rather than a clarification—is that because that's what they're saying, that it's fine to use a propensity-based inference? Or are you just implying that from the result that the court has reached?

PROF. BAVLI: I'm not just implying it. Courts both state it and do it, meaning it's very regular that courts start off this analysis by saying that "Rule 404 is a rule of inclusion and, therefore, there's a presumption of admissibility," and then that Rule 404(b)(2) provides exceptions or is an exception to Rule 404(b)(1).⁹⁵ That's extremely telling across the board. If I took a random case applying Rule 404(b)(2), I bet it would say that.

And then it's not just saying it. That's what we do when we think about evidence. We think about what's the inference that you make that makes this evidence relevant. Sometimes you have an inference that goes around the propensity box. But oftentimes it doesn't go around that propensity box.

CHAIR SCHILTZ: A typical motion in limine, at least for me, is the government moves to admit bad acts and they list all the proper purposes with no explanation.

PROF. BAVLI: Yes.

CHAIR SCHILTZ: And then I'll say, well, how does it show lack of mistake? So, I've certainly seen this in my courtroom, but I'm not aware of how explicit courts are about it when they actually write this up.

PROF. BAVLI: Very explicit. I'll just give you a very common scenario: a defendant is found in a car with a high quantity of drugs and then says, "This isn't my car." You know, maybe the defendant isn't even the driver of the car. And to prove that the defendant both had knowledge and an intent to distribute the drugs, the court will very regularly admit prior drug convictions, all kinds of prior drug convictions, and say, "because there were these prior drug convictions, you have a greater chance of having knowledge and intent to distribute."⁹⁶

93. *See generally id.*

94. *See, e.g.,* United States v. Smith, 383 F.3d 700, 706 (8th Cir. 2004); United States v. Oaks, 606 F.3d 530, 538 (8th Cir. 2010).

95. *See* Bavli, *supra* note 85, at 2448–49.

96. *See id.* at 2453.

You look at the chain of inferences that takes us from that evidence to the purpose of the evidence to prove knowledge and intent, and in that kind of scenario, there is not a route around the box.

CHAIR SCHILTZ: What you're really proposing is something similar to what we did in 702, which is just to say the same thing in a clearer way.⁹⁷

PROF. BAVLI: Yes.

CHAIR SCHILTZ: But there's a bunch of Eighth Circuit cases where the government introduces evidence of prior drug dealings to show that the person knew that that block of white powder in the car was drugs and not just baby powder or something, right?⁹⁸ But there is a half of a percent chance that it is being introduced for that and a 99.5 percent chance that it is being introduced for character-based evidence. So, that problem still remains the way you've rewritten it, because a court can still say, "Well, they're offering it on knowledge."

PROF. BAVLI: Yeah, I agree. That's a different problem and that means we have to trust courts to apply Rule 403.

CHAIR SCHILTZ: What would you think of putting primary purpose language into 404(b)?

PROF. BAVLI: That would make it even stronger. It's a great point. The problem that I'm addressing is when courts are explicitly allowing in—or explicitly, or at least implicitly allowing in—character evidence for a character purpose, meaning for character reasoning.

CHAIR SCHILTZ: Yes.

PROF. BAVLI: And so, my language there specifically addressed that problem. But to put in something like "that's the primary purpose," that assumes something slightly different—that there's a dual purpose of this evidence, one with an impermissible purpose and one permissible purpose.

CHAIR SCHILTZ: Any prosecutor worth their salt can come up with a noncharacter-based purpose. It's usually just everybody knows that that's really not the purpose.

PROF. BAVLI: Yeah.

PROF. CAPRA: The cases that I see are motive cases, so you've got a bad act, and the government wants to show the motive for committing the charged crime. And motive is reason, what reason would you have? And the court specifically says, "The reason is that they have a propensity to commit the crime." The court actually says that.⁹⁹

97. See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 1, at 70 ("[T]he proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).").

98. See, e.g., *Smith*, 383 F.3d at 706–07.

99. See, e.g., *United States v. Roux*, 715 F.3d 1019, 1025 (7th Cir. 2013) ("The district court properly determined that the acts of abuse described by [minor sisters] were probative of [defendant]'s motive to commit the charged child pornography offense . . . [because] '[p]rior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children.'" (first alteration in original) (quoting *United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir. 2006))).

PROF. BAVLI: Yeah.

PROF. CAPRA: They don't use the word "propensity." They say they have an interest in doing this crime. But it's the same thing. They can't be more explicit than that.

MR. SIFFERT: How does the current rule allow for that?

PROF. CAPRA: That's a good question. Exactly.

PROF. BAVLI: The courts look at this language and they treat it as if you need to look at the ultimate purpose of the evidence, as though people ever offer character evidence to prove character.¹⁰⁰ That's a fiction. The rule, the way it's phrased, actually oftentimes puts the criminal defendant in a worse position, arguably, than they would have been had there not been a Rule 404 in the first place, and we just left it to Rule 403. Because they're interpreting Rule 404(b)(2) as an exception, they're skewing the Rule 403 analysis where a prosecutor does come up with some alternative purpose for it and they say, "Well, that character inference is actually probative, it goes on the probative side of the scale rather than it being prejudicial."

MS. SHAPIRO: The Committee just amended 404(b) and spent many years doing it.¹⁰¹ And I was wondering if you've seen in your research any difference? I mean, I don't know if there's been enough time even for the new rule being in effect, but is what you're describing—are you looking only at pre-amendment or are you seeing that there's any difference in the post-amendment cases?

PROF. BAVLI: I have reviewed a lot of the recent cases, and I've also reviewed the cases that cite to Rule 404(b)(3) and the language in the notes of Rule 404(b)(3), and that's a great step in the right direction, I think. The problem is with respect to 404(b)(2). Because courts are looking at the ultimate purpose of the evidence, when the amendment requires that you have to explain the proper purpose of this evidence, they're interpreting it as, well, this is a proper purpose—it's to show intent or it's to show knowledge—regardless of whether it involves character reasoning.

MR. COONEY: I just want to expand on something that was said earlier because the problem is 404(b) has always swallowed up the Rules of Evidence. It doesn't take a very clever prosecutor to come up with a reason other than character. And, of course, the reasons that are listed in 404(b) are preceded by "such as."¹⁰² So it's really unlimited reasons, and most courts view 404(b)(2), the permitted uses, as a rule of admission as opposed to a rule of exclusion. And so, I read cases all the time that talk about the fact that, well, yes, of course, you can't introduce character, but all these other purposes are permissible, and, so long as it's not unduly prejudicial, it's coming in.

And if we're going to tweak 404 again—and I think there's some merit to asking why are we even dealing with 404(b) at all and why aren't other acts

100. See Bavli, *supra* note 85, at 2450.

101. See FED. R. EVID. 404 advisory committee's note to 2020 amendment.

102. See *id.* 404(b)(2).

just reviewed under Rule 403?—I think defendants would be a lot better off if that happened, and it was strictly balancing.

PROF. CAPRA: One of the suggestions when Rule 404(b) was last considered was to change the balancing test applied to bad acts evidence so it would be more exclusionary.¹⁰³ That proposal was rejected.¹⁰⁴ But the rejection is not *res judicata*. It's something that can be discussed. Judge Sullivan.

JUDGE SULLIVAN: It seems to me a lot of the problems that have been identified are not going to be eliminated by the proposed rule change that you have, but it occurs to me as I'm looking at John Siffert that much of this probably could be resolved or at least clarified through jury instructions. And I'm wondering, is that a more profitable place to be looking—at the Sand/Siffert model jury instructions for federal cases? It's pretty influential, and that might be the way to correct judges from making the mistakes that you suggest are rampant. I'm not sure if they are, but there are certainly examples.

MR. SIFFERT: Just to add to that, the discussion has been how have judges reasoned when they admitted it, but I don't think that's a concern because it's sure as hell the jury is considering it. So, they're in evidence and I don't know of a situation where I've been present where a judge hasn't given the appropriate limiting instruction.

PROF. CAPRA: But the point is that you would have the judge not let it into evidence, so you wouldn't need a limiting instruction because it wouldn't get to the jury. That's actually Hillel's point.

PROF. BAVLI: And, here, the limiting instruction is somewhat inapplicable because the court is letting it in for the character reasoning, as opposed to a dual-purpose scenario where it looks at the evidence for this purpose but not that purpose. The purpose for which they're letting it in is the problem. As to the jury instructions, I agree. I argue after studying these cases very extensively, this problem is so well ingrained in the case law and the precedent, courts sometimes don't even—at times don't even—refer to the rule. They just say, "in this jurisdiction, we do this, this, and this." And it's so well ingrained there and it's so ordinary to do this that I'm very pessimistic that it can be solved through the courts just by incorporating better jury instructions.

I really do think that we need something that clarifies the rule that makes a big change and that sets the standards. A lot of courts do this based on all different kinds of interpretations, and I think the record needs to be set straight for the courts to understand how this rule should be applied.

103. See ADVISORY COMM. ON EVIDENCE RULES, REPORT TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES app. D-6 (2019).

104. See *id.*

PROF. CAPRA: Our next witness is Professor Erin Murphy of NYU, Norman Dorsen Professor of Civil Liberties, and she's written a number of important articles of evidence.¹⁰⁵

PROF. MURPHY: Thank you very much, Dan, for inviting me here, and thanks to all for indulging me. I thought I would just inject a little controversy into our 404(b), 608 discussion. Why not throw in Rule 412?¹⁰⁶ My presentation concerns evidence of prior false accusations. This obviously arises most in sexual assault cases where there's evidence or allegations that the complainant made previous false accusations of sexual assault against others, although it does arise in other contexts—for example, with non-intimate partner violence, or nonsexual violence cases less frequently.

I'm really going to talk about it in the context of sexual violence, but it could come up, obviously, in other ways, and my recommendations don't specifically limit the proposed rule to sexual violence cases. I'm going to call them PFAs, which I know is a little bit annoying, but it's a lot easier than saying Prior False Accusation a million times. So, just by way of example, if a defendant is charged with sexual assault, say, of a complainant who is in a residential drug treatment program, and the defendant acquires evidence that this complainant has made multiple accusations in similar settings against people with what the defendant alleges is an intent to get moved out of inpatient treatment (or for some other benefit), can that defendant introduce that false claims evidence?

The Federal Rules here offer some conflicting guidance, and courts, I think, have applied a wide variety of standards. The analysis takes place against the backdrop of a defendant's constitutional rights to present a defense, to compulsory process, and to confrontation. I want to tick through how PFAs are treated, and then I'll talk a little bit about what I think the particular concerns are, and then I'll show you my proposal.

So, the most natural fit for many people may seem to be Rule 412, the rape shield rule. There are many courts that analyze these PFAs under that rubric.¹⁰⁷ I think there's two problems with that. One is that not every PFA involves an actual sexual activity or sexual conduct. You can imagine the world of PFAs as including some situations in which sex is conceded and what makes it false is whether it was consensual, and as including others in which the PFA is made up whole cloth, in that there's no evidence of any sexual activity or encounter of any kind.

In the former situation, where there is an admission of sex, you arguably could say it falls under Rule 412, but in the latter, it clearly does not. And, in fact, the Rules Committee has said that prior false accusations should be

105. See *Erin E. Murphy*, N.Y.U. L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=31567> [<https://perma.cc/8ADM-YH5F>] (last visited Apr. 3, 2024).

106. See FED. R. EVID. 412.

107. See, e.g., *United States v. Willoughby*, 742 F.3d 229 (6th Cir. 2014); *United States v. Crow Eagle*, 705 F.3d 325 (8th Cir. 2013).

dealt with under 404.¹⁰⁸ They are not barred by 412, although courts still do routinely analyze them under 412.¹⁰⁹

I also think they are just conceptually a bad fit for 412. The rape shield rules were enacted to stop the faulty inference linking sexual purity or chastity to credibility.¹¹⁰ They reject the concept that because you've had sex in the past, you're more likely to lie now.¹¹¹

And a prior false accusation is really not about the sex. It's about linking falsehood to credibility, and that is a much stronger and—in fact, I think constitutionally protected in many cases—inferential chain. Now, I do want to acknowledge that I think one thing that's attractive about the Rule 412 (the rape shield) framework in thinking about these issues. There's obviously a relationship between the purposes animating 412, which included this concern about myths about complainants in rape cases and how sexual history informed credibility and similar myths about the propensity of women, in particular, to lie about sexual assault.

There's a parallel there, I think, between the chastity argument and the credibility argument. And also, the rape shield rule is a vehicle through which courts focus on the constitutional claims of a defendant because, of course, there's a constitutional exception to Rule 412.¹¹² But, again, I think that this is not the right place, both textually and conceptually, because it really is an inference about some falsehood to credibility, not from sexual purity or chastity to credibility.

The next rule is 608(b). Rule 608(b) in many ways feels like the most logical fit for a prior false accusation. It is the rule that speaks directly to specific instances of untruthfulness, so a falsehood fits that nicely.¹¹³ I will say that there are not as many Rule 608(b) cases as you might expect. Courts tend to go different directions—Rule 404, constitutional rights, Rule 412.¹¹⁴ But I think Rule 608(b) is not the right place for this evidence either. This rule doesn't adequately address PFAs for several reasons.

First, we know Rule 608(b), prior bad acts, is a weak form of impeachment because the inference that you lied once in the past and so you're now lying under oath is a weak inference—and the Supreme Court has underscored that when they make the distinction between Rule 608(b) and constitutional rights to cross-examination—and we just know that intuitively that it is a poor

108. FED. R. EVID. 412 advisory committee's note to 1994 amendment ("Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.").

109. See Erin Murphy, *Impeaching with an Alleged Prior False Accusation*, 92 FORDHAM L. REV. 2535, 2540 (2024).

110. See FED. R. EVID. 412.

111. See *id.*

112. See Murphy, *supra* note 109, at 2537.

113. See FED. R. EVID. 608(b) ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness.").

114. See Murphy, *supra* note 109, at 2539.

inferential chain.¹¹⁵ People lie all the time in their lives. It doesn't mean they lie under oath or they lie in this way. I think that in the PFA context this is more powerful credibility evidence than just a general attack on credibility.

The second reason I think 608(b) is a problematic place is that the good faith standard is really low, in regard to the foundation required to ask about a bad act. All you have to have is good faith,¹¹⁶ and I think courts inherently want to apply a heightened standard to admission of PFAs because there's often a factual contest about whether it was, in fact, false, and there are so many different ways in which falsehood can be established. And so, you could have something as low as: the complainant never reported it to police, therefore, it must be false. Or you could have: the police didn't do anything with it when they got the report—does that mean it was false? Or the police investigation didn't identify a perpetrator—does that mean it was false? Or the complainant recanted—does that mean it was false? Or there was an actual hearing and somebody determined it was false—does that mean it's false? And good faith does not do a good job of parsing that. When backed up against the rules animating 412 and the general concerns about overuse of this kind of evidence, I think it makes it an ill fit for 608.

The other things I'll just add onto the critique of 608 are: it has no explicit procedural requirement, no notice, no hearing—as does, say, Rule 404 or Rule 412.¹¹⁷ There's huge latitude for courts to determine what's probative of truthfulness. They have that discretion inherently in the rule, and so you see courts saying “Yes, this was a prior false accusation,” but applying tests and standards to determine whether that makes it probative of the complainant's truthfulness or not. And then lastly, of course, is the ban on extrinsic evidence, which in particular bumps right up against the constitutional entitlement to present a defense.¹¹⁸

So, what I've observed in the cases is that often when things start as a Rule 608(b) question and there's powerful evidence of prior falsehood, courts just push it into 404 or push it over to a constitutional claim because the ban on extrinsic evidence and all the other features I noted make Rule 608(b) an ill fit.

So, then we get to Rule 404. You'll see cases where, for instance, the court says that the complainant's prior false accusations indicate a common

115. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (“[W]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination” [But], trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant.” (first alteration in original) (quoting Davis v. Alaska, 415 U.S. 308, 316–17 (1974))).

116. *See, e.g.*, United States v. Olsson, 713 F.3d 441, 446 (8th Cir. 2013) (noting that all that is required for cross-examination is “some facts which support a genuine belief that the witness committed the offense” (quoting United States v. Alston, 626 F.3d 397, 405 (8th Cir. 2010))).

117. *See* Murphy, *supra* note 109, at 2543–44.

118. *See* Nevada v. Jackson, 569 U.S. 505, 505 (2013) (per curiam).

scheme or plan to lie to get something they want, or that it shows a motive of the complainant.¹¹⁹ The problems raised in the presentation on Rule 404(b) that we just had are present in cases involving false complaints as well. I think the reason that false complaints are an ill fit for 404(b) is that the non-propensity purpose often feels like a stretch. It feels like a way to get the evidence in, but it's not really fair or true to the rule as properly applied.

Applying Rule 404(b) to false complaints also presents a lack of procedural protections, as well as the lack of a notice requirement because only prosecutors have to provide notice under that rule. And the foundation requirement for establishing falsity is very low, just the *Huddleston v. United States*¹²⁰ sufficiency standard. And so, you have also a concern that if you're faithfully applying the rule, a minimal showing of falsehood would allow admission of the evidence, and, again, we butt up against the Rule 412 values.

And then the last thing I'll point to is the constitutional analysis that typically either takes place via 412 (the rape shield exception) or takes place independently when a defendant makes that claim. And, here, I'll just say, as we all know, the Constitution gives conflicting—and at times hard to discern—guidance. It's obviously the backstop, which you might think, for evidence as important as a PFA, we shouldn't require such a high hurdle to jump in order to meet the constitutional standard. And courts have varied dramatically on whether they think all PFAs are just general attacks on credibility and therefore fall outside the *Davis v. Alaska*¹²¹ framework and need not be introduced—which I think is improperly excluding important evidence—or whether you can repackage it as an *Olden v. Kentucky*-style¹²² inquiry and, therefore, it should be admitted for constitutional bases even if other rules don't allow it.

And then there is the *Nevada v. Jackson*¹²³ case where the Court said it didn't violate clearly established federal law to exclude extrinsic proof of a prior false accusation, although, in that case, it's important to note first the procedural posture of habeas.¹²⁴ But also, *Nevada* actually does envision admitting extrinsic evidence.¹²⁵ The problem in that case was that the defendant was required to give notice and failed to do so.¹²⁶ And so it's a little bit of a strange case with regard to the first principle of admissibility.

119. See Murphy, *supra* note 109, at 2444–45.

120. 485 U.S. 681, 691 (1988) (holding that the standard of proof for acts of uncharged misconduct is enough for a reasonable juror to find that the act occurred).

121. 415 U.S. 308, 317–18 (1974).

122. *Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (holding that excluding evidence that the complainant reported a rape to a person with whom she was in a sexual relationship violated the defendant's constitutional rights because it was important evidence of declarant's credibility; the evidence showed that the complainant had a motive to falsify); see also Murphy, *supra* note 109, at 2538–46 (discussing courts' approaches to admitting prior false accusation evidence).

123. 569 U.S. 505 (2013).

124. See *id.* at 506.

125. See *id.*

126. See *id.* at 510.

So, I want to make a few arguments today to you about how we could better conceptualize the admissibility of PFAs . . . and then I have a proposed text that's meant to be more of an opening to the conversation. First, I want to argue that PFAs are important and likely constitutionally required evidence and that they are very much conceptually distinguishable from the kind of low-grade credibility attack that we think of 608(b) as embodying, and that's because, as I mentioned, 608(b) is about the inference that because you once lied, you are lying under oath now. And we know, just in our lived experience, people lie all the time. They lie for very different reasons and motives. And what feels weak about that is that just a mere act of falsehood, for example, "I filled out a billing thing wrong to get a little extra cash" or something like that doesn't always shed good light on a witness's credibility on the stand and also can very much distract from the core inquiries in the case.

In contrast, a PFA—I don't think is rightly thought of that way because it's not just about a character for truthfulness. It's about the character for false accusation, the propensity a person has to falsely accuse others. I think what we might all say, throughout our ordinary lives: people lie, and it doesn't shed that much light on what they do. But I don't think people routinely falsely accuse others of criminal offenses or serious misconduct. So, the inference from a PFA is actually a more potent, powerful, and important inference than just a general credibility inference.

So, I also think this is why you see courts saying things like, "This is more like *Davis*, more like the bias or ulterior motive directly related to the case than a general attack on credibility"—and also, why courts look to Rule 404, which feels like a more specific form of evidence than a generalized attack. To that end, I think a PFA is most powerful under the following circumstances: it's made publicly or it's made to officials; there is convincing evidence that, in fact, it is false; it's of the same magnitude or nature as the present claim or it's against the same person; and then lastly when the credibility of the accuser is the central issue in the case.

I also think PFAs can be most prejudicial when there's no notice or opportunity to challenge them in advance because the same values that animate our concerns about a surprise attack about something collateral to the case come into play with PFAs on occasion and when the treatment of extrinsic evidence isn't managed properly.

So, to that end, my proposal is twofold. First would be a change to Rule 608 that would allow extrinsic evidence of a prior false accusation and would provide a requirement of notice and hearing. It sets a threshold to establish falsehood and also specifically sets out a requirement for more proof than simply the failure to pursue the claim, because there are cases which suggest that failure to pursue the prior claim is sufficient to establish falsehood, which I think is problematic.

Second, the amendment to Rule 608(b) would require that the claim be substantially similar in nature, or of equal or greater magnitude to, the

charged offense. The idea here is to not get distracted by extrinsic evidence where it's a much less serious or totally different kind of accusation.

And finally, the change to Rule 608 would limit extrinsic evidence to instances in which it's necessary to complete impeachment of the witness. And so, if the witness denies making the accusation, denies its falsehood, or does not testify, you may introduce the extrinsic proof. But, if you ask the question in the Rule 608(b) form and the witness admits, "Yeah, I did make that prior false accusation," then extrinsic evidence would be unnecessary and so not allowed.

The second piece of my proposal would be to include allegations of prior false accusations explicitly within the text of Rule 412. The intention here would be to make clear that Rule 412 does not bar this evidence and that substantive admissibility of PFAs are regulated by another rule of evidence. As amended, prior false accusations would be subjected to the notice and hearing requirements of Rule 412 because everything covered in the text of Rule 412 is required to follow the notice and procedural aspects of 412(b)(3). So, the benefit there is that if you want to cross-examine on a PFA, it doesn't have to meet the strict admissibility standards, but the defendant would still have to provide notice, and there will be a hearing requirement, which I think adds a little extra protection that is justified.

I think the advantages of this approach are that, number one, it explicitly makes clear in text that 412 is applicable. It subjects PFAs to the 412 framework when they're used for 608(b) purposes especially. It provides for the admission of extrinsic evidence when a PFA is especially probative (when it has that extra *oomph*, which you could say just reinforces the constitutional rule) or, arguably, goes a little bit beyond what's constitutionally mandated in a way that, I think, is warranted and justified—and then, within that framework, provides notice as well. Some of the open questions we could discuss for consideration are whether the good-faith standard or the good-faith threshold for 608(b) PFAs is sufficient or not. You could imagine raising the standard. I would not suggest that, but you could imagine that for 608(b).

There could be more prescriptive guidance to courts on how to apply the 608(b) standard—the probativeness—to PFAs. So, once you've established this is a prior false accusation, how shall we assess its probativeness and truthfulness?

Another question that could be explored is whether to limit the amendment to criminal cases, whether to limit it to complainants. My instinct would be not to limit it to complainants because there are cases involving, say, young people where the real concern is a parent who's making serial allegations and the young person's just going along with it, and I think you'd want to make sure you can get that evidence in.

And then lastly, of course, what relationship this would have to a more traditional form of Rule 404(b), which I do think, in its proper form, would be something more like a real motive or a real pattern within the specific facts of that case.

Okay. So, that is the pitch. I'm happy to hear any questions if you have them.

PROF. CAPRA: If I may start, this is a great idea. I think that one problem you would have with 608 is when the PFA person doesn't testify.

PROF. MURPHY: Yes.

PROF. CAPRA: I am thinking that maybe the holistic approach is to have a new Rule 416 to cover false accusations. It seems to fit with the group of rules on sexual assault, Rules 412 through 415.

PROF. MURPHY: I agree. I actually originally wrote it up as a Rule 416, essentially. I didn't call it 416, but I put it at the end of Rule 412.

I had a couple concerns. One is the sex exceptionalism problem and how much I wanted to double down on that. And the more I conceptualized PFAs, the more I felt like this is really not just about sex. It's most commonly occurring in sex, but one of the critiques that gets made, I think the more you put it just in the rape shield or the sex case category, the more it blinds us to what I really think is true, which is that a PFA is a different kind of credibility attack than a general truthfulness attack. And it doesn't have to go through Rule 404(b) to be important. There's a propensity of false accusing that is independently valuable that we should recognize as well across all case types.

PROF. CAPRA: Of course, you could do that in 416 too. It doesn't have to be limited to sex cases.

PROF. MURPHY: True. I do think there's an attractiveness to 416 because it does, again, fit under sex cases primarily. It reinforces that, and you can address it in a more comprehensive way than being tethered to the existing rule structure.

PROF. CAPRA: Questions or comments from the Committee? Yes, Judge Schiltz.

CHAIR SCHILTZ: I don't have a sense as to how often this is coming up, and do you have a better sense as to how often and how often courts are getting it wrong? In other words, are they making it work more or less with the existing rules, getting to the right results but in a clumsy way and this will be more efficient, or are we saying they're really messing it up?

PROF. MURPHY: I think it's a little bit of a mix to be honest. I think it's going to continue to come up a lot because information is so much more readily available now, and you can search people's Twitter histories to see what they've said and other sources like that.

Whether it's courts coming out wrong or courts dealing with it messily, I think both happen. Predominantly, I would say it's more messy than wrong, but there is a nontrivial number of wrongs. And a messy resolution is problematic particularly because of the constitutional values underpinning the admissibility of PFAs. I think for the Federal Rules Committee there are two ways that there could be value added.

One would be to make it much conceptually clearer at the federal level and to impose these procedural protections to make sure the evidence is being sorted properly. And the other is to guide states where the admissibility of PFA's is much more frequent, and where there are wild and disparate

standards, which then come to the federal courts in the form of habeas constitutional claims that get resolved all over the map—because even the constitutional values I think are a little bit hazy. And so, clearing that haze would have multiple benefits for federal courts, both in direct cases and in habeas cases.

CHAIR SCHILTZ: Thanks.

PROF. CAPRA: Rene.

MR. VALLADARES: If the Committee were to accept your proposal, how would you suggest that the Committee addresses the issue of the “substantially similar in nature” language that you have?¹²⁷ Because I could see that that could create some problems.

PROF. MURPHY: Do you mean why do I propose it?

MR. VALLADARES: No. How do you propose that the Committee provide guidance to courts and practitioners as to what, indeed, is substantially similar in nature? For example, what about a prior PFA that doesn’t involve conduct, but it involves harassment? Would that complaint be not substantially similar in nature in a case that involves accusation of actual contact? So how would you provide that guidance? Maybe in an Advisory Committee note?

PROF. MURPHY: Because I had written this proposal to be not necessarily specific to sexual assault cases, my intention with the “substantially similar” requirement is to interpret it fairly loosely. So, there are cases, for instance, in which there’s a prior false allegation of fondling and this is a sexual assault with intercourse, and I would say that it’s sufficiently similar. I would call that sufficiently similar because it’s an allegation of sexual misconduct. That’s similar enough for me.

So, the language wasn’t meant to be, from my vantage point, too narrowly construed. It’s more that I wanted to make sure that as you go across case types, like if the current accusation is about sex and the prior false allegation was about theft—that just feels different in kind to me and should probably be excluded. And then the factor magnitude was meant to do the same thing.

The last piece, which is when the allegations are about the same person—I did think this is where you almost might say you don’t need the rule then because it’s really Rule 404(b), in that the complainant has a motive to get the defendant because the complainant is providing serial accusations. And in that case, you could say just 404(b). It was meant to catch disparate claims but against the same individual.

PROF. CAPRA: The rule gets better and better the more you keep other rules out of it.

PROF. MURPHY: I mean, there is, I think, a strong desire to just frame PFAs as a distinct and important form of a credibility attack and then say

127. See ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF OCTOBER 27, 2023, at 400 (2023), https://www.uscourts.gov/sites/default/files/2023-10_evidence_rule_s_agenda_book_final_10-5.pdf [<https://perma.cc/MN5L-2HTD>].

“404 doesn’t quite fit, 608 doesn’t quite fit, so let’s just make something new.”

MR. SIFFERT: And, Dan, is your point that if we put it under 412, it seems to ground it more in a sexual thing when we’re really talking about a spectrum of cases?

PROF. CAPRA: Yes. That’s what Erin’s saying, and I agree. I like it as a separate rule—just my instinct.

PROF. MURPHY: I didn’t want to get too ambitious.

PROF. CAPRA: Yes. Judge Mansfield.

JUDGE MANSFIELD: Iowa is one of those messy state jurisdictions that handles this under 412.

PROF. MURPHY: Mm-hmm.

JUDGE MANSFIELD: But I’m intrigued by this idea of encompassing all false accusations, not just false accusations of sexual offenses. The question I have is, would it be too much to now require these pretrial hearings when it’s just a false accusation of theft? It just seems you might be increasing the courts’ workloads quite a bit.

PROF. MURPHY: So, a couple of responses to that concern. First, it’s hard for me to gauge because anecdotally it feels like when courts are facing it under Rule 608(b) frame, where there are no procedural protections, when they feel like it’s really powerful evidence, they push it to Rule 412 or they push it to a constitutional analysis where you end up having these kind of hearings.¹²⁸ Moreover, if you’re already having a falsehood inquiry, that ends up being a little bit of a time consumer anyway. But the other thing I’ll say is, yes, it will put a burden on courts. I think, to the extent part of the burden is that you now will have a notice and an opportunity to challenge built into the rule, that’s a good thing. I mean, the concern about these kinds of attacks is that you go in thinking “I’m going to be talking about this sexual assault” and then out of left field comes something else. And I think that there’s a reason why we have this requirement in Rule 412, because it’s important to know as you prepare that this evidence is coming, and it is important to be able to challenge it.¹²⁹

So, I actually think, even if the proposal does add a burden, it’s a justified burden because they are put in evidence, but they’re not part of the charged offense, and so people should have an opportunity to challenge them or prove them conversely. And I will emphasize also that the proposal does provide that if the complainant doesn’t deny the accusation, extrinsic evidence is unnecessary. So, it does somewhat limit the use of extrinsic evidence to the instance in which either the complainant’s not testifying, or the complainant says, “I never made that accusation” or “I never said it was nonconsensual” or whatever, and there’s powerful evidence that that’s not true.

128. *See* *United States v. Velarde*, 485 F.3d 553, 555 (10th Cir. 2007) (employing an approach requiring parties to brief the evidence’s admissibility under Rule 412); *see also* *United States v. A.S.*, 939 F.3d 1063, 1072–73 (10th Cir. 2019) (conducting a constitutional analysis).

129. *See* FED. R. EVID. 412(c).

PROF. CAPRA: Judge Sargus.

JUDGE SARGUS: And you're raising the burden of proof of the proponent. You're not using *Huddleston* anymore. It's not the reasonable juror test. It's going to be a preponderance, so the judge will be much more in the role of weighing evidence rather than finding sufficient evidence.¹³⁰

PROF. MURPHY: Yes, that is intentional, and it is only for the extrinsic piece; I specifically made it a Rule 104(a) inquiry, so it would put the judge in that position.¹³¹

I think in many cases they're in that position anyway because they're making a constitutional determination. So, at some level, courts are doing either the initial inquiry into the basis for the assertion—that it's a false accusation—and a secondary inquiry on probativeness, which sometimes then goes to how strong the evidence of the falsehood is. You see courts combining it sometimes where they're saying something like, "It's not clearly false and so there is weaker probative value."

CHAIR SCHILTZ: There's a little bit of ambiguity here because it starts by providing that "extrinsic evidence of witness's prior false accusation may be admitted" but then in subdivision (3) it allows extrinsic evidence "if the witness does not testify."¹³² If the witness doesn't testify, then . . . they are not a witness. So, I'm wondering, how does this work practically? Your idea would be that at the pretrial conference you would have the witness there, and you would put them on the stand, and swear them in, and ask them if they, in fact, made this false statement?

PROF. MURPHY: Not necessarily. I think my vision—and maybe this language is not capturing it right—is that it is part of the pretrial notice. So, you would have to say, "I intend to use this prior false accusation."

CHAIR SCHILTZ: Right.

130. See Murphy, *supra* note 109, at 2550.

131. Federal Rule of Evidence 104(a) provides that the trial court must find it more likely than not that an admissibility requirement has been met. See FED. R. EVID. 702 advisory committee's note to 2023 amendment ("There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules.").

132. Professor Murphy proposed a new Rule 608(c), which would provide as follows:

(c) EXTRINSIC EVIDENCE OF A PRIOR FALSE ACCUSATION. Extrinsic evidence of a witness's alleged prior false accusation may be admitted [in a criminal case] [subject to Rule 412(b)] to attack the witness's credibility if:

- (1) the proponent gives an adverse party reasonable written notice of the intent to introduce such evidence so that the party has a fair opportunity to contest its use;
- (2) the court determines that
 - (i) the falsehood of the prior accusation has been established by a preponderance of the evidence, with more than mere proof that the complaint was not pursued by the complainant or law enforcement, or that the accused denies the accusation; and
 - (ii) the prior false accusation is substantially similar in nature or of equal or greater magnitude to the charged offense; and
- (3) the witness is confronted with the prior false accusation and denies having made the prior accusation, denies its falsehood, or does not testify.

See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 127, at 400.

PROF. MURPHY: And at that point, the other party can say “it’s not false” or “that never happened” or whatever. And then, yes, the court must make this determination before—

CHAIR SCHILTZ: Based on what? What I hear at trial?

PROF. MURPHY: No.

CHAIR SCHILTZ: Or what I do at a hearing outside of the jury?

PROF. MURPHY: A hearing outside of the jury. Again, this is why it’s meant to be in the 104(a) framework, not in a *Huddleston* framework. So, the determination of falsity would be made outside the presence of the jury, but it would not require the complainant to testify if that’s not something that the party wants.

PROF. CAPRA: The rule proposal doesn’t actually require a hearing.

PROF. MURPHY: No, it doesn’t. I mean, it might be just done on proffers.

CHAIR SCHILTZ: But the third element, involving the witness being confronted with the prior accusation, and denying having made it—that criteria I can’t decide until we’re in the middle of the trial, right?

PROF. MURPHY: Yes.

CHAIR SCHILTZ: So, I’m supposed to decide elements one and two before trial and then we just wait to see what happens with three?

PROF. MURPHY: Yes. I mean, first of all, this is a framework that some states have adopted, so it’s not like it’s never worked anywhere.¹³³

CHAIR SCHILTZ: I see. I’m just getting clarification of how this works in practice.

PROF. MURPHY: I think you could imagine it several ways. You could imagine a pretrial ruling that says, “I rule this is going to be admissible subject to subdivision three based on how the evidence unfolds.”

CHAIR SCHILTZ: Okay.

PROF. MURPHY: You can imagine a ruling that says, “Do you intend to offer this witness to testify?” The opponent says, “No, the witness is not going to testify”—like in a child case, for instance, or if the witness is unavailable. The opponent is relying on hearsay, in which case you would know right from the jump the defense has the opportunity to introduce the evidence. If the witness takes the stand and either expectedly or unexpectedly admits that the prior allegation was false, then that would be the end of it because extrinsic evidence is unnecessary. I do think there are valuable reasons not to get into the mini-trial, and so this keeps you from the mini-trial if the witness is just willing to own it and say, “Yes, that was a prior—that was false.”

Rule 403 still governs how much of a digression we’re talking about. Are we just talking about a document? Are we talking about a single witness? But this proposal permits that digression where either the witness isn’t

133. See *Kassandra Altantulkhuur*, Note, *A Second Rape: Testing Victim Credibility Through Prior False Accusations*, 2018 U. ILL. L. REV. 1091, 1116–17.

present or the witness says, “I never made that accusation” or “I made it, but it wasn’t false.”

PROF. CAPRA: It might be useful to change the term “witness” at the beginning of the proposal because we won’t always be talking about witnesses. That is something to play with.

PROF. MURPHY: When I was thinking of “witness,” I was thinking broadly. I did actually, in an earlier version, have “accusatory witness” as made-up language, and then I thought that’s too far afield of anything we’ve seen. You could limit the rule to “the complainant.” I have concerns about that because of the kid cases, where the accusation is reported by an adult.

And I’ll just say briefly I think the kid cases are really hard. Obviously, everyone has great concerns when there’s an allegation of sexual abuse by a child. I also think, conversely, children are very susceptible to adult influence, and we know that through experience. And so, there is a real concern about not letting in information about prior accusations now admittedly false, because the sympathies of the case are to try to get a conviction.

MR. COONEY: We seem to be focused on prior accusations of sexual assault and like offenses, but, really, this proposal would apply to some guy who’s been in twelve automobile wrecks and has filed claims and keeps losing them—so arguably they’re false—or prior medical claims, or insurance loss claims. We’re talking about a wide application particularly on the civil side, not just in the criminal context.

PROF. MURPHY: Yes, that’s why in the proposal I put a criminal case limitation in brackets.¹³⁴ The proposal could arguably be limited to criminal cases, especially as part of the idea of the proposal is to safeguard constitutional rights or expand them slightly. How much you want to open that door more explicitly in a civil case, I think, is a fair question.

On the civil side you could imagine cases where someone routinely alleges—

PROF. CAPRA: A practice.

PROF. MURPHY: Yeah, exactly.

PROF. CAPRA: Sexual harassment, Title VII of the Civil Rights Act of 1964.¹³⁵

PROF. MURPHY: Yes.

PROF. CAPRA: Just because you made a complaint about something doesn’t mean it’s an “accusation,” so the proposal wouldn’t apply to many civil cases.

PROF. MURPHY: That’s true. I think I had at one point provided that it had to be an official accusation, which is another way to limit the rule.

MR. SIFFERT: If you’re saying prior false statements against somebody or something like them are probative, then why would we limit the rule to criminal cases only?

134. *See supra* note 132 and accompanying text.

135. 42 U.S.C. §§ 2000e to 2000e-17.

PROF. MURPHY: I think the theory is that false statements are not as probative because we all lie, but that doesn't mean we lie in court; whereas with false accusations, how often do people accuse other people, putting other people in jeopardy directly? Not just indirectly, like, "Oh, I lied and now I'm getting more on my taxes or whatever," but rather, "I'm going to get you in serious trouble by lying about you." I think it's a different kind of credibility that needs special attention.

PROF. CAPRA: Okay. Thank you so much.

PROF. MURPHY: Thank you.

PROF. CAPRA: Our last scholar is Professor Andrea Roth, who is going to be presenting remotely. She is a nationally known expert on machine-based evidence.¹³⁶

PROF. ROTH: Thank you. This at first may seem like a major pivot from Erin's presentation, but, in one sense, I'm really just talking about another group of witnesses in a broader sense: sources of information that can only be impeached through extrinsic evidence because they cannot be cross-examined.

Let me just make a couple of framing remarks and then put up some suggested language. Like Erin's presentation, I'm seeing this as planting the seeds for and flagging issues that I think will come before the Committee and that they'll have to deal with in the next one-to-five years. And so, my hope is that this will allow you to see some of the problems and some of the options when we get to the point where some of this will need immediate attention.

What I'm talking about by machine conveyances of information is different from what Judge Grimm and Professor Grossman will be talking about later, which is more about authentication, let's say, deepfakes, where there's a concern about what am I actually even looking at.

Here, I'm talking about what is essentially an analogue to human hearsay, which is there's an actual claim that if it were made by a human declarant it would be hearsay. But instead, the information is the output of a processor system. For example, this is an Intoxilyzer 5000 report.¹³⁷ It says "Test Result: 0.15." It is saying that this person's blood alcohol level is 0.15.¹³⁸

Another example is a likelihood ratio from a probabilistic genotyping software system that gives match scores for a DNA mixture and a defendant. A third example—something that's already in criminal trials—is a computer scientist who was hired as an expert in a case where the question was, "Did a defendant write a tweet that was confessing to the crime?"¹³⁹ The expert trained three machine learning algorithms, classifier algorithms, on data sets of tweets, one of which belonged to the defendant, and then two others were

136. See *Andrea Roth*, U.C. BERKELEY RSCH., <https://vcresearch.berkeley.edu/faculty/andrea-roth> [https://perma.cc/T6MH-N8TG] (last visited Apr. 3, 2024).

137. See Appendix A.

138. *Id.*

139. See Andrea Roth, *The Use of Algorithms in Criminal Adjudication*, in *THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS* 407, 413–14 (Woodrow Barfield ed., 2020).

authored by somebody else who had access to his account, and all three classifier algorithms determined that he was not the author of the note.¹⁴⁰

So just to be clear, this is not just a concern about false accusations from machines. Machine output is also being used to present exculpatory information in civil and criminal trials.¹⁴¹ Criminal trials are where you're seeing some of the reliability issues that are most acute, but machine-generated evidence is obviously an issue in civil trials as well.¹⁴²

Just to give you a sense, the National Institute of Standards and Technology (NIST), part of the Department of Commerce, is the neutral government institution that is dealing with the rapid automation of forensic identification techniques.¹⁴³ Two years ago, NIST put out a report about probabilistic genotyping software.¹⁴⁴ And I just flag it because this is a group of well-respected scientists who are saying these systems are producing results that may well be totally unreliable in certain circumstances, and we do not have the data currently to know in which circumstances they are reliable and in which they are not.¹⁴⁵ So the concern about machine-generated evidence is not hypothetical.

I also note an example from a case in upstate New York where two different probabilistic genotyping software programs came to dramatically different results on the exact same DNA sample, and the proprietor of one of the software packages later issued an explanation for how you could reconcile the two results.¹⁴⁶ But, to my mind, the point is that if all you have is the machine output and a jury trying to figure out what it means, we're in a place where, because of slight differences in the assumptions underlying the software and matters that are not able to be discerned merely through a short cross-examination of the proprietor of the programmer on the witness stand, you're really seeing differences between a true and false accusation.

So, what do I see as the problem? The problem is that these conveyances of information from machines, they're ubiquitous, and they're potentially unreliable, even though they've also contributed to the increased accuracy of

140. *See id.* at 414.

141. *See* Jacob Gershman, *Prosecutors Say Fitbit Device Exposed Fibbing in Rape Case*, WALL ST. J.: L. BLOG (Apr. 21, 2016, 1:53 PM), <https://www.wsj.com/articles/BL-LB-53611> [<https://perma.cc/GCW5-T9MG>]; *see also* *Jalowsky v. Provident Life & Accident Ins. Co.*, No. CV 18-279, 2020 WL 4814286, at *2 (D. Ariz. Aug. 17, 2020) (compelling production of fitness device data in a disability insurance action).

142. *See* Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972, 2013–14 (2017).

143. *See Forensic Genetics*, NIST, <https://www.nist.gov/forensic-genetics> [<https://perma.cc/32J5-LLCR>] (last visited Apr. 3, 2024).

144. *See generally* JOHN M. BUTLER, HARI IYER, RICH PRESS, MELISSA K. TAYLOR, PETER M. VALLONE & SHEILA WILLIS, NAT'L INST. OF STANDARDS & TECH., DNA MIXTURE INTERPRETATION: A NIST SCIENTIFIC FOUNDATION REVIEW (2021), <https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8351-draft.pdf> [<https://perma.cc/K7QB-P38P>].

145. *See id.* at 5–6.

146. *See* Roth, *supra* note 142, at 2019–20 (discussing *New York v. Hillary*); *Ruling – The People of the State of New York Versus Oral Nicholas Hillary (NY) - DNA Evidence Admissibility*, STRMIX: EMPOWERING FORENSIC SCI. (Dec. 9, 2017, 9:00 AM), <https://www.strmix.com/news/ruling-the-people-of-the-state-of-new-york-versus-oral-nicholas-hillary-ny-dna-evidence-admissibility/> [<https://perma.cc/G646-HM72>].

proof in really important ways. They're often proprietary. Sometimes the source code is deemed a trade secret. I can only speak for The University of California, Berkeley, but researchers in our computer science department have not even been allowed to have a license to conduct independent audits to figure out how some software works under different circumstances, and it is surely difficult for jurors to assess reliability on their own without more information.

So, to the extent that jurors might not understand why a human hearsay declarant is or isn't reliable, just imagine a program that has tens of thousands of lines of code trying to figure out whether this likelihood ratio may be off by a factor of 100. A lay juror does not have the tools right now to do that.

The current rules, and common law for hundreds of years, have addressed human assertions in a lot of ways both through the ability to impeach human declarants with evidence that can attack their credibility but also in the rule against hearsay, which is essentially an enforcement of discovery rules. I like to think of cross-examination and physical confrontation as discovery tools. They are real-time trial tools that allow the litigants and the jurors to learn additional context about a statement that's important for assessing its probative value. We don't have those discovery tools when it comes to machine output. And so, I think, to the extent that we have the rule against hearsay, which says we don't want out-of-court statements of humans to come in unless you have that additional context, I think there's room for that sort of enforcement rule with respect to machine witnesses as well.

Right now, under the rules, we really just have Rule 702, which has been interpreted to allow scrutiny of certain machine outputs when it is the method underlying a human expert's opinion. You do have *Frye v. United States*¹⁴⁷ and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁴⁸ hearings—I mean, we're talking about the Federal Rules, so I'll just say *Daubert*—about certain software packages. But they are generally based on validation studies that are run by people who are not independent of the proprietors themselves, and they're very general, and they say, "Look, there's not a high false positive rate for routine casework." And that's really not enough at this point to figure out when this output is right or wrong.

You might say, "Well, why don't we just tweak the rule against hearsay to include machine declarants as well as human declarants?" But that's not an option because the rule against hearsay is built around cross-examination and physical confrontation. The problem with machine output is it's no more or less credible just because it's given in court. So, really, the rule against hearsay makes no sense as applied to machine witnesses. I know that in the 1990s and the early 2000s there were some federal courts that were treating it like hearsay, and that's just—I hate to say it—but that's just incorrect.¹⁴⁹ That's just wrong.

147. 293 F. 1013, 1014 (D.C. Cir. 1923).

148. 509 U.S. 579, 594 (1993).

149. See *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993) (finding a computer-generated report inadmissible because it "was not kept in the course of a regularly

As AI becomes more sophisticated, there is going to be a much more serious issue of legitimacy, of verdict accuracy, if we're worried about it being unreliable. Right now, these issues are dealt with in a one-off way by underfunded public defenders and underfunded prosecutors for that matter. The reliability of machine-based evidence is just not being well litigated in any way. So, let me just jump in and give a few suggested possible changes. I know this is a lot. I'm really just imagining this as sort of a survey of potential options for future discussion.

Rule 702 only applies to human experts. There are now expert systems, the output of which, if it were rendered by a human, would clearly be an expert opinion. And I could imagine one possibility would be to tweak Rule 702 to make sure that it is clear that it applies to machine output as well, when that would essentially be expert testimony if it were rendered by a human. I'm using the December 31, 2023 language of 702 here. I'm adding an extra provision for machine-based evidence.¹⁵⁰

So not only will the output help the trier of fact, et cetera, but the opponent must have reasonable access to the inputs and data at the end. The output must reflect a reliable application of the principles and methods based on the processor system's demonstrated reliability under circumstances or conditions substantially similar to those in the case. So, that would signal to judges that the issue is: Are there validation studies that show that this algorithm works under conditions of similar complexity? That is really key when we're talking about algorithms that you just can't get from anything other than validations testing. It's different from human testimony in that way. I also added that the output of basic scientific instruments and tools are not subject to the requirements of this rule. For hundreds of years, we've had, for example, the output of barometers and thermometers and sextants introduced at trial. There is a body of case law to deal with that. I'm not intending to change that. If somebody wants to point out that the battery in a digital thermometer was off, I think there are currently ways of addressing that argument.

conducted business activity"); *Jianniney v. Delaware*, 962 A.2d 229, 232 (Del. 2008) (excluding MapQuest driving estimates as inadmissible hearsay).

150. Professor Roth's proposed amendment to Rule 702 provides as follows:

(2) Where the output of a process or system would be subject to part (1) if testified to by a human witness, the proponent shall demonstrate to the court that it is more likely than not that:

(a) The output will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The output is based on sufficient and pertinent inputs and data, and the opponent has reasonable access to those inputs and data;

(c) The output is the product of reliable principles and methods; and

(d) The output reflects a reliable application of the principles and methods to the facts of the case, based on the process or system's demonstrated reliability under circumstances or conditions substantially similar to those in the case.

(3) The output of basic scientific instruments and tools are not subject to the requirements of this rule.

See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 127, at 408.

But, to the extent that there aren't, I think the Committee should also keep in the back of their mind that there might need to be changes to Rule 806, which is now the way that human hearsay declarants can be impeached in any way that they could otherwise be impeached if they had testified.¹⁵¹ But going back to Erin's presentation, one way that you can't impeach a human hearsay declarant is with extrinsic evidence of a prior false statement or evidence that's probative of truthfulness. And after Jeff Bellin's Rule 609 proposal is passed—which I'm sure it will be and which I'm in favor of—apparently, there will be no extrinsic evidence, period, even under Rule 608.¹⁵² So you could no longer bring up a 911 caller's prior twelve perjury convictions.

So, I think one change to 806 that would deal with this would be to just make clear that when it's an output of a processor system that would be hearsay if uttered by a human declarant, you could also impeach it with evidence of an inconsistency, evidence of prior false statements, or prior false allegations.¹⁵³

The last two big areas where you could imagine putting changes in instead of just creating a new rule, like Rule 808, to deal with machine declarants, would be to change Rules 901 and 902. So, as you know, Rule 901(b)(9) is this bizarre little rule that allegedly is about authentication.¹⁵⁴ But I think it is because of Judge Jack B. Weinstein, who, in the late 1960s, said something to the effect of "Hey, what about IBM counting machines, shouldn't we be putting something in here that deals with the accuracy of machine output?" He added this bizarre word "accurate" to mean evidence describing a processor system and showing that it produces an accurate result, which sounds a lot more like validity of the statement.¹⁵⁵ I know Professor Grossman's going to be talking about the difference between validity and reliability. I'm thinking of scientific validity/evidentiary reliability in the *Daubert* sense.

So, this would be a place, because that word "accuracy" is in there, to put some additional requirements on machine output. Some of these requirements are what critics have been arguing for with respect to machines.

151. *See* FED. R. EVID. 806.

152. *See* ADVISORY COMM. ON EVIDENCE RULES, *supra* note 127, at 14.

153. Professor Roth's proposed change to Rule 806 is as follows:

(2) When output of a process or system has been admitted in evidence, and would be a hearsay statement if uttered by a human declarant, the output's accuracy may be attacked, and then supported, by any evidence that would be admissible for those purposes if the output had been uttered by a human declarant. The court may admit evidence of the process or system's inconsistent output, or prior false output where probative of the admitted output's accuracy, for these purposes as well.

See id. at 409.

154. *See* FED. R. EVID. 901. Professor Roth's proposed change to Rule 901(b)(9) appears in Appendix B.

155. ADVISORY COMM. FOR THE RULES OF EVIDENCE, THE SIXTEENTH MEETING OF THE ADVISORY COMMITTEE FOR THE RULES OF EVIDENCE ON DECEMBER 10, 1968, at 39 (1968), https://www.uscourts.gov/sites/default/files/fr_import/EV12-1968-min.pdf [<https://perma.cc/45ZJ-ZPJF>].

There's a long list of people such as Jennifer Mnookin to Ed Imwinkelried who have talked about all of this.¹⁵⁶

The opponent right now has no right to fair pretrial access to the processor system. There is no current ability to get Jencks Act¹⁵⁷ material with respect to machines, which there should be, and with respect to hearsay declarants for that matter too.¹⁵⁸ I think there needs to be evidence of validation testing by an independent entity in some way, and it should be a condition of admissibility. I think a condition of admissibility in criminal cases should be that the proponent, or the proprietor of the software that the proponent is offering, should not be using a trade secrets privilege to shield the information from disclosure.

This is not about disclosing source code to the other side. I know that that is a third rail. I know it may not always be necessary to scrutinize machine output, so I'm not putting that in here as any sort of requirement. But I think one thing that the Committee should be thinking about is the existence of NIST and the fact that NIST is still seen as a very trustworthy neutral institution, and I think we should be using NIST in the same way that we use the FDA [U.S. Food and Drug Administration] for proprietary information in the drug context. It could be some sort of repository for otherwise secret information or source code or anything adding to the legitimacy of the use of algorithms, especially in criminal trials, so that people aren't being convicted based on black box information. Just to be clear, this is totally consistent with what you'll hear later on about deepfakes and Judge Grimm and Professor Grossman's suggestions for changing 901(b)(9)—I just wanted to note that it would be consistent with what they're doing.

And then Rule 902(13) is the self-authenticating version of 901(b)(9), and so there's nothing different here. I'm just pointing out that you could also require that this information be in a certification as well.¹⁵⁹

I'm going to end by saying what, as Professor Imwinkelried, who's a mentor of mine, referred to: you could imagine that changing Advisory Committee notes—like a short change that wouldn't involve taking on all of these other actual rule changes—would be to signal to judges, in tweaks to the Advisory Committee notes, that machine statements are an issue. So, changing the notes to Rules 702, 806, or 901 and 902 to say: “We mean that people should be able to impeach machine output. We mean *Daubert*

156. See Jennifer L. Mnookin, *Repeat Play Evidence: Jack Weinstein, “Pedagogical Devices,” Technology, and Evidence*, 64 DEPAUL L. REV. 571, 573 (2015) (“The opposing party could therefore test the robustness of the simulation by altering the factual assumptions on which it was built and seeing how changing these inputs affects the outputs.”); Edward J. Imwinkelried, *Computer Source Code: A Source of the Growing Controversy over the Reliability of Automated Forensic Techniques*, 66 DEPAUL L. REV. 97, 120 (2016).

157. 18 U.S.C. § 3500.

158. The Jencks Act requires the prosecutor to produce a verbatim statement or report made by a government witness or prospective government witness (other than the defendant) but only after the witness has testified. *See id.*

159. Professor Roth's proposed change to Rule 902(13) can be found at Appendix C.

hearings need to be had on machine issues. We mean for accurate results to also include validation testing on similarly complex samples.”

So anyway, I’ll stop there, even though I know that’s a lot to throw out. Again, planting the seeds for future discussion.

PROF. CAPRA: Thank you so much, Andrea. I think for the new members of the Committee, it might be worth it to touch base about why the Committee doesn’t just go back and change notes.

CHAIR SCHILTZ: Certainly, the policy exists that we don’t just change notes. We only add the note to some change in the text of the rule, but the history of that is exactly what Dan Coquillette, if he’s on—

PROF. COQUILLETTE: Yes, I am. Dan Coquillette, yes. That has been the practice for forty years, and there’s good reason for it, because there are a lot of people who still only read the rule. And so, if you make a change in the note, they may well miss it.

And also, it went back to concerns with the Congress in 1988. Congress felt that the committees were making substantive policy decisions in the notes that were escaping review because they weren’t in the rule itself.¹⁶⁰

PROF. CAPRA: Well, here’s 28 U.S.C. § 2073(d): “The body making that recommendation shall provide a proposed rule and explanatory note on the rule and the written report explaining the body’s action.”¹⁶¹ So that to us has always meant that a note must go with a proposed rule change. The language is rule “and” note, not “or.”

MR. SIFFERT: The notion that computer algorithm machine output has to be tested, it seems to me—and I’m the last person in the world who should be opining about things that are digital—is that it really needs to be able to be replicated. And all this other language about testing it, validating it—the only way that I think it could be to control the situation is to replicate it. And as I understand AI, which is minimally, it’s hard to replicate AI because it changes itself upon the iterations.

But, if we required as an evidence rule that there be markers so that someone can validate the way the AI output is being generated—the prior inconsistent statement or the prior statement (what you call Jencks material) as that was being produced (if that’s going to be produced)—it has to have markers so that we know what generation the iteration was at. And that would then, I think, impose a discipline on the scientists who are creating it because they wouldn’t want to be creating things that could not be used in court. That’s how I think of this becoming practical.

PROF. CAPRA: Andrea, do you have a comment on that?

PROF. ROTH: Yes. I think that’s absolutely right, and I think that’s why even that little tweak, I mean, could also be an amendment to the Jencks Act, but I think that the Federal Rules of Evidence could be used to enforce that, if you will, is exactly right. And it goes to the question about notes too.

160. See Letter from William H. Rehnquist, C.J., U.S. Sup. Ct., to Hon. Peter W. Rodino Jr., Chair, House Comm. on the Judiciary (Oct. 19, 1988), 134 CONG. REC. 31873–74 (1988).

161. 28 U.S.C. § 2073(d).

Part of what I think these changes are doing is empowering litigants, in the same way that rules of impeachment don't hand anything to litigants on a silver platter. They just say "You go out and find the impeachment material and, if so, you can introduce it."

And this is saying, "If you have access to the prior runs of this machine, if you have access to additional machine results that could specifically contradict the one that's in trial, you can offer it." Just to put this in context, the error rates are not always admitted by judges. They say, "Well, that's some other problem," so I think there needs to be—I mean, you can even imagine a corroboration requirement, like a two-machine requirement, but I think that that is something that would probably be better dealt with through statutes and jury instructions and such. But, yes, the quick answer is I think that there would be a benefit of requiring replication information to be disclosed as a condition of allowing these algorithms in, especially in criminal trials.

MR. COONEY: I think there's another point in here. It's not just the evolution of the program. Take the mixed DNA sample which we're all struggling with. So, you have one program that makes a series of assumptions and gets this result. Now that result is valid based on the series of assumptions, so you're going to be able to replicate that every time. The issue is you have another program that makes slightly different assumptions and it gets to the opposite conclusion. And how do you deal with that?

Mr. SIFFERT: Well, you have to have markers to show what those assumptions are.

MR. COONEY: Well, yeah, but the assumptions are not changing.

Mr. SIFFERT: I mean, they're making assumptions that they're testable.

MR. COONEY: Right. I'm not suggesting it'll solve the problem, but what I'm saying is, we absolutely need to be able to reveal the assumptions and then, have some kind of an audit. For this particular case, the program makes a series of assumptions about the random match probability of this defendant being part of that mixture, and a different program, using slightly different assumptions, reaches a different random match probability of this defendant, and how do you handle that?

PROF. CAPRA: How is that any different from two experts proceeding from different assumptions and allowing them both to testify, as we say in the 2023 Committee note to Rule 702?¹⁶²

MR. COONEY: Yeah. Well, that's the problem she's pointing out. This is machines now.

PROF. CAPRA: Yes.

MR. COONEY: And you may not have a live witness because of that.

PROF. CAPRA: Right.

PROF. ROTH: If I might just add one thing, though. Just to be clear, some of these software programs themselves based on the same assumptions, et cetera, do different iterations and spit out different likelihood ratios before

162. FED. R. EVID. 702 advisory committee's note to 2023 amendment.

they decide upon one after they think they've done enough iterations. And so, part of what litigants have tried to do is get the prior runs of the same machine on the same sample and they're not allowed to have that. So, it's not just two different experts, just to be clear.

PROF. CAPRA: Judge Caproni.

JUDGE CAPRONI: What I've seen is difficulty in getting the source code and, relative to DNA, such a small sample that they can't run it twice. In some cases, it would be great if you could send it through two of the programs and see if they agree, but there's just not enough DNA, and so then what do you do? You let it in. It's incredibly powerful testimony or evidence that the defendant really has no ability to rebut.

PROF. ROTH: Yes.

JUDGE CAPRONI: So, I agree that this is a big issue.

PROF. ROTH: In the *Hillary v. St. Lawrence County*¹⁶³ case, the New York case with the two different results on the same sample, the issue was not that there was an insufficient sample left to send it to STRmix after they got the TrueAllele result.¹⁶⁴ It was the exact same genotyping information that they sent to both.¹⁶⁵ They already had analyzed the mixture and had the electropherograms and everything.¹⁶⁶

So, I think you could still get different programs' results even if you only had a little bit of the sample. But what you just said is a major issue, especially in criminal trials, where the defendant is not present for the initial testing. I think that could be dealt with maybe through the rules of discovery or through jury instructions. But I think that's an issue that just doubles down on the need to get as much information as we can on that very first result from that very first machine because it might be the only one.

PROF. CAPRA: Well, thank you so much, Andrea, these are very challenging issues.

CHAIR SCHILTZ: I was mentioning to Dan that I think in the spring it would be worth doing a symposium on machine-based evidence. This is a really important issue that has multiple facets, and at least I feel like I need a lot more education to try to figure out how to deal with this in the rules.

PROF. CAPRA: So, for our final presenters, this is hardly even a segue. A presentation on AI and deepfakes. I want to introduce Professor Maura Grossman and the Honorable Paul Grimm, who are going to speak to us about deepfakes and the evidentiary issues surrounding them. The Chair and Reporter made the decision that the use of deepfakes is going to be an important issue in the future, and we wanted the Committee to get some input on it.

163. No. 17-CV-659, 2019 WL 977876 (N.D.N.Y. Feb. 28, 2019).

164. *See generally* Decision & Ord. on DNA Analysis Admissibility, *New York v. Hillary*, Indictment No. 2015-15 (N.Y. St. Lawrence Cnty. Ct. Aug. 26, 2016).

165. *See id.* at 9.

166. *See id.* at 3.

Dr. Grossman is a professor at the University of Waterloo in Canada and a renowned expert on AI.¹⁶⁷ Judge Grimm is very familiar to this Committee and there are two Federal Rules of Evidence that directly came from him, Rule 502 and Rule 106.¹⁶⁸ Without him, those amendments would never have happened, so I wanted to credit him on the record.

JUDGE GRIMM: Thank you. So, what we're going to do is we'll start off with a general discussion of AI, so you can get a sense of it. It builds on Professor Roth's presentation. We need to understand that AI algorithms are already being used right now in every facet of our lives, and it's inevitable that what's going to happen is, in the litigation of cases, judges are going to have to deal with the admissibility of this evidence. And so, the challenge is, for all the reasons that you just heard from the last presentation, oftentimes these algorithms are proprietary. They're developed by individuals who then license it to others to use. It's used, and then, when the litigation comes in that's against the user, the licensee that has used it, and when the challenging party wants to try to address it, they get faced with claims of trade secrets.

The few cases that have dealt with this in the past, such as *Wisconsin v. Loomis*¹⁶⁹ out of Wisconsin Supreme Court, blocked access to a particular type of algorithmic evidence that dealt with predicting recidivism rates that was being used for sentencing.¹⁷⁰ The algorithm has been shown to produce some very inaccurate results that resulted in some false determinations of likelihood of recidivism, which led to a much longer criminal sentence because it was being used for a purpose other than what it was designed to do.¹⁷¹ The Wisconsin Supreme Court said you can't have access to be able to challenge the software because it's a proprietary trade secret; whereas in the civil discovery rules world, a trade secret is not a basis for forbidding access to the underlying information.¹⁷² It's a basis for a protective order.

So, what we want to do is focus on trying to give the tools to lawyers and judges that they need now to deal with AI, and provide guidance because this evidence is being used now and the experience of what's happening when parties are trying to get access to it is problematic. It is information that can be enormously powerful.

With that in mind, I'll turn it over to Professor Grossman. She'll lay out the technical background. I'll come in at the end and bore you all with the proposed rule change. We do have a very specific, modest rule change that

167. See Maura R. Grossman, J.D., Ph.D., UNIV. WATERLOO, <https://grossman.uwaterloo.ca/> [<https://perma.cc/TK9Z-CYK7>] (last visited Apr. 3, 2024).

168. See FED. R. EVID. 502 advisory committee's note to 2007 amendment (citing *Hopson v. City of Baltimore*, 232 F.R.D. 228, 235–36 (D. Md. 2005)); ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF OCTOBER 26, 2017, at 11 (2017), https://www.uscourts.gov/sites/default/files/2017-10-26-evidence_rules_minutes_0.pdf [<https://perma.cc/GXX9-NMZE>].

169. 881 N.W.2d 749 (Wis. 2016).

170. See *id.* at 767.

171. See Paul W. Grimm, Maura R. Grossman & Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9, 41 (2021).

172. See *Loomis*, 881 N.W.2d at 763–64.

ties into some of the issues that you just heard about, and we have some thoughts about how we could get our hands around this.

But I want to tell you that a seminar on this would be fantastic. Trying to get some people together to talk about it would be a wonderful, wonderful thing, and this may just be a beginning and not an end of where we're going on treating AI.

PROF. GROSSMAN: So, thank you for having me, and I'm going to talk about supervised machine learning, reinforcement learning, deep learning, and natural language processing. I'll give you a quick tutorial on generative AI and a quick tutorial on deepfakes. I'm going to talk about validity and reliability because the language you use in the rules right now is all over the place and does not comport with how scientists talk about AI. And then, finally, I'll turn it over to Judge Grimm to talk about our proposal and why we think it's important.

So, let's start with some definitions. In the past, if I wanted to train an algorithm to distinguish between pictures of puppies and pictures of kitties, I would have to sit down and write out all the characteristics of puppies and all of the characteristics of kitties, and I'd have to write every exception. So, a puppy's ears go down, but if it's a Jack Russell Terrier, its ears can go up first and then flop down, and poodles have curly hair, but other dogs don't, and I'd have to write all of these many factors down and then I'd have to translate it into another language called a programming language.

With machine learning, we don't have to do that anymore. We give an algorithm (or computer algorithm software) pictures that are labeled (e.g., "This is a kitty," "This is a puppy," "This is a kitty," "This is a puppy"), and it will learn the rules itself, so we don't have to tell it anything. It can figure out and distinguish what are the characteristics of a puppy, what are the characteristics of a kitty. So, a big change when machine learning came in is not having to do all this programming of thousands and thousands of lines.¹⁷³ The algorithm could do it automatically.¹⁷⁴

What happens if personally I don't have tons of labeled pictures of doggies and kitties, or I have a problem that's more dynamic? I'm Amazon and I've got to figure out when I am going to deliver Dan's package to him tomorrow? I know something about what he's ordered in the past. I know something about his neighborhood, but that's old information and I've got to predict today with all the other packages I have. For that problem we can use what's called reinforcement learning. Reinforcement learning allows us to do two things. One, we balance what's called exploration and exploitation. Exploration is working with our new data, today's data, and exploitation is going back into the old data and figuring out what we can learn from that old data, and we're going to combine them.¹⁷⁵

173. See Grimm et al., *supra* note 171, at 12.

174. See *id.*

175. See Błażej Osiński & Konrad Budek, *What Is Reinforcement Learning?: The Complete Guide*, DEEPSense.AI (July 5, 2018), <https://deepsense.ai/what-isreinforcement-learning-the-complete-guide> [<https://perma.cc/3USA-7ZGV>].

But, with the new data, we're going to work live, so we are going to say when the algorithm gets it right, "good algorithm," and when the algorithm gets it wrong, we're going to say "bad algorithm." People think that ChatGPT just came out of thin air. But there was tons of reinforcement learning, people looking at thousands of responses a day and saying, "That's a good answer," "That's not a good answer," or "That's a toxic photo, don't show that."¹⁷⁶ There was a tremendous amount of reinforcement learning that was behind the scenes.

To understand deep learning, think of a stack of pancakes. On the top is your input and at the bottom is the output. So, my task is to figure out what's in a picture. Well, I'm going to have a stack of algorithms and the first algorithm may look at the pixels in the foreground, the second algorithm may look at the pixels in the background, the third algorithm may look at the color, the fourth algorithm may look at the shadows, and all of this information gets integrated together, and then a prediction is made that you can see at the end. This stacking allows us to do much more complicated tasks.

Now think about an autonomous vehicle. I have Lidar, I have radar, I have sonar, I have GPS, I have weather conditions, and I have road conditions. I can have layers dealing with all of that. Each one of these is a little brain functioning, and that's why they call it neural networks. And all of that information gets integrated.

The problem is that this is all a black box. Even the people who develop these algorithms cannot tell you what is going on at each level. ChatGPT has ninety-six of these algorithms sitting on top of each other.¹⁷⁷ Everything I talked about up to now has nothing to do with understanding meaning. It's all just probabilities, statistics, patterns. But sometimes we need to do tasks that require us to understand what it means, what is being asked of us, and that's what natural language processing does. So, it's asking a computer to understand—although it wouldn't be understanding the way that any of you would understand—but for it to understand and construct a model of language.

So, what does it do? Well, first, it splits things into words. It figures out what are the words, what are the verbs, what are the nouns, which ones are important—like the words "uh" and "the" aren't very important. They don't tell us anything. They're in every single sentence. But "platypus" may be very important because it's an unusual word. The program is going to look for context. So, "smack," "strike," and "slap" might have one meaning; "strike," "labor," and "union" might have another meaning; and "strike," "umpire," and "first base" may have a third meaning. And so, it's going to look for that context. It's basically going to build a model. So, when we're talking about AI, we're talking about any or all of these processes. It can be in any combination, so it's not just one of them.

176. See Maura R. Grossman, Paul W. Grimm, Daniel G. Brown & Molly (Yiming) Xu, *The GPTJudge: Justice in a Generative AI World*, 23 DUKE L. & TECH. REV. 1, 9 (2023).

177. See *What Are Foundation Models?*, AMAZON WEB SERVS., <https://aws.amazon.com/what-is/foundation-models/> [<https://perma.cc/JJ5Z-B49K>] (last visited Apr. 3, 2024).

Now let's discuss generative AI. Generative AI is a subset of AI. It trains from the whole internet (or a very, very large data set) and it can generate new content in response to a prompt. I ask it something. It returns an answer to me. So, it can converse. It can replicate a style. Take this evidence rule and make it into a sonnet, a Shakespearean sonnet. Now make it into an Eminem rap. So, it can change styles very easily. It falls under the broad category of machine learning, and it specifically uses deep learning. And because it is generating this new content and because there's so many different layers, it can hallucinate. It can make stuff up when it doesn't know an answer.

So why did generative AI appear all of a sudden? Well, it wasn't actually all of a sudden. There are a couple of things that happened since 2010 that have made it come to the forefront. The first is what we call Generative Adversarial Networks, or GANs. GANs are two algorithms working in competition. One is a generative network. My generative network is trying to make an image of Judge Grimm. My discriminative network is competing with it, and it says, you didn't get the glasses right. So, my generative network will try a different pair of glasses. You didn't get the nose right. So, it'll tweak the nose. Part of the problem with AI is that we don't have tools that allow us to discriminate the good data because, as soon as the discriminator gets better, the generator gets better. So, every time somebody comes up with a good discriminator to figure out whether the text or video is real or not, the generator gets better. They are locked to each other. GANs revolutionized images, video, and audio and just changed all of what we could do with them.

In 2017, Google introduced what was called transformer architecture.¹⁷⁸ It was a big breakthrough in natural language processing. We no longer needed as much of this labeled training data that I was talking about, and we can process information with ten, fifteen, a hundred computers at once instead of one computer.¹⁷⁹ And another major change with GPT-3 was they started to use this reinforcement learning in the background, saying "That's a really good answer" or "That's not a good answer."¹⁸⁰

So now let's get into deepfakes. Deepfakes are AI's answer to photoshop. It started with AI-generated fake videos. They first appeared when some guy screen-named Deepfake actually was on Reddit, and he was posting doctored porn, taking celebrity faces and putting it on the porn.¹⁸¹ And, originally, you could see where the head was connected, and it wasn't quite right. But one thing that's really unusual in this community is everybody all over the

178. See Ashish Vaswani, Noam Shazeer, Niki Parmar, Jakob Uszkoreit, Llion Jones, Aidan N. Gomez, Lukasz Kaiser & Illia Polosukhin, *Attention Is All You Need* (Aug. 2, 2023) (unpublished manuscript), https://proceedings.neurips.cc/paper_files/paper/2017/file/3f5ee243547dee91fbd053c1c4a845aa-Paper.pdf [<https://perma.cc/P5PU-4CE6>].

179. See Grossman et al., *supra* note 176, at 9.

180. See *id.*

181. See Meredith Somers, *Deepfakes, Explained*, MIT SLOAN SCH. MGMT. (July 21, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/deepfakes-explained> [<https://perma.cc/T7J7-Z2QT>].

world is doing it, and you can ask a question and somebody from anywhere on the planet will help you out and debug your program. So, he started asking people for help, and within weeks they made the fake amazingly good. Next it moved into revenge porn—you know, your partner left you, you make porn out of them.¹⁸² And then it moved into spoof and satire, so we all remember the Obama tape where they had him saying things he didn't say.¹⁸³ And, finally, of course, it extended to fraud.

In 2019, we had the first case where the head of the UK subsidiary of a German firm paid 200,000 pounds when he got a call that sounded like the CEO of the company, except it wasn't the CEO of the company.¹⁸⁴ It was a fraudster.

The term Deepfake has now been expanded to include fake photos, fake social media accounts, fake reviews, fake voice clones, and fake evidence. So, you know, for the video of Nancy Pelosi—I'm going to actually call that a shallow fake because that was a real tape of her¹⁸⁵—they just slowed it down, whereas for a deepfake, the underlying work didn't even exist as actual entities.¹⁸⁶ Again, it is those two algorithms: generator and discriminator.

So, I take Dan's face, and I take Judge Grimm's face, and I run both of them through an algorithm called an encoder, and it's going to find what is similar about the two of them, and it's going to compress that information and find all the similarities. Then I'm going to bring in a decoder to uncompress the stuff, except I'm going to put Dan on Paul's face and Paul on Dan's face and then ask the decoder to bring them back. And what's going to happen is I'm going to get a face swap, and I'm going to have Paul doing what Dan was doing and Dan doing what Paul was doing. Very easy to do.

PROF. CAPRA: I think you lose in that trade, Paul.

[Laughter.]

PROF. GROSSMAN: So, I want you to close your eyes—

JUDGE GRIMM: All in the name of science.

PROF. GROSSMAN: I want you to close your eyes for a second and listen. I hope the audio works. I did this in about two seconds. Cost me nothing.

[Whereupon an audio was played as follows:]VOICE: Hey, Janice, this is Joe Biden. I need you to do me a favor. If you can transfer \$10,000 from the treasury account to Dan Capra's checking account, account number

182. See Moira Donegan, *Demand for Deepfake Pornography Is Exploding. We Aren't Ready for this Assault on Consent*, GUARDIAN (Mar. 13, 2023, 6:16 AM), <https://www.theguardian.com/commentisfree/2023/mar/13/deepfake-pornography-explosion> [https://perma.cc/AS7V-ZFY6].

183. See Daniel Akst, *The Researchers Who Synthesized Video of Barack Obama*, WALL ST. J. (July 21, 2017, 12:52 PM), <https://www.wsj.com/articles/the-researchers-who-synthesized-video-of-barack-obama-1500655962> [https://perma.cc/3ADW-SAEQ].

184. See Somers, *supra* note 181.

185. See *Doctored Nancy Pelosi Video Highlights Threat of "Deepfake" Tech*, CBS NEWS (May 26, 2019, 9:26 AM), <https://www.cbsnews.com/news/doctored-nancy-pelosi-video-highlights-threat-of-deepfake-tech-2019-05-25/> [https://perma.cc/5ETR-SRBS].

186. See *id.*

004753926, by tonight, that would be great. Give me a call back if you have any questions. Thanks.

[End of audio.]

PROF. GROSSMAN: So that was free. That took me about two seconds. It's not perfect. It does sound like Biden, but with a little bit of money and a little bit of time and about three seconds of your voice, I can cause a lot of mischief, and how are you going to know if this is real or not?

So, I'd like to show you how easy it is to take a photo of you and then make you slobbering drunk from last night.

[Whereupon a video was shown as follows] VOICE: In the description, using this tool, it's possible to create deepfakes. The material we're about to show you is for educational purposes only. To get started with animating an image using this tool, you'll need two input sources: an image that you want to animate and a video that will be used to animate your image. The video you provide is called the driving video. Once you have your input sources ready, head over to the website by clicking the link in the description. On the site, you'll see two sections where you can provide your input sources: one for the input source image and one for the driving video. You can use the provided example image of Donald Trump or upload your own image by clicking drop a file or click to select.

For this tutorial, we'll focus only on the first model, which is based on celebrities talking in front of the camera. Once you've selected the first model, you can start the process of animating your image. The tool will use the model to create a video of your image that mimics the movements and expressions of the person in the driving video. The outcome will be a set of images that have been animated based on the style of the driving video. Click on the video and download.

Thanks for joining me today, and I'll catch you in the next one.

[End of video.]

PROF. GROSSMAN: It's that easy for me to take one of your photos and make a video of you. Okay. So, where does that leave us, and why are we here in front of you? Because there are two problems that these deepfakes and that generative AI cause. One is we're moving into a world where none of us are going to be able to tell what is real from not real evidence—which of these videos are real, which of these aren't. And I'm very worried about the cynicism and the attitude that people are going to have if they can't trust a single thing anymore because I can't use any of my senses to tell reality.

And the other is what they call the liar's dividend, is why not doubt everything, even if it's in fact real, because now I can say, "How do you know it's not a deepfake?", and we saw a lot of that in the January 6 cases. Some of the defendants said, "That wasn't me there" or "How do you know

it was me?”¹⁸⁷ Elon Musk used that defense already.¹⁸⁸ So you’re going to have both problems: one where it really is fake, and now every case going to require an expert; and the other where it really is real evidence, and you don’t want to become so cynical that you don’t believe any of it.

I want to talk about language because I’m a real stickler about words, and I’ll talk to you about the way science has viewed AI. There are two different concepts. One is validity. We don’t use the word “accuracy.” And the other is reliability. Validity is: does the process measure or predict what it’s supposed to measure? So, I can have a perfectly good scale, but if I’m trying to measure height, then a scale is not a valid measure for height. Reliability has to do with “does it measure the same thing under substantially similar circumstances?” And it’s really important that we measure validity and reliability and not “accuracy” because a broken watch is accurate twice a day, right? But it’s not reliable.

So, for those of you who are more visual, when you’re valid and you’re reliable, you’re shooting at the target, and you are consistent. When you’re invalid and unreliable, you’re not shooting at the center, and you’re all over the place. When you’re invalid and reliable, you’re shooting at the wrong place, but you’re very consistent in shooting at the wrong place. And when you’re valid and unreliable, you are shooting at the center, but you’re all over the place.

We need evidence that is a product of a process that is both valid and reliable. Right now, the rules use the word “accuracy” or “accurate” in some places (such as in Rule 901(b)(9)) and “reliable” in other places (such as in Rule 702),¹⁸⁹ and I think it’s confusing to practitioners because it doesn’t comport with what scientists mean by these words or how they’re used if you look them up in the dictionary.

So, I’m going to stop there and turn it over to Judge Grimm unless anybody has any questions about the technology.

CHAIR SCHILTZ: If you’re a stickler for language, this might depress you because I’m not going to be able to use the right language. So, you talked about how you had the algorithm generating content, and you have the other one that’s correcting it. If the other one’s smarter than the first one, why doesn’t the other one just generate the content?

PROF. GROSSMAN: Because they have different purposes. They’re doing two different things, and you need both of them to work together. It’s the competition between the two of them that lets both of them grow and get better.

187. See Shannon Bond, *People Are Trying to Claim Real Videos Are Deepfakes. The Courts Are Not Amused*, NPR (May 8, 2023, 5:01 AM), <https://www.npr.org/2023/05/08/1174132413/people-are-trying-toclaim-real-videos-are-deepfakes-the-courts-are-not-amused> [https://perma.cc/A2EC-8EBR].

188. See *id.*

189. FED. R. EVID. 901(b)(9) (permitting evidence that describes “a process or system and showing that it produces an accurate result”); *id.* 702(c), (d) (requiring that expert witness testimony be the product of “reliable principles” and reflect a “reliable application of the principles and methods to the facts of the case”).

CHAIR SCHILTZ: Is there any limit to the number of correcting programs that could be running on the generative program?

PROF. GROSSMAN: No, and that's why almost everybody is saying the answer is that we're just going to get better correcting programs, but then people pick the correcting programs that are really good, and then they make the generative program better.

CHAIR SCHILTZ: Are there correcting programs for the correcting programs?

PROF. GROSSMAN: That I don't know about, but it's been a real arms race, I do know that.

CHAIR SCHILTZ: Yes.

PROF. GROSSMAN: And then you've got all kinds of bias, like the confusion between people who aren't native English speakers with generative AI because they use language in a less sophisticated way. It's a real issue. Watermarking may be a solution down the road, but criminals aren't going to use watermarks, so—

PROF. CAPRA: Well, watermarking might be a solution in civil cases, maybe.

PROF. GROSSMAN: Well, the problem with watermarking is, if I want to get around a watermark, I could use an algorithm that watermarks and says this is made by an AI and then I take it to an AI that doesn't watermark, and I say, "Summarize or make a synopsis of what that says," and then I've got a new thing that no longer has a watermark.

And right now, the technology regarding watermarking is just not far enough along, and that's why President Biden told these big companies that we have to start to figure out how to make clear what this data is.¹⁹⁰ But nobody's solved that problem, and I don't know how long it's going to take before we have a technical solution. We may never.

CHAIR SCHILTZ: Can you explain what a watermark is to people like me that are unfamiliar with it?

PROF. GROSSMAN: A watermark is something we would put in a document generated by AI that would say, "This is an AI document," but you wouldn't see it on the cover. You'd just see the picture. But somewhere hidden in the metadata or inside the document would be some pixels that would say, "This was created by AI."

CHAIR SCHILTZ: Why can't you fake a watermark just like you can fake everything else?

PROF. GROSSMAN: You can fake a watermark. And you can also remove them. But that's where we are technically and what people are trying to do.

190. See generally THE WHITE HOUSE, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> [<https://perma.cc/G62M-ZVTP>].

PROF. CAPRA: Can't you watermark a document that's not AI to show that it's not a deepfake? Can you watermark a document to make sure that it's authentic?

PROF. GROSSMAN: Yes, but people can get around it.

PROF. MURPHY: Well, I was just going to say just on the watermark discussion—like, if it's reliable, you are going to have the correctors on the correctors, and part of the way to think about a technological solution, where the business of the evidence rules and the courts is essentially to only do business with certain reliable entities, can't you check the watermark at the front end rather than the back end?

PROF. GROSSMAN: The problem is this is going to come into criminal trials where somebody has done some kind of fraud, so nobody is going to have watermarked anything, or in a family case, somebody's going to come in and say, "Listen to this tape." I wouldn't wait for a technical solution. You're going to have this problem in courts well before we have a technical solution to this problem.

PROF. CAPRA: Tim Lau.

MR. LAU: Judge Schiltz, I just want to answer a question you posed just now regarding the generative and discriminator models and their difference. So, if you think about it this way, imagine if you're a movie critic. You may not be any good at creating movies, but you are a good critic. Now imagine someone keeps sending you movies, and you say, "No, here is what is wrong with this movie," and you get another one and say, "Here is what is wrong with this movie." At some point, good movies will be made.

CHAIR SCHILTZ: Yes. Though people who don't know how to be judges criticize the work of judges, and I don't think that makes judges better.

MR. LAU: Well, I don't know about that one.

[Laughter.]

PROF. CAPRA: So, let's turn to Paul Grimm for the evidence part of the deepfake problem.

JUDGE GRIMM: What's really intriguing, as you heard from our last excellent presentation, is that generative AI comes out like it is assertive discourse by a human declarant, except you don't have a human declarant. So, the hearsay rules are not the proper rules to be able to regulate deepfakes. We're basically talking about authentication—whether or not the item offered is what the proponent purports it to be.

With regard to questions of authenticity, we have three rules, Rules 901, 902, and 903. We don't hear much about 903 because it's just about subscribing witnesses,¹⁹¹ and I've never seen a subscribing witness in any of my cases. Probably most of you haven't either. But 901(a) is applicable. It just says you've got to show identification or authentication—that it is what it purports to be, and the showing that must be made has to be sufficient to support a finding.¹⁹² And Rule 901(b) gives us a number of examples of

191. *See* FED. R. EVID. 903.

192. *See id.* 901(a).

authentic items. There are ten.¹⁹³ And Rule 902 gives us currently fourteen examples of self-authenticating items, where nothing more than the item itself is sufficient to prove authenticity.¹⁹⁴

And the benefit of Rules 901(b) and 902 is that when we have a specific type of evidence that we're going to see a lot of and we're trying to get a baseline that people can shoot for when they're getting it into evidence, we can say, "If you want to authenticate this, this will be enough."

So, Rule 901(b)(1) provides that authenticity can be established by a person with actual knowledge of genuineness.¹⁹⁵ Rule 901(b)(2) is lay opinion testimony as to handwriting if the witness is familiar with it.¹⁹⁶ Rule 901(b)(3) is an expert comparing known to unknown handwriting samples or even the fact-finder doing so.¹⁹⁷ Rule 901(b)(4) allows authenticity to be shown by deals with distinctive characteristics and circumstantial evidence.¹⁹⁸ Rule 901(b)(5) is opinion testimony from someone familiar with the voice in a voice recording.¹⁹⁹ Rule 901(b)(6) deals with phone conversation authentication.²⁰⁰ Rule 901(b)(7) covers public records, and Rule 901(b)(8) covers ancient documents.²⁰¹ Then we have Rule 901(b)(9), which covers authentication of a system or process that produces an accurate result.²⁰²

This is the word that our proposed rule would propose to change and swap out "reliable" instead of "accurate." Accuracy is essential, but it's not enough. You have to have reliability where it's consistently accurate.²⁰³

For example, you'll see facial recognition technology where it's been trained on a certain type of training data. If it was white male training data, it might be accurate, and it might be valid and reliable at making conclusions about whether an unknown sample can be identified. A surveillance video in a store compared against a database of the pictures in a driver's license database might do a very good job in making a match of the two if the suspect and the match are both white males. But if it's someone who's not a white

193. *See id.* 901(b).

194. *See id.* 902.

195. *See id.* 901(b)(1).

196. *See id.* 901(b)(2).

197. *See id.* 901(b)(3).

198. *See id.* 901(b)(4).

199. *See id.* 901(b)(5).

200. *See id.* 901(b)(6).

201. *See id.* 901(b)(7)–(8).

202. *See id.* 901(b)(9).

203. The Grimm-Grossman proposal would change Rule 901(b)(9) to read as follows:

(9) *Evidence about a Process or System.* For an item generated by a process or system:

(A) evidence describing it and showing that it produces a reliable result; and
 (B) if the proponent concedes that—or the opponent provides a factual basis for suspecting that—the item was generated by artificial intelligence, additional evidence that:
 (i) describes the software or program that was used; and
 (ii) shows that it produced reliable results in this instance.

See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 127, at 411.

male, then it wouldn't. It would not be reliable for that purpose. It might be reliable for another purpose.

When we start to hear this word “reliable,” we are talking about reliable for a particular purpose. The echo of Rule 702 comes back because 702 is dealing with what we are talking about: scientific, technical, and specialized information. By definition, algorithmic evidence is scientific, technical, or specialized. So, when we deal with authentication, our suggestion is that since all AI evidence, whether it's generative AI or some other form of AI, is treated as evidence that results from a system or process. The authentication rules should have some standard for being able to show that it is what it purports to be. There's going to be a best practice pointers component of getting this right in the real world, and there's going to be an evidentiary part. What we tried to do was build into this rule a disclosure—an opportunity for discovery, hearing procedures—all involved because you are not going to be able to get this right unless the party that is challenging this evidence has fair access to what the technical evidence is. And it has been a very poor start because too many courts have said trade secrets prevent you from having access to it.²⁰⁴ That is a real, big problem.

One of the things we, with the gentle guidance of Dan, tried to do was to provide a method of showing that if you have what we will call AI evidence and you want to authenticate it, you have to show it's from a system or process that produces a reliable result. It plugs right into 901(b)(9).

PROF. GROSSMAN: Ideally, it would be both valid and reliable, but since you already use the word “reliable” in the rules to cover both concepts, we do that here.

JUDGE GRIMM: There's enough of a body of case law from Rule 702 that talks about reliability because, when you get to reliability under Rule 702, the questions include whether it has been tested, whether there is an error rate, whether there are sufficient facts and data, and whether there is proper application.²⁰⁵ So, speaking about reliability in Rule 901(b)(9) imports familiar concepts already in the Federal Rules of Evidence.

And keep in mind, how are you going to show this? You're going to need either a certification under Rule 902(13), which has to be signed by someone that has knowledge of reliable results.²⁰⁶ And that's not going to be the person who is merely trained to use this technology. It's going to be someone who can explain how the technology was developed and trained, and who can answer those questions about its reliability. So, what we would say for Rule 902(13) is the certification must be that the process or system produces a “reliable” result. Again, we would swap out “accuracy” for “reliability.” Why is any change to the authenticity rules necessary to deal with deepfakes?

204. See, e.g., *Hous. Fed'n of Teachers, Loc. 2415 v. Hous. Indep. Sch. Dist.*, 251 F. Supp. 3d 1168, 1177 (S.D. Tex. 2017); *Wisconsin v. Loomis*, 881 N.W.2d 749, 763–64 (Wis. 2016).

205. See FED. R. EVID. 702 advisory committee's note to 2000 amendment (discussing the *Daubert* factors that trial courts use in assessing the reliability of scientific expert testimony and discussing subsequent case law after *Daubert*).

206. See *id.* 902(13).

Because we think we need to have something in the rules that calls out AI as being at least as worthy as an opinion on handwriting or ancient documents, as something that should have a marker as to how you can authenticate it. There should be a rule providing that the authenticating witness must describe the software or program that was used, how it operates, and that it produced a reliable result in this particular instance. Without this specific treatment, you end up with the facial recognition algorithm trained on white male data but applied in a case where it made a match on someone who is not a white male.

Our thought was, if the party acknowledges that it's AI, the party must describe the software or system that produced it, show that it produces a reliable result, show that it was reliably applied to the facts of the case, and show that it is authenticated. So that's now something of encouragement to do it in a way that will allow me to lay out the facts upon which you can begin to make an authentication determination and your opponent can begin to determine a challenge. But, when we're talking about an evidentiary standard like a deepfake, one party is saying, "This is not a fake." Like a voicemail message left on my phone. "I've known this person for ten years. I've heard them talk. I've heard them talk on the phone. I've heard them record before where they have said it was them. That's their voice." And someone else comes in and says, "No, I have evidence that that did not occur. I wasn't there. I was someplace else. I have witnesses that I was somewhere else." Or they have some other kind of evidence to be able to challenge that it occurred. And now what do you do with that because one party is not acknowledging that it was a deepfake. They're saying it was genuine. The other party is saying it's fake, and then now you have to worry about who should have the burden of taking the next step.

The proposed rule would provide that the party challenging the item as a deepfake would have to come forward with a sufficient factual showing to generate an issue as to whether it was fake or not, at which point the proponent would have to come in and add that additional information to show that it was reliable and reaches reliable results in this particular case.²⁰⁷

It's a challenge because deepfakes are wolves in sheep's clothing. What we propose is a rule that closely hewed to the existing authentication rules. The standards are in the ground of authenticity—a system or process under which deepfakes will fall. It swaps out reliability with an explanation in the Advisory Committee notes as to what reliability is and why it has those two important components, accuracy and then consistent accuracy with similar sources, and then provides a method that is sufficient for the proponent to establish both of those requirements.²⁰⁸ It has specific language if you're talking about AI. What it allows is a standard for those who want to do it right to come forward with that information. And for those who do not try to do it the right way, there is a standard for the people who want to oppose it to come in and say, "Well, we have a rule right here that says, 'Judge, if

207. See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 127, at 99.

208. The proposed note to the Grimm-Grossman proposal can be found at *id.* at 97–99.

you do it this way, then that's authentic.' They didn't do that, and that should be a problem, and here's evidence that we want to introduce to show why it's not authentic."

Now there's one monkey wrench in the machinery: When you're dealing with authentication, you're dealing with conditional relevance if there's a challenge to whether or not the evidence is authentic. And so, if you're going to have a factual situation where one side comes in and says, "This is the voice recording on my voicemail, this is the threatening message that was left on my voicemail, that's Bill, I've known Bill for 10 years, I am familiar with Bill's voice, that is plausible evidence from which a reasonable fact-finder could find that it was Bill." If Bill comes in and says, "That was left at 12:02 PM last Saturday, at 12:02 PM I have five witnesses who will testify that I was at some other place doing something else where I couldn't possibly have left that," that is plausible evidence that it was not Bill. And when that occurs, the judge doesn't make the final determination under Rule 104(a).²⁰⁹ The jury does.²¹⁰ And that's a concern because the jury gets both versions now. It gets the plausible version that it is; it gets the plausible version that it's not. The jury has to resolve that factual dispute before they know whether they can listen to that voicemail and take it into consideration as Bill's voice in determining the outcome of the case.

PROF. GROSSMAN: Can I add just one thing? Two studies you should know about. One is jurors are 650 percent more likely to believe evidence if it's audiovisual, so if that comes in and they see it or hear it, they are way more likely to believe it.²¹¹ And number two, there are studies that show that a group of you could play a card game. I could show you a video of the card game, and in my video it would be a deepfake, and I would have one of you cheating. Half of you would be willing to swear to an affidavit that you actually saw the cheating even though you didn't because that video—that audio/video, the deepfake stuff—is so powerful as evidence that it almost changes perception.²¹²

CHAIR SCHILTZ: But why would judges be any more resistant to the power of this than jurors?

JUDGE GRIMM: Well, for the same reason that that we believe that in a bench trial that the judge is going to be able to distinguish between the admissible versus the non-admissible.

CHAIR SCHILTZ: I know, but it is often fictional, right? There are certain things that I really am no better at than a juror is, like telling a real picture from an unreal picture, or deciding which of these two witnesses to believe—between the witness who says, "That's his voice," and the witness

209. *See id.* at 99.

210. *See id.*

211. Rebecca A. Delfina, *Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 HASTINGS L.J. 293, 311 nn.101–02 (2023).

212. *See* Kimberley A. Wade, Sarah L. Green & Robert A. Nash, *Can Fabricated Evidence Induce False Eyewitness Testimony?*, 24 APPLIED COGNITIVE PSYCH. 899 (2010).

who said, “It couldn’t have been me.” Why am I any better at that than a juror?

JUDGE GRIMM: You might be better than a juror because you, as the judicial officer, can have it set up so that you have a hearing beforehand, which is a hearing on admissibility that the jury is not going to hear; and you have the witnesses come in, and you hear them; or you have a certificate under Rule 902(13). Also, you will be a repeat player.

PROF. GROSSMAN: Right. And you would at least know the questions to ask: How was this algorithm trained? Was it tested? What was it tested on? Who did the testing? Were they arm’s length? What’s the error rate?

JUDGE GRIMM: And order the discovery that the other side can have to be able to have the opportunity to challenge it by bringing that in.

CHAIR SCHILTZ: Yes, I get that part.

MR. SIFFERT: Based upon what Professor Grossman said, could a judge, instead of submitting it to the jury, say the prejudice substantially outweighs the probative value?

JUDGE GRIMM: That is a tough question, and Dan and I had a couple of spirited discussions about that. As I look at the Federal Rules of Evidence, I see a series of hurdles that you have to get over. It has to be relevant, has to be authentic. If it’s human declaratory language, then you have to deal with the hearsay rule. If it’s a writing, recording, or photograph, you have the original writing rule. And you have authentication for non-testimonial evidence. At the very end, there’s Rule 403. And 403, which tilts strongly toward admissibility, says that in certain circumstances, if the probative value of this is so greatly outweighed by the danger of unfair prejudice, confusion, or delay, then you can exclude it.²¹³ And so it’s a rule that tilts strongly toward admissibility but has an escape valve if you’re worried that once you get that negative impact it’s going to dwarf whatever probative value the evidence has.

It seems to me that if you have the pretrial process going on in a civil or criminal case where one side, when they acknowledge this algorithmic evidence, has said it *is* algorithmic evidence, and the judge has allowed fair discovery from the other side, then you have a hearing. You’re necessarily going to have people with science, technology, and specialized information. The minute they get on the stand they’re under Rule 702. The judge hears all the submissions, and the judge says, “Wait a minute, by 50.5 percent, a jury could find that this is authentic, but by 49.9 percent, they could find it’s not. It’s so impactful, it sounds so much like that person’s voice saying such horrible things.” Could I stand on Rule 403? I think you could make an argument for exclusion.

And I don’t think Dan said that’s a great argument.

PROF. CAPRA: No, I don’t think it’s a good argument. Rule 403 assesses probative value if it’s believed by the fact finder. That’s why, for example,

213. See FED. R. EVID. 403.

you don't use 403 to exclude unreliable hearsay; we have a hearsay rule for that.²¹⁴

JUDGE GRIMM: But the hearsay rules do have their own exclusions for unreliability.

PROF. CAPRA: Sometimes they do. Rules 803(6) and (8) do.²¹⁵ But the very point of having that exclusionary language for unreliability is that Rule 403 does not protect against unreliability. If it did, you would not need the untrustworthiness language in those rules.

CHAIR SCHILTZ: If I have four witnesses saying, "I wasn't there and, therefore, I couldn't have done it," and I said, "I didn't do it," can the video still be introduced?

MR. COONEY: That's apples and oranges because you're talking about establishing authenticity of an AI-generated item, and that example is where the opponent is suggesting, "It's not me, so it has to be AI-generated." So, really, it falls out of your proposal altogether, doesn't it?

JUDGE GRIMM: No, the proposal deals with this problem of "is it or is it not AI?" In the example, the opponent has shown enough to indicate that it might be a deepfake, and the proponent makes no showing that it is reliable.

PROF. CAPRA: Right. Your proponent hasn't made the showing.

MR. COONEY: But wouldn't the proponent have made an initial showing, and the opponent would have to come back with a rebuttal showing it's not true.

JUDGE GRIMM: The proponent only has to make a showing when there is an objection. Where there is an objection, "It's a deep fake," then no special showing on AI or the lack of it is required. You'd have to have something more than just denying it to be able to trigger that extra showing about AI.

CHAIR SCHILTZ: Right.

MR. COONEY: You have to get the expert who says, "Let me show you how you can do this."

PROF. CAPRA: But saying "let me show you how I can do this" is just saying, it might be AI. That's not enough.

JUDGE GRIMM: No, it's not enough to trigger the deeper inquiry. But whatever rule that you might come up with for authentication, it's not going to solve all the ways in which you deal with AI because there's just too many types of AI-based evidence, and it's changing too quickly.

But what you then have to do is combine a rule change with a practice and procedure component that has to be developed so judges are aware of AI-related problems, so that when it arises there can be fair discovery, which has not happened thus far, and then you have an opportunity for a *Daubert*-like hearing to look at the AI issues beforehand.

214. *See id.* 802.

215. *See id.* 803(6), (8) (permitting admissibility of business records and public records but providing that such records can be excluded if the opponent shows that the circumstances of their preparation indicates untrustworthiness).

Another issue that comes up is whether there is other evidence corroborating the audio or video item. It's when the possible deepfake is the only evidence of a key issue that you're going to have the biggest problem. If you have lots of other corroborating evidence, you don't have to worry so much about the risk of unfair prejudice.

CHAIR SCHILTZ: So, we could be talking about this all day, and I've got to keep us on track. Thank you both. This has been fascinating, and it reinforces my belief that we should really come back and spend a day on this because this is going to be a real challenge for judges, and we need to think about how best to deal with the evidentiary problems raised by AI and deepfakes. So, thanks, both of you, for coming to Minneapolis, and it's absolutely been fascinating.

APPENDIX A

INTOXILYZER 5000 REPORT

TEST	BrAC	TIME
AIR BLANK	.0!	
INTERNAL 1	.1!	
INTERNAL 2	.1!	
INTERNAL 3	.2!	
AIR BLANK	.0!	
CAL. CHECK	.0!	
AIR BLANK	.0!	
SUBJECT TEST	.1!	
BREATH VOL.	2.!	
AIR BLANK	.0!	
AIR BLANK	.0!	
SUBJECT TEST	.1!	
BREATH VOL.	2.!	
AIR BLANK	.0!	

A match between the beer bottle and Ronald Meadow is:
471 million times more probable than a coincidental match to an unrelated Black person

28 million times more probable than a coincidental match to a [REDACTED] Caucasian person

22.6 million times more probable than a coincidental match to an unrelated Hispanic person

Authorship Attribution of Micro Messages

10 / divi drof for	Roy Schwartz, Oren Tsur, Ari Rappoport Institute of Computer Science Hebrew University of Jerusalem {roys02 oren arir}@cs.huji.ac.il	Moshe Koppel Department of Computer Science Bar Ilan University koppel@macs.biu.ac.il
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TEST RESULT: 0.15 grams of Alcohol per 210L of breath.

APPENDIX B

PROFESSOR ANDREA ROTH'S PROPOSED CHANGE
TO FEDERAL RULE OF EVIDENCE 901(B)(9)

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces a reliable result, including, with the exception of basic scientific instrument, all of the follow:

- (1) that the opponent had fair pretrial access to the process or system;
- (2) in a criminal case, the proponent has disclosed all previous output of the process or system that, if the process or system were a human witness, would be disclosable under 18 U.S.C. § 3500;
- (3) that the process or system has been shown through testing by a financially and otherwise independent entity to produce an accurate result under conditions substantially similar to the instant case;
- (4) that the process or system, or a license to use it, is accessible to independent research bodies, including the National Institute of Standards and Technology and accredited educational institutions, for purposes of conducting audits of the process or system;
- (5) that the process or system is either open source or the proprietor has given the National Institute of Standards and Technology access to its source code;
- (6) that, in a criminal case, the proponent has not invoked a trade secrets privilege to block access or disclosure to the process or system or its source code.

APPENDIX C

PROFESSOR ANDREA ROTH'S PROPOSED
CHANGE TO FEDERAL RULE OF EVIDENCE 902(13)

(13) *Certified Records Generated by an Electronic Process or System.* A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11). In particular, with the exception of basic scientific instruments, the certificate must show:

- (1) that the opponent had fair pretrial access to the process or system;
- (2) in a criminal case, the proponent has disclosed all previous output of the process or system that, if the process or system were a human witness, would be disclosable under 18 U.S.C. § 3500;
- (3) that the process or system has been shown through testing by a financially and otherwise independent entity to produce an accurate result under conditions substantially similar to the instant case;
- (4) that the process or system, or a license to use it, is accessible to independent research bodies, including the National Institute of

Standards and Technology and accredited educational institutions, for purposes of conducting audits of the process or system;

(5) that the process or system is either open source or the proprietor has given the National Institute of Standards and Technology access to its source code;

(6) that, in a criminal case, the proponent has not invoked a trade secrets privilege to block access or disclosure to the process or system or its source code.